Race Discrimination Commissioner

ALCOHOL REPORT

Racial Discrimination Act 1975

Race Discrimination, Human Rights and the Distribution of Alcohol

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CONTENTS

FOREWORD

During 1990 the former Race Discrimination Commissioner received expressions of serious concern from a number of Aboriginal communities and organisations in the Northern Territory about alcohol abuse by Aboriginal people and its effect on indigenous communities.

The representations outlined the devastating effects alcohol abuse is having on Aboriginal society. For Aboriginal peoples in Central Australia, alcohol related violence, murder and social breakdown are crucial community concerns. Alcohol abuse is destroying the health and well-being of community members. It is also a major threat to the survival of Aboriginal culture and to the achievement of self-determination by Aboriginal and Torres Strait Islander peoples.

Given the problems also encountered by Aboriginal people in their attempts to restrict the availability of alcohol to their communities, the Commissioner decided to examine race discrimination and human rights issues in the context of the distribution of alcohol in the Northern Territory with particular focus on Central Australia.[1] In late 1990, the former Race Discrimination Commissioner called for submissions on race discrimination, human rights and the distribution of alcohol in the Northern Territory.[2]

I am pleased to present the findings and recommendations which grew up around these submissions and the consequent investigation of the former Race Discrimination Commissioner. I am aware that this Report has been a long time coming and that many people, not least those who provided written submissions to this Investigation, have been extremely patient waiting for it. This is especially the case given the importance of the issue.

The *Racial Discrimination Act* 1975 (Cth) (*RDA*) and its relevance to attempts to limit alcohol availability in indigenous communities raise complex legal and social questions. During the early life of this Investigation, changes were afoot in the Northern Territory in relation to the availability of alcohol to Aboriginal communities and to the structures and policies of the Northern Territory Liquor Commission. These changes came partly in the wake of the establishment of the Legislative Assembly of the Northern Territory Sessional Committee into Use and Abuse of Alcohol in the Community. The Committee's findings and recommendations prompted changes which necessitated further research and analysis by this Investigation and complicated an already difficult area.

On my appointment as Race Discrimination Commissioner in late 1994 I recognised that the Report could not be delayed any longer. The problem of alcohol abuse in Aboriginal communities in the Northern Territory as well as uncertainty about the legality of limitations or prohibitions on alcohol availability to these communities were issues in need of urgent consideration. At that time I made a commitment that the Report would be completed by June 1995.

This Report does not provide a blueprint for the treatment of alcohol abuse in Aboriginal communities in the Northern Territory. Many community based, non-legal measures are being undertaken in an attempt to combat alcohol abuse in indigenous communities. I recognise the value of these initiatives, but this Report deals principally with legal and human rights considerations.[3] It is primarily a legal document which provides guidance on the legality of

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1 The methodology and procedure followed by this Investigation are summarised in Appendix 1.

2 see Appendix 2.

3 For details of alcohol controls within communities see, for example, Legislative Assembly of the Northern Territory Sessional Committee on Use and Abuse of Alcohol by the Community, *Inquiry into*

measures undertaken to limit or prohibit the availability of alcohol to members of Aboriginal communities in Central Australia.

I am aware that the legal measures available under the *RDA* to indigenous peoples to restrict the consumption of alcohol in their communities described in this Report are complex and often difficult to use. They nonetheless provide interim workable solutions for Aboriginal communities attempting to limit or prohibit the sale of alcohol to their members. A community guide has been produced in conjunction with this Report to make its findings more accessible to people without legal training.

The broader issue of legislative review and the development of a more appropriate regime for implementing the demands of Aboriginal and Torres Strait Islander communities who are addressing alcohol abuse will be briefly touched upon in this Report but are outside the terms of reference of this Investigation. The difficult issues which have arisen in the context of the production of this Report provide a perfect example of the need to review the *RDA*, in particular, the special measures provision. I am undertaking a review of the legislation in this its twentieth year. The findings of this Report will necessarily inform that review and the recommendations for amendment which will arise from it.

Many people have been involved in the production of this Report. It is difficult to single out anyone in particular for special mention. Suffice it to say that the Report would have been impossible to produce without the excellent submissions received by the Race Discrimination Commissioner, in particular, those of Aboriginal communities and organisations, and the dedication of many research and legal officers who grappled with difficult and complex issues in preparing this document.

Alcohol abuse in Aboriginal communities in the Northern Territory is a multi-layered and divisive issue. It is my sincere hope that this Report will provide some guidance on, and contribute meaningfully to, the debate surrounding alcohol limitations and prohibition in Central Australian Aboriginal communities.

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the Operation and Effect of Part VIII 'Restricted Areas' of the Liquor Act, Report Number 4, Northern Territory Government Printer, Dec. 1993.

OVERVIEW OF THE REPORT

Submissions to the Race Discrimination Commissioner and the consequent Investigation identified several problems faced by Aboriginal communities which choose to restrict sales of alcohol to their members through informal arrangements between licensees and local Aboriginal communities.

First, there are concerns that the agreements may, ironically, lead to breaches of the *Racial Discrimination Act* 1975 (Cth) (*RDA*). It has been widely suggested that any such restrictions on Aboriginal peoples would contravene this Commonwealth legislation. Second, if publicans become unwilling to honour the agreements there is very little Aboriginal communities can do to enforce them.

Even if agreements between Aboriginal communities and publicans are formally included in liquor licences the submissions noted that the policing and enforcement of these provisions was inadequate. Several submissions suggested, for example, that licensees were selling to intoxicated persons and minors.[4]

A related concern was the lack of consultation between the Northern Territory Liquor Commission and indigenous communities with regard to the issue and content of liquor licenses.

Since this Investigation commenced in 1990 there have been moves by the Liquor Commission to consult with indigenous communities. The policy of the new Chairman of the Liquor Commission is to engage in meetings with Aboriginal people about the content of liquor licences. Enforceable conditions in liquor licences restricting or prohibiting the sale of alcohol are currently being trialed in the Northern Territory.[5]

The *RDA* includes a special measures provision in section 8(1) which saves otherwise discriminatory acts from being unlawful. The application and relevance of this provision to the context of restrictions on alcohol sales and consumption in Aboriginal communities is a central issue of this Report.

Sub-section 9(1A) of the *RDA* has the effect that an act which is indirectly discriminatory will not be unlawful if it is reasonable in the circumstances of the case. Therefore, the work of the Investigation regarding licence restrictions further revealed that it would be essential to consider indirect discrimination and the question of its reasonableness in this context.

The Investigation also identified a number of existing legal arrangements in the Northern Territory which may contravene the *RDA*:

- the 'two kilometre law' under s.45D of the *Summary Offences Act* 1923 (NT) which restricts the drinking of alcohol within two kilometres of a liquor outlet;
- s.128 of the *Police Administration Act* 1978 (NT) which allows the police to take into protective custody any person, in a public place or trespassing on private property, when they have reasonable grounds to believe that that person is intoxicated with alcohol or a drugs;

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4 Lyon, P., *What Everybody Knows About Alice: A report on the impact of alcohol abuse on the town of Alice Springs,* June 1990, p.131

5 *Tennant Creek Trading v The Liquor Commission* (unreported, Northern Territory Supreme Court, 7 April 1995 per Thomas J)

- s.122 of the *Liquor Act* 1978 (NT) which makes it an offence to serve alcohol to certain 'declared' persons.

These sanctions are also briefly addressed in the Report.

The legal issues raised by this Investigation cannot properly be understood or evaluated without also examining the social and cultural context in which they are being proposed or already exist. The opening chapters on the Report will therefore provide the context for the legal analysis which follows.

RECOMMENDATIONS

Northern Territory Alcohol Legislation and Policy Chapter 7

- The Northern Territory Liquor Commission should urgently address the Curtin Springs dispute by using its powers to vary licence conditions under Part III of the *Liquor Act* 1978 (NT). Any hearings should take place in the most appropriate Pitjantjatjara community.
- If *Project Sunshine* is to continue, immediate funding should be provided by the Northern Territory Government to the Pitjantjatjara Council for community consultations.

Problems with the Application of the *Liquor Act* Chapter 9

- The *Liquor Act* 1978 (NT) should be amended so that specific provision is made for Aboriginal communities to seek variation of licence conditions.
- The Northern Territory Liquor Commission should hear licensing matters relevant to Aboriginal communities in a place and a manner which facilitates the expression of Aboriginal views.
- The *Liquor Act* 1978 (NT) should be amended to include 'public interest' or 'public health and welfare' as a ground for community complaints to the Northern Territory Liquor Commission regarding the operation of liquor licences.
- The *Liquor Act* 1978 (NT) should expressly include a harm minimisation objective, preferably by amendment to Parts III (Licensing) and IV (Objections and Complaints) of the Act.
- The *Liquor Act* 1978 (NT) should be amended to include the number of liquor licences as a factor to be considered in licensing decisions.
- The *Liquor Act* 1978 (NT) should be amended to enable the public to lodge complaints directly with the police. The police should be required to investigate these complaints, and if substantiated, take appropriate action.
- The *Liquor Act* 1978 (NT) should be amended to require the Liquor Commissioner to establish clear policies and procedures for providing notice to communities about the investigation and handling of complaints.
- The *Liquor Act* 1978 (NT) should be amended to allow emergency suspension of a liquor licence 'in the public interest' for an indefinite period of time, subject to notification of hearing within 28 days.
- The 'community member' of the Northern Territory Liquor Commission should be a person with expertise in community health issues and should provide active support to communities wishing to make submissions.
- The Northern Territory Liquor Commission should restrict takeaway alcohol sales at all petrol stations and roadhouses throughout the Northern Territory in the light of the high incidence of alcohol-related motor accidents and fatalities.

- Magistrates should have a role in determining licences and their conditions of operation analogous to their role in declaring problem drinkers 'habitual drunks' under section 122 of the *Liquor Act* 1978 (NT).

Alcohol Related Sanctions Chapter 10

- Section 45D of the *Summary Offences Act* 1923 (NT) must be repealed.
- Section 128 of the *Police Administration Act* 1978 (NT) should be amended. If the police apprehend a person under section 128, that person should be removed to a safe place. A statutory duty should be placed on police to consider and utilise alternatives to the detention of intoxicated people in police cells. Apprehension of intoxicated people in protective custody should be an option of last resort.

CHAPTER 1
THE CONTEXT OF ALCOHOL ABUSE IN INDIGENOUS COMMUNITIES

Alcohol use and alcoholism in indigenous communities is grounded in the history of the mistreatment of Aboriginal and Torres Strait Islander peoples in this country since colonisation and in the contemporary experience of most indigenous people's lives.

Aboriginal and Torres Strait Islander peoples suffer greater disadvantage than any other Australians:

> *Aboriginal and Torres Strait Islander people, across the range of social and economic indicators, still record substantially worse outcomes, face greater problems and enjoy fewer opportunities than the rest of the population.*[6]

Indigenous peoples suffer from disproportionate levels of unemployment and many live in poverty.[7] The state of indigenous health in this country is testament to the disadvantage and neglect faced by this group.[8]

Aboriginal and Torres Strait Islander peoples have a death rate which is 3 to 6 times that of the general population and they have a life expectancy 18 to 20 years less than non-indigenous Australians.[9] Many of them have no choice but to live in conditions which would not be tolerated in the non-indigenous community and which contribute significantly to their poor health and early deaths. In 1994 the Race Discrimination Commissioner found that 45% of Aboriginal and Torres Strait Islander communities had an insufficient water supply to meet their needs over the next five years.[10]

The situation of Aboriginal peoples in the Northern Territory is an example of the disadvantage of indigenous peoples across the country. According to the 1994 National Aboriginal and Torres Strait Islander Survey, for example, the unemployment rate amongst Aboriginal peoples in the Northern Territory is 37%[11], and 20% of Aboriginal children in the Territory are malnourished.[12]

The impact of alcohol on health in indigenous communities in the Northern Territory is an indicator of the enormity of the problem of alcohol abuse amongst Aboriginal people. The Menzies School of Health Research in Darwin found that of the 69 Aboriginal deaths in the Katherine region in 1992, 39% were alcohol related.[13] The Lyons Report, a study undertaken for the Tangentyere Council, showed that about half of the deaths in the Alice Springs town

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6 Minister for Aboriginal and Torres Strait Islander Affairs, *Social Justice for Indigenous Australians 1992-93*, Budget Related Paper No 7, AGPS, p.8.

7 The overall rate of unemployment for Aboriginal and Torres Strait Islander peoples in 1994 was 38.2% with greatest unemployment (50%) experienced in the 15 to 19 age group, Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994,* AGPS, Canberra 1994, p.45.

8 For a full discussion of the health status of indigenous Australians see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report*, AGPS, Canberra, 1995.

9 Australian Institute of Health and Welfare, *Australia's Health 1994*, AGPS, 1994, p.26ff.

10 *Water: A report on the provision of water and sanitation to Aboriginal and Torres Strait Islander communities*, AGPS, 1994, p.20.

11 Australian Bureau of Statistics *op.cit.* p.49.

12 Findings based on a study of infants under two by paediatricians Dr Alan Ruben and Dr Alan Walker of the Royal Darwin Hospital and cited in "AMA demands action over black children's famine", *Australian*, 18/4/94.

13 See *Interim Report: Mortality Project looking at deaths in the Katherine Region* 1992 (unpublished).

camp between 1974 and 1988 were due to alcohol related disease, accidents or violence.[14] Alice Springs town campers die at approximately three times the rate of the greater Northern Territory population.[15]

Indigenous peoples are disproportionately represented in the criminal justice system. Aboriginal and Torres Strait Islander peoples are 17 times more likely to be imprisoned than non-indigenous people.[16] They are arrested at 29 times the rate of others in the Australian population.[17]

Despite the extensive findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), prison is increasingly used as a sanction against Aboriginal and Torres Strait Islander offenders. Even in those States that claim to have implemented Recommendation 92 of the RCIADIC, that prison be used only as a sanction of last resort against indigenous people, figures indicate that both the total number of indigenous peoples imprisoned as well as their rate of imprisonment actually increased between 1988 and 1993.[18]

> *Aboriginal people do not enjoy the same rights as the wider community. We have a lower standard of living. Suffer from poorer health and diseases that the rest of the Australian population does not suffer from. We are poorer. We die younger. We are less educated by European standards. Our communities often do not have water and electricity. We are over-represented in all levels of the criminal justice system. We die in police custody at a higher rate than non-Aboriginal people.*[19]

The High Court's 1992 decision on Native Title recognises that most indigenous peoples were dispossessed of their land at colonisation. It also dispelled the legal myth that in 1788 Australia was *terra nullius* or land belonging to no-one. The forcible and violent removal of Aboriginal peoples from their country to missions, reserves and fringe camps too often characterised this dispossession. Justices Gaudron and Deane stated in *Mabo* (No.2):

> *An early flashpoint with one clan of Aborigines illustrates the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame .... Aborigines were increasingly treated as trespassers to be driven, by force if necessary, from their traditional homelands*.[20]

This often violent removal from country continued for much of the twentieth century. In November 1963, for example, the Queensland police, authorised by the Queensland Government, forcibly removed the remaining residents of the Mapoon Aboriginal community from their land:

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14 Cited in Langton, M., "Too Much Sorry Business", (1992) 16 *Aboriginal and Islander Health Worker* 10 at 17. The full submission of "Too Much Sorry Business" can be found in Royal Commission into Aboriginal Deaths in Custody, *National Report, Vol.5*, AGPS, Canberra, 1991.

15 *Ibid*.

16 Chappell, D. & Wilson, P. (eds), *The Australian Criminal Justice System: The Mid 1990s*, Butterworths, Sydney, 1993, p.63.

17 *Ibid*.

18 Standing Group of Commonwealth Representatives, *Report on the Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1992-93*, Canberra 1994, Vol 1, p.25.

19 Behrendt, L., "No One Can Own the Land", (1994) 1 *Australian Journal of Human Rights* 43 at 47.

20 *Mabo and Others v. The State of Queensland (No.2)* (1992) 175 CLR 1 at 104, 105.

> *We're the ones that were moved out by the police, by gunpoint, [on] that boat they sent for us ... they sneaked in on us in the night ... they came from Thursday Island. We were really sad ... They destroyed the homes, burnt them down you know. And I seen all the burning down of the homes, the church ... it was destroying our culture, our lives. I said, you know, you destroyed everything from us and we want to return.*[21]

Colonisation and the resultant dispossession of Aboriginal and Torres Strait Islander peoples had wide ranging consequences for indigenous society. Aboriginal peoples were decimated by disease and an inadequate diet. They were dispossessed of not only their country but of their language, their religion and their cultural integrity. The link between 'dispossession and mistreatment, and social disintegration, economic marginalisation, unacceptable health standards and lack of opportunity'[22] is widely documented.[23]

The Central Land Council submitted evidence to the Race Discrimination Commissioner, for example, that one of the effects of white settlement has been an increase in social tension between Aboriginal people.[24] In his Second Report, the Aboriginal and Torres Strait Islander Social Justice Commissioner recognised this tension and its contribution to the problem of alcohol abuse in Aboriginal and Torres Strait Islander communities:

> *What are commonly called 'communities' are usually conglomerations of different groups which have been brought together - by force, incentive or persuasion - to a single physical location, as missions, cattle stations or government settlements. Or to the big cities, mixed in with non-Indigenous society, as they find they no longer have a place in rural areas. In all these situations people are often no longer on 'their country' and must live in close quarters with other groups who have also been alienated from their country. Immediately this happens, the established pattern of social equilibrium - the delicate and finely woven web which connects everyone to everyone in particular ways - is fundamentally disrupted. The hand of non-Indigenous intervention has punched through the web, tearing and breaking the strands that tie people to each other and people to country. This has hurt us so deeply that as we struggle to repair the damage, to spin new strands to mend the holes in our web, we can misdirect our attention from the causes of our malaise to the 'gammon' security of alcohol and violence.*[25]

The National Report of the RCIADIC also stated:

> *[A]lcohol is...particularly problematic for Aboriginal people owing to their long-term disadvantaged position, their changed status with regard to their land, the destruction of the economic bases of their societies, and the resulting reduction in their self-esteem.*[26]

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21 Rachel Peter in Roberts, J. & McLean, D., *Mapoon Story*, Book 3, International Development Action, 1976, p.10.

22 *Social Justice for Indigenous Australians op.cit.* p.8.

23 See for example Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, Canberra, 1991 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, AGPS, Canberra, 1993 and *Second Report 1994*, *op.cit.*

24 Central Land Council, *Submission to the Human Rights and Equal Opportunity Commission on Race Discrimination, Human Rights and the Distribution of Alcohol (Submission Number 1.1*), February 1991, pp.9-10.

25 *Op.cit.* p.130.

26 Royal Commission into Aboriginal Deaths in Custody, *National Report, Vol.2*, AGPS, Canberra 1991, p.303.

The Northern Territory Aboriginal Issues Unit of the RCIADIC recognised this context of alcohol abuse in its submission to the Royal Commission:

> *The ... problems relate to the feelings of powerlessness by Aboriginal people. These feelings stem from the loss of traditional lands, deterioration of culture as well as the impact of an alien culture which have combined to result in a loss of identity, security and self-esteem. Lack of employment opportunities for Aboriginal people continues to feed this feeling of having no control over their lives. It is at this level that alcohol is often seen as a quick fix. It is well known that people drink more if they feel sad or lonely or useless. Alcohol helps to relieve those problems which poverty stricken Aboriginal communities suffer from on a daily basis.*[27]

In indigenous communities, the addictive nature of alcohol combines with socio-economic disadvantage to compound the problem of alcohol abuse. The Northern Territory Aboriginal Issues Unit noted:

> *[A]lcohol is a powerful addictive chemical substance...Once Aboriginal people are in the grip of alcohol they find it difficult or impossible to escape.*[28]

It is in the context of past dispossession and present disadvantage that the problem of alcohol abuse in indigenous communities must be considered. The causes and treatment of such abuse are necessarily complex issues.

As already stated, this Report is mainly concerned with specific issues related to the *Racial Discrimination Act* 1975 (Cth).[29] The findings and recommendations do not provide a comprehensive approach to the effective and appropriate treatment of alcohol abuse in Aboriginal and Torres Strait Islander communities. They do, however, provide some direction as to the legal position when decisions are taken by indigenous communities to limit or prohibit the availability of alcohol to their members.

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27 Langton *op.cit.* pp.22-23.
28 *Ibid*, p.16.
29 See pp 4-5

CHAPTER 2
ALCOHOL ABUSE IN THE NORTHERN TERRITORY

Northern Territory Drinking Patterns

It is not only in indigenous communities in the Territory that the deleterious effects of alcohol abuse are felt. It is now recognised that alcohol abuse is a major social and economic problem for the Northern Territory community as a whole.

Research has consistently demonstrated that the quantity of alcohol consumed by Northern Territorians is excessive and that alcohol abuse is a major contributing factor to ill-health and social disruption throughout that community.[30] Approximately half the male population and one-third of the female population drink to levels which exceed those considered to be safe by the National Health and Medical Research Council.[31] According to the Australian Bureau of Statistics, the annual per capita consumption of alcohol in the Northern Territory in 1988-89 was 72% higher than the national average.[32]

Alcohol abuse also has an immense impact on the safety of the Northern Territory community. In 1991 the rate of road fatalities per 100,000 population, for example, was over three times the national average and alcohol was a contributing factor in many accidents.[33]

In addition to these social costs, the economic cost of alcohol abuse for the Northern Territory community is alarming. Public expenditure on alcohol related problems among the total population of the Territory is estimated at $200 million a year in health care, welfare, law enforcement and correctional services.[34]

A further problem is the level of violence associated with drunkenness. It was put to the Commissioner that 'violence is a relatively common adjunct of heavy drinking almost anywhere in the Northern Territory...'.[35] The rate of offences against the person in the Territory is well above the national average. For example, in 1988 the rate of murder and of manslaughter was three times higher in the Northern Territory per 100,000 of population than in the rest of Australia.[36]

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30 Legislative Assembly of the Northern Territory Sessional Committee on the Use and Abuse of Alcohol by the Community, *Measures for Reducing Alcohol Use and Abuse in the Northern Territory, Report Number 2*, Northern Territory Government Printer, August 1991, pp.100-107. It has also been estimated that in 1986, 10.8% of all deaths in the Northern Territory were alcohol related; a figure more than three times the national average, *ibid* pp.16-17. Note that the estimate of alcohol related deaths used here is based on indices which do not include certain categories of deaths such as some cancer caused deaths which are now recognised as alcohol related. Since 1990 the Commonwealth Department of Human Services and Health has adopted a revised set of indices. On the current indices these earlier estimates would be substantially higher.

31 *Ibid*, p.103.

32 *Ibid*, p.101.

33 The rate of road fatalities is measured per 10,000 vehicles, and per 100,000 population. In each case, the rate of fatalities in the Northern Territory between 1989 and 1991 was approximately three times the national average; Northern Territory Police, *Road Accident Statistics 1991*, pp.4-5. In the period from 1980 to 1991, between 20% and 29% of all road accidents in the Northern Territory were alcohol related and between one-half and three quarters of fatal road accidents were alcohol related; Northern Territory Department of Health and Community Services, *Submission to the Sessional Committee on the Use and Abuse of Alcohol by the Community*, *Appendix 1*, February 1991, pp 22-23.

34 Schulz, D., "Drowning in Sorrow", (August, 1994) *NSW Police News* 25 at 26.

35 Lyon, *op.cit.* p.36.

36 Legislative Assembly of the Northern Territory Sessional Committee on the Use and Abuse of Alcohol by the Community, citing submission by the Northern Territory Police, *op.cit.* p.120.

There is a lack of willingness among Territorians to acknowledge that alcohol misuse is a problem for the whole community.[37] Non-Aboriginal Territorians frequently claim that alcohol abuse is only a problem for Aboriginal people. This is clearly not the case. Rather the difference lies in the nature and pattern of drinking by Aboriginal people.

Aboriginal Drinking Patterns

The public face of drinking by indigenous people necessarily impacts on the way alcohol abuse in Aboriginal communities is perceived by non-indigenous people:

> *Greater visibility, audibility, and the lack of formalised avenues for intragroup differentiation whilst drinking, mark Aboriginal drinking sessions. Europeans, on the other hand, exist within a culture of outback isolation which proclaims and rationalises the rightness of their style of drinking and drunkenness ... Clubs [and a] variety of premises provide choices for Europeans ... Aboriginal drinkers have limited formal venues and must construct their social groupings elsewhere.*[38]

> *It is public behaviour [that]...creates the impression that all indigenous Australians are hapless drunks.*[39]

In any discussion of alcohol use by Aboriginal people, it is important to recognise the fact that many Aboriginal people in the Northern Territory do not drink, and of those Aboriginal people who do, not all drink to excess. These trends are reflected nationally.

Of the Aboriginal men and women surveyed by the Northern Territory Drug and Alcohol Bureau in 1988, 41.2% said that they drank alcohol.[40] By comparison, nearly 63% of the non-Aboriginal men and women surveyed in another Australian Bureau of Statistics study said that they consumed alcohol.[41]

Nationally there is a higher abstinence rate amongst Aboriginal people than amongst non-Aboriginal people. The 1994 National Aboriginal and Torres Strait Islander Survey found that 32% of indigenous peoples did not drink alcohol compared with 16% for non-Aboriginal people.[42] It also found that of indigenous people aged 13 years and over, 59% perceived alcohol to be one of the main health problems in their community. This general view was held across all age groups as well as in capital cities, other urban and rural areas.[43] The rate of alcohol-related deaths among Aboriginal and Torres Strait Islander peoples has fallen between 1985 and 1993.[44]

It has, however, long been clear that the impact of alcohol use is worse on Aboriginal people who drink than on non-Aboriginal people who drink. The reason for this is the degree of harmful consumption of alcohol by indigenous drinkers. Ten per cent of non-Aboriginal

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37 Submission of the Northern Territory Department of Health and Community Services, *op.cit.*

38 Brady, M., "Alcohol Use and its Effects upon Aboriginal Women", in Vernon (ed.), *Alcohol and Crime: Conference Proceedings*, Australian Institute of Criminology, Canberra, 1990, p.7.

39 Schulz, *op.cit.* p.25.

40 Northern Territory Department of Health and Community Services, *op cit*, p. 13.

41 Lyon, *op.cit.* p. 36.

42 "Aboriginal and Torres Strait Islander peoples and alcohol", (1995) 3 *Australian Institute of Health and Welfare: Australian Health Indicators Bulletin* 1.

43 Australian Bureau of Statistics, *op.cit.* p.14

44 "Aboriginal and Torres Strait Islander peoples and alcohol", *op.cit.* p.1.

people drink at harmful levels in comparison to 22% of Aboriginal people.[45] In the Northern Territory, more than two-thirds of Aboriginal male drinkers are classified as binge drinkers.[46]

The National Aboriginal and Torres Strait Islander Survey also found that the data for the period 1985-1993 suggest that drinking at a harmful level in Aboriginal communities starts at an earlier age than in the wider community.[47] This trend is reflected by the peak of death rates for cirrhosis at a younger age in Aboriginal people than in non-Aboriginal people.[48] Research also suggests that Aboriginal men are more likely to drink than Aboriginal women.[49]

Alcohol consumption by Aboriginal people varies significantly according to the kind of community in which they reside and the availability of alcohol to that community. One study found that drinking was more prevalent among Aboriginal men and women living in camps around large towns, with 83.5% of men and 64.8% of women drinking.[50] By contrast, alcohol consumption was much lower among people living in remote bush communities and outstations.[51]

The historical context of alcohol abuse in Aboriginal communities in the Northern Territory

Attempts are often made to explain alcohol abuse in Aboriginal and Torres Strait Islander communities from an historical perspective. Current patterns of alcohol use by indigenous people cannot, however, be fully explained in this context.[52] Nonetheless, consideration of historical factors may go some way to explaining the current situation of alcohol abuse in Aboriginal communities in the Northern Territory. Such factors are also relevant when it is recognised that the enormity of the problem of alcohol abuse in Aboriginal communities in the Territory has developed in little more than thirty years.

The introduction of alcohol by the colonisers

It has been suggested that intoxicants were used in indigenous society before 1788. Their use was apparently strictly controlled through traditional laws and reinforced by complex kinship and trading networks which stipulated when and how these substances could be used.[53] The Expert Working Group on Aboriginal Alcohol Use and Related Problems, which reported to the RCIADIC, suggested that prior to colonisation the use of alcohol was not widespread, the quantities consumed may have been very small and the beverages may have contained a very low alcohol content.[54]

The destruction of traditional authority by colonisation meant, however, that any traditional controls on alcohol use were unable to impact on the introduction of non-indigenous alcoholic

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45 *Ibid*. See also Ernest Hunter, Wayne Hall & Randolph Spargo, *The Distribution and Correlates of Alcohol Consumption in a Remote Aboriginal Population*, National Drug and Alcohol Research Centre, NDARC Monograph No.12.

46 1988 Northern Territory Department of Health survey of drug use patterns in Aboriginal communities, cited in Schulz, *op.cit.* p.27.

47 *Op.cit.* p.13.

48 "Aboriginal and Torres Strait Islander peoples and alcohol", *op.cit.* p.2.

49 Hunter, Wall & Spargo, *op.cit.* p.61.

50 Northern Territory Department of Health and Community Services, *op.cit*. *Appendix 1*, p.13.

51 *Ibid*. The link between availability and alcohol abuse is discussed in detail in Chapter 9 and Appendix 4.

52 RCIADIC, *Annual Report, Vol.2, op.cit.* p.303.

53 Broome, R., *Aboriginal Australians: Black Response to White Dominance 1988-1980*, Allen and Unwin, Sydney 1983, pp.54.

54 *National Report, Vol.2, op.cit.* p.301.

beverages with the attendant economic, political and social ramifications.

Citizenship and drinking

A second historical perspective on alcohol use by indigenous peoples argues that there is a link between the right to vote, or Aboriginal citizenship, and the right to drink. As in the rest of Australia, the legal right to drink was long denied Aboriginal people in the Northern Territory.

In 1963 Aboriginal and Torres Strait Islander peoples were given the right to vote and in the following year the prohibition on Aboriginal drinking, which had existed in various guises since 1909, was lifted. It is argued that the proximity in time between Aboriginal people gaining citizenship and the end of prohibitions on alcohol consumption is perceived by some Aboriginal people to link their use of alcohol with an expression of equality:

> *...the period 1963-64 is celebrated as the 'time we got that citizen[ship]', the right to be included on the voters' roll. 'Since we bin have that citizen[ship]' a man says, 'lotta things bin different', ...He taps twice his beer can.*[55]

The nexus between citizenship and drinking necessarily requires qualification if it is to be applied to the Northern Territory in the 1990s.

The hypothesis assumes that Aboriginal communities have had continuous contact with non-indigenous society and that they have experienced on-going non-indigenous control over alcohol use in their communities. It also suggests that the relationship of Aboriginal people with alcohol is inextricably linked with their being granted citizenship.

In Central Australia, however, a number of remote communities heavily affected by alcohol abuse gained their right to drink before improvements in travel gave them access to alcohol in any quantity. Such communities, although theoretically subject to controls on alcohol consumption, had little actual experience of prohibition because alcohol was rarely available to them. In such circumstances the experiential association between legal access to alcohol and citizenship is weak.

Further, there is now a population of young Aboriginal people in Central Australia who have known nothing of prohibition on alcohol use in their communities. These young people are caught up in the alcohol abuse which is taking place in their communities. The cycle of alcohol abuse becomes self-sustaining across generations, and a new dynamic, which itself promotes alcohol abuse amongst members of a community, is created. A 1991 study of the causes of Aboriginal alcohol use in a remote Aboriginal population in Western Australia found, for example, that 'the pattern of drinking in the community could have a large effect upon learned patterns of alcohol use.'[56]

Alcohol abuse and learned comportment

A third historical perspective on alcohol use in Aboriginal communities suggests that patterns of alcohol use and abuse by indigenous peoples are the result of modelling and imitation. The Tangentyere Council noted in its submission:

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55 Sansom, B., (1980), *The Camp at Wallaby Cross: Aboriginal fringe dwellers in Darwin*, Canberra, AIAS, p.49.

56 Hunter, Hall & Spargo, *op.cit.* p.72.

> *Aboriginal drinking comportment is learned, and the primary role models in the Northern Territory, such as stockmen and miners, frequently exhibited certain kinds of behaviour such as violence, when they were drunk. They also learned that alcohol is an 'excuse' for irrationality.*[57]

The Expert Working Group also stated:

> *In early Australia (and up to the present time in rural Australia), the models of drunken comportment were miners, stockmen, shooters and drifters. They were hard drinking characters whose drunken comportment included loud, boisterous interactions, brawling and sexual escapades....In the outback where alcohol was not so accessible, bushmen drank when they had the opportunity in town. The pattern of drinking was the binge followed by a period of hard work and sobriety back on the station or in the mine. Interestingly, Aboriginal women would have been exposed to female models of sobriety in the wives of property owners and ministers, along with the strongly held belief that it would be unseemly for wives and mothers to consume alcohol.*[58]

There is no doubt that the situation of Aboriginal people in the Territory today is linked to their situation in the past. Alcohol abuse by indigenous peoples is, however, a more complex issue and examining historical factors alone will not provide answers to the problem of alcohol abuse in Northern Territory Aboriginal communities.

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57 Tangentyere Council Inc., *Submission Concerning the Distribution of Alcohol in Central Australia to the Human Rights and Equal Opportunity Commission*, *(Submission Number 1.5)*, January 1991, pp.45-6 and RCIADIC, *National Report, Vol.2*, *op.cit.* pp.319-21.

58 RCIADIC, *National Report, Vol.2, op.cit.* pp.302-303.

CHAPTER 3
ALCOHOL — ABORIGINAL PEOPLE — CRIMINAL JUSTICE
THE PROBLEM OF ALCOHOL ABUSE FOR INDIGENOUS COMMUNITIES

This Report was initiated in recognition of the fact that alcohol abuse in Aboriginal communities in the Northern Territory is an issue of pressing concern. The experience of Aboriginal people in the criminal justice system in the Northern Territory serves as a sharp reflection of the compelling problem of alcohol abuse in their communities.

Evidence to the Race Discrimination Commissioner about alcohol abuse, the criminal justice system and Aboriginal people provided a depressing and telling example of the impact alcohol is having on indigenous communities.[59]

Aboriginal people believe alcohol plays a significant role in their high detention rates in the Northern Territory. The Commissioner heard from many organisations and individuals that alcohol abuse leads directly and indirectly to Aboriginal people coming into constant contact with the criminal justice system.[60]

Although there is still considerable debate among criminologists about the causal role of alcohol in particular kinds of crimes, a specialist study undertaken for the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) concluded:

> *....a close but complex relationship exists between the use of alcohol by Aboriginal people, and their heavy rates of involvement with the criminal justice system. This reflects, to a large extent, the social and individual factors that lead people to drink excessively, on the one hand, and the responses of the criminal justice system to Aboriginal drinking and alcohol-related crime, on the other.*[61]

The 'two kilometre law' under the *Summary Offences Act* 1923 (NT) which prohibits public drinking within two kilometres of a liquor outlet, and s.128 of the *Police Administration Act* 1978 (NT) which provides for protective custody orders for intoxicated persons, regulate public drinking in the Northern Territory. Since Aboriginal drinking often has a public face indigenous people in the Territory are more likely to be involved with the criminal justice system.[62]

Alcohol abuse and alcohol related crime place an enormous burden on the criminal justice system in the Northern Territory. In 1989, 74% of prisoners in the Territory were convicted of alcohol related offences. Aboriginal people accounted for 87% of the total number of those individuals.[63] In 1990 among the Aborigines arrested and/or summonsed, the proportion for

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59 See p. 11 of this report for discussion and figures of the current status of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

60 Individuals consulted by the Race Discrimination Commissioner at Hermannsburg and Yuendumu commented on the role of alcohol in negatively affecting Aboriginal/police relations and the proportion of Aborigines in custody. See also McDonald, D. & Biles, D., "Who Gets Locked Up? The Australian Police Custody Survey", (1991) 24 *Australian and New Zealand Journal of Criminology* 190; Chappell & Wilson *op.cit.*

61 Alexander, A. (ed.), *Aboriginal Alcohol Use and Related Problems: Report and Recommendations Prepared by an Expert Working Group for the Royal Commission into Aboriginal Deaths in Custody*, Alcohol and Drug Foundation, Australia, November 1990, p.28.

62 These provisions and their disparate impact on Aboriginal drinkers are considered in greater detail in Chapter 10.

63 *Ibid*, p.2.

alcohol related offences was 74% for males and 78.4% for females.[64] The Northern Territory Government recognised that:

> *The large proportion of Aborigines involved in virtually all alcohol-related offences and protective custody calls for radical, but sensible, action if the tragic impact on their lives and culture is to be reduced.*[65]

Alcohol also has a considerable impact on relationships between Aboriginal people and the police. The Tangentyere Council argues that in the town camps around Alice Springs, there can be an over-reliance on the police, who are often called into communities to mediate or deal with situations of conflict arising from alcohol use. Police officers may not, however, be familiar with traditional law or Aboriginal custom. This lack of cultural knowledge means the police involved may behave inappropriately.[66]

These kinds of interactions are clearly unsatisfactory for both the police officers who are obliged to respond to calls for help, and for the community which feels that appropriate police assistance has not been provided.

Aboriginal people in the Northern Territory believe the criminal justice system to be one of the least effective ways of dealing with individuals who abuse alcohol. They do not deny the importance of law enforcement as part of an overall strategy to combat the many social problems associated with alcohol abuse. They do, however, take issue with the apparently singular emphasis on policing and law enforcement as an answer to the problem of alcohol abuse in their communities.[67]

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64 Legislative Assembly of the Northern Territory Sessional Committee on the Use and Abuse of Alcohol by the Community, *op.cit. Appendix 4*, p.120.

65 Northern Territory Government, *Submission to the Human Rights and Equal Opportunity Commission: Inquiry into the Distribution of Alcohol in the Northern Territory (Submission Number 1.6)*, August 1991, p.17.

66 Hill, J., *Excessive Drinking in the Alice Springs Town Camps: Preventative Strategies: A paper prepared on behalf of the Tangentyere Council and the Central Australian Aboriginal Congress*, Australian Institute of Criminology Forum on Alcohol and the Law, Perth, April 1989, p.3.

67 See for example *Submission Number 1.5, op.cit.* pp.33-5.

CHAPTER 4
INDIVIDUAL AND COLLECTIVE RIGHTS

In the wake of the High Court's decision on Native Title and the Federal Government's response to it, including the enactment of the *Native Title Act 1993* (Cth), there is increasing debate about collective rights. In particular, the debate centres on indigenous peoples' right to self-determination. The debate will have profound implications for Aboriginal and Torres Strait Islander peoples in their attempts to control and manage problems such as alcohol abuse.

This Report must consider decisions about alcohol availability made in indigenous communities in the context of calls by Aboriginal and Torres Strait Islander peoples for self-determination and the recognition of collective rights.

Individual and Collective Rights

Restrictions on alcohol sales in certain communities will limit the absolute freedom of individual drinkers to purchase and consume alcohol. Nonetheless, indigenous peoples are increasingly demanding the right to address the problem of alcohol abuse in their communities from a collective perspective. This situation reflects the tension which exists between 'individual rights' and 'collective rights'.

It is often argued that recognising and promoting the rights of minorities or indigenous peoples threatens individual human rights. This argument contests that group rights 'create invidious distinctions between citizens'.[68] This distinction is argued in several ways.

On one level, the recognition of indigenous rights is said to place the rights of the Aboriginal or Torres Strait Islander individual in competition with the rights of the wider indigenous community. In other words the freedom of the individual is limited by the rights of the group.

On a broader level, the rights of non-indigenous individuals are said to be pitted against those of Aboriginal and Torres Strait Islander individuals who benefit from programmes and 'special' treatment as a result of being members of a minority community. This argument asserts that the recognition of collective rights results in unequal and discriminatory distinctions between members of different groups.

Informal prohibitions or restrictions on the sale of alcohol, which are implemented to restrict alcohol consumption by Aboriginal drinkers, are often criticised on these grounds. They are often attacked as limiting the capacity of Aboriginal and Torres Strait Islander individuals to exercise their rights. They are also described as being discriminatory or are seen as a violation of the principle of equality embodied both in international law and domestically in the *Racial Discrimination Act* 1975 (Cth) (*RDA*). Attempts to formally include such restrictions in liquor licences in the Northern Territory have already been challenged as discriminatory in the Northern Territory Supreme Court, although the matter has not yet been heard.[69]

These criticisms can be refuted on several grounds.

In the context of the broader society, the individual does not possess an absolute right to live

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[68] Triggs, G., "The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?" in Crawford, J. (ed.), *The Rights of Peoples*, Oxford Clarendon Press, 1988, p.147.

[69] In the proceedings of *Tennant Creek Trading v. The Liquor Commission op.cit.* submissions relating to the *RDA* were separated from other matters presented to the court and are yet to be heard.

as he or she chooses. Limitations on individual freedom have long been justified in terms of prevention of harm to others or to the individual concerned, protection of the social order and promotion of the 'common good'. The understanding of such restrictions and of what constitutes justifiable limitations, as well as theories of how the tension between individual and collective rights ought to be managed have varied considerably according to different social, cultural and historical contexts.

The limitation of individual freedom for the common good is not only a commonly held principle, but it is one which has been enshrined in law. The right to free speech, for example, is well recognised, yet Australian law restricts it through the common law of defamation and through the total or partial codification of those common law principles. With respect to access to alcohol, legal restrictions have been varied and problematic. However, the existence of laws which impose restrictions on opening hours, which dictate conditions for the sale of alcohol and which prohibit or constrain public drinking all recognise and apply this principle. The prohibition of drink driving, including the power of police officers to conduct random breath testing, is another obvious, widely experienced and widely accepted constraint on individual freedoms for the public good.

The principles of equality and non-discrimination do not require identical treatment. The promotion of equality does not necessitate the rejection of difference:

> *the principle of equality before the law does not mean the absolute equality, namely the equal treatment of men* (sic) *without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... To treat unequal matters differently according to their inequality is not only permitted but required.*[70]

Substantive equality which is achieved by taking into account individual, and in this case, racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and historical subordination achieves equality of outcome between members of different races.

In contrast, adoption of the principle of equal treatment or formal equality which relies on the notion that all people should be treated the same denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination. In reality '[t]he fact that ... Aborigines ... have been subjected to appalling inequalities demonstrates that formal equality is compatible with the grossest injustice'.[71]

The example of university entrance is a clear illustration of the different results that are obtained when different notions of equality are adopted. If a university accepts Aboriginal and Tories Strait Islander peoples on the basis of across the board entry mark requirements as it does for non-indigenous people this will fail to address the actual discrimination in tertiary representation which Aboriginal and Tories Strait Islander peoples experience in the education system.

Formal equality of treatment in this case does not deal with the underlying causes of non-entry of Aboriginal people into universities which include cultural difference, bad health and socio-economic disadvantage. If, however, Aboriginal and Torres Strait Islander students are

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70 Judge Tanaka in *South West Africa Case (Second Phase)* ICJ Rep 1966 p.6, 305-306.

71 Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, p.16.

given access to university under a different policy altogether than non-indigenous students, one which recognises the specific disadvantage of this racial group in the field of education, substantive equality is achieved. The use of different entry criteria, lower entry mark requirements and targeted programmes at secondary school level are all examples of measures adopted to achieve substantive equality.

International law recognises some collective or group rights. Article 1 of both the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* recognise, for example, the right of peoples to self-determination. Article 27 of the *ICCPR* also provides that members of ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group to enjoy their own culture, to profess and practise their own religion, or to use their own language.[72]

At international law these collective rights are guaranteed along with individual rights. In these international instruments the implication is that each right should be interpreted consistently with the others.[73] In other words, at international law, neither individual rights nor collective rights have any special status and there is no necessary hierarchy of rights.[74]

The claim that collective rights jeopardise traditional individual rights misunderstands the interdependent relationship between group and individual rights.[75] The apparent tension between individual and collective rights is partially resolved once it is recognised that certain individual rights cannot be exercised in isolation from the community.[76] This is particularly the case in indigenous communities:

> *Aboriginal rights cannot be meaningfully discussed without reference to Aboriginal cultures and their fundamental difference from [non-Aboriginal] culture. Aboriginal cultures are the water through which Aboriginal rights swim.*[77]

It is often the case that the protection and promotion of collective rights is a pre-requisite for the exercise and enjoyment of individual rights. The right of an Aboriginal or Torres Strait Islander person to protect and enjoy his or her culture, for example, cannot be exercised if an indigenous culture is struggling to survive within the majority culture and the indigenous community has no right to protect and develop its culture. If rights are not granted collectively to indigenous peoples which enable them to defend their culture, the practice of their religion and the use of their languages, the result is unequal and unjust treatment.[78]

Protection of the individual right to conscience in the matter of religion may be sufficient to safeguard the practice of the Christian faith. However, if the religious beliefs and spiritual practices of one's culture involve particular kin relationships with other people and collective participation in ceremonies, then the recognition of certain collective rights may be essential

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72 The 'minorities' and 'peoples' who are the beneficiaries of Articles 1 and 27 of the *ICCPR* have evaded precise definition but there is general consensus that they are neither co-extensive nor mutually exclusive categories. It seems clear that Aboriginal and Torres Strait Islander peoples receive protection of their collective rights under both these Articles; for further discussion see Pritchard, S. in *Laws of Australia: International Law*, The Law Book Company Limited, Sydney, 1992, pp.44-46.

73 Triggs in Crawford, *op.cit.* p.144.

74 *Ibid*.

75 *Ibid,* p.156.

76 *Ibid*.

77 Kulchyski, P., *Unjust Relations: Aboriginal Rights in Canadian Courts*, Oxford University Press, Toronto, 1994, p.13.

78 *Ibid,* p.145.

to safeguard this seminal individual right to conscience. In certain contexts, individual and collective rights are complementary. In other situations they are in opposition and a balance must be struck.

The argument that the protection of collective rights threatens individual human rights also presupposes that collective and individual rights are irreconcilable. However, in decisions made under the Optional Protocol to the *ICCPR* the United Nations Human Rights Committee has successfully resolved this contest between collective and individual rights.[79]

In *Kitok v. Sweden*[80], Kitok, a Sami person, challenged Swedish legislation which sought to secure the existence of reindeer husbandry by restricting reindeer breeding to members of Sami communities. Kitok had lost his breeding rights by pursuing other employment. When the Sami community declined to restore those rights, Kitok challenged the legislation on the ground that it interfered with his rights under Article 27 to enjoy his own culture. Kitok's challenge failed. The Human Rights Committee found that restricting the number of reindeer breeders for economic and ecological reasons, and to secure the well-being of the Sami minority, was reasonable and consistent with Article 27 of the *ICCPR*. The Committee confirmed the legitimacy of systems of rights which ensure the cultural survival of indigenous collectivities[81]:

> *A restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.*[82]

The evidence given to the Race Discrimination Commissioner clearly indicates that alcohol abuse by Aboriginal people has a range of detrimental effects on the broader indigenous community. Alcohol abuse is threatening the very survival of many indigenous communities. To hold sacrosanct the rights of the individual drinker is to impinge upon the rights of other members of his or her community. It may interfere with the community's right to control its future and with a people's right to enjoy and practice its culture and religion. A limitation of the former individual right is therefore justified by the need to protect the latter collective good.

If a matter was pursued by individual indigenous complainants under the *First Optional Protocol* to the *ICCPR* to the Human Rights Committee, it may accept an argument that the formal inclusion of prohibitions and restrictions in liquor licences is necessary to ensure the collective survival of indigenous culture and the enjoyment of that culture in Aboriginal and Torres Strait Islander communities.

Achieving a balance 'between the interests of the community at large and individuals and of identifiable groups within that community'[83] is difficult. This difficulty is heightened in the context of formulating laws or sanctioning prohibitions in relation to Aboriginal communities. Concepts of the individual and the community may differ from those of non-Aboriginal society. Indigenous communities may, for example, have different notions or rules as to what

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79 The *First Optional Protocol* to the *ICCPR* allows individuals whose State has ratified this instrument, to complain to the Human Rights Committee about breaches of their rights under the Covenant once all domestic remedies have been exhausted.

80 Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988).

81 Pritchard, *op.cit.* p.50

82 Communication 197/1985 *op.cit.* paras 9.2, 9.3, 9.8.

83 Triggs in Crawford, *op.cit.*p.148.

amounts to a 'collective' decision or different mechanisms for determining and defining the 'common good':

> *We have a distinct culture. We have different values to the dominant culture. We are more concerned with the rights of the community rather than the rights of the individual*.[84]

The debate which surrounds the moves of indigenous communities to restrict alcohol to their members increasingly focuses on the perceived individual rights/collective rights dichotomy. Lawmakers, bureaucrats and politicians must be willing to recognise the collective rights of Aboriginal and Torres Strait Islander peoples and address the difficulties which necessarily flow from the protection and promotion of these rights.

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[84] Behrendt, *op.cit.* p.46.

CHAPTER 5
SELF-DETERMINATION

In its final Report, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recognised that alcohol abuse was a symptom of Aboriginal disempowerment. Alcoholism in Aboriginal and Torres Strait Islander communities manifests itself in part because indigenous peoples lack the authority to determine their own future:

> *...the relative powerlessness of Aboriginal people is very much to the fore. So much of their current situation vis-a-vis alcohol use can be understood in these terms. Dispossession from lands, interference with kinship systems, destruction of economic resources, weakening of social control mechanisms: all are signs of disempowerment. Alcohol and other drugs do not play an essentially causal role in these processes; the causes are essentially political, economic and historical in nature ... alcohol [use] and self-destructive drinking behaviour [reflect] the individual's response to, and expression of, this disempowerment.*[85]

According to several submissions to this investigation alcohol abuse stems from the fundamental disadvantage and trauma suffered by indigenous peoples as a result of dispossession. Evidence also indicates that alcohol abuse is a response to the lack of control indigenous peoples have over their lives. Violence becomes a symptom of the frustration and sense of powerlessness which characterises the inability of Aboriginal and Torres Strait Islander peoples to determine their own future.[86]

For many Aboriginal people the effective redress of alcohol abuse is connected to the ownership and control of land and self-determination:

> *I believe that the problem of Aboriginal alcoholism will not improve until such time as the Aboriginal communities are in full control of their own affairs through the establishment of land rights and the attainment of economic independence and self-sufficiency. We believe that will only happen when the Aboriginal people are able to have a strong identity as Aboriginal people and to walk in dignity and self-respect.*[87]

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognised in his Second Report that the solution to the nature and extent of the calamity which indigenous peoples face in Australia today 'lies in giving us back the right to control our own lives'.[88] He went on to state:

> *...we must be able to control our own plans for our own futures.*[89]

The right of peoples to self-determination is recognised at international law. As outlined in the previous chapter it is contained in Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*. Article 3 of the *Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)* also provides:

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85 *Ibid*, p.297.
86 Brady, *op.cit.* p.138.
87 Gary Foley quoted in Pollard, D., *Give and Take: The losing partnership in Aboriginal poverty*, Hale & Iremonger, Sydney 1988, p. 36.
88 *Op.cit.* p.132.
89 *Ibid,* p.173.

> *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

The content of this right has long been the subject of debate. Indigenous peoples argue that they must be recognised as having the inherent right of self-determination.[90] As such, the right has been defined as:

> *... the rights of indigenous people to make political decisions concerning fundamental aspects of their life because they are a fully autonomous people with certain rights in international law .... self-determination can be seen as indigenous people setting policy and administering programs.*[91]

Indigenous participants of the United Nations Working Group on Indigenous Populations, which has been responsible for the drafting of the *Draft Declaration* since 1985, have reacted vigorously against attempts to limit this right. In contrast, many governments argue that the formulation of the right to self-determination will need to be qualified before they will adopt the instrument. Many cite protection of a nation's territorial integrity as justification for their calls to qualify the right.[92]

The Australian Government has enunciated self-determination as a key concept of Federal indigenous affairs policy[93] and pledged its commitment to the *Draft Declaration*.[94] Many indigenous people in Australia contest, however, that the notion of self-determination has been hijacked and reinvented by non-indigenous policy makers, bureaucrats and politicians. For example, the provision of an 'indigenous' programme tacked onto an existing government service, or the shift of government responsibility for a matter to the Aboriginal and Torres Strait Islander Commission (ATSIC) are too often couched in the rhetoric of self-determination for indigenous peoples.[95] The definition of self-determination has often been watered down to mean that existing government departments consult with indigenous people over specific policies.[96]

In his Second Report the Aboriginal and Torres Strait Islander Social Justice Commissioner noted that self-determination in the context of health-funding procedures is characteristically devalued 'to the level of ticking boxes on an application form'.[97] He stated:

> *I can...draw a link between the inherent right to self-determination...and the way in which the current provision of services effectively violates that right.*[98]

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90 Iorns, C.J., "The Draft Declaration on the Rights of Indigenous Peoples" (1993) 64 *Aboriginal Law Bulletin* 4; see also Pritchard, *op.cit.* p.85.

91 Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Mornington Island Review Report,* AGPS, 1995*,* p.31.

92 For further discussion of the history and content of this debate see Pritchard, *op.cit.* pp.73-86.

93 *Ibid*, p.83.

94 "The Australian Contribution: A survey of the positions put to the Working Group by representatives of the Australian Government, the Aboriginal and Torres Strait Islander Commission, and the Australian Non-Government Organisations", *UN Working Group on Indigenous Populations*, Tenth Session, 20-31 July 1992, Geneva, Switzerland, p.6.

95 For further discussion see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, *op.cit.* See also Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Mornington Island Review Report, op.cit*.

96 Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, *ibid,* p.31.

97 *Op.cit.* p.132.

98 *Ibid,* p.39.

An indigenous perspective on this right provides a very different definition of what 'self-determination' is:

> *The Australian Government has stated that it implements a policy of 'self-determination' for Aboriginal people. However, it has interpreted 'self-determination' to mean 'self-management' ...*
>
> *The Aboriginal community sees the concept of 'self-determination' as something completely different. To Aboriginal people it means total control over all aspects of our lives ...*
>
> *[T]he Government definition is not without extreme bias. It is designed to ensure that Aboriginal people are not empowered within the system but the system is still able to say the right of 'self-determination' is being protected.*[99]

Self-determination is poorly accommodated by the *Racial Discrimination Act* 1975 (Cth). In the next chapter, the special measures provision in the legislation is discussed and recognised as the only concession, albeit flawed, to the unique status of indigenous peoples within this statutory regime. The right of indigenous communities to determine their own futures will, however, increasingly flavour consultations between indigenous peoples and bodies such as the Northern Territory Liquor Commission. Complaints mechanisms, negotiation processes and policy development must also accommodate the calls of indigenous communities for genuine self-determination. It is now imperative that a concerted effort be made to bridge the gap which exists between what is officially recognised as 'self-determination' and what Aboriginal and Torres Strait Islander peoples are demanding in order to realise self-determination in their communities.

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[99] Behrendt, *op.cit.* p.48.

CHAPTER 6
SPECIAL MEASURES

The provision for 'special measures', found in the *Racial Discrimination Act* 1975 (Cth) (*RDA*), is the major mechanism which may be used to qualify formal equality of treatment and so justify constraints on alcohol sales to Aboriginal people.[100]

The United Nations Commission on Human Rights has stated that:

> *[the] prevention of discrimination on the one hand, and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem: that of fully ensuring equal rights of all persons.*[101]

However, a reliance on special measures to 'save' discriminatory acts which are made after consultation between Aboriginal communities and all relevant authorities is conceptually problematic when placed in the context of collective rights.

The *RDA* is premised on an individual rights-based approach and it therefore has little capacity to accommodate collective rights. The special measures provision is open to the criticism that it does not adequately serve collective rights. The concept of special measures rests on the idea that certain racial groups may require special treatment until they attain the standard enjoyed by others. The rationale underpinning this provision is redress for past discrimination. It is basically a 'catch-up' provision. This is problematic from an indigenous perspective.

It posits an equality based on sameness. It does not allow for the equal enjoyment of rights based on difference, based on the different culture and values of indigenous Australians. However, the rights of indigenous peoples have been recognised as sufficiently distinct to warrant the United Nations developing a separate human rights instrument, the *Draft Declaration on the Rights of Indigenous Peoples* (*Draft Declaration*).

The principle of special measures is also reminiscent of the paternalism which has traditionally characterised policy making for indigenous peoples in this country. It presumes that the practices whereby rights are enjoyed by the dominant culture will be equally relevant to indigenous peoples. Yet, the identity of Australia's indigenous peoples as this nation's first peoples, with a unique relationship with the land and with the dominant culture, may require that Aboriginal and Torres Strait Islander peoples set different benchmarks for the promotion and enjoyment of their rights.

These difficulties aside, special measures may provide a legally workable solution to the problem of illegality under the *RDA* which could arise when Aboriginal communities negotiate with publicans, other distributors of alcohol, the Liquor Commission, local councils and the police to prohibit or restrict purchases of alcohol by their members. This is discussed in detail in Chapters 11-13.

Special measures may provide a temporary means of accommodating the immediate needs of Aboriginal and Torres Strait Islander communities. However, in the light of increasing calls for genuine self-determination and the imminent passage of the *Draft Declaration* through the

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100 Under s.8(1) an exception is allowed for special measures taken to advance disadvantaged groups. The legal consideration of this provision will be discussed in Chapter 13.

101 Sub-Commission Rapporteur Capotorti quoted in "Equality in International Law", (1990) 11 *Human Rights Law Journal* 25.

United Nations, a review of the *RDA*, which takes into account the shortfalls and weaknesses of this legislative regime from an indigenous perspective, is imperative. This year marks the 20th Anniversary of the enactment of the *RDA* and the Race Discrimination Commissioner has commenced a review of the legislation. The findings of this Report and its recommendations will be considered during the course of that review.

The High Court decision on Native Title and the government's response to that decision provide a unique context in which to reverse the trends which have for so long characterised the status of indigenous peoples in this country. The time is ripe to consider indigenous affairs policy from the perspective of Aboriginal and Torres Strait Islander peoples. Self-determination must now be considered as a right and an entitlement of Aboriginal and Torres Strait Islander peoples. It should not be considered within the flawed context of welfare provision which has characterised policy formulation for indigenous peoples in the past.[102]

Any debate, policy or legislative development about restrictions and prohibitions on the sale of alcohol in Aboriginal communities must accept and recognise indigenous notions of collective rights. The right of self-determination and the right of cultural integrity must necessarily inform the development of social justice policy for indigenous peoples. Such a shift in focus and perspective will be a valuable step towards enabling Aboriginal and Torres Strait Islander peoples to address the alcohol abuse in their communities.

Despite the shortfalls of the special measures provision in the *RDA*, and the limited capacity of that legislation to accommodate notions of collective rights and self-determination, this statute is an important source of law when considering liquor availability restrictions. The later chapters of this Report will focus on the application of the Act to communities who wish to impose restrictions or prohibitions on the consumption of alcohol by their members. In particular, it will consider definitions of direct and indirect discrimination and the applicability of the special measures provision to decisions that communities take to proscribe alcohol consumption. However, the Report will first discuss the liquor licensing regime and alcohol related sanctions in the Northern Territory to provide a context for this legal discussion.

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[102] For a fuller discussion of the welfare/rights dichotomy see Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993, op.cit.* and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994, op.cit.* pp.27-71.

CHAPTER 7
NORTHERN TERRITORY ALCOHOL LEGISLATION AND POLICY

The *Liquor Act* 1978 (NT), which established the Liquor Commission, came into operation on 12 February 1979. The Act is directed at regulating the use of alcohol by controlling its availability. When it was introduced it was described as:

> *... among the most progressive in the nation [because]... it provided an opportunity for community participation in licensing decisions unequalled anywhere in the nation at that time... it gave wide powers of discretion to the Liquor Commission to grant licences and set licence conditions. It also provided for the declaration of 'dry' areas in which alcohol is restricted, a provision designed largely to meet the needs of Aboriginal communities....*[103]

The Tangentyere Council, in its submission to this investigation, noted other potentially progressive features of the *Liquor Act*.[104] The Liquor Commission's broad powers and discretion give it flexibility in tailoring licence conditions to local circumstances. It has some independence from the Northern Territory Government and industry lobby groups. It has a duty to take into account the 'needs and wishes' of the community in licensing matters. Complaints regarding the operation of a licence can be made by any member of the public. Emergency powers allow the Liquor Commission to suspend and/or cancel a liquor licence in the public interest.[105]

The Liquor Commission has powers to grant and monitor liquor licences, to set licence conditions and the conduct required of licensees, to investigate and settle complaints, and to evaluate and prescribe 'dry areas'. It is also responsible for administering the Act and collecting licence fee revenue, based primarily on the volume of alcohol sold by licensed premises. It is not bound by the rules of evidence, although its powers are similar to those of a judicial body. There is provision in the Act for appeal from its decisions.

Elements within the liquor industry are critical that the Liquor Commission's powers are too broad and that the Act's operation is overly restrictive of the industry. However, it has been the expressed view of Aboriginal communities in Central Australia and others that its powers are not used to discourage irresponsible and excessive consumption and supply of liquor. Despite the progressive language of the Act, the Liquor Commission has been the subject of severe criticism by Aboriginal organisations and government committees during its 18 years of operation, and the Commission and the Act have undergone significant modification.[106]

The Liquor Commission now operates within the portfolio of the Chief Minister to administer the *Liquor Act*. Its members are appointed by the Chief Minister, and it consists of a Chairman, a legal practitioner with no less than five years experience and three other members. Following amendments to the Act in 1992, discussed below, regulations can be made by the Northern Territory Government requiring the Liquor Commission, in exercising its powers and performing its functions, to have regard to general government policy directions.[107]

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103 Lyon, *op.cit.* p. 123.
104 *Submission Number 1.5*, *op.cit.* p.87.
105 *Ibid,* pp.16-17.
106 *Ibid, p.87-89*
107 *Liquor Act* 1978 (NT), s.128.

A Brief History of the Liquor Act and the Liquor Commission

The *Liquor Act* removed the administration of liquor licensing from the Northern Territory Police Force. It established the Liquor Commission as a permanent statutory authority responsible for administering the *Liquor Act*, which was included within the portfolio of the Minister for Health. In its first years, the Liquor Commission was praised by Aboriginal groups for responsibly administering the Act.[108] In 1980 the Liquor Commission was praised by the Pitjantjatjara Council for addressing alcohol related problems at Imanpa by suspending takeaway sales to residents of the Imanpa community. Its Chairman had considerable experience in the area of Aboriginal affairs and was very concerned about the impact of licensing decisions on Aboriginal communities.[109]

In 1986, however, the Liquor Commission was amalgamated to become the Liquor Division of the Liquor, Racing and Gaming Commission, within the portfolio of the Minister for Racing and Gaming. This body was responsible for administering the *Liquor Act* until 1990.

The original submissions to this Report were made during the Racing, Gaming and Liquor Commission era. They indicate that the Commission moved well away from a role of empowering bodies to implement alcohol restrictions. Tangentyere Council suggest that its decisions exacerbated rather than ameliorated alcohol related harm, especially amongst Aboriginal communities.[110]

The Racing, Gaming and Liquor Commission was seen as having a conflicting role as an instrument of social policy, a regulatory body and a revenue-collecting organisation which derived income from alcohol sales.[111] It was seen to have ignored social policy while focussing on fostering and protecting the liquor industry.[112] Though initially it '... took its charge as an instrument of social policy very seriously', it was said to change during this time to 'a very different body ... concerned with providing facilities for tourists, regardless of the cost to the immediate community.'[113]

The Northern Territory Government's 1990 submission stated that the Liquor Commission, in administering the *Liquor Act,* 'actively seeks to publicise its activities, to hold public hearings, to elicit public objections to liquor licence applications, and to ensure that local governments and other interested bodies are actively engaged in the decision-making processes regarding liquor licences.'[114] Central Australian Aboriginal communities felt, however, that they were not given a fair hearing. Justice Nader of the Northern Territory Supreme Court gave credence to this claim during the hearing of an appeal from a decision of the Liquor, Racing and Gaming Commission. At the 1988 hearing of an objection by the Pitjantjatjara Council to the renewal of the licence at Curtin Springs, complaints were made about irresponsible sales to Pitjantjatjara residents. There were suggestions that the submissions, or legal arguments, of the objectors to the licence renewal were not given any consideration. Justice Nader stated that the Commission had not observed proper procedure

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108 *Submission Number 1.5*, *op.cit.* p.23.

109 Pitjantjatjara Council Inc., *Submission Concerning Placing Conditions on Liquor Licences for the Purpose of Reducing Availability of Alcohol in Anangu Communities to the Human Rights and Equal Opportunity Commission (Submission Number 1.7)*, January 1991, *Appendix 1*, p.36.

110 *Submission Number 1.5*, *op.cit.* p.22.

111 *Submission Number 1.7*, *op.cit. Appendix 1*, p.66.

112 *Submission Number 1.5*, *op.cit.* p.22.

113 *Ibid*, pp.23-24.

114 *Submission Number 1.6*, *op.cit.* p.4.

and had 'merely adopt[ed] the submissions of counsel for... Peter Arnold Severin and Erldunda Ltd!'[115]

Criticisms along these lines have appeared in reports by various indigenous organisations in recent years.[116] They are implied in the 1991 Report of the Northern Territory Sessional Committee into Use and Abuse of Alcohol, which suggested a restructuring to give magistrates the power to determine licences and their conditions of operation. The Committee also recommended the creation of an 'alcohol services authority' funded or co-ordinated by the government to plan, develop and co-ordinate alcohol, health and education programmes, and work as closely with the Liquor Commission as the Government's industry development areas traditionally have.[117] This led to the establishment of the *Living with Alcohol* programme, discussed below.

The Current Liquor Commission

In 1991, the Government removed control of the Liquor, Racing and Gaming Commission from the Department of Racing and Gaming. The Liquor Commission now exists within the portfolio of the Chief Minister. Since 1993, the Commission has operated under the stewardship of a new Commissioner, and with a new mission statement and policy direction which indicate a return to the concerns the *Liquor Act* was intended to address. Some of the criticisms made by Aboriginal groups in the submissions may not still be relevant, and the Race Discrimination Commissioner to this extent welcomes the restructuring.

The *Living with Alcohol* programme was established in response to the Sessional Committee's call for restructuring. It funds and co-ordinates alcohol programmes which address problems arising from the high level of alcohol abuse in the Northern Territory. It is funded by a levy on alcohol sales, and currently has a budget of some $7 million each year. Its policy is sensible drinking... 'The program recognises that alcohol is a part of our life, and is always likely to be.'[118] Indeed, the official motto of the programme is 'Grog, We Can Live With It'.[119]

The Liquor Commission works closely with the Alcohol Consultative Committee, a joint industry-government body established to facilitate co-operation on matters of policy, including 'social' policy, and which formulates 'recommendations to government in relation to the implementation of measures which actively encourage and support sensible drinking behaviour and the prevention or prohibition of practices that might encourage harmful drinking behaviour'.[120]

This policy-making structure gives some cause for concern. The advantages of independence and flexibility to tailor local conditions of alcohol availability are compromised if local community concerns are overridden by government and industry policies. The policy of moderation espoused by *Living with Alcohol* and the Alcohol Advisory Committee should not be imposed indiscriminately on all Aboriginal communities.

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115 *Pitjantjatjara Council Inc v NT Liquor, Gaming and Racing Commission*, Unreported, Nader J, NT Supreme Court, 1991.

116 For example Langton, *op.cit.* pp.21-22.

117 *Report No 2*,*op.cit.* pp.32-34.

118 Ministerial Statement by The Hon Mike Reed, MLA, May 1995, p.2.

119 Chandler, C 'Team sets out to join grog fight', *Northern Territory News*, 2 June 1994.

120 Northern Territory Liquor Commission, *Annual Report 1993/94*, Government Printer of the Northern Territory, 1994, p.12.

Liquor licence conditions, which in their language indicate a restriction, can have the practical effect of making alcohol widely available in communities which have declared themselves dry. Such conditions may not reflect the 'needs and wishes' of the community, a point addressed further in the following chapters.

The Pitjantjatjara Council has identified this problem at Curtin Springs, where the Liquor Commission has restricted takeaway sales to a 'six-pack' per day, and the licensee has limited counter service to a few hours per day. Levels of alcohol abuse remain unacceptable, and are little reduced from the period between 1988-91 when the licensee was selling unrestricted takeaway alcohol. In contrast, the Council has a longstanding and public policy of prohibiting alcohol sales to its members.

A policy of moderation seems also to fly in the face of the statistical evidence relating to the pattern of alcohol abuse in Aboriginal communities outlined in earlier chapters of this Report. Most Aboriginal people who abuse alcohol drink excessively, that is 'binge' drink, and at an earlier age than non-indigenous drinkers. A policy of moderation may have little practical effect on this type of abuse. Many Aboriginal people demand more stringent liquor restrictions to address abuse in their communities. The dry area declarations are evidence of this. Aboriginal communities may feel that stronger measures, such as eliminating alcohol availability to members altogether, are needed. To oppose such community policy is paternalistic.

It is appropriate to note that, with the notable exception of Curtin Springs, most Central Australian licensees operating near Northern Territory Pitjantjatjara communities received praise from the Pitjantjatjara Women's Council for co-operating with local communities in recent years.

It is emphasised that this Report does not suggest that a policy of moderation in availability, involving reduced opening hours or other measures, is generally a deficient strategy for reducing abuse, nor that it lacks support from all Northern Territory Aboriginal communities. To advocate prohibition over community objection would also be paternalistic. However, the *Living with Alcohol* programme should recognise that it commenced long after the Pitjantjatjara bodies expressed their preference for alcohol not to be sold to their members in Central Australia.

The proposed Tyeweretye Social Club

An example of an initiative which would accord with the objectives of *Living with Alcohol* is the proposed Tyeweretye Social Club in Alice Springs. The proposal of the Tangentyere Council acknowledges that limits on availability are unlikely to be an effective practical solution in urban Alice Springs. The Council points out that 'dress regulations bar most Aboriginal people, particularly town campers and bush dwellers, from almost all licenced premises in Alice Springs,' resulting in public drinking and its attendant problems.[121] The Liquor Commission has so far refused to grant a liquor licence to the Club, but a Supreme Court Challenge to that decision in 1994 was successful and negotiations are continuing. *Living with Alcohol* should support such initiatives. Unreasonable objections to the community initiative, especially when coupled with a levy on wine casks to fund increased policing of public drunkenness, could potentially amount to discriminatory behaviour.[122]

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121 *Submission Number 1.5*, *op.cit*. p.28.

122 See pp. 60-61 of this report.

Project Sunshine

Project Sunshine is a recent initiative of the Northern Territory Liquor Commission which aims to address alcohol problems in Central Australia. It proposes to establish, in consultation, a 'common rule' with regard to restrictions on alcohol consumption in Pitjantjatjara communities. Other proposals include addressing the problem of illicit 'grog-runners' and the role of the police in enforcing alcohol related restrictions.

Although originally supportive of the project, several developments have led the Pitjantjatjara Council and the Mutitjulu Community to express scepticism about it. It is argued that the moderation policy of the Liquor Commission and the *Living with Alcohol* programme is not appropriate for Central Australia, and will only result in ineffective restrictions on alcohol sales near the communities. The Councils are concerned that *Project Sunshine* is driven by the policy of moderation.

Then Chief Minister, Marshall Perron, has stated at a meeting with the Chairman of the Liquor Commission, the Minister for Health, the Minister Responsible for the Liquor Commission and the Police Commissioner that he would be concerned if *Project Sunshine* reflected a policy of prohibition rather than the moderation policy espoused by *Living with Alcohol.*[123] In contrast to the independent Liquor Commission foreshadowed by the *Liquor Act* when it was passed in 1978, such statement impacts on the Chairman's capacity to base liquor licence decisions on community needs and wishes.

There is considerable cause for concern that the Northern Territory Government's policy of moderation threatens the independence of the Liquor Commission. The Sessional Committee on the Use and Abuse of Alcohol by the Community recommended that:

> *[i]t may be that the role given to magistrates with regard to declaring certain types of problem drinkers as habitual drunks would warrant a similar responsibility to be given to them in the determination of licences and their conditions of operation.*[124]

This recommendation is still relevant in the light of the on-going complaints from Aboriginal communities that the policies and structures of the Liquor Commission continue to deny their needs and wishes.

Currently the content of the proposed *Project Sunshine* 'common rule' is unclear. The proposed rule may only limit alcohol availability. There is, however, evidence in the submissions that prohibition is what some communities need and want. If this is the case, support by the Liquor Commission for alcohol sales to residents of Pitjantjatjara lands in any form is inappropriate.

The Pitjantjatjara Council has requested funding from the Liquor Commission in order to carry out consultations with communities about this proposal. The Liquor Commission has advised the Council that funding for such consultations must come from the *Living with Alcohol* programme. This funding has not yet been made available.

The Commission also appears to be delaying resolution of the Curtin Springs dispute until such time as the 'common rule' proposal is implemented. The practical effect is that the

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123 Northern Territory Liquor Commission, *Project Sunshine: Running Sheet,* 24 March 1994, p.6.

124 *Report Number 2*, *op.cit.* p.34.

Curtin Springs dispute remains unresolved and consultations within the Pitjantjatjara communities on the proposed *Project Sunshine* initiatives are at an impasse.

Understandably, the Pitjantjatjara Council has serious reservations. It is sceptical of the policy of 'moderation' which apparently underpins this programme. Submissions to this Report suggest that in practice a policy of moderation results in restrictions on alcohol availability which are easily circumvented. The Pitjantjatjara Council also doubts the willingness of the Liquor Commission to consider the needs and wishes of the communities it represents.

Although the last few years have seen some positive changes, there are indications that the Northern Territory Liquor Commission may still be unduly industry oriented when considering issues involving Aboriginal alcohol abuse and liquor licensing. The moderation policy is a potential vehicle for the denial of the statutory mandate to consider the needs and wishes of Aboriginal communities. Despite the restructure of the Liquor Commission and the comprehensive recommendations of the Sessional Committee on the Use and Abuse of Alcohol in the Community, little appears to have changed in remote Central Australia since the original submissions were received by the Office of the Race Discrimination Commissioner.

If the Northern Territory Liquor Commission continues to have inadequate regard for the needs and wishes of Aboriginal people for restriction or prohibition of alcohol within their communities, the Commonwealth Government should consider legislating under its race power to ensure that these needs and wishes are reflected in liquor licence conditions. The Race Discrimination Commission would support such a move if necessary.

RECOMMENDATIONS:

The Northern Territory Liquor Commission should urgently address the Curtin Springs dispute by using its powers to vary licence conditions under Part III of the *Liquor Act* 1978 (NT). Any hearings should take place in the most appropriate Pitjantjatjara community.

If *Project Sunshine* is to continue, immediate funding should be provided by the Northern Territory Government to the Pitjantjatjara Council for community consultations.

CHAPTER 8
POWERS OF THE LIQUOR COMMISSION

Power to Grant and Vary Licences

The *Liquor Act* 1978 (NT) (*Liquor Act*) sets out the regulatory mechanisms for the distribution of alcohol, including the procedures to be followed by individuals or companies wishing to obtain or transfer a liquor licence.[125] It also sets out the procedures to be followed by the Liquor Commission in dealing with applications for liquor licences.[126] It enables the Commission to issue licences subject to a range of conditions[127] and to vary those conditions during the currency of a licence.[128] The Act seeks to address the wide range of circumstances relevant to licensing in the Northern Territory. In considering whether to grant an application or in determining the conditions of a licence, the Act stipulates that the Commission is to have regard to the location of the establishment, the 'the needs and wishes of the community', community government advice if the premises is located in a community government area, and any other matter.[129] The discretion to impose conditions upon licences is very wide.

Where the Liquor Commission imposes such a condition upon a licence without a hearing, or where an application for a licence or the transfer of a licence has been refused by the Commission, the applicant or holder of the licence may request that a hearing be held.[130] Following such a hearing, the Liquor Commission may (a) affirm, set aside or vary the initial decision; or (b) make such other order as it thinks fit.[131]

The Liquor Commission has the power to grant 'on licences', which allow liquor to be consumed and sold as takeaway; 'off licences', which only allow takeaway liquor sales; non-profit 'club licences'; and 'roadside inn' licences.

As a result of representations made by Aboriginal communities to the Liquor Commission, several restricted licences have been granted to liquor outlets servicing Aboriginal communities. Examples include:

- **Barunga Progress Association:** takeaway sales of beer only and opening hours limited to 4 pm to 5 pm Monday to Friday.
- **Beswick Progress Association:** takeaway sales only and all purchases have to be consumed in a designated area. Maximum purchase limits apply.
- **Mt Ebenezer Roadhouse:** public roadhouse, owned by the local Aboriginal community, having as part of its licence conditions a six-can takeaway limit.

Power to Control Conduct of Licensees

As well as investigating and hearing complaints about the conduct of licensees and licensed premises, the Liquor Commission is given the power to control the conduct of licensees, including the power to suspend a liquor licence where '... the licensee has contravened or failed to comply with a condition of his (sic) licence ....'[132] Once a licence is suspended, it is

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125 Ss.26 and 27 of the *Liquor Act* 1978 (NT).
126 *Ibid*, ss.28 and 29.
127 *Ibid*, s.31.
128 *Ibid*, s.33.
129 *Ibid*, s.32.
130 *Ibid*, s.50.
131 *Ibid*, s.50(2).
132 *Ibid*, Part VII.

ineffectual until such time as the suspension is revoked by the Commission.[133]

The Liquor Commission may cancel a licence on a number of grounds. These include where the licensee has been convicted of an offence under the *Liquor Act*, or has failed to comply with a condition of the licence or is judged not to be a fit and proper person to hold a licence.[134]

As a result of amendments in 1992, the *Liquor Act* makes it a condition of all licences that a licensee:

> *shall not take any action that, in the opinion of the Commission, would induce the irresponsible or excessive consumption of liquor on licensed premises.*[135]

The amendments also further expanded the grounds on which a licence can be cancelled to include a situation in which *the presence of the licensed premises no longer meets the needs or wishes of the community*.[136] Such a cancellation is subject to the payment of compensation.

The amendments follow the recommendation of the 1991 Sessional Committee into Use and Abuse of Alcohol in the Northern Territory that licences which are identified as contributing unduly to alcohol-related harm, by virtue of their location, the manner in which they operate or the behaviour of their clientele, should be cancelled.

Complaint Handling

The Act makes provision for dealing with complaints about the conduct of licensed premises and the conduct of licensees.[137] At first instance, complaints are made to the Registrar of Liquor Licences[138] who is required to conduct an investigation into the complaint.

If the Registrar considers that the complaint should be further investigated then he or she may refer the matter to the Liquor Commission. The Commission is empowered to conduct a hearing into the complaint,[139] dismiss the complaint on the basis that it is frivolous, irrelevant or malicious,[140] or direct that no further action be taken.[141]

In the course of its investigation, or in an emergency, the Commission may '... suspend a licence, or impose or vary a condition of a licence, where it is of the opinion it is in the public interest to do so.'[142]

Following the conduct of a formal hearing into the complaint the Commission may amend the conditions of the licence, direct the licensee to take certain action to rectify or minimise the consequences of the licensee's conduct, or defer further consideration of the complaint (which may be conditional upon a transfer of the licence being lodged).[143]

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133 *Ibid*, s.66(3).
134 *Ibid*, s.72.
135 *Ibid*, s.31(4).
136 *Ibid*, s.72.
137 Part IV of the Act provides for the lodging of objections and complaints.
138 The Registrar is appointed by the Minister pursuant to section 17 of the *Liquor Act*.
139 *Ibid*, s.49(2)(c) .
140 *Liquor Act*, *op.cit*. s.49(2)(a).
141 *Ibid*, s.49(2)(b).
142 *Ibid*, s.48A(1).
143 *Ibid*, s.49(4).

Power to Declare 'Dry Areas'

Under the *Liquor Act*, the Liquor Commission is given the power to declare an area a 'restricted area'('dry').[144] Unless dismissed as frivolous, irrelevant or malicious, an application to have an area declared as a 'restricted area' is dealt with by way of hearing.[145]

Before such a hearing is held, the Commission must inform all licensees who would be affected by the declaration and the residents of that relevant area. The Commission must also obtain the opinions of affected persons and the community government council, if one exists, for the area.[146] The hearing must be held within the relevant area or at a place convenient to persons who wish to submit an opinion on the application.[147]

Once an area has been declared to be dry then it is an offence for a person to (a) bring liquor into, (b) possess, or (c) consume, sell or otherwise dispose of liquor within a restricted area.[148]

An exception to these rules is made if persons residing in, or temporarily living in, a restricted area are granted a Liquor Commission permit to consume alcohol.[149] Where this is the case, a person holding a permit can order alcohol to be delivered.[150] A guest of a permit holder may also consume alcohol at the invitation of the permit holder.[151] Such permits can be revoked by the Liquor Commission if an individual breaches or fails to comply with any condition of the permit, or at the Commission's discretion. The Act also provides for extensive search and seizure powers in relation to suspected breaches of the restricted areas provisions set out above.[152]

The Northern Territory Sessional Committee on Use and Abuse of Alcohol in the Community published a report into dry areas in December 1993.[153] It concluded that dry areas were an effective means of controlling the impact of alcohol abuse. It noted that 'the real or perceived problem of dry areas legislation merely transferring problems to the larger centres needs to be addressed.'[154] It made six recommendations, including biennial hearings to ensure that liquor restrictions reflected the needs and wishes of the community, and that the permit system in restricted communities should be amended to give primary responsibility for approving, reviewing, cancelling and suspending permits to drink to the community council.[155] These recommendations are welcomed as sensible refinements.

Obligations of Licensees

A licensee or any person employed by a licensee shall not sell or supply liquor to a person in respect of whom there are reasonable grounds for believing that she or he is intoxicated.[156]

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144 *Ibid*, s.74.
145 *Ibid*, s.77.
146 *Ibid*, ss.77-79.
147 *Ibid*, s.77. In contrast the provisions relating to the granting of liquor licences do not impose such an obligation.
148 *Ibid*, s.75.
149 *Ibid*, s.87.
150 *Ibid*, s.88.
151 *Ibid*, s.89.
152 *Ibid*, s.95.
153 Legislative Assembly of the Northern Territory Sessional Committee on Use and Abuse of Alcohol by the Community*, Report No. 4*, *op.cit.*
154 *Ibid*, p.vii.
155 *Ibid*, pp.vii-ix.
156 *Liquor Act*, *op.cit.* s.102.

The term 'intoxicated' is not defined in the Act. A licensee must not permit indecent, violent, quarrelsome or riotous conduct to occur on licensed premises.[157]

A licensee, employee or inspector is required to remove any person who is not a bona fide resident of the licensed premises if the person is '... intoxicated, violent, quarrelsome, disorderly or incapable of controlling his (sic) behaviour'.[158]

In view of the difficulties in enforcing this provision of the *Liquor Act*, the Sessional Committee recommended in its 1991 Report that the sole responsibility for enforcing the provisions of the Act be vested in the Police Force and that police increase their regular presence at licensed premises.[159] It was also recommended that police have the power to close licensed premises which supply alcohol to intoxicated persons, or where they believe public safety is being jeopardised.[160]

There have been no statutory amendments to give effect to these recommendations in the Northern Territory, but a memorandum of understanding was signed between the Liquor Commission and the Police Force in 1992, implementing a formal scheme for the joint enforcement of the Act. Police have virtually the same powers as Liquor Commission inspectors under the Act.[161]

Court Order to Forbid Sale of Liquor to Certain Persons

Before 1992, the Liquor Commission had power to declare a person a habitual drunk. The power had not been used for many years possibly because of concern that its exercise might result in challenges regarding human rights infringements.[162] The 1992 amendments removed this power from the Liquor Commission and vested it in the Court, which can make an order which forbids the sale or supply of liquor to certain persons.[163] This is regarded as a serious measure to be taken as a last resort for 'heavy and problem drinkers..., habitual drunks' who would otherwise 'drink themselves to death in a very short time', 'where other intervention such as substance abuse programmes are ineffective.'[164]

The 1992 amendments provide that a 'prohibition order' may be made by a judge or magistrate in respect of:

> (*a) a person who, by the habitual or excessive use of liquor, wastes his (sic) means, injures or is likely to injure his (sic) health, causes or is likely to cause physical injury to himself or to others or endangers or interrupts the peace, welfare or happiness of his (sic) or another's family; or,*
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> *(b) a person who, on more than 3 occasions during the preceding 6 months, has been taken into custody in accordance with Division 4 of Part VII of the Police (Administration) Act.*[165]

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157 *Ibid,* s.105.
158 *Ibid*, s.121.
159 *Op.cit.* recommendations 15, 16 and 17.
160 *Ibid*, see recommendations 20, 21 and 22.
161 *Liquor Act*, *op.cit.* s.19(10)
162 *Legislative Assembly of the Northern Territory Hansard*, Vol. 4, 1991, p.1515.
163 *Liquor Act*, *op.cit.* s.122.
164 Sessional Committee Report, *op.cit.* p.62.
165 *Liquor Act*, *op.cit.* s.122.

Once a prohibition order is made, selling or supplying liquor to the person named in the order or allowing a person to remain on licensed premises.[166] The judge or magistrate making the order may also order the person named to be referred for physical and mental assessment and to undertake a specified programme of treatment and rehabilitation.[167]

The Act provides that where an application for a prohibition order is made, then the person against whom it is sought must be told of the application and given an opportunity to comment in writing on any allegations contained in the application. Investigations are conducted by the Registrar of the Liquor Commission. A magistrate may then either reject the application as frivolous, irrelevant or malicious, or conduct a hearing.[168] Any such hearing must be conducted in private. If, after a hearing, a magistrate makes a prohibition order the magistrate is required to inform licensees in the relevant area.[169]

Regulations

The *Liquor Act* allows for regulations restricting the days when, and the times during which, licensed premises may be open for the sale of liquor for consumption away from the premises. The Liquor Commission may allow takeaway sales outside these hours if this will not lead to public drunkenness. Regulations can prohibit or regulate the quantities or kinds of liquor that may be sold at licensed premises, and the giving of credit for the purchase of liquor from licensed premises.[170]

Conclusion

The Northern Territory legislation is quite progressive compared to that of most states in Australia. The Northern Territory Government has incorporated several of the recommendations of the 1991 Sessional Committee Report as statutory amendments, resulting in improvements in some areas of the Act's operation. However, several desirable recommendations have not been acted upon, and, as the discussion below illustrates, problems in the application of the Act remain.

166 *Ibid*, s.122(3).
167 *Ibid*, s.122(4).
168 *Ibid*, ss.122(8) and (9).
169 *Ibid*, s.122(11).
170 *Ibid*, s.128.

CHAPTER 9
PROBLEMS WITH THE APPLICATION OF THE *LIQUOR ACT*

Introduction

In theory, as the previous chapter showed, the Liquor Commission has broad powers to tailor licence conditions to local circumstances, and to accommodate the needs of Aboriginal communities. This flexibility should allow it to be sensitive to the alcohol policies of Aboriginal groups, whether a particular community's policy is prohibition, moderation, community-run social clubs or unrestricted sales. This scope for self-determination in regional alcohol policy has not yet been realised. The Liquor Commission has acceded to requests by communities to go dry, but has resisted calls to back up dry area declarations with liquor licence conditions.

Communities should be able to determine their own alcohol policies. Measures which result are less likely to be discriminatory, as the analysis in the following chapters indicates. This Report does not support any one policy. However, the submissions indicated that some communities feel that strong measures are necessary. There is a convincing argument that if a community declares itself dry, and it demands limits on availability for its members, the Liquor Commission should co-operate. Electing to be a dry community alone is inadequate.

The supply of take-away alcohol outside a dry area allows community members who abuse alcohol to take supplies back to dry communities. The resulting drunkenness and violence disrupts the whole community. Bar service contributes to the problem because it allows members of dry communities to drink outside their land and then return to the community, necessarily driving considerable distances while intoxicated.

The Pitjantjatjara Council noted in its submission:

> *While most Aboriginal people do not drink alcohol, their lives nevertheless are profoundly affected by the violence, disruption, anxiety and fear that drinkers bring into their communities with grog.*[171]

Availability and alcohol abuse

The easy availability of take-away alcohol from roadside inns and other outlets situated near 'dry' Aboriginal communities is a matter of extreme concern to many communities. In Northern Territory, communities may be declared 'dry' by the Liquor Commission at a community's request. Such a declaration is a major step, requiring evidence of both the necessity to eliminate alcohol and the wish of the community to do so. The sale and consumption of alcohol on that land is thereby rendered illegal. Enforcement of alcohol restrictions on 'dry' land then falls to the police, often supported by community initiatives such as the night patrol co-ordinated by bodies such as the Pitjantjatjara Women's Council. However, availability of alcohol on the perimeters of Aboriginal land which has been declared dry poses a serious threat to a community's capacity to enforce these restrictions and control alcohol consumption amongst its members.

There is overwhelming evidence that there is a link between alcohol availability and alcohol abuse, and that wide availability has related social, economic and criminal justice

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171 *Submission Number 1.7*, *op.cit.* p.13.

implications. The submissions supported a body of research which suggests that the easy availability of alcohol on the outskirts of a 'dry' area seriously compromises a community's chances of 'beating the grog'.[172] Arguments that prohibitions result in circumvention, that 'grog-runners' and not legal sales of alcohol are responsible, or that people to whom the prohibition applies merely pressure others to buy the alcohol or bribe them to do so, are not without substance. However, they are open to two fatal criticisms if they are advanced as reasons why licence conditions are inappropriate. First, they do not justify the paternalistic imposition of alcohol policies directed at policing rather than prevention. Second, as the Pitjantjatjara submission indicates, the evidence in Central Australia is that local availability does cause abuse within dry area communities.

The Central Australian Aboriginal Congress Inc. noted 'it is well established...that increased availability [of alcohol] results in increased community consumption.'[173] The Northern Territory Aboriginal Issues Unit stated in its submission to the Royal Commission Into Aboriginal Deaths In Custody that 'harmful levels of alcohol consumption arise where alcohol is easily accessible...'[174]

The submission of the Pitjantjatjara Council cited several relevant passages from the Lyon Report:

> *[w]hen laws actually restrict alcohol availability in an absolute way (eg by drinking age) and are then liberalised, increased consumption and related problems will result. Similarly, when alcohol is already available and its availability is increased (eg by expanding days and hours of sale or the number of outlets) consumption and problems frequently increase.*[175]

The Lyon Report also cited statistical evidence of the comparatively high number of liquor outlets in Alice Springs in support of the hypothesis that local availability of alcohol is a factor in alcohol abuse in indigenous communities in Central Australia.[176]

The Pitjantjatjara Council has submitted detailed evidence that the further from a dry community it is that alcohol is sold to residents, the less will be the impact of alcohol abuse on that community.[177] 'Grog running' occurs, and hard drinkers still manage to gain access to alcohol, but past experience indicates that grog running alone does not eliminate the benefits of reduced availability.

The Alcohol Policy of the Pitjantjatjara Council

The Pitjantjatjara Council, at its General Meeting in 1983, passed a resolution to provide that:

> *Roadhouses near Pitjantjatjara Council communities and the Pitjantjatjara lands should not be allowed to sell grog to Anangu [Aboriginal people] for consumption, on*

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172 *Ibid* p.76. See also p.16 and Appendix 5 of this Report.

173 *Race Discrimination Act 1975; Race Discrimination, Human Rights and the Distribution of Alcohol (Submission 1.4)*, November 1990, p.1.

174 Langton, *op.cit.* p.13.

175 *Submission Number 1.7, op.cit.* p.76ff, p.86.

176 *Ibid.*

177 *Ibid, Appendix 1*, p.51 which cites the evidence of Peter Morrison, Senior Sergeant at Marla in South Australia. He gave evidence to the Liquor, Gaming and Racing Commission Curtin Springs licence renewal hearing in 1988 of links between proximity to alcohol and abuse within communities. He noted that in 1988, when Curtin Springs began selling alcohol to community members, there were 124 people apprehended for public intoxication on Pitjantjatjara lands, compared with four in 1987.

or off the premises ...[178]

At that meeting the Council also resolved that its lands be declared dry. The restrictions on the sale of takeaway alcohol on the perimeters of their land and the declaration of Pitjantjatjara communities as 'dry' were seen as related and complementary mechanisms necessary to address the problem of escalating alcohol abuse by Pitjantjatjara people. The resolutions of that meeting were a recognition by the Pitjantjatjara people of the interrelationship between alcohol availability and alcohol abuse and the need to restrict alcohol outside their lands to ensure the success of the 'dry area' declaration.

Since 1983, the Council has obtained changes to the licence conditions of several establishments in South Australia which sell to members of Pitjantjatjara communities, some of whom reside in the Northern Territory. The Council noted that while bodies in other states have been co-operative, it has faced most opposition in the Northern Territory.[179]

When the licensee of the Marla Hotel/Motel in South Australia, for example, sought to change the outlet's licence conditions to allow unrestricted sales, the Pitjantjatjara, Yankunytjatjara and Iwantja Councils opposed the changes. The parties agreed to certain conditions being placed on the licence, in accordance with the resolution of the Annual General Meeting. One condition prevented the licensee from selling takeaway alcohol to residents of, or persons travelling to or through, the South Australia Pitjantjatjara freehold land.

Under the South Australian *Liquor Licensing Act 1985*, the Licensing Authority may impose such licence conditions as it thinks fit and include them in the licence.[180] On 26 October 1984, relying on the predecessor to the *Liquor Licensing Act*, Justice Kelly in the Licensing Court of South Australia agreed to these 'special' restrictions being made legally enforceable conditions of the Marla licence.

Northern Territory informal agreements

The Council has had little success, however, in having similar conditions, initiated and supported by the community, placed on licences in the Northern Territory. Instead, it has been forced to seek informal agreements with the licensees of various premises, some of which are noted on their licences. These informal agreements include:

*Mt Ebenezer:	An unwritten agreement that there be no takeaway sales until the last tour bus has departed and all cars have left.

178 *Ibid*, p.14.

179 *Ibid, Appendix 1*, pp.20-21. In South Australia during the 1980's takeaway licence applications were successfully opposed by the Pitjantjatjara Council, in conjunction with member communities, at Mintabie Hotel and the Miners Right Restaurant. Takeaway sales prohibitions to persons resident on, or travelling through Pitjantjatjara lands were imposed at Marla (1983), Cadney Park Roadhouse (1988) and Mt Dare Homestead (1990). In Western Australia in 1988 an application for a takeaway licence from Yamarna Station was withdrawn following objection from Ngaanyatjarra Council, Warburton Community and Tjirrkarli Aboriginal Corporation. In the Northern Territory the only real successes have come in the Supreme Court. In 1983 a prerogative writ quashing the grant of a takeaway licence at Ernest Giles Tavern resulted in an informal agreement to prohibit takeaway sales to residents of Pitjantjatjara lands. Liquor Commission proceedings granting a takeaway licence at Victory Downs Motel were also quashed in the Northern Territory Supreme Court in 1983.

180 *Liquor Licensing Act* 1985 (SA), s.50(1) and s.50(5)(a).

*Kulgera and Yulara Tavern: An agreement with the Pitjantjatjara Council that there are no takeaway sales to persons residing in, travelling to or through the Pitjantjatjara lands.

*Wycliff Well, Wauchope: An unwritten agreement with Ali Curung Community that there be a limit of one 6 pack per person per day. As a result of discussions with police, community members and outlets to try and reduce alcohol related problems at Ali Curung.

*Ti Tree: An unwritten agreement restricting sales to between 1.30-3.30pm each day. No sales if requested by the Ti Tree community.

*Erldunda: An unwritten agreement with the Imanpa community that there be a limit of one 6 pack per person per day.

Clearly there are difficulties in relying upon these types of agreements:

(i) the licensee may not be willing to reach an agreement which is satisfactory to the needs of the Aboriginal community involved;

(ii) the agreements can only be maintained with the support of licensees. If a licensee decides to change or end an arrangement, he or she is within the law to do so. This inevitably leads to conflict with the Aboriginal community because of differing expectations;

(iii) it is doubtful whether such agreements are legally enforceable.

The Curtin Springs Roadhouse

The break-down of one of these informal agreements between the Curtin Springs Roadhouse and the Pitjantjatjara Council in 1988 was pivotal to the decision to prepare this Report. The Council's submission contained much evidence of the history of legal action and social chaos in its communities as liquor consumption escalated in adjacent dry Aboriginal communities after the agreement was breached:[181]

> *The impact of [the] decision to resume sales of takeaway alcohol to Pitjantjatjara people in early 1988 was immediate, especially on the Mutitjulu Community at Uluru National Park, which lies within easy striking distance of the Curtin Springs Roadhouse, and Imanpa.*
>
> *Grog pours into the national park community, which had only the year before been declared dry by the Liquor Commission at the request of the Aboriginal residents. Disturbances, injuries and alcohol-related motor vehicle accidents quickly followed.*[182]

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[181] This hearing, as an objection to a licence renewal at Curtin Springs, was conducted before the Liquor Commission in two sittings, on 22-24 November 1988, and 14-17 February 1989 before Mr K.G. Rae (Chairman), Mr W.A. Raby OBE and Mr J.R. Larcombe OAM. The licence applicant was Mr Peter Severin, the premises Curtin Springs Road House, and the objectors Maggie Kavanagh, Pijantjatjara Council Inc. and Mutitjulu Community Inc. The hearing was the subject of a Northern Territory Supreme Court appeal (Unreported, Nader J., 1991), after which the Commission's decision was reviewed.

[182] *Submission Number 1.7, op.cit. Appendix 1*, p.46.

From the late 1960s, Curtin Springs Roadhouse had held an unrestricted licence. However, it had also adopted the practice of not selling alcohol to Aboriginal people. In the early 1980s this practice was made into an informal agreement with local Pitjantjatjara communities.[183] However, from early 1988, the Roadhouse commenced selling takeaway alcohol to member communities of the Pitjantjatjara Council.

When the Pitjantjatjara Council objected to the Liquor Commission about Curtin Spring's newly adopted practice of selling unrestricted takeaways to members of the Pitjantjatjara communities, and requested that the practice be regulated, it was unsuccessful. It was only following the Council's appeal to the Supreme Court that the Liquor Commission reviewed its findings, and, in November 1991, restricted the Roadhouse takeaway licence to a limit of six cans per person per day. The Liquor Commission imposed a six-can takeaway limit on road houses servicing Pitjantjatjara land, applicable regardless of place of residence or destination. Although in response to the Pitjantjatjara Council's consistent calls for the Liquor Commission to address the problem of alcohol availability to its people, the licence condition does not accord with Pitjantjatjara Council policy. The Council wanted no sales to Pitjantjatjara people, or to people travelling through Pitjantjatjara land. As discussed below, the then Chairman opposed such restrictions on *RDA* grounds.

As well as the six-can takeaway limit, members of the Pitjantjatjara communities can purchase alcohol across the bar at Curtin Springs. This is in sharp contrast to the pre-1988 situation when Pitjantjatjara people were not served at the bar under an informal agreement.

Pitjantjatjara men are able to drink between 12pm and 5pm and Pitjantjatjara women between the hours of 4pm and 5pm. The effect of these takeaway and trading hour 'restrictions' on alcohol abuse is minimal. Bodies such as the Mutitjulu Council argue that rather than addressing alcohol abuse in any meaningful way, these are lip-service 'restrictions' which merely encourage excessive alcohol consumption.[184]

The tragic effect of the Curtin Springs situation is an unacceptable level of alcohol consumption within a restricted area. The increased alcohol abuse by Pitjantjatjara community members since 1988 has brought social and cultural breakdown, characteristic of alcohol problems in indigenous communities. The President of the Mutitjulu Community outlined the effects of the breach of the Curtin Springs informal agreement on members of that community:

> *greater difficulty in community control of breaches of the Dry Areas legislation, particularly by transient persons;*
>
> *increased incidents of road accidents or near misses;*
>
> *increases in situations involving domestic violence, particularly involving women and children as victims;*
>
> *a reduction in the amount of money available for families for purchasing food and other living requirements;*

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183 The licensee of Curtin Springs denied the existence of this agreement. However, it was referred to in letters dated 3.1.85 and 31.1.85 from R.N. Coutts, then Chairman of the Liquor Commission, to the Pitjantjatjara Council (reproduced as Appendix to *Submission Number 1.7*).

184 Correspondence with the Liquor Commission dated 1.95.

> *a decrease in the quality of Community members' participation in community life, e.g. absenteeism from work and children not attending school;*
>
> *behaviour of drunken people presenting a negative image of Aboriginal people in general to the public; and*
>
> *increases in specifically alarming behaviour of drunken people which very often involves sacrilege and other public breaches of Aboriginal Law.*[185]

The Mutitjulu and Pitjantjatjara councils argue that the Liquor Commission's six-can limit, although couched in terms of a response to the concerns of the Pitjantjatjara people, results in alcohol abuse on Pitjantjatjara lands, drink driving and the establishment of grog camps near road houses. When combined with bar service, a six can limit does not operate as a restriction in any real sense. The Commission's initiative appears to be a response to the needs and wishes of the community, but in fact continues to justify the denial of the long-standing call of the Pitjantjatjara Council for real restriction of alcohol sales to its members.

Pitjantjatjara lands in South Australia have effectively been dry since 1984, and a 'dry' policy has been espoused by Pitjantjatjara communities in the Northern Territory since 1983. The Mutitjulu Community officially became a dry area community in 1988, and the Imanpa Community followed in 1990. Before 1988, members of these communities could not purchase alcohol locally, either because informal agreements were in place between the roadhouse and the Pitjantjatjara communities in Central Australia or because Aboriginal people were simply not served.

The *Liquor Act* requires the Liquor Commission to consider 'the needs and wishes of the community' in determining whether to grant an application for a licence as well as the content of licence conditions. The interpretation and application of this section has drawn much criticism from Aboriginal groups. In the context of the Curtin Springs dispute this criticism is thrown into sharp relief.

The Needs and Wishes of the Community

Although the submissions received from Aboriginal organisations acknowledged the strengths of the *Liquor Act*, they were also critical of the Act's operation in a number of respects. Their most pressing criticisms involved the role of the Liquor Commission, its interpretation of the 'needs and wishes of the community' in granting and imposing conditions on liquor licences, the complaints procedure for existing licences, and the lack of enforcement of the *Liquor Act*.

Demands for licence conditions that restrict alcohol sales to members at outlets nearby

> *The informal arrangements currently existing between some communities and liquor outlets should be given legal recognition. This would provide greater protection for both parties in the event of any future disagreement. The Liquor Commission would need to ensure a high degree of community support with regard to any restriction, such as it does at present when declaring a community 'dry'.*[186]

The Northern Territory Liquor Commission, unlike its counterparts in South Australia and

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185 *Submission Number 1.7*, *op.cit. Appendix 1*, p.49.

186 Legislative Assembly of the Northern Territory Sessional Committee on the Use and Abuse of Alcohol, *op.cit*. p 46. See also Recommendations 12 and 13 of that Committee.

Western Australia, has not yet recognised a need for conditions in the licences of premises close to such communities to be drafted in a manner sensitive to the 'dry' status. It has consistently rejected demands by dry communities to modify nearby liquor licences. Central Australian Aboriginal groups such as the Pitjantjatjara Council argue that this policy has the potential to render a community's 'dry' status meaningless. The later chapters of this report argue that the *RDA* may not render appropriately drafted restrictions illegal, especially those which are based on residence of an area in which the residents have declared themselves 'dry'.

Liquor Commission decisions on the needs and wishes of the community in Central Australia

When the Pitjantjatjara Council officially objected in 1988 to the new unlimited takeaway sales at Curtin Springs, it was unsuccessful. In the course of objecting, it again requested licence conditions which restricted sales to residents of, or travellers through, Pitjantjatjara lands. The Council recorded that the grounds relied upon by the Northern Territory Racing, Gaming and Liquor Commission in rejecting this request for licence conditions similar to those applying in South Australia were that... 'they may contravene federal anti-discrimination statutes and ... they unfairly constrain licensees in the conduct of their business.'[187]

The Liquor Commission had refused a request to insert a similar licence condition at Ernest Giles Tavern, Yulara, in 1983. The refusal came despite a request for the licence condition from both the licensee and the publican. Instead, the agreement was noted informally on the licence. The Commission had then stated that it had serious doubts about the wisdom of the 'Marla Bore' decision in the South Australian Supreme Court, because the condition requested could lead to the establishment of alcohol camps outside Pitjantjatjara lands, and could constitute a technical breach of the *RDA*.

It is difficult to sustain these grounds for the refusal, both because effective informal agreements would give the same impetus for 'grog camps', and because informal agreements would not be any more or less discriminatory. The Pitjantjatjara submission notes that, since 1983, no research has been carried out by the Liquor Commission to establish whether grog camps, such as exist at present in the Northern Territory, did spring up in South Australia in the wake of the decision.

Tangentyere Council objected in 1990 that:

> *The Commissioners have shifted the burden of responsibility for formulating appropriate and legally approved licence conditions from themselves to the parties concerned...[and thus]... placed Aboriginal community interests at the feet of licensees.*[188]

The *Liquor Act* requires, however, that the Liquor Commissioner ensures licences are appropriate to the needs and wishes of the community. Responsible administration of the Act involves researching the needs of communities in Central Australia. The Racing, Gaming and Liquor Commission was seen to be openly opposing the alcohol policies of bodies such as the Pitjantjatjara Council.

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187 *Ibid*, p.18.

188 *Submission Number 1.5*, *op.cit.* p.122.

The submissions of both councils argued that the Liquor Commission ought to impose conditions upon liquor licences sought by the local Aboriginal community, since they are 'the needs and wishes of the local community', and that it ought not take into account the supposed interests of tourists at the expense of the local Aboriginal community.

The history of opposition to formal agreements

The Northern Territory Sessional Committee recommended in 1991 that:

> *If the Liquor Commission is satisfied that a proposed restriction is the majority wish of the community, or warranted in the light of past problems with alcohol in the community, the restriction should become part of the licensing agreement.*[189]

Objections to this recommendation were voiced by roadside inn proprietors. At the request of the Northern Territory Government, the Liquor Commission, under its former Chairman, conducted a *Review of Roadside Inn Licences*. Its subsequent report rejected the Sessional Committee recommendation.

The *Review* recommended merely that the Liquor Commission monitor the effectiveness of local agreements, and initiate further negotiations between parties to establish satisfactory arrangements, while reiterating a view that licence conditions ought to be seen as an 'option of last resort'.[190]

The Pitjantjatjara Council noted, however, that the Liquor Commission had declined to act in response to its Curtin Springs complaint on the specific ground that no formal condition had been breached. The value of the monitoring of informal agreements is doubtful if no action is taken on breaches. The conclusion can also be criticised for exhibiting a confidence in the process of local consultations which is not justified in light of the experience of Aboriginal organisations, especially with regard to Curtin Springs.

The Liquor Commission's *Review* concluded that legal enforcement would 'only have the effect of reinforcing the process of imposition of external controls which has contributed significantly to the difficulties already experienced'. It argued that the correct approach in establishing appropriate restrictions is 'by way of consultation and negotiation with Aboriginal communities at the local level',[191] and that regulation should occur at the level of the licensee, not through external legal restrictions.

This contention fails to take into account the distinction between self-imposed and externally imposed restrictions. The submissions from Aboriginal organisations to the Sessional Committee, and to this Report, as well as the Sessional Committee recommendations, explicitly state that externally enforced legal conditions must operate only as a backup to agreements made at the local level and initiated by communities themselves. The call is not for such initiation or community involvement to be bypassed, but rather for it to be given legal support.

The *Review* did not recognise the place or significance of appropriate legislative or institutional support in assisting communities to manage alcohol problems. The position of

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189 Legislative Assembly of the Northern Territory Sessional Committee on the Use and Abuse of Alcohol, *op.cit.* p 46. See also Recommendations 12 and 13 of that Committee.

190 Northern Territory Liquor Commission, *Review of Roadside Inn Licences*, (Abridged), August 1992, p 35.

191 *Ibid*, pp.54-55

the Liquor Commission in this regard contrasts with the willingness of the South Australian Licensing Court to impose formal restrictions of this kind in the Anangu Pitjantjatjara area.[192] The Expert Working Group for the RCIADIC observed that a feature of successful Aboriginal alcohol management programmes was the presence of legislative or other institutional backing.[193] The Pitjantjatjara submission details the consequences of the failure to provide such backing to the Imanpa community when the Erldunda and Curtin Springs hearings were held.

The *Review of Roadside Inns* asserted that 'the effectiveness of voluntary agreements is difficult to assess.' In favouring them regardless, the *Review* stated the need to 'carefully evaluate' voluntary agreements in the Northern Territory. No examination was made of the break-down of past agreements nor the fact that Aboriginal organisations have had to appeal to the Northern Territory Supreme Court to have their 'needs and wishes' recognised.[194] It concluded that 'restrictions would seriously damage the economic viability of the inns.'[195] This is contradictory, as effective informal agreements with Aboriginal communities would have the same economic effect. The *Review* pointed out that the economic viability of many roadside inns is dependent on alcohol sales, in which case it is unrealistic to expect some operators to be amenable to any thing more than the bare minimum of restrictions. There is no evidence that formal licence conditions resulted in bankruptcies of roadside inn operators in South Australia.

The licensee of Curtin Springs Roadhouse, argued that:

> *Provided that a licensee operates within the law, and within the provisions of his licence, the moral obligation of the negative effects of excessive alcohol consumption, consequential errant behaviour, and associated health problems, rests with the people who are affected by it.*[196]

By demanding co-operation in implementing a response to alcohol problems amongst its members, a community is taking responsibility for the negative effects of alcohol consumption. This statement and the history of Curtin Springs indicate that without licence conditions to ensure community policies are followed, publicans may not behave responsibly. Where Aboriginal groups have established a case for 'special conditions' of accessibility to their members, they should have the security of legally binding agreements and not be subject to unilateral changes in policy by inn operators.[197]

The conflict of rights and a community's 'needs and wishes'

The *Review* stated the problem to be finding a balance between the need 'to provide for tourists while at the same time controlling the availability in such a way as to minimise the detrimental impact of excessive drinking on Aboriginal communities'.[198] Beyond tourists, the conflicting right or interests of individual inn owners to sell alcohol must be balanced against the rights and interests of Aboriginal people to limit the availability of liquor. The

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192 See *Submission Number 1.5*, *op.cit.* p.12.

193 Alexander, *op.cit.* pp.64-67.

194 See for example, the *Review's* discussion on Pitjantjatjara Council and Curtin Springs, *op.cit.* pp.10-13.

195 Northern Territory Liquor Commission, *Review of Roadside Inn Licences*, *op.cit*. p.2 and p.28.

196 Sims, S. *Operational Update on the Handling the Alcohol Crisis (Submission Number 1.9)*, July 1991, p.8.

197 The legislative basis for this conclusion in terms of the *Racial Discrimination Act* is discussed in Chapters 11-13.

198 Northern Territory Liquor Commission, *Review of Roadside Inn Licences*, *op.cit.* p.10.

submissions from the Aboriginal organisations indicated that, in their eyes, the policy priorities of the Liquor Commission have favoured the interests of the roadside inn proprietors and tourists.

The Liquor Commission faces a complex task. It must service the interests of the tourist industry, the commercial interests of licensees, and the collective interests of a diverse community, including Aboriginal communities often suffering the effects of excessive alcohol consumption. It must also administer the collection of liquor duties. As it currently operates, and despite significant restructuring in 1993, the Liquor Commission has a difficult task balancing these often competing rights.

Rights within the Aboriginal communities themselves complicate the construction of 'needs and wishes'. The question of competing rights was discussed generally in chapter 4, and it is particularly relevant in this context. There is a conflict between the individual drinker who asserts that he or she has a 'right' to have access to liquor, and other members of the community who assert a 'right' to be protected from the effects of alcohol abuse, and thus to have limits placed on the accessibility of alcohol:

> *...the grog issue is not simply a matter of individual rights, but rather it is experienced by Aboriginal people as a clash or contradiction between what is perceived as the good of the community on the one hand, and on the other, the rights of the individual*.[199]

In questioning both the efficacy and suitability of the Liquor Commission's procedures, a report to the Drug and Alcohol Bureau has concluded that they were mistakenly based on the assumption that alcohol restrictions was purely an issue of individual rights.[200] As stated throughout this Report, restrictions on alcohol availability can no longer be considered without reference to self-determination and collective rights.

The Sessional Committee recommended that it should be the task of the Liquor Commission to determine the wish of the community and the historical experience of alcohol problems in the community before determining special conditions. Tangentyere Council has suggested that at least one person with Aboriginal health expertise, and an understanding of the particular needs of Aboriginal people, be appointed to the Commission, and that Aboriginal advisory committees should be established. It is difficult to see that the Liquor Commission will be able to achieve its aims without the skills, resources and sensitivity to consult adequately with all interested parties, and evaluate the complex issues involved. The Liquor Commission must be appropriately structured and adequately resourced. It must also eliminate delays in addressing community demands - the Pitjantjatjara Council has unsuccessfully pressed its policy since 1983.

The future of licence conditions sought by communities

In a development since the submissions were written, the Liquor Commission has indicated that it is prepared to insert conditions in licences that are based on residence of a dry area or membership of a community. To do so it must satisfy itself that the restrictions are legal under the *RDA*, as special measures or otherwise, and comply with the *Liquor Act* by representing the needs and wishes of the community. This accords with the recommendations made in 1991 by the Sessional Committee. The potential benefit for Central Australia is clear. At the

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199 d'Abbs, P., *Dry Areas, Alcohol and Aboriginal Communities: A Review of the Northern Territory Restricted Areas Legislation*: *A Report prepared for the Drug and Alcohol Bureau, Department of Health and Community Services and the Racing, Gaming and Liquor Commission*, January 1990, p.81.

200 *Ibid*, p.86.

date of writing no conditions tailored to the needs of particular communities have been implemented. However *Project Sunshine* aims to ascertain a uniform licence condition for licenced premises near Pitjantjatjara homelands in the Northern Territory, South Australia and Western Australia, and a 'Grog Symposium' held in 1994 had similar aims at Tennant Creek.

Also welcome is an amendment to the *Liquor Act* which has made it a condition of all liquor licences that 'a licensee ... shall not take any action that, in the opinion of the Commission, would induce the irresponsible or excessive consumption of liquor on licensed premises.'[201] It is hoped that the Commission does not use the vagueness of the drafting to avoid taking action under this provision.

The acknowledgement that formal licence conditions are desirable in Central Australia is commendable, but there is a danger that past mistakes will be replicated in this initiative. The issue of a uniform licence condition is really separate from the irresponsible breach of the informal agreement between Curtin Springs Roadhouse and the Pitjantjatjara community. There has already been significant and unacceptable delay in negotiations, especially in light of the longstanding history of complaints about the Curtin Springs roadhouse.

The Pitjantjatjara Council is concerned that the Liquor Commission may not come to the negotiations unswayed by the policy of wet canteens and moderation espoused by the Northern Territory Government's *Living with Alcohol* programme and by the Alcohol Consultative Committee. Such policies may be sensible in many cases, especially where the practical difficulties of eliminating alcohol are insurmountable because communities are close to towns. However, this is not the case in remote areas, and 'moderation' should not be imposed over the considered policy of the local Aboriginal community.

The *RDA* has been invoked at various points in the debate as a justification for the Liquor Commission not taking certain forms of action, such as giving legal force to agreements which regulate liquor sales to Aboriginal communities in accordance with their needs and wishes. While all persons are encouraged to be cautious in taking any form of action which may be in breach of the legislation, the types of special conditions being proposed do not necessarily contravene anti-discrimination statutes. If restrictions exist, giving them legal force will not render them any more discriminatory. This matter is discussed in greater detail in chapters 11-13.

Such restrictions are consistent with the right of peoples to self-determination and their right to freely determine their economic, social and cultural development.[202] The need for such restrictions in order for Aboriginal communities to protect their culture from the destructive effects of alcohol abuse was the subject of considerable evidence to this Report.

In addition to the need for such restrictions to preserve the social and cultural rights of Aboriginal communities, there is a need to foster the rights of individuals and to move towards ensuring that Aboriginal people enjoy equality with other Australians in the fields of housing, health, education and employment. The submissions of Aboriginal groups echoed the findings of the RCIADIC in concluding that it is not possible to deal with alcohol abuse without acknowledging and addressing the historical and ongoing disempowerment of Aboriginal people.

Procedural recommendations for the evaluation of a community's 'needs and wishes'

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201 *Liquor Act*, *op.cit.* s.31(4).

202 Articles 1(1) and 27 of the *ICCPR*.

Dry area applications are heard on Aboriginal land, recognising the difficulties members of a remote community face in travelling to town to give evidence of a community's wish to declare itself dry. An application for a licence condition to be tailored to a community's needs and wishes should also be heard on community land. Oral evidence of senior members of the community will be valuable, and unlikely to emerge in the foreign atmosphere of a courtroom far away from the community.

The Liquor Commission can vary licences without proof of a breach as such. It must be convinced that availability has a destructive impact on a community, and that a community wants restrictions. It is important that the Liquor Commission visits the communities to gather the required information in a culturally appropriate manner.

The Complaints Procedure for Existing Licences

Tangentyere Council is critical of the complaints procedures available under the *Liquor Act* to Aboriginal people and other members of the public, to challenge the operation of existing licences. The Council states:

> *If liquor inspectors, who are authorised to enforce the Liquor Act, cannot make a case against an irresponsible licensee, it is not surprising that citizens have trouble making complaints stick.*[203]

The grounds upon which individuals can complain to the Liquor Commission about the behaviour or practices of a particular licensee are not specified in the Act. It suggested that the Commission has adopted a narrow and inflexible approach to interpreting this provision.[204] If no clear breach of licence conditions can be proved, complaints are dismissed as being without foundation.[205]

Aboriginal Councils are critical of the removal in 1989 of the requirement that licences be renewed annually, claiming that it has removed a valuable opportunity for the Aboriginal community to participate in licence decisions. Tangentyere Council stated:

> *for all practical purposes, annual renewals provided the only real opportunity for the review of the conditions of a licence.... It is the only time, apart from licensees' applications for changes to their licence conditions, that community objections have resulted in changes to licence conditions.*[206]

The Liquor Commission, in its 1990 *Annual Report,* merely dismissed this complaint as groundless.[207]

Tangentyere Council also expressed concern about the repeal in 1989 of the requirement that a licensee advertise his or her intention to transfer a licence to another business or person,[208] as this was often the means by which communities remained aware of the status of a licence.

The Council stated that:

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203 *Submission Number 1.5*, *op.cit.* p.19.
204 Lyon, *op.cit.* p.131.
205 *Ibid*, p.132.
206 *Ibid*, p.133.
207 *LRGC Annual Report*, p.32.
208 *Liquor Act*, *op.cit.* s.42.

> *monitoring the operation of a licence would not be necessary were there effective means by which community members and groups could complain about the operation of a licence, be sure their complaints would be heard, and receive a reasonable explanation for whatever determination the Liquor Commission made. As it stands, in Tangentyere's estimation, that mechanism is dangerously faulty.*[209]

While the Liquor Commission argues that it takes due consideration of the public interest in decisions, submissions indicated that Aboriginal people are dissatisfied with the current complaints process:

> *At a meeting with representatives of the two organisations, [Pitjantjatjara Council and Tangentyere Council] it was argued that the Commission was already charged with taking into consideration 'the needs and wishes of the community'. However, that particular phrase is included only among the factors the Commission must take into account in reviewing applications for new licences or changes to licence conditions. The procedures for complaints are dealt with in a different section, and no such language is contained there ... In the absence of an affirmative stipulation that complaints may be lodged in the public interest, how generously the grounds for complaint are interpreted is entirely dependent on the prevailing philosophy and personality of the Commission, and this can change remarkably over time.*[210]

When the section of the *Liquor Act* dealing with 'Objections and Complaints'[211] was amended in 1989 to include the power to suspend a licence or impose or vary conditions in the 'public interest', it provided that such powers may only be in effect for 7 days.[212] In the Pitjantjatjara submission, it was argued that the complaint power should not be so limited.[213]

Lack of effective communication and ongoing consultation has characterised the relationship between the Liquor Commission and Aboriginal communities. As a result, Aboriginal communities have felt alienated from the decision-making process which affects them.

Aboriginal organisations are concerned that their complaints will be ineffective because Liquor Commission procedures are culturally inappropriate. Hearings of complaints by Aboriginal people in Central Australia should be heard on community land, and Aboriginal people should not be required to name and incriminate others before action is taken against a licensee. Where complaints centre around members of a particular community members should be informed of complaint hearings, as required in other situations.[214]

Licences should be reviewed from time to time to ensure their conditions reflect the needs and wishes of the community, with a procedure along the lines of new licence applications.[215]

The Enforcement of the Liquor Act

The Liquor Commission has been criticised for many years for inadequate enforcement of breaches of licence conditions.[216] From 1984 to 1989 there were no prosecutions against any

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209 *Submission Number 1.5*, *op.cit.* p.22.
210 Lyon, *op.cit.* p.133.
211 *Liquor Act*, *op.cit.* s.48.
212 *Ibid*, s.48A(2).
213 See *Submission Number 1.5*, *op.cit.* p.67.
214 S.79 requires notice to be given to local residents in the case of dry area application.
215 see *Liquor Act, op.cit.* s.32.

of the licensees in the Northern Territory for serving intoxicated persons, despite the recognition that some licensees were not operating within the law.[217] Concerns were expressed about alcohol sales to minors.[218] The Sessional Committee recorded widespread skepticism about enforcement of licencing laws.[219] It recommended that enforcement of the Liquor Act be made the responsibility of the police, that the policing of licensed premises be increased,[220] and that there be increased police involvement in enforcing section 102, the provision dealing with serving intoxicated persons.[221]

The reasons identified by the Northern Territory Government for the poor enforcement record included inadequate numbers of inspectors policing the act,[222] the need to obtain police assistance because of inspectors' lack of powers of arrest or detention, and the need to obtain the name and address of the person where the charge is serving an intoxicated person under section 102.[223] A Police Aide position has been created in Central Australia, but the Mutitjulu Council has alleged that necessary assistance was not given to the Aide by police.[224]

It is often difficult to establish 'intoxication', as the term is not defined in the Act.225 The Act now provides for suspension of the licences of licensees who are convicted of offences under the Act, which include serving liquor to intoxicated persons and to minors.[226]

Member bodies of the Pitjantjatjara Council have indicated that enforcement is still an issue in Central Australia, with recent complaints about the enforcement of the conditions of the licence of the Curtin Springs roadhouse.[227] The Council claims that the roadhouse is selling takeaway alcohol to drunk people about to drive a minimum of 100km to get home, and asks:

> *Where are Aboriginal People going to drink these 'takeaways'? All these people live on dry area communities, so unless they break the law they are going to drink and drive or stop on the side of the road and then drive in a drunken state.*

The Liquor Commissioner met with the Pitjantjatjara Women's Council in Alice Springs in 1993 and claimed that enforcement cannot follow unless there is hard evidence presented to him that the law is being broken. However, under section 33 of the *Liquor Act* a complaint

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216 *Submission Number 1.5*, *op.cit.* p.17.

217 *Ibid*, p.18.

218 Lyon, *op.cit.* p.131. Lyon illustrated with a case in which the parents of a twelve year old girl, who was regularly admitted to licensed premises and served liquor, complained to the Liquor Commission. The girl's mother lodged complaints against two licensees, without result. The mother then circulated her daughter's photograph to a number of licensees with instructions that she was not to be served because she was under age. She was still served. The woman complained again to the Liquor Commission. She was quoted as saying that the Commission did not give her 'the time of day'.

219 *Report Number 2*, *op.cit*. pp.169-172.

220 See Recommendations 15 and 16.

221 *Ibid*.

222 *Submission Number 1.6*, *op.cit.* p.5. The number of inspectors has actually fallen from six to four since 1990, but co-operation with police is said to have improved: *Liquor Commission Annual Report*, 1993/94, *op.cit.* p.14. Police consulted by the Liquor Commission in 1995 have stated that there was a financial limit on the number of patrols, but that six patrols per fortnight and occasional random checks are conducted: Northern Territory Liquor Commission, *Operation Sunshine Running Sheet*, *op.cit.* p.58. The Mutitjulu and Pitjantjatjara Councils claim that these have not been effectual.

223 Legislative Assembly of the Northern Territory Sessional Committee on Use and Abuse of Alcohol in the Community, *Report Number 2*, *op.cit.* p.6.

224 Northern Territory Liquor Commission, *Operation Sunshine Running Sheet*, *op. cit*. p.42.

225 Legislative Assembly of the Northern Territory Sessional Committee on Use and Abuse of Alcohol in the Community, *Report Number 2*, *op.cit*. p.6.

226 *Liquor Act*, *op.cit.* s.124 (2A).

227 Mutitjulu Community Inc, Correspondence with Liquor Commission dated 18 January 1995.

need not be substantiated for a licence to be varied where an inference can be drawn that the needs and wishes of the community require restrictions.

Culturally inappropriate procedures will never result in successful complaints, no matter how irresponsible a licensee is in conducting his or her business. Where licence conditions do not adequately reflect responsibility to a nearby dry area community which is demanding restrictions this problem is exacerbated.

The Liquor Commission deserves credit to the extent that it has begun to deal effectively with the enforcement problem in some parts of the Northern Territory. There has been an increase in the number of prosecutions in the last two years.[228]

RECOMMENDATIONS:

The 'community member' of the Northern Territory Liquor Commission should be a person with expertise in community health issues and should provide active support to communities wishing to make submissions.

The Northern Territory Liquor Commission should hear licensing matters relevant to Aboriginal communities in a place and a manner which facilitates the expression of Aboriginal views.

The Northern Territory Liquor Commission should restrict takeaway alcohol sales at all petrol stations and roadhouses throughout the Northern Territory in the light of the high incidence of alcohol-related motor accidents and fatalities.

The *Liquor Act* 1978 (NT) should be amended to include 'public interest' or 'public health and welfare' as a ground for community complaints to the Northern Territory Liquor Commission regarding the operation of liquor licences.

The *Liquor Act* 1978 (NT) should be amended to require the Liquor Commissioner to establish clear policies and procedures for providing notice to communities about the investigation and handling of complaints.

The *Liquor Act* 1978 (NT) should be amended to allow emergency suspension of a licence 'in the public interest' for an indefinite period of time, subject to notification of hearing within 28 days.

The *Liquor Act* 1978 (NT) should be amended to include the number of liquor licences as a factor to be considered in licensing decisions.

Magistrates should have a role in determining licences and their conditions analogous to their role in declaring problem drinkers 'habitual drunks' under section 122 of the *Liquor Act* 1978 (NT).

The *Liquor Act* 1978 (NT) should expressly include a harm minimisation objective, preferably by amendment to Parts III (Licensing) and IV (Objections and Complaints) of the Act.

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228 *Liquor Commission Annual Report 1993/94, op.cit.* pp.17-18.

The *Liquor Act* 1978 (NT) should be amended to enable the public to lodge complaints directly with the police. The police should be required to investigate these, and if substantiated, take appropriate action.

The *Liquor Act* 1978 (NT) should be amended so that specific provision is made for Aboriginal communities to seek variation of licence conditions.

CHAPTER 10
ALCOHOL RELATED SANCTIONS

Submissions to this Investigation drew attention to several alcohol related sanctions in the Northern Territory which in their operation appear to discriminate against Aboriginal people. This section contains a brief discussion of these provisions. As outlined throughout this Report, Aboriginal people have consistently called for limitations and prohibitions on alcohol in their communities. Ironically, while alcohol availability has altered little, Aboriginal people are increasingly sanctioned for alcohol related public order offences. The link between availability and alcohol abuse suggests that such sanctions would be far less frequently invoked if community needs and wishes were acted upon.

The *Summary Offences Act*: The 'Two Kilometre Law'

The *Summary Offences Act* 1923 (NT) creates a number of offences relating to the consumption of alcohol. Section 45D, otherwise known as the 'two kilometre law', states that:

> *A person shall not, within two kilometres of premises licensed under Part III of the Liquor Act for the sale of liquor, drink liquor in a public place or on unoccupied private land, unless*
>
> *(a) the owner or lawful occupier of that public place or land has given him* (sic) *express permission, which has not been withdrawn, to do so; or*
>
> *(b) the public place or part of the public place in which he* (sic) *drinks the liquor is the subject of a Certificate of Exemption under section 45E or is an exempt area under section 45EA, and the drinking of that liquor is not in contravention of a condition of that Certificate of Exemption or declaration of the exempt area.*
>
> *Penalty: $200.*

To be exempt from prosecution under the 'two kilometre law', a Certificate of Exemption can be obtained from the Liquor Commission. This requires an application to be made by the owner or person responsible for the management of a public place. After considering the general use of the public place, the provision made for the disposal of litter and any representations received in relation to the application, the Liquor Commission may decide to grant a Certificate of Exemption.[229] The Commission also has the discretion to declare an area to be an exempt area without application being made to it.[230]

The 'two kilometre law' arose out of a recommendation of a March 1981 Working Party appointed by the Northern Territory Cabinet to 'examine all aspects of reducing drunkenness, including reducing hours of sale of liquor, responsibility of licensees, drinking in public places and alcohol abuse education'.[231] The aim of the legislation was to reduce the amount of public drinking '... in the expectation that this will also reduce public intoxication, thereby improving the amenity of public streets and places'.[232]

Criticisms of the 'Two Kilometre Law'

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229 *Liquor Act*, *op.cit.* s.45E.
230 *Ibid*, s.45EA.
231 *Submission Number 1.6, op.cit.* p.8.
232 *Ibid*, p.9.

Submissions describe the 'two kilometre law' as repressive and ultimately worthless as a means of controlling alcohol abuse. Many submissions echoed the criticism that:

> *...[the two kilometre law] is not designed to prevent alcohol abuse per se, but rather to ensure that abuse does not occur in particular places where non-participants may be upset.*[233]

Tangentyere Council suggested that the 'two kilometre law' is discriminatory because it is used as a means of social control to limit the public drinking behaviour of Aboriginal people:

> *The law ... was passed at a time when the 'Aboriginal alcohol problem'... was a significant public issue ... It was quite plainly designed to remove noisy and unsightly Aboriginal drinkers from the scenic precincts of the town.*[234]

The use of public drunkenness legislation as a mechanism for controlling Aboriginal drinking was also discussed in the final report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Reference was made to the Northern Territory, specifically the 'two kilometre law':

> *The community's response to Aboriginal drinking in public is frequently racist, by which I mean, in this instance, a response to the drinking by Aboriginal people, rather than to excessive and disruptive drinking practices themselves. Perhaps the best known of these initiatives are the limitations placed on drinking in public places in the Northern Territory: the so-called 'two kilometre law' ... The effect of the legislation and its enforcement has been to push Aboriginal drinkers from public view into such places as town camps, simply a 'street cleaning' operation, not one aimed to prevent or minimise problem drinking.*[235]

The law also operates in a discriminatory fashion in its practical application. The vast majority of persons detained for drinking in a public place within two kilometres of licensed premises are Aboriginal because Aboriginal drinkers, by choice or by necessity, have limited access to formal drinking venues.

The report of the Northern Territory Legislative Assembly Sessional Committee on the Use and Abuse of Alcohol by the Community acknowledges the concerns expressed by the Aboriginal community in relation to the discriminatory effects of the legislation:

> *...[it] remains a controversial issue in the community, particularly amongst those people who consider that it acts mainly against Aboriginal people who are less likely to have alternative and less public drinking venues... In the case of Aboriginal public drinking one of the major 'causes' is the absence of an alternative drinking venue if the town camp or home community is 'dry' ...*[236]

The Northern Territory Government has itself acknowledged:

> *[t]he 2km law has received much criticism from its inception. It has been attacked by Aboriginal groups as discriminatory and blamed for forcing drinkers from public places onto town camp leases where they subsequently cause disruption ... regardless of what*

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233 d'Abbs, *op.cit.* p.l27.
234 *Submission Number 1.5*, *op.cit.* p.36.
235 RCIADIC, *National Report*, *op.cit.* p.311.
236 *Ibid*, p.65.

> *public place drinking legislation is enacted, the end result may well be the same ... Aborigines make up the majority of people living a 'public' lifestyle and are thus more likely to be affected by any law which places a restriction on activities, drinking or other, which are deemed unacceptable in a public place.*[237]

In summarising their views, Tangentyere Council stated:

> *Until these issues are resolved, the fact that Aboriginal people are so overwhelmingly affected by these [legislative] mechanisms for maintaining public order will continue to cause unease and generate discontent.*[238]

According to the Council, rather than alleviating Aboriginal drinking problems, the imposition of the 'two kilometre law' has placed additional pressure on the Aboriginal community:

> *Aboriginal drinkers who are excluded from on-licensed premises by dress regulations and who previously drank in open-air camps, almost all of which are located within the prohibited two-kilometre zone, were forced back into the town camps by the absence of any alternative, save abstinence.*[239]

The effect of forcing Aboriginal drinkers into town camps is to create additional social pressures:

> *Whilst the 2km law is not explicitly directed at Aboriginal people, in practice it is used virtually exclusively against Aborigines ... The effect of this is to force abusers back into town camps where their impact disrupts the whole community and has frequently resulted in violence, especially domestic violence, with consequent injuries and deaths ...*[240]

Another major criticism of the law is that it is a punitive measure which does not offer any solution to the problem of alcohol abuse. The use of legislative controls to deal with the problem of alcohol abuse does not address the underlying causes of anti-social drinking behaviour and it arguably diverts funding which would be better directed towards alcohol treatment programmes. A special issues paper on alcohol abuse prepared for the RCIADIC noted that:

> *... the 'two kilometre law' is neither a preventative nor rehabilitative measure for alcohol mis-use, but rather is intended as a deterrent against public drunkenness.*[241]

In 1991 the Northern Territory Government appeared willing to address these issues. In its submission the Government stated:

> *The Northern Territory Government has an open mind on how currently unacceptable levels of public drinking and drunkenness can be reduced and will consider any alternative suggestions to the 2km approach.*[242]

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237 *Submission Number 1. 6*, *op.cit.* p.9.
238 *Submission* Number 1.5, *op.cit.* p 39.
239 *Ibid*, p.37.
240 *Submission Number 1.4*, *op.cit.* p.2.
241 Alexander, *op.cit.* p 79.
242 *Submission Number 1.6*, *op.cit.* p.10.

However, new initiatives recently announced by the Minister for Health and Community Services under the *Living with Alcohol* programme suggest that the Northern Territory Government has altered its position on this point. In May 1995 it revealed plans to extend the programme to kerb alcohol-related anti-social behaviour in the Territory's large urban centres.[243] It is foreseen that revenue for this initiative will be generated by a new 35 cent per litre levy on volume sales of cask wine.[244]

The Minister justified this initiative on the grounds that the Northern Territory Government will not stand by:

> *and allow the day-to-day cycle of alcohol abuse in public areas to continue, with the enormous associated costs in human and economic terms... In determining the levy on wine casks the Government proposes to recover as much as possible, the cost of these programs from those responsible for causing offensive behaviour and litter in our community.*[245]

The Minister also announced that Councils would be enacting suitable by-laws to enforce the existing 'two kilometre law' under the *Summary Offences Act* and other council statutes prohibiting the consumption of alcohol in public areas.[246]

The direction and tone of this initiative is worrying. It is also surprising in the light of the Northern Territory Government's submission to this Report and the long standing criticism of the 'two kilometre law' and other similar public drunkenness provisions. Critique of the use of public drunkenness provisions as a mechanism to address alcohol abuse and their failure to impact on Aboriginal drinking patterns is extensive.

As previously discussed, the 'public face' of Aboriginal drinking in the Northern Territory may mean that this initiative will disparately effect Aboriginal people. There is a real risk that Aboriginal people will bear the brunt of these increased public order restrictions and alcohol abuse will be simplified to an issue of individual choice rather than addressed as a complex and difficult medical and social reality.

RECOMMENDATION:

Section 45D of the *Summary Offences Act* 1923 (NT) must be repealed.

The *Police Administration Act*

The *Police Administration Act* 1978 (NT) regulates a number of policing procedures and the administration of the Northern Territory police force and police powers. The provision enabling police to take intoxicated persons into protective custody is particularly important. Section 128(1) of the Act states:

> *Where a member [of the police force] has reasonable grounds for believing that a person is intoxicated with alcohol or a drug and that person is in a public place or trespassing on private property the member may, without warrant, apprehend and take that person into custody.*

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243 Minister for Health and Community Services, The Hon. Mike Reed, MLA, *Media Release,* 1 May 1995, p.1

244 *Ibid*.

245 *Ibid* p.2.

246 *Ibid*.

Individuals detained under this section are not charged with an offence but can be held by police for a period of six hours or released into the care of a responsible person or organisation such as a sobering-up shelter.[247]

Criticisms of s.128 of the *Police Administration Act*

Criticisms of the protective custody provision of the *Police Administration Act* are similar to those of the 'two kilometre law'. The 'two kilometre law' effectively results in a very high proportion of Aboriginal people being detained because 'by necessity and often by preference [Aboriginal people] tend to consume liquor in the open air, frequently within sight of the general public'.[248] Another practical impact of this 'public face' of Aboriginal drinking is that Aboriginal people are more likely to come to the attention of police and be apprehended under section 128 of the *Police Administration Act*. This assertion is confirmed by the Northern Territory detention statistics outlined on page 20.

While the submissions received indicate concern about the numbers of Aboriginal people detained under section 128 of this Act, they are not critical of its intent. As Tangentyere Council notes:

> *...protective custody offers benefits to both Aboriginal people and the society at large ....many people (drinkers and their families) have been spared incalculable trouble by having an intoxicated person picked up and deposited at the shelter before his* (sic) *drunken behaviour brought him* (sic) *before a magistrate on more serious charges ... There is no telling how many lives may have been saved by such action.*[249]

An examination of this legislative provision highlights the difficulties involved in balancing the diverse 'rights' involved. In this case, there may be conflict between the 'rights' asserted by the individual drinker and 'rights' of others, including the family, who are placed at immediate risk, and the collective rights of the broader community. It is one of the objectives of this section of the legislation to protect the 'rights of others'.

The major criticism of the *Police Administration Act* is that, although protective custody can be an effective measure for dealing with the immediate behaviour of individuals who abuse alcohol, it does not provide a solution to the problem of alcohol abuse.

The Tangentyere Council points out that being taken into custody can inadvertently exacerbate alcohol abuse for some individuals. It creates a vicious cycle with chronic alcohol abusers only receiving help for their problem because of their contact with the criminal justice system, rather than receiving early intervention and not coming into contact with the police at all.[250]

This issue was discussed at length by the Northern Territory Aboriginal Issues Unit in its submission to the RCIADIC and it concluded that:

> *[i]t is well documented that there is a 'core group' of alcohol users, people to whom detention in protective custody is a common and repeated event. For this group, who*

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247 *Submission Number 1.6, op.cit.* pp.6-7.
248 *Submission Number 1.5*, *op.cit.* p.36.
249 *Ibid*, p.39.
250 *Ibid.*

> *need detoxification and rehabilitation rather than repeated incarceration, protective custody is a revolving door.*[251]

This 'revolving door' syndrome was also described in several submissions and presented as a partial explanation for the disproportionate representation of Aboriginal people in the criminal justice system.

The provision is also regarded by Aboriginal groups as a representation of the lack of genuine self-determination in indigenous communities. It is seen as a manifestation of:

> *how little control [Aboriginal people] have over the systems that affect their lives. This includes the activities and policies of the police department as well as the operation of the sobering-up shelter.*[252]

Section 122 of the *Liquor Act*

Section 122 of the *Liquor Act* 1978 (NT) provides for a prohibition order to be made in respect of persons who are habitually intoxicated. A prohibition order forbids all persons from selling or supplying liquor to the person named in the order or even to allow that person to be on or at premises which hold a liquor licence. The magistrate or judge making the order can also order that the person named in the order be referred for physical and mental assessment and to undertake a specified programme of treatment and rehabilitation.

One of the criteria for the making of a prohibition order is that the person involved has been detained in protective custody pursuant to Division 4 of Part VII of the *Police Administration Act* on more than three occasions within the preceding six months.

The practical implications of the operation of this provision have been the subject of several important criticisms. Aboriginal people are disproportionately represented in detention statistics under s.128 of the *Police Administration Act*. Consequently, a disparate number of Aboriginal people will logically be the subject of prohibition orders under s.122 of the *Liquor Act*.

As with the 'two kilometre law' and the protective custody power the operation of this provision does little to address the complex issue of alcohol abuse in Aboriginal communities. Evidence to this Report raised concern that considerable pressure is placed by 'prohibited persons' on other family members to get alcohol for them. This pressure often falls on women, young adults and the elderly and is reminiscent of the disruption caused in Aboriginal families during prohibition when Aboriginal people with 'dog licences' were pressured by other family members to get alcohol for them.[253] The logical result of this pressure is that community or family members who supply liquor to somebody with a prohibition order are then themselves in breach of the Act. This breach may attract further police involvement in Aboriginal life.

Section 122 may also induce drinkers who have prohibition orders against them to move to another locality. As with the 'two kilometre law', the provision then goes little way to solving the problem of alcohol abuse and instead results in increased social pressure within the

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251 Langton in RCIADIC, *National Report, Vol.5., op.cit.* p.409.
252 *Ibid*, p.39.
253 Samson, *op.cit.* 45f.

Aboriginal community itself.[254] Similarly, it was contested that the operation of this legislative provision is contrary to attempts to broaden community alcohol management strategies which aim to reduce emphasis on police enforced legislation.

In Victoria an informal agreement has been established between the Victorian Police Force and Aboriginal Community Justice Panels. These panels have mostly indigenous voluntary members who are contacted by police when an Aboriginal person is taken into custody. If the offence for which an individual is detained is not serious the volunteer will remove the Aboriginal offender to a safe place such as a sobering up shelter or to their home. The result of this programme has been that when Aboriginal people are detained by the police for public order offences and public drunkenness they are removed to a safe place rather than held in custody.[255]

This initiative reflects the findings of the RCIADIC and in part implements Recommendation 81 which states:

> *That legislation decriminalizing drunkenness should place a statutory duty upon police to consider and utilize alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.*

RECOMMENDATION:

Section 128 of the *Police Administration Act* 1978 (NT) should be amended. If the police apprehend a person under section 128 that person should be removed to a safe place. A statutory duty should be placed on police to consider and utilise alternatives to the detention of intoxicated people in police cells. Apprehension of intoxicated people in protective custody should be an option of last resort.

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254 O'Connor, R., *A Report on the Effects of One Year's Enforcement of the Two Kilometre Law on Aboriginal Town Campers in Alice Springs*, Northern Territory Drug and Alcohol Bureau, March, 1984.

255 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice: Regional Agreements*: *Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package*, Volume 2, April 1995, p.7.

CHAPTER 11
DISCRIMINATION AND ALCOHOL RESTRICTIONS

Introduction

The *Racial Discrimination Act* 1975 (Cth) (*RDA*) potentially affects both formal liquor licence conditions and informal restrictions.

Informal agreements between indigenous communities and proprietors of liquor outlets, some of which have operated for many years, may expose a publican to complaints under the *RDA*. The threat of legal action against a publican has the potential to destroy agreements with which both communities and publicans are satisfied.

Sections 31-33 of the *Liquor Act* 1978 (NT) allow the Liquor Commission to vary the conditions of a liquor licence held by a licensee to give effect to 'the needs and wishes of the community'. The Northern Territory Liquor Commission can consult Aboriginal communities about their demands to reduce access to alcohol from liquor outlets nearby. Many Northern Territory communities have banned alcohol within their communities with dry declarations under the *Liquor Act*. The legal validity of licence conditions which restrict alcohol availability to members of Aboriginal communities depends, amongst other things, on the operation of the *RDA*.

A discussion of the effect of the *RDA* in this context requires an examination of four main issues:

- whether such formal and informal restrictive conditions amount to discrimination under the terms of Part II of the *RDA*;
- if so, whether that discrimination is direct or indirect;
- whether conditions that would otherwise amount to indirect discrimination may not, in the circumstances, breach the *RDA* because they are reasonable; and
- whether both formal licence conditions and informal restrictions which at first glance offend sections of the *RDA* are capable of being saved because they constitute special measures under section 8 of the *RDA*.

Before considering these issues, a brief discussion of the facts and findings of the High Court in the leading case of *Gerhardy v Brown*[256] is useful. Despite facts different to those contemplated in this Report, it is relevant both for findings by members of the Court on what constitutes discrimination under Part II of the *RDA*, and because it is the leading High Court case on special measures under that Act.

Gerhardy v Brown: An Example of Lawful Discrimination

On 27 February 1982, Robert Brown entered land which was the subject of the *Pitjantjatjara Land Rights Act* 1981 (SA) *(Land Rights Act)*.

The *Land Rights Act* constituted as a body corporate the Anangu Pitjantjatjaraku, of which all Pitjantjatjara were members.

A 'Pitjantjatjara' was defined in the *Land Rights Act* as a person who is:

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256 [1984-85] 159 CLR 70.

(a) a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people; and
(b) a traditional owner of the lands or a part of them.

Brown was Aboriginal but not a Pitjantjatjara. Section 18 of the *Land Rights Act* provided that "All Pitjantjatjaras have unrestricted rights of access to the lands."

Section 19 of the *Land Rights Act* provided that persons who were not Pitjantjatjaras, and who entered the lands without the permission of the Anangu Pitjantjatjara, were guilty of an offence and liable to a penalty. Brown was present on the lands without having applied for permission to enter. On the complaint of David Gerhardy, he was charged with a breach of section 19.

Section 9(1) of the *RDA* makes it unlawful for a person to:

> *do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.*

Section 10(1) provides:

> *If, by reason of, or of a provision of, a law of the Commonwealth or of a State or a Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.*

Both sections 9 and 10 incorporate rights enumerated in Article 5 of the *International Convention for the Elimination of all Forms of Racial Discrimination* (*CERD*).[257] A "human right or fundamental freedom" in section 9, and a "right" in section 10, include, by the incorporation of Article 5(d)(i) of *CERD*, "the right to freedom of movement and residence within the border of the State".

By force of section 8(1), sections 9 and 10 do not apply to special measures 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'.[258]

The action against Brown was heard by a special magistrate who stated a case raising a number of questions of law for the Supreme Court of South Australia. One of those questions was whether section 19 of the *Land Rights Act* was invalid or restricted in its operation by reason of the *RDA*.

Justice Millhouse of the South Australian Supreme Court held that section 19 of the *Land*

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[257] S.9(2) of the *RDA* provides that "a reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of human life includes any right of the kind referred to in Article 5 of the Convention (CERD)". S.10(2) similarly provides that a right includes a right of any kind referred to in Article 5.

[258] Article 1(4) of *CERD*.

Rights Act was invalid as it conflicted with section 9 of the *RDA*. Gerhardy, the complainant, appealed to the Full Court of the Supreme Court of South Australia.

On the application of the Attorney-General for South Australia and the complainant, the matter was removed into the High Court. The Full Bench of the High Court unanimously reversed the decision of Justice Millhouse on the basis that the *Land Rights Act* was a special measure within the meaning of section 8(1) of the *RDA*, and accordingly section 19 of the *Land Rights Act* was a valid law of the Parliament of South Australia.

Five members of the Court considered the question of discrimination. Chief Justice Gibbs and Justices Mason and Murphy held that section 19 of the *Land Rights Act* would have been rendered inoperative by section 10 of the *RDA* had the State Act not been a special measure, because the right of unrestricted access to the lands was a right within the scope of section 10. Justice Brennan held that if the *Land Rights Act* had not been a special measure, section 19 would have been both inconsistent with section 9 of the *RDA,* and subject to section 10. Justice Deane held that the inconsistency would have been with section 9 of the *RDA*, and did not pursue the applicability of section 10.

Many of the principles in *Gerhardy* are directly applicable to alcohol restrictions. However, the legal position is made quite complex by the diverse fact situations which could arise, as well as by developments in the common law, uncertainties about the scope of the prohibition of discrimination, and amendments to the *RDA*, including a relatively new provision defining indirect discrimination.

Do Alcohol Restrictions Amount to Discrimination Under the RDA?

What is discrimination under the RDA?

The *RDA* is a Commonwealth Act dealing with racial discrimination. It is based on the *International Convention on the Elimination of all Forms of Racial Discrimination* (*CERD*), which was ratified by Australia at the UN in 1975. Sections 9 and 10 of the *RDA* do not define discrimination as such. Rather, section 9 renders unlawful contraventions of 'human rights or fundamental freedoms', as enumerated in Article 5 of *CERD*. Section 10 confers compensatory 'rights' as defined in Article 5 where they are interfered with by a State or Territory law. Article 5(f) of *CERD* affords a right of equal access to 'any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks'. A liquor outlet may come under the expression 'place or service intended for use by the general public'.

Although there is no definition of direct discrimination in the *RDA* as such,[259] section 9 has been amended to contain a definition of *indirect* discrimination in sub-section (1A). Section 9(1A) has no effect as a prohibition but provides a definition to be read into sub-section (1) and succeeding sections of Part II of the Act. Through this definition, acts of indirect discrimination in the sale of liquor can be rendered unlawful, either by section 9(1) or the related provision in section 13 which proscribes discrimination by providers of goods and services. Section 9(1A) will be discussed below in the section on indirect discrimination.

Which rights must be infringed for the *RDA* to apply?

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259 There are piecemeal definitions of specific forms of racial discrimination in ss. 11-17.

Sections 9 and 10 require infringement of a right as defined in Article 5. If one right enumerated in Article 5 is infringed so that other enumerated rights can be enjoyed, has unlawful discrimination occurred? This question has provoked controversy among commentators, and the debate is discussed below in the section dealing with the scope of Part II of the *RDA*.

Questions of a conflict between collective and individual rights also arise in this context. Group rights, as well as issues of indigenous self-determination and cultural preservation, arise where action to restrict the availability of alcohol is initiated by Aboriginal communities.

Justice Mason in *Gerhardy* reasoned that group rights came within the ambit of Article 5. He considered the expression 'human right' to include claims of individuals as members of a racial or ethnic group to 'the protection and preservation of the cultural and spiritual heritage of that group'.[260] His Honour also considered that:

> *Although section 10(2) includes rights of a kind referred to in art. 5**, it is not confined to the rights actually mentioned in that article**. What then are the other rights, if any, to which section 10(1) relates? The answer is the human rights and fundamental freedoms with which the Convention is concerned, the rights enumerated in Art 5 being particular instances of those rights and freedoms, without necessarily constituting a comprehensive statement of them (*emphasis added*).*[261]

This reasoning would apply equally to the inclusive definition of 'rights and freedoms' in section 9(2). The tension between collective and individual rights is discussed elsewhere in this report.[262] Sections 9 and 10 require that a right be nullified, impaired or enjoyed to a lesser extent. If a measure merely favours group rights implied in *CERD* over the individual rights that are explicitly enumerated, the question arises whether a right has been infringed in the necessary way. If rights in section 9 and 10 include group rights, then a balancing exercise may be required.

Application of the RDA to Restrictions on Liquor Sales

The split between members of the Court in *Gerhardy* as to which section of the *RDA* applied gives an indication of the difficulty in determining the sections upon which arguments against liquor restrictions would rely.[263] Sections 9, 10 and 13 could possibly apply. It is first necessary to isolate which parties will be involved, and to examine actions against publicans and the Liquor Commission separately. In actions against the Liquor Commission, the question of the breadth of section 10 arises. It must be emphasised that none of sections 9-15 apply if section 8(1) operates, and the arrangement to restrict alcohol constitutes a special measure.

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260 [1989-90] 159 CLR 70 at 101-102.

261 *Ibid* p.101. On this analysis it may be argued that the expression 'human right or fundamental freedom' also includes rights and freedoms such as those set out in the *International Covenant on Civil and Political Rights*, which is annexed to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) and which includes group rights such as the right of minorities to enjoy their own culture.

262 See Chapter 4; see also Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, AGPS, Canberra 1986, pp.95-96.

263 *Gerhardy* was argued in the Supreme Court of South Australia as if s. 9 of the *RDA* applied to the *Land Rights Act*. In argument before the High Court s.9 was again the basis of the main submission, with s.10 relied upon in the alternative. Only Brennan and Deane JJ ultimately found that s.9 could apply to the state law, with Brennan J finding that both ss. 9 and 10 applied. Deane J did not then proceed to consider the application of s.10.

Alleged discrimination by a publican

A person refused service could bring an action against a publican under section 9(1) or section 13, especially if the restriction took place as a result of an informal agreement between an Aboriginal community and a publican. Section 10 has no application because no State or Territory law is involved. Section 13 applies specifically to providers of goods and services. It will be discussed below in greater detail.

If a liquor condition compelled the licensee to restrict sales, the publican could theoretically be exposed to a complaint by an 'aggrieved person'[264] under section 9 or 13. The possibility of liability is reduced by section 8(1), as it is unlikely that the Liquor Commission would insert a licence condition unless representatives of the target community had called for it as a special measure. However, as Aboriginal communities do not necessarily speak for all Aboriginal people in the area, possible complaints may come from dissident members of the community or Aboriginal people from other parts of Australia. Dissident members of communities could be answered by a special measures argument. However, in the case of mistaken application to Aboriginal people who do not belong to the group intended to be benefited, special measures would not save the publican from liability. To minimise this risk, publicans should be vigilant in satisfying themselves that the conditions are applied accurately.

Nonetheless, at present, if a complaint is lodged it must be assessed individually to determine whether a condition constitutes a special measure in the circumstances. The possibility of a provision for the Race Discrimination Commissioner to grant formal exemptions from Part II of the *RDA* will be canvassed as part of the review of the *RDA* scheduled for 1995/96.

The damages arising out of, if not the possibility as such, of vexatious litigation against publicans acting in accordance with conditions in liquor licences will be minimised if publicans act in good faith. The fact that a publican has gone through the process of seeking an exemption would be evidence of this. Legal impediments to successful complaints against appropriate licence conditions, as examined in this Report, should further restrict such litigation.

Alleged discrimination by the Liquor Commission

If the restriction took the form of a licence condition, a complaint by a person refused service on the grounds of race would lie against the Liquor Commission under section 9(1) or section 10 for the act of inserting the licence condition.[265] Section 9 provides that 'it is unlawful for a person to do any act...', and in *Gerhardy* those Justices who did consider section 9 considered an exercise of a statutory discretion to be an 'act'.[266] The question of whether the discrimination was direct or indirect would follow. Section 13 would not apply against the Liquor Commission, as the Commission does not provide goods and services.

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264 *RDA,* s.22(1).

265 This was the case in *Waters v Public Transport Corporation ('Waters')* 173 CLR 349, where the complainants were denied access to goods and services as a result of a discretion to implement an indirectly discriminatory bus ticketing system.

266 Justice Brennan at 120-121 held that the discretionary grant of land authorised by s.15 of the *Land Rights Act* was the requisite "act", and so s.19 of the *Land Rights Act* would be invalid because it conflicted with s.9 via s.15; Gibbs CJ at 81 and Mason J at 93 held there was no discretionary act and so s.9 did not apply. Justice Deane at 146 stated that particular discretionary "acts" were not required for the application of s.9, as enforcement of the discriminatory provision entailed such 'acts' as action by courts and law enforcement agencies.

Section 17(a) prohibits the inciting of a person to do an act contrary to the provisions of Part II. The word 'incite' would not, however, appear to encompass the regulatory actions of the Liquor Commission. The Concise Oxford Dictionary definition of incite is 'urge or stir up'. Arguably, a mandatory directive by an administrator lacks the necessary sense of encouragement, and does not come within the terms of the section. Section 17(b) prohibits the assistance or promotion of discriminatory acts, and, although this sub-section is perhaps broader in its operation, the words 'assist' or 'promote' are again unlikely to encompass the regulatory acts of the Liquor Commission.

An action may also be brought by a publican or group of publicans seeking a declaration that the discretion to insert licence conditions in a manner which directly discriminates against, or impacts disproportionately on, Aboriginal people involves a direct inconsistency between section 9 or 13 of the *RDA* and the *Liquor Act.* If this argument were accepted, then, by operation of section 109 of the Constitution, sections 31-33 of the *Liquor Act* would be invalid to the extent that they authorised discretions unlawful under the *RDA*.

It is also necessary to consider whether section 10 might apply.

Section 10 and the *Liquor Act*

Section 10 of the *RDA* applies to discrimination '...by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory'. A state legislature may pass discriminatory legislation, but the provision directly affects the legislation by conferring compensatory rights ('to the same extent') on those who do not enjoy an equal right under its terms. If a law providing for a ban on sales of alcohol to a racial group was passed by a state legislature, section 10 would confer the same right to buy alcohol on members of the racial group as were enjoyed by all others. Neither the provisions of the *Liquor Act* nor any proposed liquor law in the Northern Territory forbids sales of alcohol to Aboriginal people. This distinguishes the *Liquor Act* from the provision of the *Land Rights Act* which excluded non-Pitjantjatjaras in *Gerhardy*, a law which did operate in a directly discriminatory manner.

The use of the expression '...by reason of, or of a provision of, a law' introduces some doubt as to the breadth of section 10. Statutory discretions conferred by legislation would probably be covered if the terms of the statute somehow required the discretion to be exercised in a discriminatory manner. However, a general discretion such as that conferred on the Liquor Commission by the *Liquor Act* is a different matter. A natural reading of the terms of sections 9 and 10 suggests that section 9 and not section 10 applies where an otherwise inoffensive discretion is exercised in a racially discriminatory manner. Although the discretion is exercised under a law, it is probably not exercised 'by reason of, or of a provision of, a law'.

The Scope of Part II of the *RDA*

Under the reasoning adopted by Justices Wilson and Brennan in *Gerhardy*, sections 9 and 10 of Part II apply to all forms of distinctions based on race and not merely to invidious, unjustified or arbitrary discrimination. It was argued in *Gerhardy* that 'discrimination' for the purposes of the *RDA* does not include benign distinctions. Under that argument a legitimate rights-based justification for a distinction, exclusion, restriction or preference would remove the activity from the ambit of sections 9 or 10. The argument was rejected by Justices Brennan and Wilson on the basis that section 9 refers to *any* distinction, and that if it had been

intended to limit discrimination under the *RDA* to invidious discrimination then it would not have been necessary to provide for special measures as an exception under the legislation.[267]

There has been academic dispute about the interpretation in *Gerhardy* of sections 9 and 10 to cover all racial distinctions, rather than just racial distinctions which are invidious. According to the Australian Law Reform Commission, the definition of discrimination at international law limits discrimination to 'adverse' discrimination.[268] To the extent that the validity of the *RDA* depends on the external affairs power, this definition should be incorporated into the Act. Some affirmative action programmes which make up for past discrimination should be outside sections 9 and 10. Administration of programmes can become cumbersome if they must be saved as special measures each time a complaint is made. A related concern is that the assimilationist, individual rights focus of special measures is inappropriate to current thinking on indigenous rights.[269]

Alcohol restrictions, indigenous rights and Part II of the *RDA*

If the High Court were to change its approach to Part II, or if the *RDA* is amended so that only invidious racial distinctions fall within sections 9 and 10, there would be significant implications for alcohol restrictions sought by Aboriginal people as part of a collective attempt to preserve indigenous health and culture. An exercise of sovereignty by an Aboriginal community, which may have declared itself 'dry', to restrict the availability of alcohol to its members may fall outside the operation of Part II of the *RDA*, whether the restrictions are formal or informal. If this is the case, the issue of special measures need not arise.

Some commentators argue that a law can make a distinction based on race but not be racially discriminatory so as to offend the *RDA* or *CERD*.[270] On this analysis, Article 1(1) of *CERD*, the basis of section 9 and 10, uses a definition of discrimination under which not 'any distinction... based on race' is discriminatory, but only a distinction based on race which 'has the purpose or effect of nullifying or impairing... the recognition, on an equal footing, of human rights...'.[271] A racial distinction is therefore outside the ambit of the 'discrimination' within the terms of Article 1(1) if this effect or purpose is lacking.

The special measures provision, on this analysis, is included merely to *confirm* that measures which make amends for past invidious discrimination are not the intended targets of the *RDA*. Section 8(1) is thus not a defence which must be relied upon when any racial distinction is made, but merely a corollary to the proposition that it is invidious discrimination which is unlawful.

If this analysis is not adopted, the legislation inevitably appears to embrace an assimilationist model repugnant to indigenous people.[272] Formal equality will not always be appropriate if it means the imposition of European standards on indigenous groups. For example, rights to land involving a racial distinction are of a permanent nature. They involve separate rights, not

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267 per Wilson J at 113-114 and Brennan J at 131.

268 Australian Law Reform Commission, *op.cit.* Vol. 1, paras 147-148, 150.

269 See, for example, Nettheim, G., "Indigenous Rights, Human Rights and Australia" (1987) 61 *Australian Law Journal* 291 at 299.

270 Sadurski, W., "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't" (1986) 11 *Sydney Law Review* 5; McKean, *Equality and Discrimination under International Law* (1993), p.288; Brownlie, I., *The Rights of Peoples in Modern International Law* (1983), p.10; Australian Law Reform Commission, *op.cit.* Vol. 1.

271 *Ibid*, p.30.

272 Nettheim, *op.cit.* p.299.

an interim measure. They do not easily fit within the notion of a special measure, which theoretically must be temporary, but they arguably involve a racial distinction not intended to be the target of the *RDA*.

The High Court in *Western Australia v Commonwealth*[273] mentioned the approaches both of Justices Brennan and Wilson in *Gerhardy* and the alternative approach of the commentators outlined above. By countenancing neither, the Court left open the question of which approach it preferred.[274] If the view of commentators were taken, measures aimed at the improvement of the situation of disadvantaged groups that still suffer the effects of discrimination would not constitute discrimination under the *RDA*. The review of the *RDA* in 1995/96 will address this issue in detail.

The Pitjantjatjara Council submission argued that alcohol sale restrictions, especially those sought by 'dry area' communities, can be justified by reference to 'human rights' as defined in the *RDA*, and therefore are not adversely discriminatory. The Council argued that the restrictions will contribute to the development of a milieu in which Pitjantjatjara people are in a position to enjoy rights in Article 5 'which are either of no value, or of a significantly diminished value, in the circumstances that currently prevail.'[275] The rights mentioned included: security of persons; education; marriage; peaceful assembly and association; work; housing; public health, medical care, social security and social services; education and training; and cultural activities.[276] Arguably, Part II of the *RDA* does not apply, and its provisions should be amended to clarify this position.

Under the terms of section 9(1A) *indirect* discrimination requires a distinction based on race that is not reasonable in the circumstances. Arguably, as the invidious nature of discrimination will be important in determining whether it is unreasonable, only invidious *indirect* discrimination comes within the scope of the *RDA*.

Intention to Discriminate

The *RDA* does not require an intention to discriminate, simply that the *effect* of the discriminator's actions is discriminatory.[277]

Specific Prohibitions

Sections 11 to 17 of the *RDA* inclusive prohibit specific types of discrimination. Those possibly relevant to this report are:

- discrimination in access to places and facilities (s.11);
- discrimination by providers of goods and services (s.13);

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273 (1995) 128 ALR 1.

274 at 62.

275 *Submission Number 1.7*, *op.cit.* pp.35-41.

276 Article 5 expressly extends equal rights to: 5 b) security of persons; 5 c) education; 5 d) iv) marriage; 5 d) ix) peaceful assembly and association; 5 e) i) work; 5 e) iii) housing; 5 e) iv) public health, medical care, social security and social services; 5 e) v) education and training; and 5 e) vi) cultural activities.

277 This point has been discussed in *Australian Iron & Steel Proprietary Limited v Banovic and Others ('Banovic')* (1989) 168 CLR 165: "the intention or motive of the intention to discriminate... is not a necessary condition to liability" (per Deane and Gaudron JJ at 176, approving *Reg v Birmingham City Council; ex parte Equal Opportunities Commission* [1989] AC 1155, at p 1193-1194); see also Mason CJ and Gaudron J at 359 in *Waters v Public Transport Corporation ('Waters')* 173 CLR 349.

- inciting or assisting the doing of an act which is unlawful by reason of the foregoing prohibitions (s.17).

Discrimination for the purposes of these specific prohibitions occurs when one person is treated *less favourably* than another by reason of the first person's race. Section 13 is of particular relevance for the purposes of this Report. It states:

> *It is unlawful for a person who supplies goods or services to the public:*
> *(a) to refuse or fail on demand to supply those goods or services to another person; or*
> *(b) to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon or subject to which he would otherwise supply those goods or services;*
> *by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.*

Section 9(4) states that the provisions in section 11-17 complement, but do not limit the generality of, section 9(1).

The definition of indirect discrimination in section 9(1A) is imported into these sections. Section 9(1A) deems an indirectly discriminatory act to be done 'by reason of' race as required by sections 11-17. An act is therefore unlawful if the remaining elements can be established (see discussion below of indirect discrimination).

There may be perceived advantages in establishing the elements of sections 11-15 in a given case, as disparate treatment. The publican would have the option of relying on section 9, but might perceive some advantage in an argument framed in terms of 'less favourable treatment' rather than in terms of human rights. A hypothetical case could involve the Pitjantjatjara Council calling for a ban on takeaway alcohol sales to members of its community at a certain liquor outlet. A (directly) discriminatory restrictive condition could be incorporated into a liquor licence by the Liquor Commission, exercising a discretion granted by the *Liquor Act.* The publican might seek a declaration, or raise in response a defence, that it is impossible[278] to lawfully comply with section 13 by providing goods and services on equally favourable terms to all. The argument would be that the act of the Liquor Commission in inserting the conditions gives rise to an inconsistency between the *Liquor Act* and section 13 of the *RDA*,[279] and is therefore invalid. No reliance would need to be placed on a breach of 'human rights'.

In the context of section 15, which deals with employment discrimination, the typical course appears to have been for a complainant's case to be initially considered under section 15 rather than section 9. Section 9(1) follows as a general fall-back provision if the elements of section 15 cannot be established.[280]

The Effect of Section 9 and 13 on State and Territory Legislation

If a State law makes lawful the doing of an act which section 9(1) or section 13 of the *RDA* forbids, and there is no special measures justification, there will be a direct inconsistency for

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278 NB leaving aside a special measures justification.

279 see below for the application of the inconsistency doctrine.

280 Hunter, R., *Indirect Discrimination in the Workplace*, The Federation Press, Sydney, 1992. See p.68, and cases listed at note 176.

the purposes of section 109 of the Commonwealth Constitution. The sections will operate to invalidate the inconsistent State law to the extent of the inconsistency.[281]

The *Liquor Act* would be inconsistent if it conferred authority to exercise the discretion in a discriminatory way, and invalid to that extent. If the discretion to insert a licence condition has been exercised in a discriminatory way, then, as occurred in *Waters v Public Transport Commission ('Waters')*[282], a Court may remit the matter to the Liquor Commission with an order that a decision is made which is consistent with the *RDA*. To the extent that the state law authorised discretionary acts which did not breach the *RDA*, the section conferring discretion would not be invalid. Thus, if a licence condition were a special measure, or indirectly discriminatory but reasonable, it would not breach the *RDA* and the question of inconsistency would not arise.

Conclusion - Alcohol Restrictions and Direct Discrimination

Alcohol restrictions sought by Aboriginal communities operate throughout Central Australia and elsewhere as a result of informal agreements. In South Australia alcohol restrictions applicable to residents of Pitjantjatjara lands have been included as formal licence conditions, and have not resulted in complaints under the *RDA*. Restrictive licence conditions have been requested by residents of Northern Territory Pitjantjatjara lands for many years, and there have been numerous calls for the Liquor Commission to act on these requests. Until recently the Liquor Commission has refused to consider doing so on the ground that the *RDA* would render such conditions unlawful.[283]

The restrictions sought by the Pitjantjatjara Council are arguably not directly discriminatory. They apply to residents of certain areas, such as Pitjantjatjara lands, rather than directly to a racial group, such as the Pitjantjatjara people. The non-Pitjantjatjara population of the lands makes up about 15-20% of the total population, and this significant group cannot buy alcohol locally while resident within the 'dry area'.[284] The discussion of indirect discrimination in the next chapter is relevant to this situation.

This chapter concludes that sections 9 or 13 are the most likely sources of invalidity for alcohol restrictions sought by Aboriginal communities that operate on a direct racial basis, and that the special measures provision in the *RDA* is the main avenue currently available to prevent invalidity. Although probably only arguable in the High Court, there is an alternative argument under section 9 that restrictions are not discriminatory if they draw benign racial distinctions which advance the enjoyment of rights enumerated in Article 5 of *CERD*. If this argument was accepted, or if the *RDA* was amended to apply to invidious discrimination only, restrictions sought by Aboriginal communities would not breach the Act. The next chapter considers indirectly discriminatory restrictions. Chapter 11 considers whether such restrictions, if discriminatory, are exempt under section 8(1) as special measures.

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281 *Clyde Engineering Co. Ltd v Cowburn* (1926) 37 CLR 466 at 490, approved in *Gerhardy* at 93 (per Mason J) and 121 (per Brennan J).

282 173 CLR 349

283 The Liquor Commission did vary licence conditions in reliance on the special measures provision in the circumstances which led to the case of *Tennant Creek Trading & Ors v The Liquor Commission of the Northern Territory and Julalikari Council*, (NT Supreme Court, Thomas J, 7 April 1995).

284 *Submission Number 1.7*, *op.cit.* pp.17-18, and the demographic profile appended to that submission.

CHAPTER 12
INDIRECT DISCRIMINATION

Introduction

After considering whether a liquor restriction could constitute unlawful discrimination under the *Racial Discrimination Act* 1975 (Cth) (*RDA*), the issue of whether discrimination is direct or indirect arises. If the members of specific race communities must not be served alcohol, the previous chapter noted that it would be open to complaints of direct discrimination and unlawful under sections 9(1) or 13.

Conditions may also seek to impose limits on all purchasers, such as a takeaway limit of four cans or a total ban on takeaway sales, regardless of the race of the customer. Alternatively, a restriction might apply to residents of a specific area, and this Report addresses requests for such conditions from residents of Pitjantjatjara lands. Such restrictions would not be discriminatory on their face, and would not constitute direct discrimination under the *RDA*. However, as measures with a disparate impact on a racial group by virtue of the population from which the customers are drawn, the restrictions might be indirectly discriminatory.

The definition in Section 9(1A)

Section 9(1A) of the *RDA*, which came into effect on 22 December 1990, defines indirect discrimination. It can probably be categorised as a declaratory provision, adding no new law but clarifying the ambit of section 9(1), specifically that 'indirect' or 'disparate impact' discrimination, as well as the principles in the US case *Griggs v Duke Power Co,*[285] are within the scope of the *RDA*.

The sub-section uses a device similar to a deeming provision. Section 9(1A) sets out the elements of indirect discrimination, and declares an act of indirect discrimination to be an act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin. Section 9(1A) contains only the definition. Sections 9(1) and 11-17 contain the prohibitions.

Section 9(1A) states:

> *Where:*
> *(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and*
> *(b) the other person does not or cannot comply with the term, condition or requirement; and*
> *(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;*
> *the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.*

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[285] (1971) 401 US 424 at 431.

The formula 'a distinction based on, or an act done by reason of' is used to define indirect discrimination as unlawful under both section 9(1), which covers 'distinctions based on' race etc., and under sections 11-17, which cover acts done 'by reason of' the race etc. of a person.[286] By the device of using the same key terms, the definition in sub-section (1A) is imported into these sections.

The Explanatory Memorandum to the amending Act stated:

> *The operation of subsection 9(1A) will involve an examination of whether the imposed term, condition or requirement impacts disproportionately on persons of the same race, colour, descent or national or ethnic origin as the person on whom the term, condition or requirement is imposed. It will not be necessary, to establish such a disproportionate impact, that the imposition impairs the enjoyment of a human right by every person of that race, colour, descent or national or ethnic origin.*

One central difference between direct discrimination and indirect discrimination is that, under section 9(1A) of the *RDA*, indirect discrimination will not be unlawful if it is 'reasonable'. 'Colour blind' or 'facially-neutral' conditions which impact disproportionately on persons of a particular race, and which are not reasonable, will contravene the *RDA*. Reasonableness is not, however, relevant to a case of direct discrimination, except indirectly through the special measures exemption in section 8(1).

The interpretation of the various elements which comprise the usual statutory definition of indirect discrimination has been the subject of a number of recent High Court decisions, in particular:

a) the meaning of 'term, condition or requirement';
b) the meaning of 'reasonable'; and
c) the selection of the 'base group' with which a comparison is to be made.[287]

However, section 9(1A) itself has not been the subject of judicial interpretation, and differs from the common statutory definition of indirect discrimination[288] because of the omission of element (c) above. Instead of the 'base group' requirement, paragraph (c) of section 9(1A) uses the words of Article 1.1 of *CERD*, and so provides that indirect discrimination occurs if a requirement to comply with a particular criterion operates to impede the equal enjoyment of a right specified in *CERD*, such as Art. 5(f), by members of a racial, ethnic or national group.

The definition in the *RDA* has been described as more flexible than that typically used to define indirect discrimination in other anti-discrimination legislation[289] which renders unlawful requirements with which a substantially higher proportion of persons of a different status to the aggrieved person are able to comply. Some sort of comparison along these lines will nevertheless be relevant in determining whether a requirement has the purpose or effect of nullifying or impairing the equal enjoyment of a right.

The requirement of a 'term, condition or requirement' with which a person cannot comply

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286 See Hunter, *op.cit.* pp.68-69.

287 Notably *Banovic* and, most recently, in the High Court decision in *Waters*.

288 For example s. 24(3)(a) of the New South Wales *Anti-Discrimination Act* 1977 requires compliance with a condition 'with which a substantially higher proportion of the opposite sex to the other person comply or are able to comply'.

289 Hunter, *op.cit.* p.66ff.

In the context of formal licence conditions or informal restrictive arrangements which affect all patrons of a particular liquor outlet there are difficulties in establishing whether there is a term with which a person cannot comply. The problem in part derives from the use of a standard which was adapted for an employment context. In *Banovic v Australian Iron and Steel*,[290] Dawson J stated that:

> *... it is clear that the words 'requirement or condition' should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees ... Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.*[291]

This construction was approved in *Waters* outside the employment context.[292] The actual requirement or condition need not be made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination.[293] The courts have indicated that a liberal interpretation should be given to the expression.[294] In the context of the provision of goods or services, a person should be regarded as imposing a requirement or condition when "that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed."[295]

If a complaint is directed against the proprietor of a liquor outlet who is a party to an informal agreement, the requirement would be whatever condition must be satisfied before a person was served. Residence or direction travelled are possible conditions.

If, on the other hand, the complaint is directed against the Liquor Commission, the relevant requirement could be the licence condition which resulted in a person being refused service. The actual condition inserted by the Liquor Commission under the *Liquor Act* will vary depending on the needs and wishes of the community in the area.

The Meaning of 'Reasonable'

To constitute discrimination under section 9(1A) of the *RDA*, the term, condition or requirement must not be *reasonable having regard to the circumstances* of the case. The circumstances could include matters of effectiveness, efficiency and convenience in performing the activity.[296] However, in *Waters,* members of the Court warned against introducing an element of overly wide discretion to justify discriminatory acts.[297]

Justices Dawson and Toohey in *Waters* approved the following formulation of reasonableness:

> *The test of reasonableness is less demanding than one of necessity, but more demanding than one of convenience.... The criterion is an objective one, which requires the court to*

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290 168 CLR 165.
291 *Ibid*, p.185.
292 173 CLR 349 per Mason CJ and Gaudron J at 360, per Dawson and Toohey JJ at 393-394, per McHugh J at 407.
293 *Ibid*, p.360.
294 per Dawson and Toohey JJ at 393-394, McHugh J at p.407.
295 *Ibid* at 407.
296 For example Brennan J in *Waters* at 378.
297 *Ibid*, per Mason CJ and Gaudron J at p. 362 and Deane J at p. 383.

> *weigh the nature and extent of the discriminatory effect on the one hand, against the reasons advanced in favour of the requirements or conditions on the other. All the circumstances of the case must be taken into account.*[298]

A majority of the court in *Waters* held that whether or not the activity could have been carried out in a less discriminatory manner was relevant to the consideration of reasonableness.[299]

The burden of proving that a term or condition is not reasonable will be upon the complainant throughout the case, rather than the Liquor Commission or the publican who is the subject of the complaint. In *Waters* Justice McHugh held that if an indirect discrimination provision specified, as an essential element, that a requirement must not be reasonable, the burden of proof is borne by the complainant. In *Secretary, Department of Foreign Affairs v Styles (Styles),*[300] the Court applied *Wards Cove Packing v Antonio,* in which the US Supreme Court shifted the ultimate burden of proving that discriminatory employment practices are not reasonable back onto the complainant.[301]

Indirect Discrimination Outside the Section 9(1A) Definition

A commentator in the employment field has argued that it is unlikely that the question of the residual operation of section 9(1) beyond 9(1A) will be of practical importance, because the terms of section 9(1A) are more flexible than other Australian legislative provisions defining indirect discrimination.[302] Alcohol restrictions may lead to a different conclusion.

Prior to 1990, there was some doubt as to whether indirect discrimination was caught by Part II of the *RDA*. Section 9(1A) was inserted to remove doubt that section 9(1) (and sections 11-17) might not cover indirect discrimination, and not because its terms were not general enough to do so.[303] An American case, *Griggs,* recognised that legislation containing general prohibitions of discrimination covers both direct and indirect discrimination, which were described respectively as 'disparate treatment' and 'disparate impact'. Prior to the amendment in 1990, section 9(1) had been used to deal with indirect discrimination,[304] and commentators in the field suggested indirect discrimination was within its scope.[305] There was a persuasive body of opinion that the language of section 9(1) and the specific sections were wide enough to catch indirect racial discrimination, and the principles in *Griggs* applied to Part II of the *RDA*. However, the question has never been ruled on by the High Court.

The High Court has considered the proposition that a provision in anti-discrimination legislation containing a general prohibition and a definition of indirect discrimination in different sub-sections may nevertheless allow the interpretation that both sub-sections can define indirect discrimination. In *Banovic*, most of the bench rejected this argument, although in that case the relevant Act was drafted so as to define both direct and indirect

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298 at 383, approving *Styles*, per Bowen CJ and Gummow J, (1989) 23 FCR 251 at 263.

299 Per Mason CJ and Gaudron J at 363, Brennan J at 380 and Dawson and Toohey JJ at 395.

300 (1989) 23 FCR 251 per Bowen CJ and Gummow J at 264.

301 490 US 642 (1989) at 659 reversed the onus applied in *Griggs*.

302 Hunter, *op.cit.* p.69.

303 Commonwealth Attorney-General, *Second Reading Speech on Law and Justice Amendment Bill 1990*, Weekly Hansard, 17-20 1990 at 2339-40.

304 Hunter, *op.cit.* p.67 notes that indirect discrimination complaints (related to the facts in *Dao v Australian Postal Commission* (1987) EOC 92-132) under sections 9(1) and 15 were accepted by the Human Rights Commission before the 1990 amendment.

305 See for example Bailey, P., *Human Rights: Australia in an International Context,* Butterworths, Sydney, 1990 p.189; Rowe, G "*Maynard v Neilson*: Goods and Services Discrimination Against Aboriginal People" (1988) 35 *Aboriginal Law Bulletin* 12 at 13.

discrimination.[306] The *RDA*, on the other hand, contains no definition of direct discrimination *per se*, and has only defined indirect discrimination since the 1990 amendment.[307]

In *Waters*, while considering Victorian legislation which was drafted in different terms to the *RDA*,[308] Chief Justice Mason and Justice Gaudron held that indirect discrimination falling outside the ambit of the sub-section expressly dealing with indirect discrimination might nevertheless fall within the general provision. Their judgment involves reasoning which suggests that section 9(1) should be interpreted broadly despite the provision which defines indirect discrimination, and thus catches residual indirect discrimination which falls outside the definition in section 9(1A).[309] Referring to the Victorian statute, they stated 'indirect discrimination... may occur otherwise than by the imposition of a 'requirement or condition''.

Indirectly Discriminatory Alcohol Restrictions Outside Section 9(1A)

There may be some difficulty in finding 'a requirement with which a person cannot comply', as required by section 9(1A), in cases involving indirectly discriminatory alcohol restrictions.

Alcohol restrictions which apply across the board, but which are imposed only in areas where the population is overwhelmingly Aboriginal, may be indirectly discriminatory. For example, the Liquor Commission has imposed six can limits in Central Australia, but has so far avoided any restrictions which are not 'facially neutral'. If section 9(1) has broad application, six can limits will be no more or less discriminatory than those sought by the Pitjantjatjara Council, and refused by the former Liquor, Racing and Gaming Commission on *RDA* grounds. Indeed, given that they are not the conditions sought by the communities, they may be more likely to be discriminatory.

If section 9(1A) is an exhaustive statement of what constitutes indirect discrimination, then section 13 of the *RDA* requires an analysis of impaired or nullified rights when it applies in an indirect context. The terms of section 13 only require *less favourable treatment* in the provision of goods and services. Sections 9 and 9(1A) are expressed in terms of rights. The possibility of framing an indirect discrimination argument by importing the principles from *Griggs* (as members of the High Court have done when construing similar legislation), rather than in terms of human rights under *CERD*, may have been removed with the 1990 amendment. It is difficult to predict the consequences of this development, but a declaration sought by a publican that an indirectly discriminatory licence condition inserted under the *Liquor Act* is invalid to the extent of a direct inconsistency with the section 13 of the *RDA* would be more complex as a result.

Pending judicial interpretation, the relationship between the sections is uncertain. The review of the *RDA* will explore the relationship between the sub-sections.

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306 (1989) 168 CLR 165 at 170-171 (per Brennan J), 175 (per Deane and Gaudron JJ, who stated "The presence of s.24(3) in the act takes much of the force from the argument that s.24(1) should be given a broad application"), 184 (per Dawson J), and 196 (per McHugh J). In *Waters* McHugh J (at 400) affirmed the reasoning of Dawson and Brennan JJ in *Banovic*, that direct discrimination must come under the sub-section expressed to deal with it.

307 *Australian Iron and Steel v Banovic* (1989) 168 CLR 165 involved the *Anti-Discrimination Act* 1977 (NSW), s.24 of which contained ss.(1), defining direct discrimination, and (3), defining indirect discrimination. *Waters v Public Transport Corporation* (1991-92) 179 CLR 330 involved the *Equal Opportunity Act* 1984 (Vic), ss.17(1) and 17(5) similarly defining each separately. *Cf* the *RDA,* which does not contain a definition of direct discrimination.

308 *Ibid.*

309 (1991) 173 CLR 330 at 358. Justice McHugh at 410 recorded his disagreement with this analysis.

Reasonableness and Liquor Licence Conditions

A successful challenge to an indirectly discriminatory licence condition or informal agreement, which impeded the equal enjoyment by a particular racial group of one of the rights in Article 5 of *CERD*, must establish that the restriction is not reasonable having regard to the circumstances of the case.

A consideration of reasonableness requires:

- A balancing of the nature and extent of the discriminatory effect against the reasons advanced in favour of the restriction; and
- A judgement upon whether there was a less discriminatory substitute measure.

The onus is on the complainant to show that the condition is unreasonable.

Much of the discussion in this section is also relevant to the consideration of whether an alcohol restriction is a special measure for the purposes of section 8(1) of the *RDA*.[310] The same evidence is relevant to both issues. The question of whether a benefit is conferred on some or all members of a class, or an alcohol restriction is *necessary* in the interests of a racial group, will be relevant to assessing both reasonableness and special measures. Unlike the doctrine of special measures, which focuses on whether the interests of the minority group are advanced, 'reasonableness' in the context of indirect discrimination involves balancing a range of interests.

There is little guidance as to the considerations that will be relevant to assessing whether an alcohol restriction is 'reasonable having regard to the circumstances of the case' under section 9(1A) of the *RDA*. In an employment context, the interests that must be balanced would be those of the employer and the employee who is unable to comply with the condition or requirement.[311] In *Waters,* the context of disability discrimination in the Victorian Public Transport system demanded consideration of a greater number of interests. In evaluating alcohol restrictions, the task is still more complex.

Relevant considerations

It is noted at the outset that a 1995 Northern Territory Supreme Court challenge to a directly discriminatory licence condition was unsuccessful.[312] Various licensees alleged that the decision of the Liquor Commission to vary their licences was manifestly unreasonable, and sought prerogative relief. Their submission was rejected.[313]

Evidence that the availability of alcohol at liquor outlets contributes significantly to alcohol abuse would be essential to show that a restriction was reasonable. If a restriction could be circumvented and its ameliorative effect on alcohol-related harm was negligible, then it is unlikely that a restriction would be held to be reasonable. The Pitjantjatjara submission detailed a significant and compelling body of evidence that the availability of alcohol near dry

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310 See pp.84-91 of this Report.

311 See for example *Styles*.

312 *Tennant Creek Trading & Ors v The Liquor Commission & Julalikari Council Aboriginal Corporation* (Unreported, NT Supreme Court, Thomas J).

313 *Ibid*, p32-33.

area communities causes abuse, and that restrictions on availability improve the health and cultural life of a community.[314]

The Northern Territory Government's *Living with Alcohol* programme espouses moderation in alcohol behaviour, and is seen by the Pitjantjatjara Council as promoting an ineffective policy within the Liquor Commission of wet canteens, limited availability through restricted trading hours and takeaway limits. These measures may be unreasonable if they lack the capacity to reduce alcohol abuse in Central Australia. They also run counter to the longstanding Pitjantjatjara policy of prohibition for residents of its 'dry area' lands.

The nature and extent of the discriminatory effect must be weighed against the reasons advanced for the measure. Facially-neutral liquor restrictions which have a discriminatory effect are only likely to be imposed on licensees in areas where the population is predominantly Aboriginal and the community has called for the restrictions.

An indirectly discriminatory licence condition or informal agreement will not necessarily be unreasonable merely because it impacts upon people (both Aboriginal and non-Aboriginal) who did not call for the restriction. If evidence exists that a measure had sufficient community support, and that the problems of alcohol abuse are of greater concern than the hardship experienced by the affected population, the condition would not be unreasonable. Health indicators relating to alcohol abuse in the Northern Territory would be useful evidence. In remote areas, take away sales may arguably encourage excessive drinking whilst driving. The higher incidence of alcohol-related road accidents in the Northern Territory is relevant to a decision to impose a take-away limit. Although restrictions or prohibitions are imperfect measures, the extreme nature of the problem requires that it be addressed with the means available, and measures which have been proposed by those who must face the problem in their communities.

Part II of the *RDA* uses a 'human rights-based' approach. In determining what is reasonable in the context of alcohol abuse among Aboriginal people and Torres Strait Islanders, developments in the recognition of the right of indigenous self-determination is relevant. The Royal Commission into Aboriginal Deaths in Custody, discussed in the opening chapters of this report, recognised the link between alcohol use by Aboriginal people and custody, and the destructive role of alcohol in the perpetuation of indigenous socio-economic disadvantage. As discussed in Chapter 5, the High Court decision on Native Title and the Commonwealth *Native Title Act* of 1993 reflect a legislative and philosophical climate in which the genuine recognition of indigenous self-determination is now possible. Australia has been actively supporting the *Draft Declaration on the Rights of Indigenous Peoples*, which recognises the right of indigenous self-determination and social, cultural and political integrity. Appropriate licence conditions demanded by Aboriginal communities represent a step towards the achievement of a meaningful right to self-determination. This consideration is relevant to reasonableness, and of considerable weight.

This policy trend gives force to the view that it is reasonable that Aboriginal peoples, in determining the future of their communities, make rules to prevent harm resulting from alcohol abuse.

A licence condition which had inadequate community support raises the issue of paternalism towards Aboriginal Communities, and would be unlikely to be considered reasonable.

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314 *Submission Number 1.7*, *op.cit.* pp.67-92, and extensive bibliography relating to availability and abuse at p.94 and reproduced as Appendix 5.

However, if inserted by the Liquor Commission at the insistence of, and in consultation with, Aboriginal communities, licence conditions do not represent a non-indigenous paternalistic interference with rights. The wishes of a community may be difficult to determine, but sections 31-33 and 48 of the *Liquor Act* require the Liquor Commissioner to take account of the needs and wishes of the community in determining the conditions of a licence, and therefore to gauge whether the call for a restrictive condition has bona fide community support. Appropriate consultation would arguably make it difficult for a plaintiff to establish that a resulting condition was unreasonable.

In 'dry area' communities, there are additional arguments that restrictions on sales to residents of the areas are reasonable. Sales of takeaway alcohol to people returning to dry communities may necessarily involve the customer breaking the law, either by drinking while driving on the return journey or by having alcohol where its possession is prohibited by the *Liquor Act*.

In considering facially neutral conditions, economic harm done to publicans and the impact on tourism must be considered. However, if 'across the board' restrictive conditions were only imposed in locations where the alcohol problems are severe, the economic harm caused by reduced alcohol sales should be outweighed by public health and other considerations.

Submissions revealed that liquor restrictions have been drawn up so that tourist facilities, such as Yulara in central Australia, are not affected. If economic considerations are given weight, then consideration of the effects on tourism may be required. Tourism should, however, be culturally appropriate, and the interests of tourists who want to drink may, in some cases, be counterbalanced by other considerations. The reduction of alcohol problems in both the Aboriginal and non-Aboriginal communities will be beneficial to tourism in the long term. The economic benefits of addressing this problem extend to considerable savings in the huge health budget.

Whether or not licence conditions could have been framed in less discriminatory terms is relevant to considering the issue of reasonableness. The hearing process embodied in section 58 of the *Liquor Act* will ensure that alternative suggestions can be put to the Liquor Commission, and conditions imposed are those best adapted to the problem.[315]

The Recommendations of the Northern Territory Government Sessional Committee

The Northern Territory Sessional Committee into Use and Abuse of Alcohol[316] was empowered to look into problems associated with alcohol consumption in the Northern Territory. In its 1991 Report, it recommended a number of measures as necessary to combat the unacceptable social and economic costs of alcohol abuse in the Territory amongst both non-Aboriginal and Aboriginal people. Relevant recommendations included:

- a reduction in the number of liquor outlets to more closely reflect the national per capita level;
- restrictions on sales of certain alcohol products;
- reduced trading hours for takeaway outlets; the discontinuation of alcohol sales from roadside inns (although with exceptions for registered residents and travellers staying overnight);

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315 See *Tennant Creek Trading v The Liquor Commission of the Northern Territory* (Unreported, NT Supreme Court, 7 April 1995)

316 Legislative Assembly of the Northern Territory Sessional Committee on Use and Abuse of Alcohol by the Community, *Report Number 2*, *op.cit.*

- the formalisation of informal arrangements with local communities into licence conditions; and
- measures aimed at stopping the selling and supplying of alcohol to intoxicated persons, including vesting responsibility for enforcing the *Liquor Act* in the police force.

The submissions to the Sessional Committee and the findings in its annual report provide evidence that alcohol restrictions are reasonable.

Indirect Discrimination and Special Measures

Theoretically, under the terms of Part II of the *RDA*, a measure which is indirectly discriminatory may be saved as a special measure despite being unreasonable. The test of whether discriminatory impact is unlawful depends on reasonableness, while the special measures exception depends on the satisfaction of both a sole purpose and a necessity test. This dual test is different in its terms. In practice, however, the scope for the residual operation of the special measures provision may be limited. If a condition was found not to be reasonable in all the circumstances, then it would probably be less likely to constitute a special measure.

Conclusion

Whether or not an indirectly discriminatory licence condition or informal agreement will be reasonable depends on all the circumstances of the case, including whether a community has called for the restriction. If the restrictions are an effective and appropriate response to the alcohol problem in an area in which a particular liquor outlet is situated, then the *RDA* will not render the restriction unlawful.

CHAPTER 13
THE SPECIAL MEASURES EXEMPTION IN THE *RDA*

The final legal consideration in examining whether liquor restrictions contravene the *Racial Discrimination Act* 1975 (Cth) (*RDA*) is the exemption from the operation of the Act afforded to 'special measures'. The defence potentially applies to both direct and indirect discrimination. Although not ideal from the point of view of Aboriginal self-determination, the analysis adopted in *Gerhardy* can be used to uphold appropriate community-sought alcohol restrictions.[317] However, there is not a great deal of clarity as to what constitutes a special measure.

The Special Measures Exception

Section 8(1) of the Act states:

> *This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies...*

Article 1(4) is phrased as an exception from the ambit of racial discrimination. It states:

> *Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

Article 2(2) of *CERD* also deals with special measures, although it is not specifically mentioned in section 8(1). It is phrased more as an obligation to ensure adequate development and protection of certain groups. The paragraph states:

> *States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.*

Articles 1(4) and 2(2) may well be directed to different issues, although the High Court does not appear to have considered this possibility.[318] In *Gerhardy,* the entire Court except for Justice Dawson read both Articles into section 8(1) as a means of taking advantage of the more liberal regime under article 2(2). Neither the limitation that a measure must be 'necessary' nor the 'sole purpose' requirement appears in Article 2(2). The problem with an interpretation which expressly incorporates both articles into the *RDA* is that each introduces,

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317 See pp.65-67 and Chapter 11 of this Report.

318 See Lerner, N., *The U.N. Convention on the Elimination of all Forms of Racial Discrimination*, Sijtoff & Noordhoff, Netherlands, 1980, p.39. Lerner notes that the drafters decided to deal twice with special measures, both in the definition of discrimination (Article 1) and in an enunciation of policies that States Parties should follow in order to eradicate racial discrimination (Article 2).

in its conclusion, a limitation to the scope of special measures. The limitations have been called the 'non-separate rights proviso' and the 'non-permanent continuation proviso.'[319]

Two distinct fact situations may give rise to arguments which centre around special measures. On the one hand, a special measure may provide an answer to a dissident member of the protected group who complains that he or she cannot get liquor. On the other hand, it may be the focus of argument where a member of a majority race alleges discrimination in an affirmative action situation because a benefit available to the minority is not available to members of the majority. The complainant could argue that a departure from the strict indicia of special measures has rendered a programme illegal. Conversely, the argument by, or on behalf of, the minority group would be that qualification as a special measure defeats the complaint and upholds the programme.

Of the seven High Court judges in *Gerhardy*, Justice Brennan discussed the meaning of the term 'special measure' in the greatest detail. His conclusion was that a special measure bears four characteristics:

> *A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.*[320]

These four criteria are derived from an examination of the terms of Articles 1(4) and 2(2) of *CERD*. They allow some observations on the legality of alcohol restrictions which draw distinctions based on race.

Confer a benefit on some or all members of a class

The relevant benefit may be a collective benefit even if it is gained at the expense of restricting an individual's rights. In *Gerhardy*, the *Land Rights Act* conferred the benefit of individual and collective rights over land, although the rights of individual Pitjantjatjaras to invite non-Pitjantjatjaras to their home, which Justice Brennan held was an aspect of the right to freedom of peaceful association, was impaired. Justice Brennan stated:

> *At all events, where the enjoyment of the home might be prejudiced if the individual right were not foregone in favour of a collective right, it cannot be said that the human rights and fundamental freedoms of the household's members are impaired by their acceptance of membership on the terms that the right should be exercised collectively.*[321]

An indigenous community may perceive that a collective benefit flows from alcohol restrictions, including possibly the preservation of the culture from destruction as a result of alcohol abuse. By direct analogy, this collective exercise may ostensibly impair the right outlined in Article 5(f) of *CERD*, but nevertheless satisfy this criterion.

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319 Sadurski, *op.cit.* p.22.
320 *Gerhardy*, per Brennan J at 133.
321 *Ibid*, p.135.

The membership of the class must be based on race, colour, or national or ethnic origin

Although Article 1(4) of the Convention refers only to 'racial or ethnic origin' it should be read as including the various categories of race, colour, descent, or national or ethnic origin which are mentioned in Article 1(1). The question of what constitutes race or descent was not discussed in *Gerhardy*, but there was no suggestion that it was to be construed narrowly so as to prevent Aboriginal community-based schemes from classification as special measures.

The sole purpose must be the securing of adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms

The purpose of the special measure in *Gerhardy* was to 'restore to an Aboriginal people the lands which they occupied traditionally' and to 'provide that people with the means to protect and preserve that culture.'[322] Justice Mason observed that:

> *indigenous people may require special protection as a group because their lack of education, customs, values and weakness, particularly if they are a minority, may lead to an inability to defend and promote their own interests in transactions with members of the dominant society.*[323]

The purpose of alcohol restrictions sought by Aboriginal groups such as the Pitjantjatjara is to advance the community by eliminating alcohol related harm in the communities, as well as to preserve culture from the destruction that alcohol abuse entails.

The purpose of a measure can be ascertained by reference to its terms and the background to the measure. This purpose of 'advancement' is not a paternalistic concept, determined by the motive of the policy maker alone:

> *'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.*[324]

Alcohol restrictions imposed upon Aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures.

Justice Brennan found on the facts of *Gerhardy* that the support offered by the *Land Rights Act* to preserve the identity of the Pitjantjatjara, by giving them undisturbed and full access to their traditional lands, amounted to an intention to make provision for the adequate advancement of the Pitjantjatjara. In reaching this conclusion, Justice Brennan noted that:

> *If such a racial minority is denied those supports, its members may not only lose their own sense of identity but be unable to adopt the standards and customs of the majority*

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322 *Ibid*, Mason J at 103. See also Gibbs CJ at 87, Brennan J at 136-7, and Wilson J at 113.
323 *Ibid*, at 105.
324 *Ibid*, at 135.

> *or to cope with the pressures which assimilation with the majority entails.*[325]

Presumably, section 8(1) would today be construed in the light of developments in the last ten years, the progress of Aboriginal demands for self-determination and a divergence from the assimilationist model referred to by Justice Brennan. The Pitjantjatjara Council's submission noted that Justice Mason went beyond a purely assimilationist interpretation of special measures when he recognised the preservation of culture to be within the concept of human rights.[326] The Council argued that an alcohol restriction sought by the community with the purpose of restoring or protecting a culture would come within the concept of advancement.[327] However, an argument that cultural rights are sufficient need not be relied upon in isolation, as a reduction in harm caused by alcohol is advancement in itself. Alcohol restrictions which are sought by indigenous people, whether formal or informal, are likely to bear sufficient analogy to the purpose of the *Land Rights Act* in *Gerhardy*.

The circumstances must be such that the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms

The need for the special measure must match the purpose:

> *To determine whether the measure in question is intended to remove and is necessary to remove inequality in fact (as distinct from formal inequality), the circumstances affecting the political, economic, social, cultural and other aspects of the lives of the disadvantaged group must be known and an opinion must be formed as to whether the measure is necessary and likely to be effective to improve those circumstances... Do ... [the beneficiaries] require the protection given by the measure in order to enjoy and exercise their human rights and fundamental freedoms equally with others?*[328]

If indigenous communities decide that alcohol restrictions are necessary to enjoy political, economic, social or cultural freedom in fact, this criterion is arguably satisfied.

Other considerations

As well as satisfying these four characteristics, the measure must not 'lead to the maintenance of separate rights for different racial groups' nor 'be continued after the objectives for which [it was] taken have been achieved', in accordance with the provisos in Article 1(4) of the Convention. It is not necessary for the relevant special measure to have a sunset clause, provided that upon the achievement of the goal the special measure is discontinued. The special measure must therefore be kept under review in order to ascertain when the objectives have been achieved.[329] Further criteria can be extracted from the judgments in *Gerhardy*. First, it is not necessary that the special measure be incorporated into legislation.[330] Licence conditions or informal agreements may be special measures. Second, one factor to be taken into account in the assessment of what constitutes a special measure includes the result

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325 *Ibid*, at 136.
326 *Ibid*, at 105.
327 *Submission Number 1.7*, *op.cit.* p.54.
328 *Gerhardy, op.cit.* at 137.
329 *Ibid*, at 88 per Gibbs CJ, at 105-6 per Mason CJ, at 113 per Wilson J, at 139 per Brennan J.
330 *Ibid*, at 133

intended to be achieved by the persons promoting or taking the special measure.[331] Finally, members of the Court in *Gerhardy* emphasised strongly the need for evidence of the necessity to achieve the purpose of a scheme sought to be exempted as a special measure.[332]

The Commission is currently reviewing its procedures for classifying special measures. An examination of the special measures provision is also high on the agenda for the review of the *RDA*. Amongst proposals being considered are specific statutory guidelines incorporated by amendment into the *RDA*, and an amendment enabling Human Rights Equal Opportunity Commission or the Racial Discrimination Commissioner to grant binding exemptions from the operation of Part II. The review will also canvass amending the special measures provision as it applies to indigenous people. The Commonwealth Government could rely on the 'races power' in the constitution to make special laws for 'the people of any race for whom it is necessary to make special laws',[333] to amend the special measures provision, perhaps in line with the *Draft Declaration on the Rights of Indigenous Peoples.*

If a complaint is received by the Commission, and it appears that the allegedly unlawful act may constitute a special measure, an assessment will be made using the criteria laid down in *Gerhardy* as to whether it can be regarded as a special measure. In the event that the Race Discrimination Commissioner considers that the alcohol restriction in question is a special measure, it may decline to consider the matter under section 24(2)(a) of the *Human Rights and Equal Opportunity Act* 1986 (Cth) on the grounds that the relevant act is not unlawful. The Commission can review this exercise of power to decline. Judicial Review of this decision in the Federal Court is as of right.

The Commissioner can evaluate the background to a formal or informal agreement restricting alcohol sales. The fact that the Commissioner has expressed an opinion that a measure satisfies the criteria of a special measure will not in any way bind the Commission or preclude the Commission from hearing a complaint.

Will Alcohol Restrictions Qualify as Special Measures?

The assessment of whether a licence condition constitutes a special measure for the purposes of the *RDA* must be carried out on a case by case basis. In the following analysis of licence conditions, a) - d) refer to the criteria articulated by Justice Brennan.

a) A special measure confers a benefit on some or all members of a class. In the case of a restriction which affected members of a particular Aboriginal community (such as, for example, the Anangu Pitjantjatjara) the benefit, in general terms, that could be cited is the counteracting of the individual and collective destructive effect of alcohol. Specific examples of the benefits of restricting access to takeaway alcohol include:

- a reduction in the incidence of violent crime within the community, including violence against women;
- a reduction in the representation of Aboriginal people in the criminal justice system;
- an improvement in the health of individual abusers of alcohol;
- an improvement in the health and well-being of non-drinkers who experience violence,

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331 "Any fact which shows what the persons who took or who promoted the taking of a measure intended to achieve casts light on the purpose for which it was taken provided the measure is not patently incapable of achieving what was so intended." *ibid*, at 133.

332 per Gibbs CJ at 87-88, per Deane J at 152, per Mason J at 105-106 and per Brennan J at 142.

333 s.51(xxvi)

suffer problems resulting from an inadequate diet as a result of community income being spent on alcohol, and who suffer the stress that flows from involvement with alcohol abusers;
- a corresponding increase in available income to spend on necessities such as food, clothing and housing;
- removing the burden that alcohol places on existing health and medical services;
- a corresponding improvement in the health and medical resources available to communities to devote to other types of health problems;
- the fostering of an environment conducive to education; and
- a renewal of interest in the heritage of the community and the preservation of a community's identity.

These benefits all pertain to human rights recognised in *CERD* (which is appended to the *RDA*) and the *International Convention on Civil and Political Rights* (appended to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

In *Gerhardy*, the *Land Rights Act* bestowed the benefits associated with land rights upon the Anangu Pitjantjatjaraku. Justice Brennan considered the impairment of an individual's right of peaceful association to be a corollary of collective land rights. Similarly, restrictions upon the availability of alcohol to members of specified Aboriginal communities may impair the exercise of the right in Article 5(f) of *CERD*. However, as noted above, *Gerhardy* is authority for the proposition that the fact that a collective benefit involves some derogation from an individual's rights does not disqualify it from being a benefit for the purposes of this assessment.

b) The class that is to be benefitted would need to be based on race, colour, descent, or national or ethnic origin. This would be the case if negotiations are conducted between the publican or Liquor Commission and Aboriginal Communities. The restrictions are a result of the demands of a group based on race, and are expressly stated to be for the benefit of that group.

c) The sole purpose of the restriction must be to secure the adequate advancement of the community to which it applies. This purpose can be ascertained by referring to the background material to the imposition of the measures. A number of Aboriginal communities have requested restrictions or bans on the availability of alcohol for many years. Those requests appear in the submissions made by Aboriginal communities to the Sessional Committee,[334] the material which Aboriginal communities have submitted to licence hearings conducted by the Liquor Commission, the submissions received by this Report from Aboriginal communities[335] and submissions made to the RCIADIC. The requests appear in submissions to the Race Discrimination Commissioner. In the case of the Pitjantjatjara, the policy of banning alcohol was adopted at the 1983 Annual General Meeting in Alice Springs.

The wishes of the community to whom the restriction applies, and that community's concept of their own advancement, is the motivating force behind the restrictions. Community self-government and sovereignty were the major thrust of the recommendations of the Royal

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334 An example of a call for alcohol restrictions by Aboriginal people in Central Australia can be found in a summary of a 'grog meeting' convened at Harts Creek in 1991 in the Legislative Assembly of the Northern Territory Sessional Committee on Use and Abuse of Alcohol in the Community, *Report Number 2 op.cit* pp.219-222.

335 See especially the extensive evidence cited at p.57ff of *Submission Number 1.7, op.cit.*

Commission. This adds weight to the contention that appropriate measures demanded by communities should be within the scope of special measures.

d) Restrictions must meet a need. They must be designed on a case-by-case basis with the wishes and needs of individual communities in mind. The factors influential in designing appropriate measures could include the magnitude of the alcohol problem within the relevant community, the size of that community, the access of that community to liquor outlets and the remoteness of the community. The availability and efficacy of other options are also relevant, and the fact that communities have attempted to deal with the problem in a number of ways which have not been successful. Restrictions which did not address the needs of particular communities and proceeded, for example, by way of a blanket ban on the supply of alcohol to all Aboriginal people in the Northern Territory would clearly contravene the *RDA* and would obviously not qualify as a special measure.

By analogy with *Gerhardy,* the fact that some who have not called for the restriction are affected - realistically, there will be dissenters both within and outside the community - is not conclusive.

Evidence of the need for restrictions can be found in the submissions to this report, as well as those to the Sessional Committee and to the RCIADIC. These investigations all document the need for restrictions on the availability of alcohol. The Pitjantjatjara submission is particularly strong in providing evidence relevant to special measures, with evidence that the communities are disadvantaged, that takeaway sales add to the disadvantage and that the proposed restrictions are likely to advance the Pitjantjatjara communities as a group.

Finally, mention should be made of the possibility of complaints arising from programmes which qualify as special measures, but which are mistakenly undertaken and in their application affect customers who do not belong to the community which sought the restriction. In such a case, the fact that the restriction would otherwise have been a special measure does not help the person who has made the mistake. This problem can only be addressed by a licensee being vigilant in satisfying himself or herself that a person is a member of a community, in which case the licence condition would not be breached. However, wilful blindness should not excuse a licensee.

Conclusion

This and the previous two chapters give an outline of the legal considerations involved when Aboriginal communities seek alcohol restrictions to address the problem of alcohol abuse in their communities. The problem is illustrated by the example which led to the preparation of this Report, the calls by the Central Australian Pitjantjatjara communities for restrictions on alcohol availability. The issues raised, however, have broader application, and are relevant to attempts throughout Australia by Aboriginal and Torres Strait Islander peoples to limit or prohibit alcohol consumption.

The preceding discussion of special measures and indirect discrimination indicate that, while the *RDA* can accommodate indigenous community initiatives such as alcohol availability measures, it is a flawed vehicle for doing so. The Race Discrimination Commissioner also recognises that the *RDA* is based on a formal equality model, and is an unsatisfactory means of accommodating the broader issues relevant to indigenous peoples, particularly their rights to self-determination and protection of cultural integrity.

During the Review of the *RDA* in 1995/96 an examination of the special measures provision from an indigenous perspective will be undertaken. Again, to avoid an overly assimilationist definition of what constitutes discrimination, it may be necessary to amend section 8(1), the special measures provision, by relying on the races power (section 51(xxvi)) in the Commonwealth Constitution.[336]

The Pitjantjatjara Council has pursued a policy in Western Australia, South Australia and the Northern Territory requesting licence conditions similar to the following in certain liquor licences:

> *There shall be no sale or supply of any liquor for carrying off the premises to any person who is a resident of or travelling to or through any of the following areas:*
> *(a) the Mutitjulu living areas at Ayers Rock and Yulara.*
> *(b) the Pitjantjatjara freehold lands in the far north west of South Australia.*
> *(c) the Central reserves area of Western Australia.*
> *(d) Imanpa.*
>
> *Further, neither the licensee nor his servants or agents will knowingly sell or supply liquor for carrying off the premises to any person who intends to sell or supply that liquor to a person who is a resident of or travelling to or through any of the areas specified above.*

The longstanding policy of the Pitjantjatjara affiliated councils is that alcohol should not be available to members living within communities. The condition reflects the policy of the Pitjantjatjara, Ngaanyatjarra and Yankunytjatjara communities over the last fifteen years.[337]

Based on the analysis in the body of these chapters, this condition is not unlawful. It is based on residence and not race. As such it is an example of indirect discrimination. It is linked to these communities having declared themselves 'dry'. For this and other reasons mentioned in the body of this Report, it is likely to be reasonable. Furthermore, it is already in effect on an informal basis in the Northern Territory, and similar conditions are in effect on a formal basis in South Australia and Western Australia.

The Race Discrimination Commissioner is prepared to certify her opinion in appropriate cases that measures such as those in force in South Australia and Western Australia are not rendered unlawful by Part II of the *RDA*. The grant of a certificate would follow analysis of the applicability of reasonableness where the restriction was potentially likely to constitute indirect discrimination under the *RDA*, or alternatively an analysis of the exemption for 'special measures'. The certificates are not binding, but may be used as evidence before a Commission hearing into a discrimination complaint resulting from a community imposed liquor restriction.

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336 'to make special laws for the people of any race for whom it is deemed necessary.'

337 Recent support has been expressed in correspondence dated 21.1.94 to the Race Discrimination Commissioner from Josephine Mick, Chairwoman of the Pitjantjatjara, Ngaanyatjarra and Yankunytjatjara Women's Council; dated 7.3.95 from Andrew Lawson, Director, Ngaanyatjarra Council. The Mutitjulu Council has also expressed support in correspondence with the Liquor Commission dated 18.1.95.

CHAPTER 14
CONCLUSION

A procedure should be introduced whereby the Human Rights and Equal Opportunity Commission or its local delegate, or the Race Discrimination Commissioner, could provide some non-binding clarification as to whether or not an act may be discriminatory, and, if it is discriminatory, whether it can be saved by s.8(1) of the *Racial Discrimination Act* 1975 (Cth) (*RDA*).

In the Northern Territory and elsewhere it can be difficult for the Liquor Commission and licensees to tighten alcohol distribution arrangements with local Aboriginal communities if they are concerned that they are vulnerable to complaints under the *RDA*, even when it is the local communities themselves which are the strongest supporters of these tighter controls. Concern can arise from the risk of complaints by Aboriginal people who may not be members of the local Aboriginal communities, or who may be unaware of the arrangements or the reasons for them. There is also the problem of licensees deliberately breaching arrangements with the local Aboriginal communities.

The *RDA* appears to have been relied upon to frustrate calls by Aboriginal communities for tighter distribution agreements, just as the *RDA* has been used to challenge land rights legislation in the past. There has been a particular history of this in the Northern Territory, leading the Pitjantjatjara Council in its 1990 submission convincingly to allege discrimination by the Liquor, Racing and Gaming Commission for, among other things, refusing its demands to tighten alcohol distribution in the region and using the *RDA* as an excuse for doing so.[338]

There is a newly constituted Liquor Commission, but the problems in Central Australia have not yet been solved. There is no common rule among publicans. The Curtin Springs dispute is unresolved. These are distinct issues and both must be addressed. Lack of progress in arriving at a common rule should not affect Curtin Springs. The Liquor Commission has a broad power under section 33 of the *Liquor Act* 1975 (NT) to vary licence conditions. This power should be used.

Licensees in Central Australia seem to have support from the Liquor Commission for their contention that 'grog runners' cause the problems in Central Australia, not irresponsible licensees.[339] Although 'grog-runners' are undeniably a problem, this contention cannot be greeted without skepticism, especially in light of the enormous problems which developed since 1988 amongst the Mutitjulu, Imanpa and other communities since the Curtin Springs Roadhouse began selling unrestricted takeaway alcohol to their members. The point has been made that a six pack limit after six hours of takeaway drinking amounts to no limit at all. Most roadhouses in the area now restrict sales to six cans, whether these are drunk at the bar or taken away, and some do not sell to residents of dry communities.

The Liquor Commission should run a full inquiry as to whether Curtin Springs should have its licence revoked in light of events since 1988, including the breach of the informal agreement noted in 1985 in the letters sent by the then Chairman to the Pitjantjatjara Council. While grog running is a problem, it is an issue which can be dealt with separately. Irresponsible alcohol

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338 *Submission Number 1.7*, *op.cit*. p.93ff.

339 *Project Sunshine Information Package and Running Sheet*, *op.cit.* p.39: "Zelma Collins advised Geoff Langford the Commission had no evidence that the problems were stemming from Curtin Springs and had been informed from the licensees and communities in the area that grog running was a major problem and by putting the Project into operation we would be able to pinpoint where the problem was, i.e. with grog runners or licensees (sic)."

distribution to members of dry communities against the wishes of the communities is contrary to the principles of the *Liquor Act*. The fact that the problem is compounded by grog running is not particularly relevant.

Licences are now automatically renewed. If an Aboriginal community wishes to complain about the operation of a particular licence, it must lodge a complaint about the breach of an actual condition of that licence. Previously, Aboriginal communities had successfully challenged licence renewals in the Northern Territory Supreme Court, and obtained prerogative writs quashing Liquor Commission decisions to renew. A breach of local informal arrangements was held to be a relevant consideration to the decision to renew. This avenue is no longer available.

The issues surrounding the distribution of alcohol in the Northern Territory centre around principles of Aboriginal self-determination. Alcohol has had a destructive effect on Aboriginal communities. Efforts by communities to structure their environments to best advantage must not be obstructed. This means supporting the restrictive distribution of alcohol *if that is the stated wish of the community.* In certain circumstances, the special measures provisions of the *RDA* can be legitimately applied to exempt persons who are restricting the distribution of alcohol and thereby being in breach of the *RDA*.

The formal certificate reprinted in the community guide to this report states that a particular situation is either non-discriminatory or is saved from being racially discriminatory through the special measures provisions of s.8(1) of the *RDA*. This certificate could be sought in a number of circumstances, including when an Aboriginal community organisation is making submissions to a State or Territory liquor licensing body in support of restricted alcohol distribution in a specified geographical area or to members of a nominated community. At a minimum, the grant of this certificate would involve the community satisfying the four characteristics of the term 'special measure' as spelt out by Justice Brennan in *Gerhardy v Brown*.

If there are any further judicial pronouncements upon the characteristics required for 'special measures', or if any other legal requirements are introduced, they too will need to be satisfied before a certificate would be granted.

The certificate is not binding in law. However, it relies on the characteristics of special measures as accepted by the High Court in the case of *Gerhardy* and which have not been overturned in any subsequent cases. It has the effect of saying that in the view of the Race Discrimination Commissioner, on the facts available, the situation specified on the certificate would be extremely unlikely to be found to be racially discriminatory, on the grounds that a measure is either non-discriminatory and reasonable or saved by the special measures provisions of s.8(1).

The inclusion of such a certificate in a community submission regarding liquor licences would assist the State or Territory Liquor Commission to grant licences with restrictive conditions. The Liquor Commission could be confident the restrictive licences are unlikely to be discriminatory in the circumstances. The certificate is not binding, however, and the matter would still be open to judicial challenge. It would be a matter for the State or Territory Liquor Commission to satisfy itself about the efficacy of inserting restrictive conditions (such as those informal arrangements which currently exist between some licensees and local communities) into the licence, having regard to the provisions of the relevant liquor legislation. The granting of such a certificate may be relevant to the question of culpability of any person who was found to be in breach of the *RDA* whilst relying on such a certificate.

The use of discrimination and ‘special measures’ provisions is a cumbersome procedure. As already stated, this utilisation is dictated by the fact that the *RDA* is directed in the main towards individual rights. The concept of ‘collective rights’ that has become inherent to any debate on rights, and increasingly heard as the world's indigenous peoples move towards their own international instrument, is not reflected in the *RDA*.

Consideration of collective rights in areas such as the distribution of alcohol is a major consultative task and will result in recommendations for changes of the *RDA*. For that reason, the Race Discrimination Commissioner is satisfied with the production of a certificate as an interim measure to satisfy the current concerns about alcohol distribution, but acknowledges that legislative change must take place in the future to ensure that collective rights have legal status.

APPENDIX 1

Procedure Followed by the Race Discrimination Commissioner

a. *Submissions*
On 15 October 1990, a public notice was placed in the major Northern Territory newspaper, the *NT News*, calling for submissions to the Investigation and outlining its terms of reference. The public notice is reproduced as Appendix 2.

The Race Discrimination Commissioner also approached relevant organisations and Northern Territory governmental bodies advising them of the Investigation and inviting their submissions.

The Commission received eleven formal written submissions. They came from representative organisations of Aboriginal communities in Central Australia, the liquor industry and the Northern Territory Government. A full list of submissions received is provided in Appendix 3.

The submissions covered the specific matter of legislation which regulates alcohol distribution in the Northern Territory, as well as underlying social and economic issues which affect alcohol consumption, the effects of alcohol abuse, and strategies designed to combat alcohol abuse and its effects.

b. *Consultations*
The Race Discrimination Commissioner and policy and legal staff of the Commission undertook formal meetings and informal discussions with a range of individuals and organisations. During September 1990, the Acting Race Discrimination Commissioner and two Commission staff members visited Central Australia and Darwin to undertake consultations with the Northern Territory Government, members of the Sessional Committee and Aboriginal organisations.

The Sessional Committee On Use and Abuse of Alcohol by the Community in the Northern Territory was established in 1989 by the Northern Territory Legislative Assembly. The Committee investigated the accessibility and availability of alcohol in the Territory, relevant existing legislation, the social and economic consequences of current patterns of consumption and the services and programs available to address the consequences of alcohol abuse.

In August 1991 this Committee released a report entitled *Measures for Reducing Alcohol Use and Abuse in the Northern Territory* which made forty-one recommendations aimed at reducing what it regarded as the harmful levels of consumption of alcohol in the Northern Territory.

The Sessional Committee has subsequently undertaken two further Inquiries, one into "dry area" legislation, and the other into services and programs for the prevention and treatment of alcohol problems.

This Investigation has been mindful of the work of the Sessional Committee. The Race Commissioner has drawn on its recommendations in this Report.

The consultations included visits to the Aboriginal communities of Hermannsburg, which is now known as Ntaria and Yuendumu, both former missions in Central Australia. The consultations were particularly valuable to the Investigation. They provided an opportunity to explore specific concerns which had been raised in the submissions and allowed the former Race Discrimination Commissioner to gain a closer understanding of the complex problems facing Aboriginal people in relation to the use and abuse of alcohol.

A full list of people and organisations consulted is provided in Appendix 3.

c. *Research*
The Investigation also relied heavily on the *Report and Recommendations prepared by an Expert Working Group for the Royal Commission into Aboriginal Deaths in Custody* and the report of the National Aboriginal Health Strategy Working Party, *A National Aboriginal Health Strategy*. These, and a number of other reports provided valuable expert information on the nature of alcohol abuse by Aboriginal people and strategies to address the situation.

Additional research and consultations were carried out by the Commissioner, including a consideration of the *Racial Discrimination Act* 1975 (Cth) and the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) as they applied in the context of the restriction of alcohol consumption.

APPENDIX 2

Public Notice
Racial Discrimination Act 1975
Race Discrimination, Human Rights and the Distribution of Alcohol
Call for Submissions

The Race Discrimination Commissioner, Irene Moss, is examining race discrimination and human rights as they relate to the distribution of alcohol in the Northern Territory, especially in Central Australia.

Of particular interest to this examination are the laws relating to liquor licences.

Section 9 of the Racial Discrimination Act provides that:

> **It is unlawful for a person to do any act involving a distinction, exclusion, or preference based on race, colour, descent or national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural, or any other field of public life.**

Section 11 of the Act prohibits discrimination by reason of the race, colour, or national or ethnic origin of a person or the relative or associate of that person in his/her access to places and facilities to which members of the public or a section of the public is, entitled or allowed to enter or use.

Section 13 of the Act provides that it is unlawful for a person who supplies goods or services to the public or to any section of the public to refuse or fail on demand to supply those goods or services to another person or to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions on the basis of the race, colour, national or ethnic origin of a person or the relative or associate of that other person.

Section 20(1) of the Act confers various functions on the Commission including the function of enquiring into alleged infringements of the Act and the promotion of an understanding and acceptance of, and compliance with the Act.

Comment are invited from members of the general community, non-government and government organisations and licensees on race discrimination and human rights issues in relation to:

(1) the existing liquor laws;
(2) the effectiveness of existing liquor laws;
(3) methods of granting licences;
(4) suggested amendments (changes) to licensing laws;
(5) reasons for seeking amendments; and
(6) any other relevant comments.

APPENDIX 3

Submissions to the Investigation

1.1 Central Land Council, *Submission to the Human Rights and Equal Opportunity Commission on Race Discrimination, Human Rights and the Distribution of Alcohol,* February 1991.

1.2 Alice Springs Town Council, *Comments by the Alice Springs Town Council to the Human Rights and Equal Opportunity Commission: Race Discrimination, Human Rights and the Distribution of Alcohol*, November 1990.

1.3 Peter Jull, Acting Director of The Australian National University North Australia Research Unit, October 1990.

1.4 Central Australian Aboriginal Congress Inc., *Race Discrimination Act 1975; Race Discrimination, Human Rights and the Distribution of Alcohol*, November 1990.

1.5 Tangentyere Council Inc., *Submission Concerning the Distribution of Alcohol in Central Australia to the Human Rights and Equal Opportunity Commission*, January 1991.

1.6 Northern Territory Government, *Human Rights and Equal Opportunity Commission Inquiry into the Distribution of Alcohol in the NT*, August 1991.

1.7 Pitjantjatjara Council Inc., *Submission Concerning Placing Conditions on Liquor Licences for the Purpose of Reducing Availability of Alcohol in Anangu Communities to the Human Rights and Equal Opportunity Commission,* January 1991.

1.8 Peter Severin, Licensee, Curtin Springs Station.

1.9 Steve Sims, Manager Curtin Springs Station*, Operational Update on Handling the Alcohol Crisis*, May 1991.

1.10 Confidential

1.11 Australian Hotels Association, Northern Territory Branch, *Racial Discrimination Act 1975: Race Discrimination, Human Rights and the Distribution of Alcohol*, November 1990.

Consultations Undertaken by the Investigation During Visit to the Northern Territory, September 1991

CENTRAL AUSTRALIA

Alice Springs, Tuesday 17 September 1991
Ms Maureen Tehan, Solicitor, Pitjantjatjara Council and Ms Maggie Kavanagh, Coordinator of the Ngaanyatjarra, Pitjantjatjara, Yankunytjatjara Women's Council

Betty Pearce, Women's Coordinator, Tangentyere Council

Eric Poole MLA, Chairman, NT Legislative Assembly Sessional Committee on Use and Abuse of Alcohol by the Community

Hermannsburg (Ntaria), Wednesday 18 September 1991
Gus Williams, Director, Community Council

Consultations with members of the community and attendance at a specially convened women's meeting

Yuendumu, Wednesday 18 September 1991/Thursday 19 September 1991
Sister Evelyn Simmons, Nursing Sister

Sergeant Wayne Puxty

Rex Granites, Chairman, Yuendumu Town Council

Anne Mosey, Coordinator, Yuendumu Women's Council

Judy Nampijima Granites, Maggie Napangka White and other members of Yuendumu Women's Night Patrol

Attendance at full community meeting

Alice Springs, Friday 2O September 1991

Richard Allmark, Regional Manager, Aboriginal and Torres Strait Islander Commission

John Liddle, Director of the Central Australian Aboriginal Congress

Doug Walker, Director, and Lana Abbott, Project officer, Central Australian Aboriginal Planning Unit

Wayne Pash, Central Land Council

Tangentyere Council

DARWIN

Monday 23 September 1991
Vai Stanton, Coordinator, Foundation of Rehabilitation With Aboriginal Alcohol Related Difficulties

Neville Jones and Ray Hempel, Chief Ministers Department; Peter Conran, Secretary, Department of Law, and Carmel O'Loughlin, Director, Office of Women's Affairs

Pat Davies

Ross Worthington, Director, Northern Australia Development Unit, Gordon Pitts, Regional Director, Department of Social Security, and staff

Mick Dodson, Director, Northern Land Council

Tuesday 24 September 1991
Kelvin Rae, Chairman, Northern Territory Liquor Commission

Denella Beer and staff, Aboriginal Women's Resource Centre

Wendy Eccleston, Executive Secretary, Gordon Symonds Hostel

Neil Bell MLA, member of the Legislative Assembly Sessional Committee on Use and Abuse of Alcohol by the Community

Wednesday 25 September 1991
Ben Cubillo, Field officer, Department of Social Security

APPENDIX 4

Relevant International Instruments

The concept of human rights underpins the *Racial Discrimination Act* 1975 (Cth). The Act gives force to the *International Convention on the Elimination of All Forms of Racial Discrimination* (*CERD*), which is appended as a Schedule to the legislation.

Article 1(1) of *CERD* defines racial discrimination as:

> *any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights of fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

Article 1(4) and 2(2) allow for special measures. Article 5 provides:

> *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
>
> *(a) The right to equal treatment before the tribunals and all other organs administering justice;*
>
> *(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government official or by any individual, group or institution;*
>
> *(c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service*
>
> *(d) Other civil rights, in particular:*
>
> *(i) The right to freedom of movement and residence within the border of the State;*
>
> *(ii) The right to leave any country, including one's own, and to return to one's country;*
>
> *(iii) The right to nationality:*
>
> *(iv) The right to marriage and choice of spouse;*
>
> *(v) The right to own property alone as well as in association with others;*
>
> *(vi) The right to inherit;*
>
> *(vii) The right to freedom of thought, conscience and religion;*
>
> *(viii) The right to freedom of opinion and expression;*
>
> *(ix) The right to freedom of peaceful assembly and association;*

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks.

The *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), which established the Human Rights and Equal Opportunity Commission and provides for its administration, gives force to a further five international instruments. Schedule 2 to the Act is the *International Covenant on Civil and Political Rights* (*ICCPR*). It defines 'human rights' as:

> *... the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument. (Article 3)*

In ratifying these conventions, the Australian Government has agreed to implement all legislative, judicial and institutional measures required to ensure compliance with them. It has stated before the international community that the principles of the instruments will be reflected in the lives of all Australians.

An examination of these rights reveals an apparent tension between individual rights and collective rights, a tension at the core of this Report. It will be apparent that some rights are expressed in terms of the rights of the individual, and some, such as articles 1 and 27 of the *ICCPR* (see below), in terms of group rights.

Rights and freedoms in the *ICCPR* and relevant to this Report are contained in the following Articles:

1(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2(1) Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3 The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

> *4(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his (sic) status as a minor, on the part of his (sic) family, society and the State.*
>
> *26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.*
>
> *27 In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

Rights set out in the *Declaration of the Rights of the Child* are also relevant to this Report. They include the following principle:

> *2 The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him (sic) to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.*

The *Convention on the Elimination of All Forms of Discrimination Against Women* is also relevant. That Convention provides that measures shall be taken to ensure the full development and advancement of women in the political, social, cultural, civil or any other field. It includes the following article:

> *3 State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

The instrument which may be of most relevance to indigenous people is still in draft form and has not yet been ratified. The content of the *Draft Declaration on the Rights of Indigenous Peoples* has been negotiated by representatives from the United Nations Working Group on Indigenous Populations, an international representative body. The instrument represents the first involvement of indigenous peoples in the identification and definition or human rights appropriate to their status as first peoples.

Article 3 states:

> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Article 4 states:

> *Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the state.*

Both articles, if ratified, will further support arguments that controls such as alcohol restrictions, which are put in place by Aboriginal communities themselves, are not in breach of individual human rights.

The Commission's Reporting Requirements vis a vis International Instruments

The Human Rights and Equal Opportunity Commission is responsible for reporting to government on compliance with the articles of the international instruments. The *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) governs the functions of the Commission in discharging its reporting requirements under the five instruments appended to the Act. Breaches of the instruments must be reported by the Commission, but an exception exists where a breach is a positive measure intended to advance a disadvantaged group. Section 11(2)(a) provides that the Commission shall not:

> *regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(e) by reason of a provision of the enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons.*

The provision reflects a philosophy that laws may in some circumstances be required so that disadvantaged groups can secure advantages enjoyed by the broader community, and that equality before the law will not in such circumstances require the same laws for all. Where a tension between individual rights and group rights is resolved in favour of group rights the Commission in its reporting function may not have to regard the result as a breach of human rights.

APPENDIX 5

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(extracted from Pitjantjatjara Council Inc. Submission)

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