

Submission to the Three-Year Review of the Liquor Act 2019 (NT)

March 2023



About FARE

The Foundation for Alcohol Research and Education (FARE) is the leading not-for-profit organisation working towards an Australia free from alcohol harms.

We approach this through developing evidence-informed policy, enabling people-powered advocacy and delivering health promotion programs.

Working with local communities, values-aligned organisations, health professionals and researchers across the country, we strive to improve the health and wellbeing of everyone in Australia.

To learn more about us and our work visit www.fare.org.au.

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Executive summary

The most important thing is the health, safety and wellbeing of our children, families and communities. Community safety and wellbeing includes people being protected by effective liquor licensing from alcohol harm. Putting the health and wellbeing of people first also means empowering them to have a genuine say in the decisions that impact them, including liquor licensing decisions.

Alcoholic products cause significant harm to the Northern Territory (NT) community. This should be reflected in the laws that govern the sale and supply of alcohol. Alcohol is a cause of diseases such as cancer, Fetal Alcohol Spectrum Disorder (FASD), many injuries and deaths, and contributes to mental ill-health, suicide, family violence and broader social and economic hardship for communities.

The NT continues to have the highest use of alcohol per capita of all Australian states and territories, at 73 per cent higher than the national average. After initially decreasing for two years following the implementation of the 2017 Riley Review recommendations, per capita use of alcohol in the NT has risen to 12.2 litres per person in 2021.

A range of harms have also increased in prevalence, including alcohol-related assaults, alcohol-attributable emergency department presentations, and alcohol-related assault offences involving domestic violence. Alcohol-related assaults and hospitalisations had improved significantly in the first year following the 2017 Riley Review reforms being introduced. However, alcohol-related assaults, domestic violence and hospitalisations all increased in the following two years during COVID.

Communities expect that the Government will prioritise their wellbeing, placing them at the centre of liquor licensing processes intended to minimise the harm from alcohol. This means building protections from the risk of alcohol harm by implementing effective harm reduction measures. These must take an evidence-based public health approach; manage alcohol industry conflicts of interest and harmful conduct; commit to international human rights obligations; and commit to justice and self-determination for Aboriginal and Torres Strait Islander peoples.

The Three-Year Review of the Liquor Act 2019 Discussion Paper raises several issues for consideration by stakeholders. Some of these, like license transfers, extension of the takeaway licence moratorium and risk-based licensing can be strengthened to ensure that harm reduction measures remain effective. Other measures, such as liquor accords, do not have evidence that they will adequately prevent harm from alcohol in their current form. These measures should not be implemented or expanded, without improvement and further research demonstrating evidence of their effectiveness.

Some proposed measures, such as increased penalties or new offences for secondary supply, and the expansion of search and seizure powers, raise human rights concerns. These measures should be avoided altogether.

There are other policy initiatives regarding alcohol advertising and promotion that can be implemented to reduce alcohol-related harm. These include better regulation of public building advertising; ending point-of-sale promotional activities and harmful price discounting; and incorporating health promotion campaigns in alcohol management plans (AMPs). The NT Government can also advocate at the national level for better regulation of alcohol marketing.

FARE's submission outlines ways the NT Government can strengthen the Liquor Act with evidence-based, community-centred measures to help protect the community from increased risk of alcohol harm. FARE thanks the NT Government for the opportunity to make this submission on *The Three-Year Review of the Liquor Act 2019 Discussion Paper*.

We have addressed each of the issues raised in the Discussion Paper except for the issue of undue and unreasonable noise. We have raised additional issues for your consideration about alcohol marketing.

Recommendations

| Recommendation Number | Recommendation |
|------------------------------------|--|
| <i>Principles</i> | |
| 1 | Adopt an evidence-based, public health approach to preventing alcohol-related harm in the Northern Territory (NT). |
| 2 | Implement appropriate management of the conflict of interest that affects the participation of the alcohol industry in alcohol policy-making. Focus solutions to the problem of alcohol-related harm on measures to control the harmful conduct of the industry that drives alcohol use and harm. |
| 3 | Ensure that alcohol policy reflects Australia’s commitments under international human rights law. |
| 4 | Ensure that alcohol policy reflects a commitment to justice and self-determination for Aboriginal and Torres Strait Islander peoples. Ensure that the voices of Aboriginal and Torres Strait Islander peoples are included and heard in decision-making about alcohol policy in the NT and changes to the Act. |
| <i>Transfer of licence</i> | |
| 5 | Amend the provisions relating to the transfer of a licence to include public interest and community impact criteria, public notification, and the right to object. |
| 6 | Amend the provisions for the substitution of a premises so the provisions for deciding an application for a new licence apply, including the requirement for a public notice of the application for substitution. Repeal section 75(3) to remove the inconsistency between sections 75(1) (substitution applications as new licence applications) and 75(3) (substitution applications as variation applications). |
| <i>Liquor accords</i> | |
| 7 | Undertake a comprehensive review of liquor accords in the NT to determine if they reduce harms from alcohol, whether they should be retained and if so, whether the Act needs to be amended for more effective use of liquor accords to achieve the purposes of the Act. Amend the Act to make compliance with the terms of a liquor accord a condition of a licensee’s licence. |
| <i>Secondary supply of alcohol</i> | |
| 8 | Do not increase penalties for offences relating to secondary supply, nor create new offences such as ‘transporting liquor intending to supply’ or ‘possessing liquor |

| | |
|---|---|
| | intending to supply'. Implement the Riley Review recommendations that an <i>'education campaign be conducted in remote communities to raise awareness of the problems that sly-grogging causes.'</i> |
| Expansion of search and seize powers | |
| 9 | Do not grant <i>'special search and seizure powers'</i> to additional categories of persons such as transit officers, public housing safety officers, park rangers, council rangers and contracted licensed security officers. |
| Extension of moratorium on takeaway licences | |
| 10 | Extend further the Riley Review recommended moratorium on takeaway licences. |
| Risk-based licensing | |
| 11 | Retain risk-based licensing (RBL) with higher penalties for licence breaches and reduced deductions for compliance. |
| Banned drinkers register | |
| 12 | Defer any decision about the Banned Drinkers Register (BDR) until the completion of the current review of the BDR being led by Deakin University and the Menzies School of Health Research, and until there has been adequate public consultation with all relevant stakeholders on the findings and any options for reform. |
| Alcohol marketing restrictions | |
| 13 | Advocate at the national level for independent, legislated control on the content, placement and volume of all forms of alcohol advertising and promotion. Also advocate at the national level that the issue of alcohol advertising during telecasts of live sports events be reviewed, with a view to prohibiting such advertising. |
| 14 | Ensure that publicly owned assets in the NT such as buses and buildings are free of alcohol advertising. |
| 15 | Amend the Act to specifically prohibit certain types of promotional activities, such as shopper docketts (liquor promotion vouchers on the purchase receipts) and harmful price discounting such as the sale of alcohol at half, or less than half, of the usual price. |
| 16 | Ban the display of point-of-sale promotional materials for liquor (such as 'happy hours,' free gifts with purchase, prominent signage, competitions, price discounts for bulk purchases, and sale prices) on and around licensed premises where children or young people are likely to be present. |
| 17 | If a 'guideline' on advertising and promotion has not been created under section 316 of the Act, this be done as matter of priority so as to give full effect to the rule in |

section 103 against promotions that ‘could be construed as inducing the irresponsible or excessive consumption of liquor or in licensed premises.’

Framing of FARE’s submission to the Review

FARE’s submission to the Review is informed by the theoretical frameworks, legal principles and political commitments set out in this section. This section provides the rationale for the following recommendations:

Recommendation 1: Adopt an evidence-based, public health approach to preventing alcohol-related harm in the Northern Territory (NT).

Recommendation 2: Implement appropriate management of the conflict of interest that affects the participation of the alcohol industry in alcohol policy-making. Focus solutions to the problem of alcohol-related harm on measures to control the harmful conduct of the industry that drives alcohol use and harm.

Recommendation 3: Ensure that alcohol policy reflects Australia’s commitments under international human rights law.

Recommendation 4: Ensure that alcohol policy reflects a commitment to justice and self-determination for Aboriginal and Torres Strait Islander peoples. Ensure that the voices of Aboriginal and Torres Strait Islander peoples are included and heard in decision-making about alcohol policy in the NT and changes to the Act.

Public health principles and evidence

FARE is committed to advancing the health of individuals and populations. It uses the best available public health evidence to inform its policy positions and advocates for those interventions that have a sound basis in scientific evidence. A public health approach also means that FARE is interested in the way in which measures can be applied across the population to *prevent* alcohol-related harm. In the context of alcohol policy, population-level measures (such as pricing, availability and advertising regulation) are more effective than measures targeted at individuals who drink at risky levels.^[1] They also tend to be less stigmatising of individuals in the population. FARE’s commitment to public health principles also means that it has a special focus on equity and the higher rates of harm among some communities, including Aboriginal and Torres Strait Islander peoples.

Commercial determinants of health approach

FARE also adopts a ‘commercial determinants of health’ framework in its work. It understands that, ‘in the modern era, the economic and political power of the private sector influences our physical and social environments, the evidence surrounding problems and their solutions, and even the nature of public discourse and understanding.’^[2] In the context of alcohol, the activities of commercial actors, such as producers, wholesalers, on-premise and off-premise retailers, industry associations and related actors (such as the media and sporting codes) are powerful influences on consumption. Their commercial interests steer them towards taking policy positions that are profit-maximising but that have the effect of deprioritising other interests, in particular the health of individuals and populations, human rights and justice for Aboriginal and Torres Strait Islander peoples. An example of this is seen in the way the Woolworth’s Group acted in the NT in relation to its proposal for a Dan Murphy’s outlet – as acknowledged in the subsequently commissioned Gilbert Review.^[3] It is therefore critical to recognise the role of the industry in the production of alcohol harm. The consequences of doing so are two-fold:

- There needs to be appropriate management of the conflict of interest that affects the participation of the alcohol industry in alcohol policy-making, such as in relation to this Review; and
- The solutions to the problem of alcohol harm need to focus on measures to control the harmful conduct of the industry that drives consumption and, in turn, harm.

Australia's human rights obligations and other foundational legal principles

The arguments made in FARE's submission reflect the commitments that Australia has assumed under international human rights law, in particular the right to health,^[4] the right to equality and to be free from discrimination,^[5] the right to life,^[6] the right to liberty and security of the person,^[7] the right to privacy,^[8] the right to freedom of assembly,^[9] and the right to equal protection before the law.^[10]

Although Australia has not implemented all these obligations in domestic law, Australia (and sub-national governments such as the Government of the Northern Territory) remain bound to act in accordance with the obligations Australia has assumed under international law. Compliance with such obligations should be one of the goals of policy and law-making at all levels of government in Australia.

A commitment to justice and self-determination for Aboriginal and Torres Strait Islander peoples

FARE recognises that sovereignty was not ceded by Aboriginal and Torres Strait Islander peoples. FARE also acknowledges that Aboriginal and Torres Strait Islander peoples continue to bear the impacts of on-going colonisation, including through harms from alcohol.

FARE notes the following commitments, amongst others, made by Australia in the United Nations Declaration on the Rights of Indigenous Peoples in 2007:^[11]

'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' (article 3);

'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions' (article 18);

'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them' (article 19); and

'States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration' (article 38).

Commitments to non-discrimination against Aboriginal and Torres Strait Islander peoples are also found in the *United Nations Convention on the Elimination of All Forms of Racial Discrimination* ('CERD') to which Australia is a party.^[12] These obligations include:

'Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation' (article 2(1)(a)); and

'Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists' (article 2(1)(c)).

Australia has implemented some of its international obligations under CERD in domestic law through the *Racial Discrimination Act 1975* (Cth), which prohibits discrimination on the grounds of race and offensive behaviour based on racial hatred.^[13]

One of the most powerful ways in which justice can be done and the right to self-determination can be attained is through Aboriginal and Torres Strait Islander participation in decision-making about matters that affect them. This means that the voices of Aboriginal and Torres Strait Islander peoples must be heard in decision-making about alcohol policy in the NT and changes to the Act. The Australian Human Rights Commission has advised that that participation of Aboriginal and Torres Strait Islander peoples means that ‘consultation processes are framed “to make every effort to build consensus on the part of all concerned” and that contemporary forms of governance, including collective decision-making structures and practices, are respected.’^[14] Furthermore, the free, prior and informed consent of Aboriginal and Torres Strait Islander people is mandatory, as is good faith on the part of those conducting the consultation.’^[15]

Transfer of licences under s 72 of the Act

Do you believe amendments should be made with respect to the transfer of a licence under s 72 of the Act? If so, what do you suggest?

In this part, FARE addresses (a) the transfer of licences under section 72 of the Act and the related issue of (b) the substitution of premises under section 75 of the Act.

Transfer of a licence

Recommendation 5: FARE recommends that the provisions relating to the transfer of a licence under section 72 be amended to clearly state the following requirements:

- (a) the licence must only be granted if the public interest and community impact criteria are satisfied by the applicant;
- (b) the public notice requirements that apply to an application for a new licence also apply to the transfer of a licence
- (c) the right to object that applies to an application for a new licence also applies to the transfer of a licence.

The *Riley Review* recommended that the transfer of a licence only be approved ‘within the same licence category’ and subject to ‘appropriate probity, public interest and community impact requirements’ (Riley recommendation 2.5.22).

Despite the *Riley Review* recommendations, the Act remains very unclear on the requirements for making and determining an application for the transfer of a licence. On the one hand, there is a requirement for an application to be made ‘as if the proposed transferee is applying for a new licence’ (section 72(2)). But the Act then seems to establish a separate set of rules applying to licence transfer applications and to require only limited information in the transfer application compared to new licence applications. For example, the Act states that the following sections relating to applications for new licences do apply to applications for transfers:

- Sections 52(1), (2), (3)(c) and (4) (an application to be made using the prescribed form and paying the prescribed fee);
- Section 53 (body corporate applicants to have a nominee);
- Section 54 (requirement for an affidavit disclosing persons of influence and potential beneficiaries);

- Section 55 (associates of a person); and
- Sections 56(1), (2), (3) and (4)(b) (requiring the Director to notify the Commissioner of Police of the application).

The Act, in section 72(5), also confirms that the ‘the applicant is not required to provide the following: (a) the evidence necessary to satisfy the onus specified in section 51 (about the public interest and community impacts); and (b) a summary of the evidence referred to in section 52(3)(d) (about the public interest and community impacts)’. The fact that an applicant does not need to provide evidence about the matters of public interest and community impacts implies that that Commission is not required to consider these factors in making its decision about the transfer application. If that is the case, then the Commission’s power to decide to transfer the licence turns on the Commission being satisfied that the applicant is a fit and proper person (section 49(1)(c) and section 73(1A)). This is a very thin basis for deciding whether a person may hold a licence to sell liquor. In accordance with the *Riley Review* recommendation, FARE recommends that the public interest and community impact criteria should also apply to deciding applications to transfer a licence.

For an application to transfer a licence, unlike with a new licence application (under section 57), there is no requirement that the applicant submits to the Commission a draft of the public notice that they propose using for informing the public about the proposed licence (see section 72). This seems to suggest that there is no requirement to notify the public about an application for the transfer of a licence. The notice provision in section 57 serves multiple purposes: letting the community know about a proposal for a licensed venue and who the applicant for the licence is; giving them the knowledge required to enable persons to object under section 61.

The right to object in section 61 allows objections about the adverse impacts of the licence *and* that the applicant is not a fit and proper person. But the right does not extend to licence transfer applications so there exist no formal means for objectors to intervene and provide information relevant to the Commission’s decision about the transfer application. As discussed above, it is unclear if the public interest and community impact tests apply to licence transfers, but the fit and proper person test clearly does. The exclusion of the notice requirements and the right to object to transfer applications removes the means for the community to assist the Commission with information about whether the applicant is a fit and proper person to hold a licence. The fitness and propriety of a person to hold a licence impact the ways in which the licensed premises are operated and, in turn, the risks they pose to community health and safety.

Although the *Riley Review* did not recommend that the notice requirement applies to licence transfers, FARE recommends that such a requirement be imposed on applicants for the transfer of a licence. It further recommends that the right to object in section 61 be extended to applications for the transfer of a licence. The inclusion of the notice requirement and the right to object are especially important if the public interest and community impact criteria are clarified to be part of the licence transfer process as recommended by FARE.

Substitution of premises

Recommendation 6: FARE recommends that section 75(3) of the Act be repealed. The effect of the repeal is to clarify that an application to substitute premises is not to be made and decided in the same manner as an application for the variation of a licence. Rather, it is to be made and decided in the same manner as an application for a new licence (including the requirement for public notice of the application for substitution).

The Riley Review recommended that substitution applications be treated as new licence applications, except where the substituted premises are in ‘close proximity to the premises identified in the licence; there is no significant change in the nature of the business; and no other concerns arise’ (Riley recommendations 2.5.24

and 2.5.25). The *Riley Review* also recommended that the public notice requirement also apply to an application for substitution of premises (Riley recommendation 2.5.26).

At present, there is a lack of clarity in the Act as to whether the application for substitution is to be treated as a new application or as an application for a variation of conditions on a licence. The public notice requirement is also missing from the process of deciding substitution applications, but it is an important part of the process applicable to new licence applications and should also be applied to applications for the substitution of premises. Furthermore, the Act also, contrary to the *Riley Review* recommendation, imposes no limits on the discretion of the Commission to amend a licence to allow the substitution of premises.

Section 75(1) currently provides, 'If a licensee wishes to substitute other premises for the licensed premises, the licensee must apply for *a new licence* for those new premises.' Section 75(2) also grants discretion to the Commission to decide the substitution application through an abridged process if it is satisfied that 'the substitution satisfies the public interest and community impact requirements.'

At the same time, section 75(3) provides, 'An application to substitute premises is to be made in the same manner as *an application to vary conditions* of the licence under Part 4, Division 5.'

Section 75 is therefore confusing. On the one hand, it suggests that an application for substitution is to be treated as a new licence application, but, on the other hand, it says that the application is to be made in the same manner as an application for a variation of conditions. In effect, two different standards and processes for decision-making are set out in section 75.

In FARE's view, the *Riley Review* recommendation should be implemented and an application for substitution of premises should be treated as a new licence application, as the change in location of the licensed premises necessarily requires a re-examination of whether the licence will be in the public interest and whether it will have any adverse impacts on the community. A particular benefit of this approach would be that it would also make clear that there is a requirement for public notice about the application.

At present, under section 52, an application for a new licence *must* be accompanied by a draft of the applicant's proposed public notice (section 52(3)(b)) and, under section 57, the applicant is *required* to publish that public notice and otherwise publicise the application as required by the Director of Liquor Licensing. The public notice must indicate that a person may obtain copies of the evidence that the applicant has submitted to satisfy the Commission that the grant of the licence is 'in the public interest; and will not have a significant adverse impact on the community' (sections 57(4)(d); 52(3)(c) and 51(1)). The public notice requirement is important to exercise the right to object to an application under section 61.

By contrast, an application for variation of licence conditions does not mandate that the public be notified of the proposed variation. Section 57 provides that, 'The Director may require the applicant to publish a notice of the application to vary the conditions of a licence or an authority if the Director considers it to be in the public interest.' This leaves discretion in the hands of the Director as to whether the public will be notified of the proposed variation. The right to object under section 61 also applies to variation, but potentially loses some of its utility if there is no obligation to notify the public of a proposed variation.

The community should be notified of an application for substitution of new premises. The application should be subject to close scrutiny in respect of the public interest in, and the adverse community impacts of, the substitution being permitted. A substitution of premises has the potential to significantly change the nature of the alcohol business being operated under the licence, as demonstrated by the case of the application by the Woolworth's Group (under the *Liquor Act 1979* (NT)) for the substitution of a 'modest'^[16] BSW store for a 2000m² Dan Murphy's store under the same licence. The *Riley Review* also warned, '[s]ubstitution should

not be available to remove the need to apply for a new licence or to circumvent moratoriums that may be in place from time to time.’^[17]

To remove the inconsistency between sections 75(1) (substitution applications as new licence applications) and 75(3)(substitution applications as variation applications), FARE recommends that section 75(3) be repealed.

Liquor accords

Do you believe that liquor accords are operating in accordance with s 133 of the Act? If not, why not?

Recommendation 7: FARE recommends that the Northern Territory Government consider undertaking a comprehensive review of liquor accords in the Northern Territory to determine:

- (a) Whether they are working to reduce harms from alcohol;
- (b) Whether they should be retained as part of the suite of measures under the Act; and
- (c) If they are retained, whether there are amendments to the Act that are required to enable the more effective use of liquor accords to achieve the purposes of the Act.

FARE recommends that the NT Government review liquor accords and consider the *foundational questions* of whether liquor accords are working to reduce harms from alcohol and whether they should be retained in the NT. In the literature,^[18] it has not been demonstrated that liquor accords can make a meaningful contribution to harm minimisation, although they are a preferred mechanism ‘because they give the appearance of doing something, while not interfering with the licensees’ trade.’^[19] Given these studies, it cannot be presumed that liquor accords in the NT are effective. This needs to be properly investigated. Their effectiveness will be one consideration in deciding whether liquor accords should be retained. It may also be decided that a much more productive, effective, transparent and accountable way to proceed is through government regulation rather than voluntary industry agreements.

It is only once these foundational questions about the utility of liquor accords in the NT are addressed that it can be determined whether there should be changes made to the way that liquor accords operate.

In such a review, it is important to understand the strengths and weaknesses of the current liquor accords from the perspective of those who are parties to the accords, consumers subject to the terms of the accords, and community organisations whose work relates to the scope and purposes of the Act. The perspective of the industry should not be determinative of the utility of the liquor accords.

We note that there are seven liquor accords listed on the NT Government website.^[20] A desk review of the terms of these accords in light of the Act suggests as follows:

The accords rarely include Aboriginal and Torres Strait Islander or public health community organisations as parties.

The accords include licensees, the Director of Liquor Licensing and the NT Police. Other organisations that are parties to one or more (but not all) of the accords are:

- the local council;
- Hospitality NT;
- NT Chamber of Commerce Association;
- Australian Hotels Association (NT); and
- Liquor Stores Association NT.

In the Kakadu accord, two Aboriginal organisations are members: Gunbang Action Group and Gundjeihmi Aboriginal Corporation. These seem to be the only Aboriginal organisations who are members to any accord.

A Government review of the liquor accord system is important to understanding why Aboriginal and public health organisations are not participating in accords. The Act envisages that such organisations may be parties ('a community or residents' group with an interest in preventing or reducing alcohol-related violence or in improving the amenity of a local area' may be a party: section 134(4)(d)). A comprehensive review would help the Government to understand whether accords are effective in reducing harms and, if so, whether there should be measures in place to enable a more diverse group of interested parties to be part of accords.

One of the issues with the exclusion or non-participation of Aboriginal and public health community organisations is that the rules of the accord are created without the input and perspective of these organisations. The rules therefore potentially reflect a partial set of interests and solutions to problems of alcohol harm, in particular those of the alcohol industry. Although the Director's involvement is guided by the scope and purposes of the Act including harm minimisation, community organisations can bring to the table solutions that better assure cultural respect and safety and that bring a highly effective health approach to issues of alcohol harm. This is a different way of looking at the issues than what is currently seen in liquor accords. As found in the *Riley Review*, '[there appears to be a strong focus on responsible service of alcohol [in liquor accords]. While this is a critical issue, consideration should be given to a broader range of strategies, with more guidelines provided by the licensing authority.'^[21] The *Gilbert Review* similarly found that the Woolworth's Group in its application to substitute premises to open a Dan Murphy's store was almost entirely focused on the responsible service of alcohol, and security and crime prevention at and around the store.^[22] Woolworth's Group failed to understand the other determinants of alcohol-related harm, including the increased availability of low-price alcohol. It is acknowledged that some of the current liquor accords do contain rules relating to opening hours and pricing of alcohol, but the more significant focus is on responsible service of alcohol.

There may be inadequate monitoring of compliance with the liquor accords

The Act does not create a specific monitoring mechanism for the liquor accords scheme in Part 6, Division 2. The liquor accords themselves have no facility for any person to monitor a licensee's compliance with the terms of the accord. It may be that some monitoring of licensee compliance with the terms of the accords is occurring through other monitoring schemes in the Act, such as through:

- harm minimisation audits (Part 6, Division 4);
- inspections (Part 7, Division 1);
- complaints (Part 7, Division 3); or
- investigations by the Director (Part 7, Division 2).

There is express power to conduct a harm minimisation audit to audit of 'a licensee's activities, operations and licensed premises to measure the extent to which the licensee ... complies with any local liquor accord to which the licensee is a party' (section 149(d)). The harm minimisation audit must report to the Commission about the outcome of the audit and any recommendations for changes to licensee's activities, operations and licensed premises (section 150). The Director can take action against the licensee on the basis of findings in a harm minimisation audit (section 151).

A question for the review would be whether these existing mechanisms have been used to monitor compliance with the terms of the accords and, if so, whether they are adequate for the task.

There are no clear consequences in the Act or the accords for parties who do not adhere to the terms of the accord.

Under sections 132(2) and (3), the Director may, by written notice, require a licensee to be a party to a liquor accord, and the licensee is deemed to be a party 14 days after the issuance of the notice. Under section 134(1), all licensees must comply with any local liquor accord to which the licensee is a party. However, the Act does not state that a breach of this latter obligation is an administrative or criminal offence to which penalties attach (cf: section 285 that makes it an offence to serve liquor to an intoxicated person).

It may be that some of the enforcement powers under the Act are being used indirectly to sanction non-compliance with the terms of an accord. We do not know if they have been used in any case. For example, as noted above, after a harm minimisation audit, the Director may take action against the audited party (section 151(1), including:

- giving the licensee a formal warning;
- issuing an infringement notice (but there is no infringement related to not complying with a liquor accord per se, so this would only be useful if the breach of the liquor accord rules also amounted to an offence under the Act);
- offering the licensee the option of entering into an enforceable undertaking (section 159), breach of which is grounds for disciplinary action by the Commission.

Two of the accords refer to the accord's members having a role in responding to non-compliance. The Kakadu accord states, 'All members will ... deal with any breaches, penalties and appeals under the Accord. The Katherine accord is similar, 'All members will ...deal with any major breaches of the Accord.' No further detail is provided about how the members 'deal' with breaches.

There appears to be inadequate provision for review and renewal of the operation of liquor accords

The *Riley Review* (Riley recommendation 2.5.34) recommended that '[t]he licensing authority undertake evaluation and monitoring to inform regular reviews of all accords.' Some of the accords are approximately 10 years old and, from the references to dates in the accord text, there is no evidence that they have been reviewed. For example, the Katherine and Kakadu accords were made in 2012. Some more recently concluded accords (Darwin and Alice Springs) commit to reviewing every two years.

A good regulatory system requires review of the operation of the system and the revision and renewal of the content of instruments (including substantive and procedural rules) on a regular basis.^[23] Such review and renewal ensures that the system is responsive to the changing contours of the issue that it is seeking to address, in this instance, being alcohol use and harm.

Secondary Supply of Alcohol

Do you believe that penalties for secondary supply offences should carry tougher penalties? If not, why not? Do you have any concerns regarding the secondary supply of alcohol in the NT? If so, what are they?

Recommendation 8: FARE recommends that there be no increase in penalties for offences relating to secondary supply and no new offences created of 'transporting liquor intending to supply' or 'possessing liquor intending to supply'.

FARE acknowledges the concerns about the supply of alcohol in general restricted areas, special restricted areas and interim alcohol protected areas as outlined in the Discussion Paper, and to persons on the Banned

Drinkers Register (see *Alcohol Harm Reduction Act 2017* (NT) section 42). FARE also acknowledges that there are currently resourcing difficulties in policing such conduct in remote locations.

However, the penalties attached to the supply of alcohol in general restricted areas, special restricted areas and interim alcohol protected areas are already very high: 200 penalty units or imprisonment for up to 12 months (see sections 170B, 173, 183). At the present penalty unit rate of \$162, fines for these offences could amount to \$32,400. It seems doubtful that any further increase in the fines will offer any further deterrence to those considering engaging in secondary supply (as was the view taken in the *Riley Review*).^[24] A further issue of concern to FARE is that an increase in the level of the penalty, coupled with the inability of an offender to pay, may lead to their incarceration. In the context of the history of Aboriginal deaths and mistreatment in custody, any measures that would increase the risk of incarceration for Aboriginal and Torres Strait Islander peoples should be resisted.

Relatedly, the suggestion to create new 'intention to supply' offences should also be rejected. 'Intention to act in the future' offences such as these can be complex to administer: how is it determined if a person intends to supply alcohol to another in the future? Such offences can also generate over-policing of sub-populations, including questioning about common behaviours such as purchasing or carrying alcohol.

Adamson et al describe the issue of secondary supply in the NT as 'a wicked problem.'^[25] One of the factors that they found in their study as complicating the issue of secondary supply was the cultural expectation amongst some Aboriginal groups for 'sharing' all possessions, including alcohol, and for honouring the requests for assistance by elders and others in a position of cultural authority.^[26] The creation and application of more offences, and/or the imposition of higher penalties, without recognition of the cultural context in which these criminal laws would operate, has the potential to aggravate the impacts of white settlement on Aboriginal people in the NT.

In the alternative, FARE supports further work being done in the NT to better implement the *Riley Review* recommendations that an 'education campaign be conducted in remote communities to raise awareness of the problems that sly-grogging causes' and 'additional police resources be made available to remote communities to provide appropriate law enforcement' (Riley recommendations 2.12.16 and 2.12.17). It is essential that such public education campaigns are designed and implemented by Aboriginal community controlled organisations.

Expansion of search and seize powers

Do you think that special seizure powers should be extended to other suitably qualified officers? If not, why not?

Recommendation 9: FARE recommends that the 'special search and seizure powers' in Part 10 of the Act not be reposed in additional categories of persons listed in the Discussion Paper: transit officers, public housing safety officers, park rangers, council rangers and contracted licensed security officers.

Part 10 is entitled 'Special Search and Seizure Powers' and confers exceptional powers to:

- search a person's body, their clothing or the property in their immediate control (section 236);
- seize a container believed to contain alcohol and dispose of, destroy or keep the container (section 243); and
- for forfeiture offences,^[27] search a person, their premises, their vehicle, vessel and aircraft (section 239) and seize 'things' (section 244).

These search and seizure powers are reposed in police officers and ‘inspectors’ (appointed by the Minister under s 16 of the Act) (and, as mentioned in the Discussion Paper, some additional categories of persons under other laws).

The categories of persons the Discussion Paper proposes to repose powers include transit officers, public housing safety officers, park rangers, council rangers, and contracted licensed security officers. It is not clear what is meant by ‘contracted licensed security officers.’ This category is of the greatest concern. Are these security officers contracted by private bodies, such as supermarkets or hotels? The granting of public power to private individuals should be strongly resisted.

The exercise of the powers under Part 10 involves exceptional interferences with the individual’s rights to autonomy, liberty and bodily integrity, and property (some of the rights outlined in Part 2.4 above). Human rights law demands that these powers be used in the most restrained way and only when absolutely necessary, given the interferences with fundamental rights and freedoms that the exercise of the powers potentially involves. The powers are already expansive in their reach as they authorise interferences for acts such as drinking alcohol, as opposed to causing harm to another person.

Although these interferences may be considered justified, the legislature does nonetheless recognise the exceptional nature of these powers in its imposition of some limits on their exercise, such as the state of mind that the officer must form before exercising the powers. One of the pre-conditions for the lawful exercise of the ‘basic’ search powers in section 236 is that the inspector or police *suspects on reasonable grounds* that a person is contravening or is about to consume alcohol (or inedible alcohol: e.g., methylated spirits) in a public place (sections 153 and 171). One of the pre-conditions for the lawful exercise of the ‘basic’ seizure powers in section 243 is that the inspector or police *suspects on reasonable grounds* that a person is, or is about to, consume alcohol in a public place (section 171); possess/consume liquor in restricted premises (section 189); breach the restrictions of the Banned Drinker Register; or commit a forfeiture offence.

The fact that the powers are placed in the hands of a small number of people (only police and inspectors) also provides some safeguard, as the powers are held more tightly, and it should be easier to control and monitor the use of the powers.

Furthermore, police specialise in law enforcement and the use of search and seizure powers in a range of policing contexts. Liquor inspectors are experts in the purposes, rules and processes of the Act. This expertise of these two categories of public officials also provides some (but by no means complete) protection against the excessive and inappropriate use of search and seizure powers. There are complexities relating to the use of these powers, especially where a person subject to them is ‘intoxicated.’ Bringing a public health and welfare approach to the use of these powers provides some protection against harm to the person being searched or having their property seized. The extension of the powers to further groups of persons, who are not experts in liquor licensing or community law enforcement, raises the possibility that the powers will be used unlawfully, in a discriminatory and harmful manner, and in a way that lacks understanding of the social and economic inequalities experienced by some Aboriginal people, as well as the distinctive social and cultural contexts which shape the lives of many Aboriginal people in the Northern Territory. The misuse of the powers by public officials may result in serious harms (including death) for which the Government may be held liable, including in actions such as false imprisonment. The findings in the coronial inquest into the death of Tanya Day in police custody in Victoria^[28] and the evidence being given in the inquest into the shooting of Kumanjayi Walker near Alice Springs^[29] underscore the high level care that must be taken when using the criminal law (powers of search, seizure, arrest and incarceration) to respond to intoxication.

The extension of public power to a broader category of persons also creates an additional burden in terms of accountability and mechanisms for ensuring that exercises of the power by these persons can be subject to public scrutiny and oversight.

Extension of moratorium on takeaway licences

Should the moratorium on takeaway licences be extended post 31 August 2023?

Recommendation 10: FARE recommends an extension on the moratorium on the issuance of take-away licences post-31 August 2023.

In 2017, the *Riley Review* found that the NT was ‘over-serviced’ in terms of facilities for take-away alcohol.^[30] It recommended the creation of a new ‘stand-alone’ take-away licence category and a moratorium on the issuance of new take-away licences for 5 years (Riley recommendation 2.5.20). The NT Government enacted the recommendation in section 84(3) of the Act in 2019, with the option of extending it by regulation (section 84(4)).

The drivers for the *Riley Review* recommendation for the moratorium and its enshrinement in the Act persist in the NT. Per capita consumption of alcohol has risen since 2017 when the *Riley Review* occurred. In 2017, it stood at approximately 11.6 litres per person in the NT. In 2021, it stood at approximately 12.2 litres.^[31] A range of harms have also increased in prevalence, including alcohol-related assaults,^[32] alcohol-attributable emergency department presentations (for Royal Darwin Hospital, Alice Springs Hospital and Palmerston Regional Hospital),^[33] and alcohol-related assault offences involving domestic violence (seemingly driven by sharp increases in Alice Springs).^[34] In this context, the moratorium should not be lifted as the issuing of new take-away liquor licences is likely to increase alcohol use and harm.

Risk-based licensing

Do you believe that penalties for breaches should carry tougher restrictions? Do you have any other comments or suggestions regarding the Risk Based Licensing model, including areas for improvement?

Recommendation 11: FARE supports the continuation of risk-based licensing (‘RBL’) with the following adjustments to the formula for calculating licence fees

- (a) the addition of a ‘space multiplier’ to take account of the floor space of the licensed premises;
- (b) higher ‘penalties’ for licensees who breach their licence restrictions; and
- (c) no ‘deductions’ for acts of compliance.

There is no ‘right’ to sell liquor in Australia and the granting of a licence to do so is a privilege that comes with the obligation to minimise harm from the use of the licence.

The *Riley Review* recommended the introduction of RBL (recommendations 2.4.1 and 2.4.2) on the basis that ‘a more sophisticated annual fee formula that recognises the risks of different categories of licence and venues is more appropriate.’^[35] The NT Government introduced RBL in the Act in 2019 (section 70 and *Liquor Regulations 2019* (NT) Part 3). The model used in the NT combines a base rate related to the inherent riskiness of a licence type (eg, a licence with a take-away authority is categorised in the RBL formula as ‘very high risk’), with a multiplier based on opening hours and volume of alcohol sold. There are then ‘deductions’ for efforts by the licensee that further harm minimisation and ‘additions’ for breaches of the Act by the licensee.^[36]

Risk-based licensing should be understood as a mechanism for ensuring licensees bear a proper share of the costs associated with regulating their businesses in the public interest. In this sense, the RBL provides a

stream of revenue to support licensing activities, including inspections and policing, both of which require considerable resources but are vital to the sound operation of the licensing system.

If this rationale is accepted, then the formula for calculating the fee should be scrutinised, with the goal of ensuring that businesses bear the cost of the administrative system required to enable their activities. Changes would include more heavily weighting the fee for businesses that demand more administrative attention – that is, those businesses that generate higher risks of harm, that have longer and less sociable opening hours, that sell higher volumes of alcohol and that are larger in size, and that are non-compliant with the Act. For this reason, FARE makes its recommendation 7 above that a ‘floor space multiplier’ and higher ‘penalties’ for non-compliance should be factored into the formula for calculating the licence fees. All businesses should be compliant and therefore FARE also recommends that there be no deductions for ‘good behaviour’. Compliance should be the norm.

Banned drinkers register

Do you believe that amendments should be made with respect to the BDR? If so, what do you suggest? Do you have any other comments or suggestions regarding the BDR, including areas for improvement?

Recommendation 12: FARE recommends that any decision about the existence and scope of the Banned Drinkers Register (‘BDR’) should be deferred until:

- (a) the completion of the current review of the BDR being led by partners including Deakin University and the Menzies School of Health Research, and supported by funders including the Australian Research Council and both the NT Government and FARE; and
- (b) there has been proper and extensive public consultation on the findings from the review and any options for reform with all relevant stakeholders, in particular, those persons and communities most impacted by the operation of the BDR.

FARE would be pleased to contribute to future public consultation relating to the BDR.

Alcohol marketing restrictions

FARE would like to take this opportunity to make a submission on the regulation of alcohol marketing in the NT.

Recommendation 13: FARE recommends that the NT Government continues to advocate to, and offer support for, the Commonwealth Government to legislate a ban on alcohol marketing in all formats, including in digital media, traditional media and sponsorships.

Recommendation 14: FARE recommends that the NT Government more fully implement the Riley Review recommendation and extend the ban on liquor advertising on commercial passenger vehicles to all government buildings and infrastructure such as bus stops.

Recommendation 15: FARE recommends that the NT Government ban harmful price discounts on alcohol with a focus on off-premises licensees, including through ‘shopper docketts.’

Recommendation 16: FARE recommends that there be a ban on point-of-sale promotions such as free gifts with purchases of alcohol, prominent signage, and competition offers.

Recommendation 17: FARE recommends that if a ‘guideline’ on advertising and promotion has not been created under section 316 of the Act, this be done as matter of priority so as to give full effect to the rule in section 103 against promotions that ‘could be construed as inducing the irresponsible or excessive consumption of liquor or in licensed premises.’

Alcohol marketing continues to be inadequately regulated in the NT and around Australia. Properly regulating alcohol marketing is critical to removing one of the drivers of alcohol consumption and harm. There is sound evidence of a causal relationship between exposure to alcohol marketing and initiation to drinking and harmful drinking patterns in minors.^[40] Alcohol marketing as a ‘cueing’ system for drinking is highly problematic for those who seek to reduce their alcohol use, including those who are in recovery from alcohol dependence.^[41] The widespread marketing of alcohol continues to normalise the use of the product.^[42]

The regulation of alcohol marketing requires a joint effort between the Commonwealth and the states and territories. This was recognised in the *Riley Review* which recommended that ‘[t]he Northern Territory Government advocate at the national level for independent, legislated control on the content, placement and volume of all forms of alcohol advertising and promotion. There should be a comprehensive code and enforceable decisions with sanctions that act as a deterrent to inappropriate alcohol advertising’ (Riley recommendation 2.10.1). Since the *Riley Review*, there has been no new legislation at the Commonwealth level. It is for this reason that FARE recommends that the NT Government continues to advocate, and offer support for, the Commonwealth Government to legislate to ban alcohol marketing in all formats, including in digital media, traditional media and sponsorships.

The *Riley Review* also made recommendations directed to the NT Government’s controls on alcohol marketing within the NT. One of the recommendations was that, ‘[t]he Northern Territory Government bans alcohol advertising on publicly owned assets such as buses and buildings’ (Riley recommendation 2.10.12). FARE understands that this recommendation has been implemented in terms of ‘all commercial passenger vehicles.’ This is a positive step. FARE recommends that the NT Government more fully implement the *Riley Review* recommendation and extend the ban to government buildings and infrastructure such as bus stops. Queensland has this useful restriction as part of its alcohol policy.^[44]

The *Riley Review* also recommended that, ‘[t]he legislation makes clear that promotion (by whatever means) of alcohol by reference to harmful price discounts is prohibited’ (Riley recommendation 2.10.6). It also recommended that ‘[t]he Liquor Act be amended to provide for the licensing authority to specifically prohibit certain types of promotional activities, such as shopper dockets’ (2.10.8). FARE understands that these two recommendations have yet to be fully implemented by the NT Government. The current Liquor Commission code of practice and associated guidance note address the issue of pricing promotions as part of the provisions on ‘rapid or excessive liquor consumption.’^[45] However, the code and the guidance note are directed towards promotions by licensees for on-premises consumption. They do not adequately deal with off-premises consumption and take-away licensees, in particular the pricing deals (e.g. ‘shopper dockets’, heavy discounting). The NT Government is to be commended for introducing minimum unit pricing, yet controls on pricing promotion are also needed to reduce alcohol harms. FARE recommends that the *Riley Review* recommendations be implemented to ban harmful price discounts on alcohol with a focus on off-premises licensees, including through ‘shopper dockets’.

FARE is concerned about the proliferation of promotions at point-of-sale for take-away alcohol. These include free gifts with purchases of alcohol, prominent signage, competition offers, sales prices and price discounts. In addition to recommendation 11 above about the ban on price promotions, FARE recommends that there be a ban on point-of-sale promotions .

Finally, FARE notes that the Commission has not issued guidelines about alcohol promotions under section 316 of the Act. Section 316 provides that, ‘[t]he Commission may, with the Minister’s approval, make

guidelines in relation to the operation and administration of this Act'. Section 103 states that, '[a] licensee must not publish or cause to be published, in any media, an advertisement that could be construed as inducing the irresponsible or excessive consumption of liquor on or in licensed premises.' This is contrary to a guideline of the Commission under section 316. Section 103 is an important control on alcohol promotions. However, it cannot have an effect without there being guidelines on 'promotions inducing the irresponsible or excessive consumption of liquor.' FARE acknowledges that the Commission has produced a code of practice on the responsible advertising and promotion of liquor and issued an associated guidance note.^[46] It is not clear to FARE whether these documents together are 'guidelines' under section 316. FARE recommends that if a 'guideline' has not been created under section 316, this be done as a matter of priority so as to give full effect to the rule in section 103 against promotions that 'could be construed as inducing the irresponsible or excessive consumption of liquor or in licensed premises.'

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