SUPREME COURT OF QUEENSLAND

CITATION:	*Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2008] QSC 305
PARTIES:	**AURUKUN SHIRE COUNCIL** (Applicant) v **CHIEF EXECUTIVE, OFFICE OF LIQUOR GAMING AND RACING IN THE DEPARTMENT OF TREASURY** (Respondent) **KOWANYAMA ABORIGINAL SHIRE COUNCIL** (Applicant) v **CHIEF EXECUTIVE, OFFICE OF LIQUOR GAMING AND RACING IN THE DEPARTMENT OF TREASURY** (Respondent)
FILE NO/S:	516 of 2008 528 of 2008
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	27 November 2008
DELIVERED AT:	Cairns
HEARING DATE:	30 October 2008
JUDGE:	Jones J
ORDER:	**In each proceeding; -** **1. Refuse the application for a declaration that the amendments to the Liquor Act 1992 brought about by the Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008 are invalid.** **2. Dismiss the applications for judicial review of the decisions of the respondent.** **3. Reserve the question of costs, allowing each party to make submissions in writing within 14 days from the date hereof.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEW

OF PARTICULAR DECISIONS – where the decision maker refused to extend the operation of the liquor licence of the first respondent – whether the legislation by which the licence was made to lapse was invalid by reason of inconsistency with the *Racial Discrimination Act* 1975 (Cwth) – whether the decision maker failed to have regard to the unavailability of certain health and social services to deal with the impact of the discontinuation of the licence

Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008 (Qld)
Acts Interpretation Act 1954 (Qld)
Judicial Review Act 1991 (Qld)
Liquor Act 1992 (Qld)
Racial Discrimination Act 1975 (Cwth)

COUNSEL: DJ Campbell SC and G Del Villar for the applicants
M O Plunkett for the respondent

SOLICITORS: Bottoms English for the applicants
Crown Law for the respondent

[1] By its amended application, the applicant seeks, pursuant to Part 5 of the *Judicial Review Act* 1991 ("JRA"), a judicial review of decisions made by the respondent affecting the general liquor licences held by the respective applicants and alternatively, a declaration that certain provisions of the *Liquor Act* 1992 are invalid. The licence held by the Kowanyama Aboriginal Shire Council has not been operative since 30 July 2008. This Council pursues its application only for a determination of whether it can lawfully retain the stocks of liquor in its possession. It will be convenient therefore to deal in full only with the issues raised by Aurukun Shire Council (hereinafter "the applicant").

Background facts

[2] The applicant is an elected body pursuant to the *Local Government Act* 1993 and subject to the provisions of *Local Government (Aboriginal Lands) Act* 1978. It manages the Aurukun Aboriginal Community situated approximately 100 km south of Weipa in Far North Queensland and as well is the trustee of the land occupied by the community. The community numbers approximately 1200 persons.

[3] Since January 2003 there has been in place at the community an alcohol management plan whereby alcoholic liquor cannot be brought into the Shire Council area. The only place where alcohol can be legally sold and consumed is at a tavern under the applicant's control, the Three Rivers Tavern. The applicant holds a general Liquor Licence issued by the respondent. That licence is heavily restricted. Since 26 March 2008, only beer with an alcohol content less than 4% can be sold there. Bottled spirits are banned and pre-mix spirits can only be sold with a meal. The sale of takeaway alcohol is banned. The tavern trades for only

nine hours per week from 4.30 pm to 7.30 pm on Mondays, Tuesdays and Wednesdays.[1]

[4] In early 2008, the Queensland Government introduced a new policy concerning who may apply for and hold a liquor licence. The policy was brought into effect on 1 July 2008 upon assent to the *Aboriginal and Torres Strait Island Communities (Justice, Land and Other Matters) and Others Acts* 2008 (the "amending Act"). This change was most significantly manifested in an amendment to s 106 of the *Liquor Act* wherein subsection (4) provides:-

> "(4) Also, a local government, corporatised corporation or relevant public sector entity may not apply for or hold a general licence."

This amendment made necessary certain transitional provisions which are found in ss 276-281 of the *Liquor Act* 1992 as amended (hereinafter "the Act"). As a consequence the general licences held by the applicant and other local governments were to lapse. There remains the potential for a general licence for the tavern to be held by a person not otherwise prohibited by the terms of s 106.

Statutory provisions

[5] The relevant transitional statutory provisions are as follows:-

> *"277* ***Application of sdiv 1***
>
> *This subdivision applies to a general licence (the* ***relevant licence)*** *held immediately before the change day by a local government, corporatised corporation or relevant public sector entity, other than the Torres Strait Island Regional Council.*
>
> *278* ***Lapsing of relevant licence***
>
> *(1) The relevant licence lapses at the beginning of the change day.*
> *(2) However, subsection (1) does not apply if the chief executive decides, under section 279(1), that the licence is to continue in force from the change day.*
> *(3) Despite any other Act or law, no compensation is payable by the State to any person because of the operation of subsection (1).*
>
> *279* ***Continuation of relevant licence***
>
> *(1) The chief executive must before the change day –*
> *(a) Decide whether the relevant licence is to continue in force from the change day; and*
>
> *(b) If the chief executive decides that the licence is to continue in force from the change day – decide the day (the* ***relevant day****, not later than 31 December 2008 until which the licence is to continue in force.*

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1 Exhibit "DT-1" to affidavit of Dominic Tennison

(2) In making the decisions mentioned in subsection (1), the chief executive must have regard to the following –

(a) any health and social impact on the relevant community of the licence continuing, or not continuing, in force;

(b) the availability of health and social services to deal with any health and social impact on the relevant community of the licence continuing, or not continuing, in force.

(3) If the chief executive decides that the licence is to continue in force, the chief executive must as soon as practicable give the licensee written notice of the decision and relevant day.

(4) If the chief executive decides that the licence is to continue in force, the licence continues in force until the relevant day and lapses at the end of that day.

(5) However, subsection (4) stops applying if the licence is surrendered or cancelled under this Act.

(6) Despite any other Act or law, no compensation is payable by the State to any person because of the operation of subsections (1) and (4).

(7) In this section –

***Relevant community** means the community of the locality in which the premises to which the licence relates are situated."*

[6] The amending legislation reversed the earlier provisions whereby the holding of general licences in a community area could only be held by a board or entity prescribed by regulation.[2]

The decisions

[7] The applicant claims there are two decisions which are susceptible to review in this proceeding.

[8] On 15 May 2008, the applicant made a submission in writing to the respondent for a continuation of its general licence to 31 December 2008.[3] By letter dated 23 June 2008 the respondent extended the general licence to 1 November 2008 and gave a Notice – Lapse of Licence effective at that date.[4] This is the first decision. In his accompanying reasons the respondent said –

> "Pursuant to sections 278 and 279 of the *Liquor* Act, I have determined that a continuance of the licence be granted and the licence will lapse on 1 November 2008. This means that from 1 November 2008 the Aurukun Three Rivers Tavern will not be a licensed premises and no liquor may be sold or supplied from the premises. I have enclosed a notice of Lapse of General Licence for your attention.
>
> …
>
> I have determined that the current operation of the licensed premises can continue until 1 November 2008 to coincide with improved

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2 Section 32 of *Indigenous Communities Liquor Licences Act* 2002

3 Affidavit of Neville Thomas Duncan filed 17 October 2008 – Exhibit "NTD-2"

4 This in the terms of the legislation became the "**relevant day")**

> services being provided to the community. However, the continuance of the licence will not prevent the division from taking action against the licence should problems arise during the continuance period."[5]

It is common ground that the delivery of improved services there being referred to was a determining factor in deciding on 1 November 2008. These included provision of a Well Being Centre, Police Communities Youth Club activities and other extensive alcohol treatment services.[6] The evidence established that not all of those services were in place by 1 November 2008.

[9] On 19 September 2008, the applicant sought an extension of the continuance of the licence beyond 1 November 2008 until 30 December 2008 citing as the basis the delay its attempts to find a replacement licensee and the importance to the community of having a controlled alcohol service. This latter argument received unqualified support from the Queensland Police Service.

[10] The application for further extension was refused by the respondent on the grounds that he did not have power to grant a second extension of the licence, his power to do so having been excluded by the terms of s 279(1), which provided that the "Chief Executive **must before** the change day (1 July 2008)" decide on the continuance and its duration. The respondent considered himself to be excluded thereby from any further consideration of the matter.[7] The applicant identifies this is as the second decision. The respondent contends that this was not in truth "a decision". Rather it was an assertion by the respondent of his lack of power to make a decision.

The issues

[11] The application for judicial review in respect of the first decision is made out of time being filed more than three months after it was communicated to the applicant on 23 June 2008. So the first issue is whether an extension of time should be granted to allow the applicant to proceed. Section 46(1)(b) of *Judicial Review Act* 1991 ("the JRA") dictates that any application for review must be made as soon as possible but in any event within three months after the day of the decision, that is, in this instance before 24 September 2008. The application was in fact filed on 21 October 2008. The application so far as it relates to the second application is within time.

[12] The Court has the power to extend time which power should be exercised on broad considerations of the explanation for the delay, notions of what was fair and equitable in the circumstances, whether any prejudice would be occasioned to the respondent, the public interest and the merits of the substantial application for

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5 Ibid Exhibit "NTD-3"

6 Affidavit Johannes Bensch – Exhibit "JFB-1"; Affidavit of Dominic Tennison – Exhibit "DT-3" at 00 7-8

7 This is consistent with the information sheet sent to the applicant before it made its application (Exhibit "NTD-1" to Affidavit of Neville Duncan) and repeated in his letter of 15 October 2008 Exhibit "NTD-6".

review. *Hoffman v Queensland Local Government Superannuation Board*[8]. Moreover the applicant is seeking a declaration as to the validity of the relevant sections of the Act. As to that issue, if it be the case that the sections are invalid then no time limit question arises.

[13] The period of that delay is relatively short and is probably accounted for by the difficulty in obtaining instructions from a corporate litigant which has a duty to consult and which is based in a remote location. The granting of an extension of time in respect of the first decision depends on the applicant's prospects of success which in turn is linked to other substantial matters which are not touched by this time limitation. I shall therefore grant the extension of time and turn to consider the substantive issues.

[14] The primary argument of the applicant is that the legislation by which the licence was made to lapse is invalid by reason of its inconsistency with the provisions of the *Racial Discrimination Act* 1975 (Cwth) (hereinafter "RDA") and its adoption of the International Convention on the elimination of all forms of racial discrimination ("the Convention").

[15] Secondly, if the enactment is valid, the respondent's decisions are reviewable on the grounds of error on the part of the decision maker. With respect to the first decision, the alleged error arises on his failure, as required by s 279(2) to have regard to the "health and social impact" on the community of the licence continuing and of the availability of health and social services to deal with any such impact. With respect to the second decision, the alleged error was in the respondent's failure to make the decision at all because of his perception of a lack of power to decide.

[16] The respondent challenges each of these grounds asserting that the Queensland legislation was within its legislative power and did not offend the RDA. The respondent argues that the applicant is not a natural person that can be discriminated against and further that, within the meaning of s 10 of RDA, the legislation does not have the effect of denying rights enjoyed by persons of other race. The respondent also contends that the two decisions are not reviewable under JRA. I shall deal with each issue inturn.

Validity of the legislative provisions

[17] The challenged provisions are those brought into force by the amending Act. The specific question was whether the exercise of the powers defined in the transitional provisions (ss 278 and 279) were inconsistent with the RDA. But these powers are only incidental to the more major interference with the applicant's rights occasioned by s 106(4) whereby there was imposed a prohibition on a local government applying for or holding a general licence.

[18] There is no doubt that the making of such a provision was within the legislative power of the State. The applicant does not suggest otherwise. There is no doubt that the RDA binds the State of Queensland and the agencies of the State. The question is, whether those provisions are, for the purpose of s 109 of the

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8 [1994] 1 QdR 369

Constitution of Australia, inconsistent with the provisions of the Commonwealth legislation embodied in the RDA. This may arise directly if it is not possible to obey both Commonwealth and State laws or the conflict may be indirect. The distinction is unimportant in the circumstances of this case. *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[9].

[19] The terms of s 106(4) and the associated transitional provisions of the Act are of general application. But the reality is that the only local governments holding such licences are Aboriginal Councils. The applicant is a non-natural person without any characteristic of race, colour or national or ethnic origins and is thus not directly a target of discrimination based on race. However, Mr Campbell of Senior Counsel for the applicant contends that the discrimination occurs because of **the effect** of the amending legislation. He relies upon s 10 of RDA which relevantly provides:-

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or 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 national 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.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

[20] This section was considered by the High Court in *Western Australia v Ward*[10] where from the judgment of the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) the following appears:-

> "105. A number of points may be made at once. First, the subsection does not use the word "discriminatory" or cognate expressions. Yet these terms are used throughout the authorities in which s 10(1) has been considered. That to which the subsection in terms is directed is the *enjoyment* of rights by some but not by others or to a more limited extent by others; there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin. "Enjoyment" of rights directs attention to much more than what might be thought to be the purpose of the law in question. Given the terms of the Convention which the RDA implements (the International Convention on the Elimination of all Forms of Racial Discrimination) that is not surprising. The Convention's definition of racial discrimination refers to any distinction, exclusion, restriction or preference based (among other things) on race which has the purpose *or effect* of nullifying or impairing (again among other things) the enjoyment of certain rights. Further, the basic obligations undertaken by States party to the Convention include taking effective measures to nullify laws which have *the effect* of

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9 [1979-80] 142 CLR 237 per Mason J at p 260

10 [2002] 213 CLR 1

> creating or perpetuating racial discrimination (Art 2, s 1(c)). It is therefore wrong to confine the relevant operation of the RDA to laws whose purpose can be identified as discriminatory (202)."

[21] It does not matter then that the prohibition relates to a corporate entity if its effect is to discriminate against individuals on racial grounds. In *Koowarta v Bjelke-Petersen*[11], Mason J considered whether a particular individual who was an associate of a corporate entity had standing to challenge a government's refusal to transfer a lease to the entity. He said (at p 236):-

> "By virtue of s 22(a) of the *Acts Interpretation Act* 1901 (Cth) a reference in a statute to a "Person" includes a reference to a body corporate, unless a contrary intention appears. It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, "person" should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s 12 being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of race, colour or national or ethnic origin of any associate of that corporation. It is also submitted that the reference in the concluding words to "any relative or associate of that second person" is inappropriate to a corporation. Certainly that is so of "relative", but a corporation may have an "associate". The concluding words are therefore quite consistent with the "second person" denoting a corporation as well as well as an individual."

[22] This application is not concerned with the standing of any individual nor has any individual been made a party to the proceeding. Indeed, as Mr Plunket of Counsel for the respondent points out, there are no pleadings or particulars which specify precisely what actions are relied upon as being discriminatory.

[23] These specific articles of the Convention which the applicant argues were breached are:-

> Article 5(d)(ix) – right to freedom of peaceful assembly and association;
> Article 5(e)(vi) – right to equal participation in cultural activities;
> Article 5(f) - right of access to any place or service intended for use by the general public.

[24] As to whether there has been a breach of s 10 of RDA, the test is that identified by the majority in *Ward* at paras [115]-[116] as follows:-

> "115. In determining whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a right (216); it does not require that the relevant law, or an act authorised by that law, be "aimed at" native title, nor does it require that the law, in terms, makes a distinction based on race. Section 10(1) is directed at "the practical operation and effect" of the impugned legislation and is "concerned not merely with matters of

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11 [1983-4] 153 CLR 168

> form but with matters of substance" (217). Mason J in *Gerhardy* put the matter this way (218);
>
> > "[Section] 10 is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour or origin, or do not enjoy that right to the same extent." (Original emphasis.)
>
> 116. Some care is required in identifying and making the comparison between the respective "rights" involved…"

[25] The right which could not be enjoyed, either by the applicants or persons associated with it, seems to me to be simply that Aboriginal people at Aurukun upon the lapsing of the licence, would not have the opportunity to purchase alcohol at the tavern. The evidence shows that the tavern was frequented also by non-Aboriginal persons, particularly workers employed at a nearby mine site. They too would be denied that access to alcohol service. So the prohibition is effectively a blanket ban and does not result in a person of a particular race not being able to enjoy a right that is enjoyed by persons of another race.

[26] More significantly, I have difficulty in conceptionalising how this regulatory prohibition has anything to do with any of the specific rights identified in Article 5. There is no discrimination affecting freedom of assembly nor participation in cultural affairs. As mentioned above, denial of access to the tavern brought by the prohibition is the same as for the general public. But Article 5 does not set out the entire list of rights that might be protected by RDA. In *Gerhardy v Brown*[12] Mason J referred to the broader concept in the following terms (at p 101):-

> "The questions whether the lack of enjoyment of the right of access arises by reason of a law whose purpose and effect is to create racial discrimination and whether the right of access given by s 18 is a human right or fundamental freedom or is otherwise a right of a kind referred to in Art. 5 of the Convention may be considered together. Although s 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 s 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.
>
> In deciding whether the right of access given by s 18 is a human right or fundamental freedom we encounter the ever present problem of defining or describing the concept of human rights. The expression "human rights" is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society. The expression includes claims of individuals as members of a racial or ethnic group to equal treatment of the members of that group in common with other

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12 (1985) 159 CLR 70

> persons and to the protection and preservation of the cultural and spiritual heritage of that group. As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom. This is not a matter with which the Convention concerns itself."

Consequently not every human right is protected by the statute. As sections are limited to protecting those particular rights and freedoms with which the Convention is concerned. *Ebber v HREOC*[13].

[27] In my view, neither the terms of the legislative provisions, nor the facts before me give rise to any inconsistency with the provisions of the *Racial Discrimination Act*.

[28] The respondent also argues that the legislation comes within the "special measures" provisions of RDA. See s 8 and Articles 1(4), 2(2). By reason of the views expressed above it is not necessary to give further consideration to this point.

Is the first decision reviewable?

[29] The decision to continue the applicant's licence beyond the change day, 1 July 2008, required of the respondent, as decision maker, a balancing of a number of competing interests. The material before him detailed a long history of alcohol related problems at Aurukun and as well the reduction in the scale of those problems after the imposition of restrictions as to the type of alcohol sold.[14] The respondent also had available assessments made by various stakeholders involved in the care of residents at Aurukun as to the impact of the cessation of the applicant's liquor licence. For example, the concern of the Queensland Police Service was expressed in the following terms:-

> "The cancellation of the licence at Aurukun will create an increased workload either in Aurukun with an increase in sly-grog or in its neighbouring divisions of Weipa and Coen with displaced persons…
>
> It is the reporting officer's opinion that the since the implementation of light beer at the Three Rivers Tavern, the licensed premises has no longer been major contributor to disturbances or violence within the community and the benefits of the licence being maintained at the present allocation or even extended to operate 5 days a week, may in fact outlay the adverse effects of removing the licence completely, if the present alcohol restrictions in relation to types of beer, namely light beer only are retained.
>
> The adverse effects of displacement and/or sly grog are in fact a greater danger on the community."[15]

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13 129 ALR 455 AT P 477

14 Affidavit of Dominic Tennison sworn 29 October 2008

15 Ibid Exhibit "DT-3" at p 149

Other assessments included observations and opinions as to continuing harmful effects of the abuse of alcohol even with the imposed restrictions.

[30] Section 279 required the respondent to have regard to the following:-

(a) Any health and social impact on the relevant community of the licence continuing, or not continuing, in force;

(b) Availability of health and social services to deal with any health and social impact on the relevant community of the licence continuing, or not continuing.

It is evident from the extensive report prepared for the respondent and dated 17 June 2008 that these matters were considered.[16] In the overall summary the following remarks appear:-

> "There are extensive services planned for delivery in the period to 31 December, which are expected to address the impact of the closure of the licensed premises. These services should all be in place by October 2008. However some extra time could be required to allow for delays in implementation."[17]

[31] Subsequent events have shown that not all of the expected health and social services had in fact been delivered but this failure on the part of others to meet the respondent's expectation is not a basis for impugning his decision. Whether there remains a power to revoke or to amend the decision based on these new circumstances will be considered later in these reasons. In short, the first decision was administrative in character. The applicant does not suggest that it was not made with due regard to the legislative provisions nor with due process.

[32] The basis upon which the applicant asserts that the respondent's decision is reviewable is that there is no rational or logical basis for continuing the licence only to 1 November 2008 as opposed to 31 December 2008. Moreover, the decision disregarded the Queensland Police Service advice and did not address the potential for violence.

[33] The respondent contends that these arguments are no more than an attempt to have an impermissible merits review. At best, it leaves the applicant in no better position than arguing that the decision was so unreasonable that no reasonable CEO could have made it in the sense described in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[18] .

[34] The respondent was the person duly empowered to make the decision. The evidence considered by the respondent before making the first decision was quite wide ranging. As appears from the foregoing, he was clearly aware of his legal obligation to consider the matters referred to in s 279(2).

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16 Ibid Exhibit "DT-3"

17 Ibid at p 56

18 [1948] 1 KB 223; see also *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] 197 CLR 611

[35] I am not persuaded that the first decision was tainted by any error or that it was unreasonable in the *Wednesbury* sense.

Response to the applicant's request for extension (second decision)

[36] By letter dated 19 September 2008 the solicitors for the applicant sought to have the respondent extend the period of continuance of the licence from 1 November (erroneously stated as 31 September) 2008 until 31 December 2008. The basis of this request was that there had been delay in the tender process by which a new licensee was to be chosen and the continuing of the operation was important –

- To provide the local community with a place where controlled service of alcohol can be monitored;
- To maximise opportunities for the community to benefit from the provision of meals;
- To provide employment within the community;
- To provide food and takeaway service for the community.[19]

[37] The respondent in his letter of reply referred to the fact that the legislation prohibits the applicant from holding a licence and that there was no scope for him to decide to continue the licence after the change date.[20]

[38] The applicant argues that the decision is reviewable because the respondent erred in denying to himself power to vary the terms of the licence pursuant to s 111(1) of the *Liquor Act* or alternatively the amend the first decision pursuant to s 24AA of the *Acts Interpretation Act* 1954.

[39] As to the power to vary a licence pursuant to the s 111 of the *Liquor Act*, this does not seem to me to be apt where the issue is whether or not the licence continues to exist. Rather the purpose of the section is to provide the means for changing the conditions or the details associated with an existing licence.

[40] The focus on the power given to a decision maker under s 24AA of the *Acts Interpretation Act* 1954 evoked the following submissions from the applicant. Firstly, the scope of the section is wide unless its application is displaced by a "contrary intention appearing in any Act". Section 4 of *Acts of Administration Act*. Secondly, the applicant argues that the purpose of requiring a decision about the continuance prior to 1 July was simply to prevent the licence lapsing and that whilst the licence remains on foot further extensions may be granted. Thirdly, because of the requirement to consider the availability of health and social services, the changed circumstances of those services not being available as at 1 November 2008 compels the use of the power to extend the licence. Finally, the applicant contends that the respondent's suggestion there was no power to extend the period of the licence, cannot be accepted because it would mean that his first decision was unreviewable by any tribunal.

[41] The respondent refers to the fundamental theme running through the statutory scheme of the *Liquor Act* which is to "minimise harm caused by alcohol abuse and

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19 Affidavit Dominic Tennison Exhibit "DT-2" at pp 27-28

20 Ibid at p 29

misuse and associated violence".[21] There can be no doubt that the trigger for the amending legislation was an attempt to minimise the harmful effects of alcohol abuse as had been observed in Aboriginal Council lands. The respondent contends that a consideration of the legislative scheme shows unmistakably the intention that a final decision about the lapsing of the licence was to be made before 1 July 2008. Sections 278 and 279 are transitional provisions. The force of the amending legislation was that from 1 July 2008 local councils were prohibited from holding a general licence. The lapsing of a general licence occurs by automatic operation of the scheme subject only to the transitional provision for the continuation of certain licences. The manner in which a continuance was to be decided upon and the relevant considerations were specifically identified. The date of the lapse of licence was to be fixed before the change day. In the case of the applicant that extension was confined by the terms of the Notice – Lapse of General Licence dated 23 June 2008.[22] That first decision having been made the respondent had exhausted his power. As a consequence the respondent argues that there was no second decision as such simply because he has no power to make one. Thus, judicial review is not an appropriate remedy in the circumstances.

[42] The issue between the parties will be determined on the question whether the legislative intent inherent in the amending provisions was to deny any continuance of a general licence beyond what was determined before 1 July 2008. This becomes a matter of interpretation of the relevant terms. In *Minister for Immigration and Ethnic Affairs v Kurtovic*[23], Gummow J said:-

> "…there was "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise"…however, s 33(1) of the *Acts Interpretation Act* 1901 (Cth) (which was modelled upon s 32(1) of the *Interpretation Act* 1889 (UK)) provides that where an Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed "from time to time as occasion requires". But in any given case, a discretionary power reposed by statute in the decision maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be *ultra vires*. The matter is one of interpretation of the statute conferring the particular power in issue."

[43] In *Firearm Distributors Pty Ltd v Carson and Ors*[24] Chesterman J considered a number of authorities illustrating the application of this approach and concluded at para [40] as follows:-

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21 E.g. s 107C of the *Liquor Act*
22 Exhibit "DT-1" at p 3
23 (1990) 21 FCR 193/211
24 [2000] QSC 159

> "Nevertheless, the underlying reasoning made explicit by Vaisey J, and adverted to by Gummow J and Lawton LJ is, that where a power is adjudicative in nature, affecting rights or liabilities, it can only be exercised once. Such a view would accord with the law relating to arbitrarial awards and judicial pronouncements. The common law very early insisted that an arbitrator could not vary or recall an award. The rule was very strict."

[44] Whilst the decision of the respondent might be more correctly characterised as administrative, the legislative scheme was directed quite distinctly to the prohibition of Aboriginal councils holding a general liquor licence. This is evident from the terms of the legislation and the setting of specific dates upon which the changes were to take effect. This is to be contrasted with a situation where a licence might not be renewed when it had reached its expiry date. The scheme was such as to call for finality in respect of any decision concerning the continuance of a licence which by force of s 106 was prohibited as from the 1 July 2008. Granting of a continuation under the transitional provisions was in terms of a contradiction of the general prohibition. Mr Plunkett suggested that although the grant of an extension was a matter of discretion it was in the nature of "an indulgence"[25]. But in any event, the chief executive's power to do so was significantly constrained in its scope and its timing by s 279 of the Act. The primary decision – whether the licence is to continue must be made before the change day, 1 July 2008 (subsection (1)(a)). At the time of that decision the lapse date is to be fixed (subsection (1)(b)) and the licence to lapse at the end of that date (subsection (4)) unless earlier surrendered or cancelled (subsection (5)). The evident purpose is to achieve certainty and finality as to the lapsing of the licence. It would offend the spirit of this legislation and the clear intention of the legislature for the prohibition against holding the licence to be subject to arbitrary extensions. It is my view that the legislation does express a "contrary intention" to the availability of s 24AA for the purpose of amending a decision taken in accordance with the amending legislation.

[45] I find therefore that the respondent was correct in holding that he did not have the power to respond to the request for a further extension of the licence period and that there is no basis for any judicial review of his decision.

[46] The above reasons apply equally to the issues raised in the applications by Kowanyama Aboriginal Shire Council. The parties in each proceeding have accepted that notwithstanding the lack of pleadings that in the resolution of the issues I should treat the application for declaratory relief as allowing final orders to be made. In accordance with reasons expressed above I therefore make the following orders:-

In each proceeding: -

1. I refuse the application for a declaration that the amendments to the *Liquor Act* 1992 brought about by the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act* 2008 are valid.
2. I dismiss the applications for judicial review of the decisions of the respondent.

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[25] Transcript 1-44/50

3. I reserve the question of costs, allowing each party to make submissions in writing within 14 days from the date hereof.