

### Decision Notice

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<b>Matter:</b>	Application for the grant of a Restaurant Liquor Licence
<b>Proposed Premises:</b>	Shillelagh's Restaurant 378 Stuart Highway Winnellie NT 0820
<b>Applicant:</b>	Aminjarrinja Enterprises Aboriginal Corporation
<b>Proposed Nominee:</b>	Ms Alison Jane Foster
<b>Objectors:</b>	Nil
<b>Legislation:</b>	Section 26 of the <i>Liquor Act</i>
<b>Decision of:</b>	Director-General of Licensing
<b>Date of Decision:</b>	15 October 2015

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### Background

1. By application dated 9 April 2015 Ms Alison Foster, on behalf of Aminjarrinja Enterprises Aboriginal Corporation ("the Applicant"), applied to the Director-General of Licensing ("the Director-General") for the grant of a restaurant liquor licence for premises known as Shillelagh's Restaurant. The restaurant is located at 378 Stuart Highway in Winnellie and is a part of the Leprechaun Resort located outside the Darwin Central Business District.
2. The Applicant proposes to operate a traditional Irish cuisine restaurant with full table service offering quality food and beverages. The Applicant seeks a liquor licence that will provide for the sale of alcohol on the premises ancillary to a meal during the hours of 11.30 am until 2.00 am the following day seven days per week.

### The Applicant

3. The Applicant is an Aboriginal Corporation serving the needs of Aboriginal people residing in the Groote Eylandt community of Umbakumba. The Applicant is engaged in a variety of construction activities on Groote Eylandt and operates in Umbakumba, Angurugu, Alyangula, Milyakburra and Numbulwar. As part of its business enterprises the Applicant manages and operates the Leprechaun Resort. The Applicant was first registered with Australian Securities and Investment Commission in 2006 and appears to be financially sound, recording a significant profit in the preceding financial year. The proceeds of the Applicant's enterprises are invested in the advancement of its Aboriginal beneficiaries.
4. The Applicant has provided a comprehensive business plan for the resort and restaurant with the primary mission being to provide high quality accommodation and associated amenities to targeted markets. Profits generated by the resort are used to facilitate the development of the community of Umbakumba and to provide for the future of its Aboriginal residents.

5. Ms Foster, the proposed Nominee for the licensed restaurant is not currently known to the Director-General. However, she and her husband have significant experience in the hospitality industry both in the United Kingdom and, more recently, in Darwin.
6. Ms Foster holds a certificate in the Responsible Service of Alcohol and has successfully completed the NT *Liquor Act* test. Ms Foster is also the holder of a Level 2 National Certificate for Personal Licence Holders issued in the United Kingdom and a Personal Licence issued by the Solihull Metropolitan Borough Council under the 2003 *Licensing Act* (UK). Ms Foster and her husband, Mr Scott Foster have been employed as General Managers of the Leprechaun Resort for the past 2 years and 8 months. Ms Foster's National Police Certificate shows no disclosable court outcomes.

## Advertising and Objections

7. The application was advertised in the Northern Territory News on 22 and 24 July 2015 with the objection period expiring on 22 August 2015. No objections were received during the objection period.
8. Comments were sought from relevant stakeholders, NT Police, Health, NT Fire and Emergency Services and the City of Darwin, via emails dated 24 September 2015. No adverse comments were received from NT Police, Health or NT Fire and Emergency Services. City of Darwin had not provided a response at the time of this decision.

## Current Situation

9. The Applicant Corporation is required, pursuant to section 26A of the *Liquor Act* ("the Act") to lodge an affidavit disclosing details of all persons who are able to influence the conduct of the business under a liquor licence. Section 26A(3)(d) requires the Applicant to disclose the names of each executive officer of the body corporate. The Applicant has complied with those requirements and named the six directors of the Aminjarrinja Enterprises Aboriginal Corporation as falling within the scope of section 26A of the Act.
10. In assessing this application for a liquor licence the Director-General is required, in accordance with section 28(2)(f) of the Act, to consider whether each of the named directors is a fit and proper person to be an associate of the licensee. That type of assessment generally involves, amongst other matters, obtaining a criminal history check for each person whose fitness and propriety is to be assessed for the purpose of determining whether or not to grant the liquor licence.
11. The National Police Certificates obtained in respect of this application disclose that three of the current directors of the Applicant Corporation have no disclosable court outcomes. However, the remaining three directors have criminal histories that raise concerns as to their appropriateness to be officers of a corporation holding a liquor licence. The criminal histories of concern, disregarding spent convictions and driving offences, may be summarised as follows:

	Offence	Date of Conviction	Penalty Imposed
Director 1 <sup>1</sup>	Possess trafficable quantity of Cannabis	17/2/2009	Fine of \$1,5000, 2 year good behaviour bond.
Director 2	Aggravated assault (male/female/weapon)	28/2/2007	Convicted. 18 Months imprisonment (suspended)

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<sup>1</sup> For privacy reasons the names of the directors of concern are not disclosed.

## Director-General of Licensing Decision Notice

	Bring Liquor into a prescribed area	20/5/2008	Convicted. Fine of \$600
	Bring liquor into alcohol protected area	19/3/2014	Convicted. Penalty aggregated with DVO conviction below.
	Engage in conduct that contravenes DVO	19/3/2014	Convicted. 12 month good behaviour bond.
	Supply liquor alcohol protected area	19/3/2014	Convicted. Penalty aggregated with DVO conviction above
	Engage in conduct that contravenes DVO. 2 counts	16/4/2014	Convicted. 12 months good behaviour bond with conditions (aggregated for counts 1 & 2)
	Bring liquor into alcohol restricted area	19/6/2015	Convicted. Fined \$550.
Director 3	Damage property. Loss over \$5,000	21/4/2009	Convicted. 12 month good behaviour bond. Restitution \$4,020.
	Go armed in public	13/9/2012	Convicted. Fine \$500

12. In its application, the Applicant appropriately and frankly acknowledged that a number of the directors may have adverse criminal histories. The Applicant has requested a waiver of the usual requirements as to fitness and propriety of persons holding such office on the basis the directors in this instance will not have any significant say or authority in respect of the operation of the business conducted under the liquor licence on a day to day basis.
13. In support of a waiver, the Applicant has advised that the powers of the directors will be restricted to the extent that no director may present themselves directly at the Leprechaun Resort and make requests (of the management or staff). Any request from any of the directors must be presented in writing 14 days before that request and brought to the attention of the Chief Executive Officer of Aminjarrinja Enterprises Aboriginal Corporation, who in turn will discuss the matter with the General Managers before final decisions are made.

### Consideration of the Issues

14. The application under consideration is for a restaurant liquor licence with alcohol only being available ancillary to the purchase of a meal in the Shillelagh's Restaurant. There were no objections to the grant of the licence and it is noted that restaurant liquor licences, where alcohol is only available in conjunction with the consumption of a meal, are the least problematic licence type from a risk perspective and, with very rare exceptions, not the type of licence that results in alcohol related anti-social behaviour or other adverse outcomes.
15. Apart from the concerning criminal histories of some of the directors of the Applicant Corporation there are no other factors of concern that would result in a decision to refuse the grant of the licence. However, the criminal histories of three of the directors of the Applicant Corporation are significant, both in the context of the types of offending recorded and, in the case of the offending on the part of Director 2, include regular and very recent offending.
16. Section 28 of the Act deals with the assessment of applications for liquor licenses and provides, relevant to the issue under consideration here:

**28 Assessment of applications**

(2) *The Director-General must consider an application for a licence, the accompanying affidavit made under section 26A and the results of investigations conducted in relation to the application and make an assessment of the following matters:*

(f) *if a person is referred to in the affidavit under section 26A – whether that person is a fit and proper person to be an associate of a licensee;*

17. Apart from the reference shown above, the Act is silent as to the matters that are to be taken into account by the Director-General in determining whether a person is fit and proper to be a director of a corporation holding a liquor licence. In the normal course the following factors are considered in reaching a determination as to whether an applicant, or in this case an associate of the applicant, is a fit and proper person:

1. whether the person has been convicted of an offence against a law of the Commonwealth or of a State or Territory and if so, the seriousness of the offence;
2. (if applicable) whether the person has ever has been subject to disciplinary proceedings that have resulted in the cancellation or suspension of his/her licence or registration within a regulated industry;
3. whether the person has ever become bankrupt, applied to take the benefit of a law for the benefit of bankrupt or insolvent debtors;
4. whether the person has ever been disqualified from managing corporations or holding the position as director of a corporation or entity;
5. whether the person has ever provided false or misleading information or made a false or misleading statement to a regulatory body;
6. whether the person has previously been found not to be a fit and proper person for the purposes of the *Liquor Act* or for the purposes of some other form of regulatory legislation;
7. whether the public is likely to have confidence in the person's suitability to be involved in an entity engaged in the liquor industry; and
8. any other relevant matter.

18. Given the criminal histories set out above the criteria under bullet points 1 and 7 are clearly enlivened in this application. In respect of the issue of how those criteria should be applied to a director of a corporation holding a liquor licence, guidance can be gleaned from common law authorities. That issue was specifically considered by the High Court matter of *Australian Broadcasting Tribunal v Bond*<sup>2</sup> ("the Bond Media Case"). The decision in that matter included the following observations in respect of the standards to be applied when assessing a person's fitness and propriety:

*The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur.*<sup>3</sup> (Emphasis added)

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<sup>2</sup> (1990) 170 CLR 321

<sup>3</sup> *Ibid* per Toohey and Gaudron JJ at paragraph 36

19. In assessing the fitness and propriety of a corporation vis a vis its directors, the High Court noted:

*When the question is whether, having regard to its character or reputation, a company is fit and proper, the answer may be given by reference to the conduct, character or reputation of the persons by and through whom it acts or who are otherwise relevantly associated with it. The identity of the persons relevant to the character and reputation of a company will necessarily vary according to the circumstances of the company under consideration. At one extreme, if a person regularly exercises control in all important matters affecting the company's activities, then, ordinarily, the question will be sufficiently answered by reference to that person. At the other extreme, if no person is in a position of control or if one person, although in a position to exercise control, regularly delegates that control to others, then it will ordinarily be necessary to have regard to the persons who manage the company's affairs and activities. The question whether it is sufficient to have regard to one person or necessary to have regard to others when determining whether a company is fit and proper is one that depends on the circumstances of the company and not on any legal requirement imported by the expression "fit and proper". It follows that, in appropriate circumstances, the question of the fitness and propriety of a company to hold a commercial licence under the Broadcasting Act may be determined by reference to the conduct, character or reputation of a single person associated with it.<sup>4</sup>*

20. In respect of the application under consideration here, the activities in which the directors of the corporate licensee may be involved include activities relating to the management and oversight of the operation of a restaurant licensed to sell alcohol. Of concern in that context are the criminal histories of three of the directors and, in particular, their convictions for offences relating to breaches of the Act, violence offences and drug related offences. In some regulated industries, for example the private security industry, offences of that nature are classified as disqualifying offences with the result offenders are statute barred from being licensed in or participating in some professions or industries.
21. In this instance the Applicant, to its credit, has recognised the potential repercussions of the criminal offending of three of its directors on the prospects of the licence being granted and, on its own volition, has specifically sought a waiver of the usual requirements that all directors of an entity holding a liquor licence must be fit and proper persons. As noted above, the Applicant has proposed that any requests from the directors to the management or staff of Shillelagh's Restaurant must be presented in writing 14 days before that request and brought to the attention of the CEO, who in turn will discuss the matter with the General Managers before final decisions are made.
22. The following observations may be made in respect of the prior offending of the three directors in question. Director 1 was convicted in 2009 of possessing a trafficable quantity of cannabis. Whilst that in itself is a serious offence, and particularly in circumstances where the person potentially has some control over licensed premises, it is noted that Director 1 was not convicted of supplying cannabis to another person. The conviction was recorded some 6 ½ years ago and Director 1 has no relevant criminal history since that time.
23. Whilst still of legitimate concern, the offending of Director 3 is at the lower end of the scale by comparison. The conviction for damaging property was recorded over 6 years ago with no similar convictions in the intervening period. The only offence for which Director 2 was convicted since that time was that of going armed in public. That offence is clearly one of a serious nature which carries a maximum penalty of 3 years imprisonment. However, in this instance the offender was issued with a fine of \$500, an indication of the seriousness the court attributed to the nature of the offending in that case.

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<sup>4</sup> Ibid Toohey and Gaudron JJ at paragraph 42

24. Applying the High Court's rationale in the Bond Media Case to Directors 1 and 3, and taking account of the fact that their authority in respect of the operation of the restaurant will be formally and significantly curtailed, it is appropriate in this instance to place more emphasis on the propriety of the persons managing the restaurant than on that of the directors.
25. The criminal history of Director 2 is significant, both in terms of the frequency and serious nature of the convictions. Between 2008 and the present time Director 2 has been convicted on four occasions for breaches of the Act, the legislation that governs the operation and management of licensed premises. The most recent of those convictions was recorded on 19 June 2015, after the application for a liquor licence for Shillelagh's Restaurant was lodged. Also of significant concern in the assessment of the propriety of Director 2 are the convictions for aggravated assault and the two domestic violence convictions, the second of which was recorded in April 2014.
26. In determining whether to grant a liquor licence the Director-General is charged with assessing applications against the objects of the Act. So far as the assessment of this application is concerned a number of those objects are of particular relevance, both in terms of refusing or granting the licence.
27. The primary objects of the Act are to regulate the sale, provision, promotion and consumption of liquor so as to minimise the harm associated with the consumption of liquor; and in a way that takes into account the public interest in the sale, provision, promotion and consumption of liquor. A further object of the Act is to facilitate a diversity of licensed premises and associated services for the benefit of the community.
28. The public interest in this particular case includes an assurance that persons engaged in the operation and management of a liquor licence, including the directors of corporate licensees, are fit and proper persons. That requirement must be balanced against the background of this application and consideration of the circumstances and stated objectives of the Applicant.
29. Aminjarrinja Enterprises Aboriginal Corporation is an Aboriginal organisation that owns a number of business entities and is involved in numerous commercial activities and enterprises, including the operation and development of the Leprechaun Resort. Profits achieved by the corporation are used and applied for the advancement of the Aboriginal people residing in the Umbakumba community. It is also in the public interest that corporations such as Aminjarrinja Enterprises Aboriginal Corporation are authorised to maximise the profits from their investment in business ventures. Clearly the inclusion of a licensed restaurant is a facility that would be expected at tourist accommodation of this type.
30. In considering the competing public interests I am inclined on balance, and on the basis of the proven track record of the Applicant in operating the Leprechaun Resort to date, to grant the restaurant liquor licence.
31. The significant concerns regarding the criminal histories of three of the directors remain as a live issue for consideration. However I am satisfied that those concerns in respect of Directors 1 and 3, including the public interest concerns referred to above, can be addressed by the application of appropriate licence conditions, essentially in line with the submissions from the Applicant in respect of the limitations to be placed on the ability of the directors to improperly influence the operation of the restaurant.
32. It must be emphasised that the waiver of the usual requirement that all directors of corporations holding a liquor licence must be fit and proper persons should not be viewed as a general precedent. The concessions made in respect of this application are unique to an extent and reflect the fact the licensed entity is an Aboriginal corporation whose directors reside and work in a remote community on Groote Eylandt. Unfortunately it is a sad fact that persons in that category are more likely to have an adverse criminal history in comparison to the mainstream population of the Northern Territory.

33. As outlined above, the prior offending on the part of Director 2 is of the greatest concern and, in my opinion the frequency, seriousness and types of offending identified provide a clear indication that Director 2 is not presently a fit and proper person to be involved, in any capacity, with the operation of a liquor licence, including in the capacity as a director of the licensee corporation.
34. An option for the resolution of concerns in regard to Director 2 would be for him to be replaced as a director of the Applicant Corporation. However, any direction in that regard by the Director-General would be inappropriate and, dependent on the particular skills and expertise of Director 2, may not be in the best interests of the advancement and development of the other businesses and commercial activities in which the Applicant corporation is involved.
35. Section 31 of the Act provides the Director-General with the authority to issue a liquor licence subject to conditions that are necessary or appropriate in the particular circumstances of an application. Section 31(k) specifically provides for the imposition of licence conditions restricting the activities of employees of the licensee. As indicated above, I intend to impose such a condition restricting the involvement of the directors of the Applicant Corporation in the day to day management and operation of the restaurant. That condition will be in terms similar to the submission of the Applicant which addresses the level of involvement of the directors in the operation of the restaurant.
36. For the reasons outlined above, I am of the view that such a condition is not sufficient to take account of the seriousness of the prior criminal offending of Director 2. In that regard the grant of the licence will be subject to a pre-condition that the Applicant enter into an enforceable undertaking, as contemplated by section 72A(1)(b) of the Act, to the effect that Director 2 will at no time have any involvement whatsoever with the day to day operation or management of Shillelagh's Restaurant.
37. In all the circumstances I am satisfied that the grant of a restaurant liquor licence to the Aminjarrinja Enterprises Aboriginal Corporation is in the public interest and in accordance with the object of the Act to facilitate a diversity of licensed premises and associated services for the benefit of the community. In its application the Applicant has clearly demonstrated the need for a tourist facility such as the Leprechaun Resort and has demonstrated its capacity to manage such a facility in a professional and appropriate manner. It is anticipated that the addition of a licensed restaurant, for the enjoyment of both tourists and Darwin residents, will further enhance the business opportunities for the Leprechaun Resort.
38. I am also satisfied that the public interest in ensuring that only appropriate persons are involved in the management and operation of licensed premises will be appropriately addressed through the imposition of the specific licence conditions and through the enforceable undertaking referred to above. Any future breach of the licence condition limiting the involvement of the directors in the operation of the restaurant or the undertaking in respect of Director 2 will have serious repercussions, including the prospect of the licence being suspended or cancelled.

## Decision

39. The Applicant has provided adequate details and information in support of the application to satisfy the requirements set out in the Act for the grant of a Restaurant Liquor Licence, pursuant to section 29(1)(a) of the Act, for the purpose of operating the Shillelagh's Restaurant as a component of the Leprechaun Resort. The Nominee (Manager) for the corporate licensee, and the person responsible for the day to day management of the premises and compliance with the requirements of the licence conditions and the Act is Ms Jane Foster.

40. The grant of licence is subject to the Applicant entering into an appropriately worded enforceable undertaking, pursuant to section 72A(1)(b) of the Act, to the effect that Director 2 will have no involvement whatsoever with the management or operation of the liquor licence.
41. Again in accordance with section 29(1)(a) of the Act, the licence issued will be subject to a condition limiting the influence or involvement that the remaining directors may have in the day to day operation of the licensed restaurant. The wording included in concession made in that regard by the Applicant are considered appropriate for the purpose of formalising that licence condition.
42. In addition, the licence will be subject to the usual licence condition requiring notification to the Director-General of any change in the corporate structure of the corporation, including any future change of directors. Persons appointed as officers of the corporation in the future will be subject to the usual probity checks.

## **Review of Decision**

43. Section 120ZA of the Act provides that a decision of the Director-General, as specified in the Schedule to the Act, is a reviewable decision. A decision to grant or refuse an application for a liquor licence pursuant to section 29 of the Act is specified in the Schedule and is a reviewable decision. Section 120ZC of the Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision must be lodged within 28 days of the date of this decision. For the purpose of this decision, and in accordance with section 120ZB(c) of the Act, the affected persons are the Applicant, the Aminjarrinja Enterprises Aboriginal Corporation, and its directors.



**Cindy Bravos**  
**Director-General of Licensing**

Date *15 October 2015*