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Dear Ms Heske

Submissions in respect of the seizure and forfeiture provisions in the *Liquor Act 1984*

1. Thank you for the opportunity to provide submissions on the seizure and forfeiture provisions in the *Liquor Act 1984* (**the Act**). We understand it is the government's intention to present amendments to the Legislative Assembly in May.

2. We set out our submissions as to the amendments to be made below.

SUMMARY OF NAAJA'S POSITION

3. We understand that in the past some measures of alcohol restrictions may have been endorsed by Communities. We are not aware of the Communities' attitudes specifically with forfeiture and seizure provisions within the Act. We therefore encourage you to undertake detailed consultations with communities affected by the seizure and forfeiture provisions.

4. Although we have not undertaken detailed consultations, we are able to speak about the experiences of our individual clients and concerns we have based on the issues which have arisen for them in relation to vehicle seizures and forfeitures.

5. Our view, based on these experiences, is that unless your consultation confirms that Communities do want seizures and forfeitures, forfeiture and seizure provisions should be removed. In our view, such provisions amount to double punishment, erode the presumption of innocence in respect of alcohol offences, are procedurally unfair, result in disproportionate consequences for communities and individuals and

cause both the Territory and our clients to incur very significant and unreasonable cost.

6. Although the provisions are facially neutral as to race, they disproportionately affect Aboriginal people living in, and travelling to, the restricted areas.

7. If a decision is made to retain the power to seize vehicles, changes should be made to the regime to limit the circumstances in which vehicles may be seized, enable the easier and more cost-effective return of vehicles where appropriate and ensure that persons who have been found not guilty have their vehicles returned. The Act should be drafted in a way that recognises the often devastating flow-on effects that seizure of a vehicle has on a community generally. Finally, the Act should be amended to permit review of decisions in the Northern Territory Civil and Administrative Tribunal (**NTCAT**).

8. We set out our suggestions in more detail below.

DISCUSSION

9. On the basis of your assertion that Communities do endorse forfeiture and seizure powers, and subject to any additional view the Communities have, the following submissions focus on amendments which would remove some of the worst iniquities in the current system, and is structured as follows:

    - First, we suggest changes to that of which police must be satisfied before seizing a vehicle: see s 95 of the Act;
    - Second, we suggest changes to that which Commissioner must consider before releasing a vehicle which has been seized: see s 97 of the Act;
    - Third, we suggest changes to the mechanism for release in the Local Court: see s 98 of the Act; and
    - Fourth, we make certain other suggestions to make the system fairer, less financially burdensome, and more reflective of the severe consequences seizure of vehicles can have on remote communities generally.

10. In our view, the changes suggested are likely to result in reduced resources being spent by the Territory and are likely to improve the lives of people in remote communities without affecting the legislative purpose of maintaining dry communities.

The conditions permitting seizure in s 95(1)(b) should be replaced

11. This section sets out the problems with the present conditions enlivening the power to seize vehicles, then proposes an alternative formulation.

Problems with the current test

12. The Act, as published on the Northern Territory Government's legislation website does not set out s 95A, which was altered by s 10 of the *Stronger Futures in the*

Northern Territory Act 2012 (Cth). This creates a misrepresentation of law which exacerbates the other barriers our clients face in accessing the law. The official legislation (as listed on the website) must be updated as a matter of urgency to include s 95A within the Act itself and, in time, the Act should be amended to include a note to the effect of s 10 of the *Stronger Futures in the Northern Territory Act 2012 (Cth).*

13. Even if the requirements set out in s 95A of the Act are complied with, s 95 of the Act is incompatible with human rights.[1] Section 95 of the Act;

    a) Erodes the presumption of innocence, reversing the onus of proof. The provisions are also procedurally unfair, denying affected persons natural justice. The power to seize a vehicle arises on the basis of an inspector's reasonable belief that an offence has been, or is being or likely to be, committed: see s 95(1)(a).[2] The seizure of the car amounts in substance to punishment for the suspected commission of an offence prior to / without any judicial process and prior to any determination by the Courts that an offence has been committed. Neither the driver of the vehicle nor the owner of the vehicle are afforded the opportunity to respond to the allegations against them before the punishment is metered out.[3] In some cases the car will have been lent to the alleged offender, and the vehicle will have been seized without the actual owner having any knowledge of its use or even of the fact it has been seized. The onus is then on the owner of the vehicle to prove that they had no knowledge of the alleged alcohol-related offence with which the vehicle was allegedly connected, that is to say, there is a presumption of guilt on all affected parties until they can prove innocence. This reverses the acceptable onus of proof, and denies all affected parties natural justice.

    b) Is undifferentiated in its application to potentially minor offences. The provisions apply in the same way regardless of whether the person has brought a very large or very small amount of alcohol into the community. For example, we are aware of a case in which a vehicle was seized after 5 mL of alcohol was found inside. This renders the provisions completely disproportionate.

    c) Fails to adequately reflect cultural pressures which may cause the owner of the vehicle to be unable to refuse requests. Police are not currently required to take into account whether the owner/driver of the vehicle had any choice in their vehicle being involved in the commission of the offence. Culturally, Aboriginal people may be obliged to lend their vehicle to more dominant family members, or drive elderly or more dominant family members as requested to do so. Furthermore, those involved in relationships of unequal power, such as child/parent, wife/husband, and youth/elder may be coerced into driving a dominant party, or lending their vehicle to a dominant party. The Act does not contemplate family violence. The current forfeiture provisions do not make an exception in situations where the owner of the vehicle may not have been reasonably able to prevent the commission of the offence. While this issue has

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1 See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), Pt 3.

2 *International Covenant on Civil and Political Rights* [1980] ATS 23, Art 14(2).

3 *International Covenant on Civil and Political Rights* [1980] ATS 23, Art 14(2).

been partially addressed by recent amendments to s 97(5)(b), it is not appropriate for persons who are culturally obliged or coerced into lending the use of their car to another person to be required to apply to police for the return of their vehicle. Rather, such persons should not be put to the expense, stress and inconvenience of losing their car at all.

14. The last issue is clearly apparent in the case study at Appendix A. As discussed during our meeting of 23 April 2019, we would be grateful if you would refrain from publishing this case study as its details make our client readily identifiable.

Options to replace the test

15. In view of those matters, we consider that s 95(1)(b) should amended be so that the inspector can only seize a vehicle if he or she is satisfied that:

    a) an amount of alcohol has been found that exceeds the reasonable threshold (to be determined); and

    b) the owner of the vehicle had actual knowledge that the offence was being committed; and

    c) seizure of the vehicle was reasonable and necessary in all the circumstances to prevent the future commission of a relevant offence.

16. This test would address some of the issues identified above. In particular:

    a) The requirement of actual knowledge would go some way to addressing procedural fairness concerns because it would require police to contact owners (who may not be present) to check whether they had knowledge of an offence before seizing vehicles;

    b) The minimum alcohol requirement would go some way to addressing proportionality concerns;

    c) The "reasonable and necessary in all the circumstances" test would require police to consider whether the owner actually had a choice to refuse a request to use the vehicle to carry alcohol, whether seizing the vehicle will actually contribute towards preventing alcohol from entering restricted areas, to consider the broader effect of seizure on the community and to consider the considerable cost to the Territory of seizure, as well as any other relevant matter.

    d) The continued application of s 95A would also go some way to addressing issues relating to hardship.

There should be a presumption in favour of the Commissioner releasing vehicles

17. This section sets out problems with the current test in ss 97(5) and (6) and proposes options to repeal and replace it.

Problems with the current test

18. If it is necessary to restrict property rights to achieve the legislative purpose of maintaining dry communities (which, as discussed above, we do not necessarily accept), those rights should be infringed as little as possible to achieve that purpose. The central problem with s 97(5) is that it sets up considerable barriers to persons who wish to reclaim their vehicles, with no rational connection with the legislative purpose. The high bar established by s 97(5) has the capacity to effect very substantial harm on individuals and communities with no rational connection with the legislative purpose it purports to achieve.

19. Section 97(5) provides that the Commissioner:

> *'may release the thing to the applicant only if the Commissioner is satisfied:*
>
> *(a) The applicant owns, or has an interest in, the thing; and*
>
> *(b) The applicant*
>
> *(i) did not know or could not reasonably have known about the commission of the offence; or*
>
> *(ii) knew about the commission of the offence but was not in a position to reasonably prevent the commission of the offence.*

20. Section 97(6) provides that despite s 97(5), the Commissioner may refuse the application if the Commissioner decides it is 'inappropriate' to release the thing, having regard to the evidential value of it and any other things the Commissioner considers relevant.

21. This test inappropriately restricts the property rights of individuals and has no connection to maintaining dry communities. In particular:

a) The test in s 97(5) is formulated as the Commissioner only having power to return if an applicant establishes certain matters. This reverse onus makes it very difficult to establish that vehicles should be returned. Combined with the fact that vehicles may be seized on reasonable suspicion and without affording procedural fairness, this weighting is unfair and unreasonable on applicants who may be entirely innocent of any alcohol offence but are nonetheless burdened with establishing that vehicles should be returned

b) The objective knowledge test in s 97(5)(b)(i) is unfair and compounds the problems with the reverse onus of proof. Failure to prevent an alcohol offence in circumstances where one should have known it would occur is not itself an offence. But the effect of s 97(5)(b)(i) is that merely being in a position to know that an offence may be committed can lead to the permanent seizure of property of great monetary value and of even greater value to an individual's

independence, autonomy and capacity to assist his or her community, particularly in the wet season where a 4WD is necessary to be able to get in and out of the Community. This is an extraordinary and manifestly disproportionate punishment for an innocent bystander, who the common law would ordinarily presume not to be under any duty to prevent harm.

c) The caveat that the application may be refused if it is 'inappropriate to release the thing' has no rational basis and effectively gives the Commissioner an unlimited discretion to refuse applications. We note that the Police have power to seize items that are evidence under the *Police Administration Act (1979)* as well as under the common law[4]. There provision therefore serves no utility for the purposes of preserving the vehicle as evidence. It is difficult to see circumstances were, with the other requirements of s 97 having been satisfied, it would otherwise be inappropriate to release the vehicle.

Options to replace the test

22. In view of those matters, we consider that s 97(5) and (6) should be repealed and replaced with a provision that *requires* the Commissioner to release the car *unless* he is satisfied that

    a) the owner has been convicted of a relevant offence to which the seized vehicle was related.

23. Further, rephrasing the test as a duty to return subject to certain matters recognises the primacy of upholding basic property rights against arbitrary interference by the State, and limits such interference to the minimum which is necessary to achieve the legislative purpose of maintaining dry communities.

24. In addition, the NTCAT should be given jurisdiction to review refusals by the Commissioner. Having regard to the very significant detriment that seizure of vehicles have and the potentially very large monetary value at stake to individuals, it is inappropriate that there is no review mechanism to challenge decisions not to release vehicles.

Section 98 should be simplified and release be the default position

25. This section sets out problems with the current test in s 98 and proposes options to repeal and replace it.

Problems with s 98

26. There are very considerable problems with s 98:

    a) As it applies to persons who have been found not guilty and where no other person has been found guilty, s 98 requires proof that they did not know or could not reasonably have known about the commission of an offence. This is absurd, manifestly unfair and amounts to the arbitrary confiscation of personal property for the achievement of no legislative purpose. In its place, there

[4] See G.H. Photography Pty Ltd v McGarrigle and another [1974] 2 NSWLR 635 at 640

should be a provision which states that vehicles must be returned to persons who have not been found guilty of a relevant offence;

b) Persons who have been found guilty of an alcohol related offence have no chance to recover their vehicle. This can be an extraordinarily disproportionate consequence, as the case study demonstrates; and

c) It is a waste of court time and Territory resources for the Local Court to deal with requests for the release of vehicles. It is more appropriate for applications to be made to the Commissioner, with review rights to the NTCAT.

Options to replace the test

27. The application in s 98 should be amended to apply the following tests:

a) If an owner is not found guilty of the commission of a relevant offence, the vehicle must be returned.

b) If an owner is found guilty of a relevant offence, the vehicle will nevertheless be returned unless the Commissioner is satisfied that it is more likely than not that the vehicle will be used again in the commission of an alcohol-related offence and it is reasonable in all the circumstances that the vehicle be forfeited.

28. There should be capacity to review decisions of the Commissioner in the NTCAT.

Review by the NTCAT and consideration of discretionary factors

29. In our meeting, a concern was raised that the Government may not allow further discretionary considerations to be given to the release of vehicles due to the costs of the Court resources in considering these matters.

30. The benefit of having the NTCAT consider these matters is that the process is less formal and costly, and thereby ensures that these considerations can be taken into account in a low cost way.

31. To be clear, regardless of whether the Court or the NTCAT have the jurisdiction to hear these mattes, one of these bodies ***must*** have the ability to consider these discretionary factors and review decisions by the Commissioner.

32. While it might be the case that that on average the seized cars are assessed as having low value, NAAJA is aware of a significant number of situations where vehicles worth $20,000 to $40,000 have been seized under these provisions. Irrespective of the actual value of the vehicles at the time of seizure, and as noted above, there is a significant value to the Communities beyond the vehicle's market value as they are essential to:

a) Clients getting to and from appointments with medical centres, government agencies (such as Territory Families) and other such critical meetings; and

b) Allowing persons to be able to enter and exist Communities during the wet seasons.

33. The value to the Communities is multiplied by the fact that these vehicles are generally used in a communal way, which means that if one person loses the benefit of the vehicle so do many other members of the community. Property is often considered to have broad or community ownership and use in traditional culture, in contrast to the application of personal ownership interpreted by the law.

34. Given this value, it would be incredibly unconscionable that the Government would preserve their power to seize these vehicles without allowing the owner to have the ability to put forward their circumstances in a bid to retrieve their property. Given the disproportionate effect these laws have on Indigenous people, this would be an exceptionally discriminatory and excessive use of Government power.

Other necessary changes

35. Section 97(7) permits the making of conditions on the release of vehicles. This is inappropriate in circumstances where police have seized vehicles on a reasonable suspicion which turned out to be unfounded. Conditions are an interference with property rights and can only be rationally justified if the judicial process has found that the vehicle has been connected with the commission of a relevant offence.

36. In addition, even if there was a rational basis to seize a vehicle under s 95 which turns out to have been well-founded, there should not be a power to impose general conditions on the use of vehicles. Conditions should be limited to those which achieve the legislative purpose of maintaining dry communities, and should not be at large.

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Encl – Appendix A, Case study