

NORTHERN TERRITORY LIQUOR COMMISSION

NOTICE OF PRELIMINARY RULING

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT
APPLICATION FOR RECUSAL

REFERENCE: LC2018/146

LICENCE NUMBER: 80902690

LICENSEE: LAE Supermarkets Pty Ltd

PREMISES: **Northside IGA**
North Stuart Highway
ALICE SPRINGS NT 0870

LEGISLATION: Part VII of the *Liquor Act*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Ms Pauline Reynolds (Health Member)
Mr Blair McFarland (Community Member)

DATE OF HEARING: 11 December 2018

DATE OF DECISION: 19 December 2018

RULING

1. On 11 December 2018, the Northern Territory Liquor Commission ("the Commission") dismissed an application by the Licensee that Members Goldflam and McFarland recuse themselves on the ground of apprehended bias from hearing a complaint against the Licensee that it had contravened a provision of the *Liquor Act* ("the Act") and contravened a condition of its licence. These are the reasons for that ruling.

REASONS

BACKGROUND

2. The Licensee is authorised to sell liquor for removal and consumption away from the licenced premises, a bottle shop located on the premises of a local independent Alice Springs supermarket ("Northside IGA").
3. On 15 February 2018, NT police, including an officer undertaking covert duties, attended the Northside IGA, as a result of which a complaint was made to the Director-General of Licensing ("the Director-General") that the licensee or an employee had contravened

s102 of the Act, and the conditions of the licence, by selling liquor to a person who was drunk.

4. On 12 November 2018, the Director-General referred the complaint to the Commission pursuant to s68(5)(b)(iii) of the Act. The Commission notes in passing that the unexplained delay of some nine months between the event the subject of the complaint and the referral of the complaint to the Commission appears to be excessive.
5. On 26 November 2018, in accordance with s53(1) of the Act, and in his capacity as acting Deputy Chairperson of the Commission, Member Goldflam notified the Licensee and the Director-General that the Commission had fixed the complaint for hearing at Alice Springs on 11 December 2018.
6. On 4 December 2016, the Licensee's solicitors wrote to the Commission requesting, among other things, that Member Goldflam recuse himself from hearing this matter because of his prior membership of the Peoples Alcohol Action Coalition ("PAAC") and his participation as a Commission Member in the Commission's on-going inquiry into license conditions for local takeaway outlets, one of which is the Licensee ("the s33 inquiry").
7. On the same day, the Commission responded by informing the Licensee's solicitors that:
 - the issue of recusal should be heard and determined by the Commission before embarking on the substantive hearing of the complaint
 - Members McFarland and Reynolds had also been appointed to hear the complaint
 - Members McFarland and Reynolds are both also participants in the s33 inquiry
 - Member McFarland is also a former PAAC member
8. On 5 December 2018 the Licensee's solicitors informed the Commission that the Licensee also sought the recusal of Members McFarland and Reynolds.
9. Accordingly, and with the consent of the Director-General, the Commission vacated the substantive hearing listed for 11 December 2018 in order to hear and determine the preliminary issue of the recusal application.

THE HEARING

10. Mr Simmons appeared for the applicant Licensee. Ms Morley appeared on behalf of the Director-General. Ms Morley's submissions in relation to the recusal issue were, as is appropriate, confined to a submitting appearance. The Commission thanks counsel for their attendance and assistance.
11. The Licensee did not proceed with an application that Member Reynolds recuse herself, and resiled from reliance on the circumstance that the sitting Members are also participants in the on-going s33 inquiry. The sole basis on which recusal was sought was the prior membership of Members Goldflam and McFarland of PAAC.
12. At the commencement of the hearing, Members Goldflam and McFarland declared that prior to being appointed to the Commission, they had been active members of PAAC for approximately 20 years and 8 years respectively. On appointment to the Commission, they had immediately resigned their membership of PAAC. Member Goldflam declared

that while a member of PAAC, he had often spoken at conferences and other public events about alcohol policy issues, but that since his appointment to the Commission, he has ceased to comment publicly on alcohol policy and has absented himself when there is discussion regarding alcohol policy issues within various bodies in which he still participates. Member McFarland declared that he is employed by an organisation that works to reduce volatile substance abuse. Despite not being the subject of an application to recuse herself, Member Reynolds also made a declaration regarding her employment, at an alcohol rehabilitation facility in Tennant Creek.

13. The Licensee tendered two documents, being publications by PAAC entitled "Northern Territory 2016 Election Platform: Calling time on too much grog in the NT", and "Submission to the Alcohol Policies and Legislation Review in the Northern Territory", dated July 2017.

14. The Licensee's submission can be distilled as follows:

- PAAC is a prominent advocacy body that has long campaigned for the minimisation of alcohol-related harm, particularly through supply reduction measures.
- PAAC asserts that alcohol-related harm in Alice Springs is a very serious problem, that licensees are to a significant extent responsible for this problem, and that accordingly there should be stricter regulation of licensees.
- PAAC is concerned that the alcohol industry (including licensees), which has a vested interest in the sale of liquor, has too much influence over liquor policy.
- In this case, it appears likely that the primary issue in dispute will be whether a customer observed by police to purchase liquor from the Licensee was in fact drunk. The determination of that issue will involve the exercise of fine judgement.
- A fair-minded lay observer might entertain a reasonable apprehension that Members Goldflam and McFarland might not bring an impartial and unprejudiced mind to the resolution of the question before the Commission,¹ because, as active members of PAAC in recent times, their mind-set has been affected by the PAAC world-view, which is negatively disposed towards licensees.

CONSIDERATION

15. The Commission was established by the *Liquor Commission Act*, which came into force on 28 February 2018. The Attorney-General and Minister for Justice appoints Members² for a term of up to five years.³ A person is qualified for appointment if the Minister is satisfied that the person has the appropriate knowledge, experience and expertise to be a member.⁴ A person is not eligible to be a member if, among other things, a person holds an office, or has an interest in, a liquor licence.⁵ Members are required to disclose direct or indirect pecuniary interests in matters under consideration by the Commission.⁶

¹ See *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293.9, cited in *DPP v McNamara & Ors* [2012] NTSC 81 at [25] per Barr J

² *Liquor Commission Act 2018* (NT), s7(1)

³ *Liquor Commission Act 2018* (NT), s11

⁴ *Liquor Commission Act 2018* (NT), s7(3)

⁵ *Liquor Commission Act 2018* (NT), s7(4)(a)

⁶ *Liquor Commission Act 2018* (NT), s21(a)

16. The *Liquor Commission Act* does not in its terms require Members to disclose non-pecuniary interests or affiliations.
17. To date, the Minister has appointed thirteen Members to the Commission. Members Goldflam and McFarland are the only Members resident in Central Australia. Member Reynolds is the only member resident in the Barkly. Member Goldflam, a lawyer, is the only Member not resident in Darwin qualified to preside over sittings of the Commission.⁷ Members include medical and health practitioners, legal practitioners, a former publican, a former Chief Executive Officer of the Australian Hotels Association NT, and persons with extensive experience of public administration.⁸
18. The Council of Australasian Tribunals *Practice Manual for Tribunals* (2017) states, at page 57:

The bias rule is subject to a principle of necessity, which recognises that in some cases a tribunal or member must be allowed to proceed despite an appearance of bias, if the tribunal would otherwise be unable to perform its statutory function.⁹ If the tribunal could not find enough members to constitute a panel, a member who would otherwise be disqualified for bias may take part in the decision. This might occur... in a small jurisdiction with fewer members.¹⁰

19. The *Practice Manual for Tribunals* also states, at page 66:

Courts have cautioned judges and tribunal members not to acquiesce too readily to applications for them to stand down, since this can cause hardship to parties, particularly if the matter is part heard. To stand down when there are no legal grounds for disqualification may even amount to an abdication of the member's duty.¹¹ The member may also consider whether standing down without sufficient grounds would encourage tactical objections and abuse of process in other cases.¹²

20. On 16 April 2018, the Commission adopted its own *Policy and Procedures Manual*, which contains the following passages:

2.4 Conduct of Commission Members

The Commission plays a key role in liquor licensing decisions in the Northern Territory.

There is an expectation from the community and the liquor industry that Members will carry out their responsibilities conscientiously and diligently and shall maintain the highest standards of ethical conduct.

⁷ *Liquor Commission Act*, ss17(a), 8(2), 10(2)

⁸ Department of the Attorney-General and Justice, *Liquor Commission Members* (webpage), accessed on 13 December 2018 at <https://justice.nt.gov.au/regulatory-services/licensing-boards-committees-and-advisory-councils/liquor-commission/members>. In addition to the 12 Members listed in this document, Phillip Carson, a surgeon, was appointed as a Member on 5 October 2018 (Northern Territory Government Gazette G44).

⁹ *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88 (Mason CJ and Brennan J)

¹⁰ *Sanders v Snell (No 2)* (2003) 130 FCR 149

¹¹ See e.g. *Re Polites: ex parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78

¹² *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294

Decisions must be made impartially and take into account all relevant issues. Determinations must be made not only without bias but without the perception of bias.

The rule against bias is inherent in the principles of natural justice and procedural fairness and governs the attitude or state of mind of the decision maker. Members must ensure that they are approaching matters for determination objectively and also so that a person observing the Commission's processes and procedures could not reasonably form the view that a matter had been pre-determined.

In dealing with perceptions of bias it is better to be proactive, so a member should alert their Chairperson to any relationships the member may have which could possibly be perceived as influencing him/her to favour a particular party in the matter before the Commission. For example, a Member might be a social member of a large licensed social club which is seeking a variation of its licence conditions. The Chairperson would then in all likelihood disclose that relationship to the parties at the commencement of the hearing and deal with any objections to that Member remaining on the panel.

Members have a fundamental responsibility to act within applicable legislation, applicable common law and accepted principles of good governance and to act in accordance with generally expected ethical principles applying to the public sector.

2.5 Conflicts of Interest

Members have an obligation to act in the best interests of the Commission in an ethical manner and must:

- act in good faith and put interests of the Commission ahead of their own;
- exercise their powers for the purpose of the Commission; and
- observe a duty of care in discharging their duties with regard to the law.

To ensure good governance, the Commission must behave ethically and lawfully and procedures must be place to reinforce ethical conduct. An aspect of good governance is the management of a conflict of interest and it is best practice to have a procedure in place for examining the potential conflict whenever it arises.

A conflict of interest may occur if a financial interest or a relationship influences or appears to influence the ability of a member to exercise objectivity or where a Member puts his/her personal interests ahead of the interests of the Commission.

A conflict of interest exists when it is likely that a Member could be influenced, or could be perceived to be influenced, by a personal interest in carrying out their duty. A conflict of interest that leads to partial decision making may constitute corrupt conduct.

Conflicts cannot always be avoided but they must be identified and action must be taken to ensure that the conflict situation is mitigated effectively. If a conflict of interest does arise and is not prevented, it can have a damaging impact on public confidence in the Commission. The law only protects a Member who breaches the duties of office if the breach was due to an honest mistake.

The Act provides for the following strategies for avoiding conflict of interest:

- it prohibits a Member from holding an office or having an interest in, a club or body corporate that holds a liquor licence or a gaming machine licence;
- it obliges a Member to declare any interest in any matter being considered by the Commission or about to be considered by the Commission and requires the nature of the interest to be disclosed to the Chairperson as soon as practicable after the relevant facts have come to his or her attention;
- it obliges the Chairperson to declare any interest in any matter being considered by the Commission or about to be considered by the Commission and requires the nature of the interest must be disclosed to the Minister as soon as practicable after the relevant facts have come to his or her attention;
- it prohibits a Member or the Chairperson who has disclosed an interest, from taking part in any deliberation of a decision in any matter in relation to that interest; and
- mandates the Commission to make and publish guidelines specifying the types of interests that a member must disclose under section 21 of the Act.

...

2.8 Political Affiliations

A Member has the same right to freedom of political expression and association as other Members of the community. However, political interests must always be undertaken in a strictly private capacity and must not conflict with the primary duty of Members.

21. In the Commission's view, compliance with the principles and practices enunciated in the Manual neither requires nor supports a decision to recuse Members Goldflam or McFarland.

22. Moreover, just as "the reasonableness of the fictional observer [of a magistrates court] is to be tested in the context of ordinary judicial practice",¹³ the reasonableness of the fictional observer of the Commission should be tested in the context of the Commission's Policy and Procedures Manual, with which the reasonable fictional observer would expect the Commission's Members to be both familiar and compliant.

23. The Commission was referred by counsel for the Licensee to the decision of the Northern Territory Court of Appeal in *Attorney-General (NT) v Director of Public Prosecutions &*

¹³ *Attorney-General (NT) v Director of Public Prosecutions & Ors* [2013] NTCA 2 at [25]

Ors [2013] NTCA 2, in which at [19] the court cited this authoritative passage from *Ebner v Official Trustee in Bankruptcy*:

“The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.”¹⁴

24. The task of determining whether it can be established on the balance of probabilities that the complaint should be upheld is unlikely to involve unusual or complex matters of judgement. It will likely turn on the Commission's assessment of the oral evidence of the attending police officers, and of the contemporaneous records they obtained, which the Commission is informed will include CCTV footage of the impugned transaction, an audiovisual recording made on a police officer's mobile telephone, and the results of a breath analysis conducted at the Alice Springs watchhouse.
25. Having regard to the scope and nature of the task before it, the Commission is not persuaded that the Licensee has articulated a cogent logical connection between the impugned mindset of its Members that has been purportedly identified, and any feared deviation by those Members from deciding the complaint on its merits.
26. In the Commission's view, it would not be reasonable for a fair-minded observer to fear that merely because of their privately held opinions about alcohol policy (whatever they might be), Members Goldflam or McFarland might fail to make a fair assessment of evidence adduced in relation to an allegation that liquor had been sold to a person who was drunk.
27. For these reasons, the application that Members Goldflam and McFarland recuse themselves is refused.

¹⁴ (2000) 205 CLR 337 at 345 [8], per Gleeson CJ, McHugh, Gummow and Hayne JJ.

28. The Commission intends that this preliminary ruling be read with and incorporated into the Decision Notice that will be issued after the hearing of the complaint.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

19 December 2018

On behalf of Commissioners, Goldflam, Reynolds and McFarland