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TENNANT CREEK TRADING PTY LTD, WHYTEROSS PTY LTD, CHARLES KEITH HALLETT and
TENNANT CREEK HOTEL PTY LTD v THE LIQUOR COMMISSION OF THE NORTHERN TERRITORY
OF AUSTRALIA and JULALIKARI COUNCIL ABORIGINAL CORPORATION
No. SC 179 of 1994
Number of pages - 27
Administrative law - natural justice - perceived bias

COURT
IN THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
THOMAS J

CWDS
Administrative law - natural justice - perceived bias

HRNG
DARWIN, 7 April 1995
#DATE 7:4:1995

Appearances not available

ORDER
Application refused.

JUDGE1
THOMAS J This summons on Originating Motion is brought by the plaintiffs following a decision by the first defendant made on 8 June 1994 to vary the conditions of the plaintiff's licences by reducing their hours of trading and prohibiting the sale of certain types of liquor.

2. The second plaintiff was granted leave to file a Notice of Discontinuance on 20 February 1995. The fourth plaintiff did not attend the hearing. I was satisfied on the information provided by counsel and my own perusal of the Court file, that the fourth plaintiff had been advised as to the date and place of the hearing and had chosen not to attend.

3. Following an application made by the Julalikari Council Aboriginal Corporation to be added as a defendant in these proceedings, the Master made an order on 15 September 1994 that "it would be just and convenient to add the Council as a defendant".

4. Accordingly, the Julalikari Council Aboriginal Corporation now appears as a second defendant in these proceedings.

5. The plaintiffs, by Originating Motion issued on 24 August 1994, seek the following relief. The plaintiffs seek a remedy in the nature of certiorari pursuant to Order 56 of the Supreme Court Rules to quash the decision (by the Liquor Commission to vary the terms and conditions of the plaintiffs' licence) on the following grounds:

"14.(a) The Defendant failed to afford natural justice to the Plaintiff because of, inter alia, the matters pleaded in paragraph 7 above.
(b) The varied conditions required the Plaintiffs to undertake an illegal act, namely to discriminate in the supply of goods on the basis of a person's race and/or

affiliation contrary to the Anti-Discrimination Act 1992 (NT) and/or the Racial Discrimination Act 1975 (Commonwealth).

(c) The Decision was unreasonable, impracticable and imposed unduly onerous conditions on the Plaintiffs.

6. I was informed that the relief sought in (b) above had been stayed by consent and the plaintiffs were not relying upon that ground.

7. In relation to the grounds of perceived bias the plaintiff seeks orders in the alternative as set out in paragraph 16 and 17 of the Originating Motion:

"16. Further the Plaintiffs seek a remedy in the nature of prohibition pursuant to Order 56 of the Rules of the Supreme Court to prevent the members of the Defendant who participated in the Decision from participating in and/or sitting at the hearing of the Plaintiffs' applications on the ground that the involvement of those members of the Defendant in the hearing may allow or be seen to allow prejudgment or predetermination of the merits of varying the conditions of the licences.

17. Further and alternatively, the Plaintiffs seek a declaration that the members of the Defendant who participated in the Decision are disqualified from participating in and/or sitting at the hearing of the Plaintiffs' applications on the ground that the involvement of those members of the Defendant in the hearing may allow or be seen to allow prejudgment or predetermination of the merits of varying the conditions of the licences."

8. The background to this matter is set out in the Amended Statement of Agreed Facts which was tendered in Court at the commencement of the hearing and marked Exhibit 1. Exhibit 1 includes the Amended Statement of Agreed Facts dated 20 February 1995 together with annexures. Exhibit 1 also includes the annexures to the Statement of Agreed Facts dated 6 February 1995 and six volumes referred to as the Brief which was prepared by the Commission upon receipt of notices from the affected licensees requesting a hearing in relation to the proposed licence variations. The Amended Statement of Agreed Facts (omitting reference to the relevant annexures) states as follows:

"1. At all material times, Jasmin Afianos has been the licensee and nominee of the Tavern licence in respect of the premises known as Rockits Tavern in Tennant Creek.

2. At all material times Charles Keith Hallett has been the licensee and nominee of the public hotel licence in respect of the Goldfields Hotel.

3. At all material times Tennant Creek Trading Pty Ltd has been the licensee and Scott Hallett has been the nominee in respect of a liquor merchant's licence.

4. At all material times Tennant Creek Hotel Pty Ltd has been the licensee and Michael Spina the nominee in respect of the public hotel licence held by the Tennant Creek Hotel in Tennant Creek.

5. At all material times Whyteross Pty Ltd has been the licensee and Graham Whyte the nominee of the liquor merchant's licence held in respect of the Headframe Bottle Shop.

6. At all material times the Julalikari Council Aboriginal Corporation ("Julalikari Council") has been an incorporated body under the Aboriginal Councils Association Act 1976 (Commonwealth). The Julalikari Council was incorporated on 29th June 1989.

7. During 1993 the Liquor Commission of the Northern Territory ("The Commission") decided to conduct a symposium in Tennant Creek concerning alcohol consumption in the town.

8. On 20th and 21st January 1994 co-ordinators for the proposed Tennant Creek Symposium visited Tennant Creek to inform the community of the forthcoming event.

9. Weekly advertisements for the proposed symposium appeared in the Tennant and District Times during the period 28th January 1994 to 25th February 1994.

10. Co-ordinators for the proposed symposium visited Tennant Creek for the second time on 7th and 8th February 1994.

11. The Tennant and District Times of 4th March 1994 contained the Programme for the symposium and a registration form.

12. In or about March, 1994 Keith Hallett and others made written submissions to the Liquor Commission.

13. During the week commencing 11th March 1994, 900 copies of the Programme were distributed to mailboxes in Tennant Creek and Warrego.

14. A symposium under the title "Tennant Creek, Tourism, Grog - Progression or Regression?" was conducted in Tennant Creek on 16th and 17th March 1994.

15. Staff of the Northern Territory Liquor Commission subsequently prepared an interim report on the

symposium.

16. On Thursday 24th March 1994 as a result of directions issued by the Liquor Commission, all liquor outlets in Tennant Creek were closed for the day (the "grog free day").

17. On 24th March 1994 a meeting took place between representatives of liquor licensees in Tennant Creek and representatives of the Julalikari Council. This meeting proposed the establishment of a Steering Committee and a number of specific proposals.

18. Subsequently a Steering Committee was established, consisting of representatives of the Julalikari Council, the NT Police, BRAADAG, the Department of Health and Community Services, Tennant Creek Town Council, liquor licensees and the Liquor Commission.

19. Following the meeting between the representatives of the licensees and of the Julalikari Council, the Liquor Commission circulated in Tennant Creek a questionnaire calling for public comment on 13 proposals identified at the meeting.

20. The inaugural meeting of the Steering Committee was held in Tennant Creek on 26 April 1994.

21. The results of the responses to the questionnaire were subsequently compiled.

22. A special meeting of the Northern Territory Liquor Commission was held in Darwin commencing at 8.30 a.m. on 8th June 1994 ("the 8 June meeting").

23. Commission members present at the meeting were Mr John Maley (Chairman), Mr Graeme Buckley, Mr Bruce Deans, Mrs June Tuzewski and Mrs Jan Hardwick. Ms Robyn Power was present as Minute secretary and Mrs Mae Govern was present with visitor status and as a non-voting member.

24. At the 8 June meeting, the Commission was addressed by Mr Peter d'Abbs (of the Menzies School of Health), Dr Shirley Hendy (of Living with Alcohol) and Mr Elliott McAdam (of the Julalikari Council). After addressing the meeting these persons withdrew and were not involved in the subsequent deliberations of the Commission.

25. In the course of the subsequent deliberations of the Commission, the Commission considered proposal 13 on the Agenda for the meeting.

26. On 10th June 1994 the Liquor Commission issued a Notice of Intent proposing variations of the conditions of a number of the liquor licences in Tennant Creek.

27. On or about 10th June 1994 the Liquor Commission served a notice on each of Tennant Creek Trading Pty Ltd, Whyteross Pty Ltd, Charles Keith Hallett, Tennant Creek Hotel Pty Ltd and Jasmin Afianos advising of proposed changes to the licence conditions in respect of those premises respectively.

28. On 16th June 1994 Graham Whyte, the licensee of the Headframe Bottle Shop, wrote to the Commission requesting a hearing in relation to the proposed variations of licence conditions. On 23rd June 1994 Michael Spina, the nominee of Tennant Creek Hotel Pty Ltd, wrote to the Commission requesting a hearing in relation to the proposed variations.
On 6th July 1944 (sic) Philip and Mitaros, barristers and solicitors of Darwin, wrote to the Commission requesting a hearing in relation to the proposed variations on behalf of the licensees of the Tennant Creek Hotel, the Headframe Bottle Shop, the Goldfields Hotel and Tennant Creek Trading.
On 1st July 1994 Jasmin Afianos, the licensee of Rockits Tennant Creek, wrote to the Commission and requested a hearing in relation to the proposed license variations.

29. Upon receipt of the notices from the affected licensees, the Commission caused a brief to be prepared incorporating all relevant documents. This brief consisted of six volumes.

30. On 17th June 1994 the Julalikari Council caused an advertisement to be published in the Tennant and District Times.

31. On 13th July 1994 the Commission conducted a directions hearing in relation to the proposed hearing.

32. At the directions hearing on 13th July 1994, Pamela Ditton, principal of Dittons, Barristers and Solicitors of Alice Springs, sought leave to appear for the Julalikari Council. She was granted leave to appear at that directions hearing, but directed to file a formal application should she wish to appear at the formal hearing.

33. Pamela Ditton wrote a letter dated 14th July 1994 to the Chairman of the Commission as directed, formally seeking leave for the Julalikari Council to be represented by counsel at the proposed hearing.

34. Philip and Mitaros, solicitors for the licensees, wrote a letter dated 27 July 1994 to the Registrar of the Liquor Commission, opposing the application for leave sought by the Julalikari Council.

35. On 2nd August 1994 the Commission advised the parties that the Commission had decided to allow the Julalikari Council to be legally represented at the hearing and that it would publish its reasons the following day.

36. On 3rd August 1994 the Commission published Reasons for its ruling in relation to legal representation at the hearing on the part of the Julalikari Council.

37. On 5 August 1994 Philip and Mitaros, solicitors for the licensees, wrote a letter to the Chairman of the Commission presenting the licensees' concerns regarding the Commission's determination and including a request that the Commission confirm that no person who participated in the decision (being the decision to vary the licensees' conditions of licence) would be involved in the hearing required as stated in paragraph 28 above."

9. This concludes the Amended Statement of agreed facts.

10. The Court was informed the plaintiffs had not received a reply from the Liquor Commission to a letter from Philip and Mitaros dated 5 August 1994.

11. The Notice of Intent, issued by the Liquor Commission on 10 June 1994 is annexure "H" to the Statement of Agreed Facts and reads as follows:

"In the past year Tennant Creek residents have engaged in widespread public discussion over the negative health and social effects caused by excessive consumption of alcohol.

In March the Northern Territory Liquor Commission sponsored a two day Grog Symposium featuring a variety of speakers while taking separate written submissions from interested parties and Licensees. The Commission has also canvassed community attitudes on the subject by individual questionnaire, with over 360 submissions responding.

The Liquor Commission, in recognising those community

concerns, met on 8 June 1994 and as a result today announces a 3 month trial period of major changes to the town's liquor licensing laws. After that 3 month period, an evaluation of the changes will be carried out by independent assessors, excluding the Liquor Commission or law enforcement agencies. The Commission wishes to emphasise that existing laws in relation to Tennant Creek's restaurants, social and sporting clubs or special extended licences will not be altered or affected by the changes.

The Julalikari Council has made a submission to the Commission that their members are prepared, within the guidelines set down by Northern Territory and Federal Anti Discrimination legislation, to abide by special measures over that 3 month trial period. Those measures are:

1. That members of the Julalikari Community will be prohibited from buying wine in casks of four (4) litres or more;

2. That they be prohibited from purchasing spirits of all varieties;

3. That they will be entitled to purchase two (2) litre casks of wine at a rate of one per person per day.

4. They will be entitled to purchase six (6) cans of heavy beer per person per day with no limit imposed on the sales of light beer.

All Licensees must abide by the following initiatives:

1. Licensees will not be permitted to make third party sales to taxi drivers.

2. There will be changes in trading hours for all licensed front bars and takeaway outlets open to the public including the Headframe, Goldfields Hotel, Tennant Creek Hotel, Rockits, and Tennant Creek Trading. The new trading hours will be between 12.00 midday and 8.00 pm every day except Thursday when takeaways and front bars will be closed.

3. All other bars will open at 12.00 midday and close at their current closing time as per their provision of licence.

4. A general limitation will apply to all front bars where no wine sales of any type will be sold to any member of the public.

This Notice of Intent is designed under Section 33 of the Northern Territory Liquor Act to allow Licensees to respond in writing or demand a public hearing into the previously announced initiatives."

12. On 10 June the Liquor Commission served a notice on the first plaintiff, Tennant Creek Trading Pty. This notice is annexure "I" to the Statement of Agreed Facts and states as follows (omitting formal parts):

"TAKE NOTICE that pursuant to Section 33(1) of the Liquor Act the Commission has decided to vary your licence conditions and hereby gives you notice that 28 clear days after the date upon which this Notice is served on you your conditions of Licence Number 81002132 are varied in the following manner:

1. Liquor is to be sold only during the hours of 12.00 midday and 8.00pm Friday to Wednesday inclusive. Trading on each Thursday is prohibited.

2. (a) You are prohibited from selling any of the following named products to Aboriginal people belonging to or members of Julalikari Community, namely:
- no 4 or 5 litre cask wines to be sold;
- no more than two (2) litres of wine per person per day;
- no more than six (6) cans of "heavy" beer (ie more than 3% by volume of alcohol) per person per day but with no limit on light beer sales.

(b) Sales of liquor to taxi drivers are prohibited where those taxi drivers are acting as purchasing agent for third parties or in circumstances that might reasonably lead you to believe the liquor purchased is not for the taxi driver's personal consumption.

3. These varied conditions of your licence shall come into effect within 28 days of service of this notice on you or on 11 July 1994 whichever is the later and shall remain in effect until further review by the Commission three (3) months after the date of effect if there are variations.

4. These variations to your licence conditions are to be read in addition to your existing licence conditions which remain the same unless modified by these variations.

AND TAKE NOTICE THAT should you be dissatisfied with this

Notice of Variation of your licence conditions you may request the Commission to conduct a hearing in relation to your conditions of licence as provided for in Section 33(2) of the Liquor Act."

13. This Court is not concerned with the merits of the decision or whether the Liquor Commission is right or wrong, but rather whether in reaching their decision on 8 June 1994 the Liquor Commission followed due process.

14. Mr Tiffin, counsel for the Liquor Commission, advised the Court that he appeared to abide the decision of the Court and had been instructed to render such assistance as he could to the Court.

15. The application by the plaintiffs is essentially based on three grounds; (1) denial of natural justice; (2) unreasonableness; and (3) apprehended bias.

16. Mr Basten QC, counsel for the second defendant, stated the second defendant opposed the granting of the plaintiffs' application and sought to have the matter proceed to hearing before the Liquor Commission pursuant to s33 of the Liquor Act. Mr Basten QC indicated that the second defendant also were not satisfied with the proposed changes to the terms and conditions of the licences, and would be seeking at a hearing before the Liquor Commission to have some changes made to the proposed terms and conditions of the licence.

17. The plaintiffs put the following evidence before the Court:

(1) Affidavit of Charles Keith Hallett sworn 1 February 1995 - paragraphs 1, 2, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 the first sentence, 17 subject to clarification and evidence in chief, 19, 20, 21, 22, 23, 24 except the last sentence, 25, 29 except the last paragraph, 30, 31, 32, 35 subject to clarification by further evidence in chief, 36,37, 38, 39, 40, 46, 47 and 67. Annexures A, B, C, D, E and F. Mr Hallett was cross examined by counsel for the second defendant.

(2) Affidavit of Scott Andrew Hallett sworn 1 February 1995 - paragraphs 1, 2, 3, 4, 5, 7 except the last sentence, 8, 9, 10, 11, 12, 13 the first sentence only, 14, 15, 16, 17, 18, 19 first sentence only, 20, 21, 23, 24, 25 first sentence only, 28, 29, 31, 32 only the last sentence, 34, 35, 36 first sentence only, 37, 38 the first sentence only, 39, 40, 41 last sentence only, 45 and subparagraphs 1 and 3, 46, 47 second sentence only, 49 and 57. Annexures A, B, C, D and E.

(3) Affidavit of Darren Joseph Trindall sworn 2 February 1995 - paragraphs 1, 2, 3, 4, 6, 7, 11, 12, 13, 14, 15, 22, 23, 24 except the part 'I was a bit surprise by this because', 25 and 26.

18. Letter from Charles Keith Hallett dated 30 May 1994 to the Chief Minister was tendered and marked Exhibit 2.

19. The second defendant did not put any evidence to the Court.

20. The first defendant put forward the following affidavits as evidence in the proceedings before the Court.

(1) Affidavit of John Vincent Maley sworn 13 February 1995.

(2) Affidavit of Terry Hanley sworn 13 February 1995.

EVIDENCE OF MR MALEY

21. Mr Maley was cross examined in respect of his evidence on affidavit. Mr Maley agreed in cross examination that the Commission had not placed any time limit on the process of consultation with the people of Tennant Creek in

regard to attempts to reach a community consensus or solution to the alcohol abuse problem. Mr Maley stated he had supported the concept of discussions between the licensees present at the symposium held on 16 and 17 March 1994 and the Julalikari Council. A Steering Committee was formed to carry on the consultative process after the symposium. An interim report was prepared by staff of the Liquor Commission following the symposium. This report is annexure "F" to the Statement of Agreed Facts. Following the meeting between the licensees and the Julalikari Council the Commission was provided with a document headed "Proposals for Public Discussion Agreed at the Meeting Between Licensees and Julalikari Councillors" on 24 March 1994 in Brief included in Exhibit 1. It was proposed that thirteen items be put to the community of Tennant Creek in a questionnaire. The Commission agreed to organise that process. A Steering Committee was formed and this committee met on 29 April and 26 May 1994. The main purpose of the Steering Committee was to provide the Commission with a united voice, representing the Tennant Creek community at large. Mr Maley agreed no time limit had been placed on this process. There were a number of recommendations by the Steering Committee contained in Minutes of its meeting dated 26 May 1994. The recommendations are set out on pp 812-818 of the Brief included in Exhibit 1. Mr Maley agreed that the thrust of the Minutes was that the whole matter was still under consideration by the Steering Committee and no time limit was set on this process. The Steering Committee was to meet again on 30 June 1994. Mr Maley gave evidence that on either 30 or 31 May 1994 he decided to call a special meeting of the Liquor Commission on 8 June 1994. By this time he had read the Minutes of the meeting of the Steering Committee on 26 May 1994. He had received representations from Mr Martino, whom Mr Maley treated as one of the licensees. He was aware one of the other licensees had approached the Ombudsman and Mr Charles Hallett had made representations to the Chief Minister. Mr Maley stated he invited the Julalikari Council to attend the meeting of the Commission on 8 June and advised them that the meeting would be about imposing conditions on liquor licenses in Tennant Creek. Mr Maley gave evidence he made no attempt to contact the licensees of Tennant Creek. He did discuss the intention to change the licence conditions with members of the Tennant Creek Town Council. Mr Maley agreed that he assured the manager of the Tennant Creek Town Council and the Steering Committee, that no changes would be made to the licence conditions without them being fully consulted. He agreed he gave the people of Tennant Creek and the people directly involved to understand that he was going to consult with them fully before any licence conditions were changed. Mr Maley further agreed that the only member of the Tennant Creek community invited to attend the meeting of the Commission on 8 June 1994 was a representative of the Julalikari Council. Mr Maley issued this invitation because he wanted to be sure the Commission members knew the final position of the Julalikari Council and because they were a significant part of the Tennant Creek community.

22. Mr Maley gave evidence he was aware the representatives for the Tennant Creek Town Council believed that the "grog free day" had resulted in racial disharmony or divisiveness in the township of Tennant Creek. Mr Maley said the Commission believed bringing in a restriction on trading that was less than a totally "grog free day" would have the opposite effect. It is Mr Maley's evidence that other persons who attended the meeting on 8 June were Mr Peter D'Abbs from Darwin and Dr Hendy who is with the Health and Community Services Department in Darwin. Mr Maley gave the following evidence on p. 53 of the transcript:

> "So, surely, Mr Maley, knowing the views of the Tennant Creek Town Council on that issue, you must have thought to at least ring them up and say, 'Listen, we're thinking about implementing these sorts of substantial restrictions on trading every Thursday in the town. What do you think about that?'---Well, firstly, prior to the - - -

Did you think that? Surely you must have?---I didn't - I
didn't - I didn't know what the meeting of 8 June would -
would result, the first point; and, secondly - - -

Can I just stop you there. Of course, there was no need for
it to be decided on 8 June, was there?---Yes. In my view,
yes.

Why?---Because we, myself and other commission members, were
of the view that we had to start the clock ticking by
putting up some firm proposals in view of the diversity of
opinion and the complexities of the - what - the review and
the - from the questionnaires and also from the symposium
and the workshops at the symposium."

23. Mr Maley agreed that the proposal to have substantial restrictions on trading had not been discussed at either of the Steering Committee meetings. Mr Maley did not know what would be the reaction of the Steering Committee to the proposed restrictions on trading. Mr Maley acknowledged that at the meeting of 8 June 1994 he knew of the letter from Mr Hallett to the Chief Minister dated 30 May 1994 (Exhibit 2) and the financial impact Mr Hallett maintained he had suffered as a consequence of the "grog free day".

24. It is Mr Maley's evidence that the six can limit referred to in the Commission's Notice of Intention was not discussed at the Steering Committee meetings. Mr Maley knew from reading the Minutes of the Steering Committee meetings that there were some concerns expressed by the Steering Committee about the implementation of certain restrictions in relation to human rights and Anti-Discrimination legislation. Mr Maley did not himself believe there were problems. He agreed the Commission decided to change the one carton (twelve cans) limit suggested by the Steering Committee down to a six can limit that would apply to members of the Julalikari community. Mr Maley stated he knew that the decision of the Commission on 8 June 1994 to impose a restriction of six can per day per member of the Julalikari community would effectively remove that area of trade from the licence held by the Tennant Creek Trading Pty Ltd. Mr Maley stated it would have been an easy matter to contact Mr Scott Hallett and discuss these proposals but he did not do so. Before and after the symposium held in Tennant Creek, Mr Maley had held discussions with members of the Human Rights Commission and was confident any problems in relation to the Human Rights and Equal Opportunity Commission could be resolved. Mr Maley did not consider it necessary to invite a representative of the Human Rights Commission or the Anti-Discrimination Commissioner to the meeting of the Commission on 8 June 1994. Mr Maley agreed that the proposed restrictions would place the responsibility on the licensees to administratively enforce the restrictions. The Commission did not consider the possibility of discrimination between people who had membership of a particular community and those that did not as an insurmountable problem. Mr Maley agreed the only section of the Tennant Creek Community given a hearing at the Commission's meeting on 8 June 1994 were the Julalikari Council Aboriginal Corporation. This Corporation also complained about the decision on 8 June 1994 and sought to become a party to the subsequent proposed hearing under s33 of the Liquor Act. The Corporation want the restriction to apply to all aboriginal people in Tennant Creek. There is no such legal entity as the Julalikari community. Mr Maley gave the following evidence at p. 70 of the transcript:

"Why didn't you just make a decision on the matters that

the
steering committee had either asked you to or come to a position where they agreed to disagree?---We were concerned about several matters and it took up quite a lot of discussion at the meeting and we took the decision fully, being fully aware that that decision or that notice of intention wouldn't be implemented if there was - if no-one - if it wasn't totally agreed to and we knew that there was ample opportunity for all those affected, including everyone, to have a formal hearing into the matter and we virtually started the clock because we were - - -"

25. Mr Maley agreed that at the meeting on 8 June 1994 the Commission heard from the persons already mentioned, considered the relevant provisions of the Liquor Act and deliberated for five and a half hours. Following the meeting on 8 June 1994, Mr Maley gave directions to the Registrar, Mr Hanley, to write to the licensees and inform them of the decision.

26. Copy of letter to the licensee of the Tennant Creek Hotel, Mr Michael Spina, appears at pp. 927-928 of the Brief included in Exhibit 1. This letter, omitting formal parts, which the Court was informed was sent to all licensees, reads as follows:

"Delivered herewith you will find Notice of Variation to your licence conditions.

As you know, a review of the Tennant Creek alcohol situation has been undertaken over the past six (6) months.

In the Commission's view the present situation cannot be tolerated according to our perception of the wishes of the Tennant Creek Community.

At the same time we are mindful that draconian measures would run the risk of alienating some segments of the community and no doubt cause damage to your business with little prospect of changing the situation.

The Commission believes a balanced flexible approach to the problem is essential if there is to be any hope of change for the better.

At its meeting on 8 June 1994 the Commission expressed support for various initiatives arising from the Symposium and the Steering Committee. These include:

- the appointment of an Aboriginal Liaison person;
- a qualified person to be placed to monitor the impact of measures undertaken;
- increased police presence;
- a rehabilitation centre to be established and to be available for inclusion with Prohibition Orders.

It is in this overall context that we seek the support of

those Licensees affected by these variations. Your continued input into the process will be appreciated.

The Commission proposes to review the measure taken some three (3) months after implementation and any submissions by you will be considered.

It may be that the 4-5 litre cask sales ban to Julalikari people will leave you with stock that is slow to move. There may be other problems of a similar kind. These and other problems should be notified to the Chairman for consideration."

27. On 10 June 1994, the Liquor Commission issued a Notice of Intent proposing variations of the conditions of a number of the liquor licenses in Tennant Creek. A true copy of the "Notice of Intent" is annexure "H" to the Statement of Agreed Facts and has been set out in full on pp. 7-8 in these reasons for decision. This Notice of Intent sets out the reasons for the intention evinced by the Commission to vary the terms and conditions of licenses. It sets out the variation made to the terms and conditions of the licence and concludes with this paragraph:

"This Notice of Intent is designed under Section 33 of the Northern Territory Liquor Act to allow Licensees to respond in writing or demand a public hearing into the previously announced initiatives."

28. On 10 June 1994, the Commission forwarded a notice to each of the licensees in Tennant Creek. Copy of notice sent to Mr Scott Hallett, Tennant Creek Trading is annexure "I" to the Statement of Agreed Facts and has been set out in full on page 9 in these reasons for decision.

29. Mr Maley gave the following evidence relating to the notices to licensees to vary the conditions of their licence at transcript p. 77:

"It wasn't a notice of intention to vary; it was a notice of your decision made on 8 June, wasn't it?---In accordance with the Act it was - I - I believe it was a notice of intention to vary.

You decided that you were going to have a hearing on 22 August 1994?---Yes.

That states the hearing is anticipated to last for some weeks?---No, not some weeks, no.

Some time?---Some time, yeah.

Some considerable time?---Well, we weren't sure. We - -

It was going to be held in Tennant Creek?---Yes.

Who was going to sit on the commission for that hearing? ---Myself as chairman, Mr Graham Buckley, the legal member, and Mrs Jan Hartwig.

And each of those people, including yourself, were involved

in the decision - - - ?---Yes.

- - - of 8 June?---Yes.

Is that right?---Yes."

30. Mr Maley stated that it was the original hope of the Commission that the Steering Committee which was established would be able to speak as a single voice on behalf of the Tennant Creek community. Prior to 8 June 1994, the Commission reached the conclusion that the Tennant Creek community was not going to speak with unified or single voice. The process of consultation undertaken prior to 8 June 1994 was designed to ascertain the needs and wishes of the Tennant Creek community as is required under s32 of the Liquor Act for the purpose of exercising the function of the Commission under s31 Liquor Act. These consultations were on an informal basis and not in any form prescribed by legislation or regulations. Of the 113 people who registered for the symposium in Tennant Creek 90 had Tennant Creek addresses. This included Mr Frank Martino who is the owner of licensed premises and plays an active role in his communication with the Liquor Commission. Mr Maley stated on reading the letter from Mr Hallett to the Chief Minister (Exhibit 2) Mr Maley formed the view Mr Hallett, together with other licensees in Tennant Creek, were keen to have the problems of alcohol abuse in Tennant Creek resolved so that everyone knew where they stood. Mr Maley stated it was his understanding that after the notice to vary terms of the licence issued, a party could request a hearing under s33 of the Liquor Act.

31. Mr Maley gave evidence that at its meeting on 8 June 1994, the Commission was addressed by Dr Shirley Hendy, Dr Peter D'Abbs and the representative from Julalikari community. These three persons then left the meeting and the Commission deliberated and formed a proposal as contained in the Notices of Intention and the notices to the licensees stating the variation in conditions of licence.

PLAINTIFFS' SUBMISSION
NATURAL JUSTICE AND PROCEDURAL FAIRNESS:
32. Mr Reeves, counsel for the plaintiff, submits the plaintiffs were entitled to a fair go in the process leading up to the decision on 8 June because.

(a) The rights of the licensees in respect of the business they conduct was substantially prejudiced by the decision to vary the licenses.

(b) The licensees had legitimate expectations arising out of the Commissions public statements and conduct surrounding the consultative process to ensure that the community was fully consulted before any changes to licence conditions were made.

33. The plaintiffs assert they were in these circumstances entitled to be told about the meeting of the Commission on 8 June 1994, to be advised that their rights may be affected by the deliberation at that meeting and to be given an opportunity to make submissions prior to the Commission making a decision which would affect their rights under the licence.

34. It is the plaintiffs' argument that the hearing to which the licensees are entitled pursuant to s33 of the Liquor Act is not a comprehensive right of appeal.

35. In addition it gives rise to an apprehension of bias because the persons who will sit at any subsequent hearing under the Liquor Act are the same

persons who constituted the Commission when it made its decision on 8 June 1994.

36. Counsel for the plaintiff equates the situation with passing sentence before hearing from the parties affected by the sentence. The plaintiff contends in this instance the Commission decided the issue and then forwarded the notices to the licensees. The licensees are then put in the position that they will have to go before the Commission and argue that the Commission was wrong.

37. For these reasons the decision of 8 June 1994, should be set aside and the proper process applied.

38. DECISION WAS UNREASONABLE: Alternately, the plaintiffs submit the decision itself was unreasonable.

(a) No reasonable body in the position of the Commission could make the decision it did by imposing restrictions on the sale of alcohol in light of the knowledge the Commission had that the "grog free day" had caused racial disharmony in Tennant Creek.

39. It was also unreasonable because the Commission was aware from its reading of the letter from Mr Hallett to the Chief Minister (Exhibit 2) that imposing a "grog free day" had already had serious adverse effects on Mr Charles Keith Hallett's trading and to impose restrictions on a permanent basis would compound those adverse effects.

(b) It was unreasonable because the restriction of sale of alcohol to members of the Julalikari community is discriminatory on the basis of race. It is the equivalent of saying a large segment of the aboriginal people living in Tennant Creek have a restriction placed on them in respect of the supply of alcohol. There was no consultation by the Commission with the Human Rights Commission or the Office of the Anti-Discrimination Commissioner. There was no consideration given to whether it breached the Anti-Discrimination legislation. Whether or not it is discriminatory is not the issue. The point is that the Commission did not use the process of finding out the views of the other respective Commissions as they should have.

40. APPREHENDED BIAS: Thirdly, the plaintiffs raise the issue of perceived bias. It is not submitted the Commission is actually biased. Any member of the Commission who participated in the decision on 8 June 1994 should not be permitted to sit on a hearing under s33 Liquor Act. Any member of the public with knowledge of the circumstances might apprehend those persons are biased in the sense that they have already made their decision on the issue. At the meeting on 8 June 1994, the Commission considered a great deal of material, heard from various persons, deliberated on the matter for many hours and then issued the decision on the basis that it reflected the needs and wishes of the community. Any reasonable member of the community would conclude the Commission had made up its mind and apprehend bias by the Commission at a subsequent hearing. Any member of the Commission who participated in the decision of 8 June 1994 should be disqualified from the hearing under s33 Liquor Act.

41. Counsel for the plaintiffs submits the law applicable to those three broad areas is as follows:

42. Denied natural justice - procedural fairness; Natural justice applies to every situation where people's rights are affected, except if the legislature has by very plain and clear provisions, ruled it out (Annetts and Anor v McCann (1990) 170 CLR 596; and Twist v Randwick Municipal Council (1976) 136 CLR 106.

43. When the body with the power to make a decision interferes with property rights then this is even stronger reason to accord that person natural justice

and procedural fairness (Delta Properties Pty Ltd v The Brisbane City Council (1955) 95 CLR 11 at 18).

44. The plaintiffs had a legitimate expectation, they would be afforded natural justice and the Commission having set up that expectation should have afforded the plaintiffs' right of hearing at the meeting on 8 June 1994 (Kioa v West (1985) 159 CLR 550 at p. 582):

> "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: Twist v. Randwick Municipal Council (1976) 136 CLR 106 at p 109; Salemi (No. 2) (1977) 137 CLR at p 419; Ratu (1977) 137 CLR at p 476; Heatley v. Tasmanian Racing and Gaming Commission (1977) 137 CLR 487 at pp 498-499; FAI Insurances Ltd. v. Winneke (1982) 151 CLR 342 at pp 360, 376-377; Annamunthodo v. Oilfields Workers' Trade Union (1961) AC 945. The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.
>
> The reference to "legitimate expectation" makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest. Take, for example, an application for a renewal of a licence where the applicant, though he has no legal right or interest, may nevertheless have a legitimate expectation which will attract the rules of natural justice ..."

45. The plaintiff was entitled to be informed that his rights might be affected so that he could be given the opportunity of dealing with it.

46. There is no provision in the Liquor Act that rules out procedural fairness. A reading of the legislation gives a clear indication that the intention of the legislature was that natural justice should be followed in relation to anyone who might be affected by a decision. Examples of this are s48(6)(a), s51(2), s77(2), s82 and s122(6).

47. The plaintiffs' submission is that in this particular case, the principles of natural justice would have been satisfied if the Commission had advised the plaintiff what was being proposed and inviting them to make written submissions supplemented by oral submissions at the Commission meeting on 8 June 1994.

48. It is not for this Court to decide what the Commission should do after the Court makes a declaration that the decision be set aside. It is not the merits of the Commission's decision which is for analysis but rather the

process by which they reached that decision.

49. The plaintiff further submits that the entitlement to procedural fairness is not removed by the provisions of s33 of the Liquor Act for a hearing because it is not a comprehensive right of appeal to an independent body. It is not a hearing before a Court or to an independent administrative body (Twist v Randwick City Council (1976) 136 CLR 106 at 112 Mason J). The plaintiffs' submission is that the existence of the provision for a hearing under s33 Liquor Act does not remove the right to be afforded natural justice prior to the notice being issued. There is no full statutory right of appeal to an independent body reflected in s33. It is important to look at the whole process to determine whether at the end of the day procedural fairness has been achieved. The plaintiffs' argument is there was nothing provisional about the decision the Commission arrived at on 8 June 1994. An appeal or hearing after the event is not good enough (Carroll v Sydney City Council (1989) 15 NSWLR 541 at p. 549; Macksville District Hospital v Mayze (1987) 10 NSWLR 708 at pp. 727-728).

50. Where the appeal is not to a Court but to an administrative body, this is not sufficient to overcome the basic requirements of natural justice (Gardner v TIO (1991) 104 FLR 287). Applying the principle to this case, the hearing provided for under s33 should not be before the same body who made the decision in the first place.

51. Decision was unreasonable: Counsel for the plaintiffs submits the principles in relation to unreasonableness is expressed in Minister for Aboriginal Affairs v Peko Wallsend Ltd (1985-86) 162 CLR 24 at 40:

> "It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power: Sean Investments Pty Ltd. v. MacKellar (1981) 38 ALR at p 375; Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965) 113 CLR 177 at p 205; Elliott v. Southwark London Borough Council (1976) 1 WLR 499 at p. 507, (1976) 2 All ER 781 at p 788; Pickwell v. Camden London Borough Council (1983) QB 962 at p 990. I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in Wednesbury Corporation (1948) 1 KB at pp.

230, 233-234, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it ..."

52. The decision imposed a burden on the licensees to apply the restrictions which were impractical. The restrictions were discriminatory and raised the question of the provisions of the Anti-Discrimination Act and the Racial Discrimination Act. These were problems the Commission should have looked at and considered. The Commission were aware that s59 of the Anti-Discrimination Act makes provision for an application for exemption. This should have been done before any discriminatory conduct is put in place. Neither was there any proper inquiry made of the Human Rights Commission as to whether the proposed conditions were a breach of fundamental human rights. The Liquor Commission was placing the licensees in the invidious position of facing possible prosecution by either the Human Rights Commission or under the Anti-Discrimination Act. To arrive at the decision they did without putting all those measures in place, was unreasonable.

53. In addition, the decision was unreasonable because of the adverse effects on the licensees trading, i.e. it had a detrimental effect on their property rights.

54. Apprehended bias: The High Court has extended the principle of apprehended bias to administrative tribunals (Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70.

55. Re Media Entertainment and Arts Alliance v Theatre Managers Association; Ex Parte Hoyts Corporation Pty Ltd (1994) 68 ALJR 179 at 182:

"The rule against bias is directed to ensuring that a judge or a member of a tribunal that is bound to act judicially brings and is seen to bring "an impartial and unprejudiced mind to the resolution of the question" to be decided. One aspect of the rule, and the only one that is relevant for immediate purposes, is that the decision should be made on the basis of the evidence and the argument in the case, and not on the basis of information or knowledge which is independently acquired. That aspect of the rule is similar to but not identical with the rule of procedural fairness which requires that a person be given an opportunity to meet the case against him or her. However, in the case of the rule against bias, the question is not whether there is or was an opportunity to present or answer a case, but whether, in the circumstances, the parties or the public might entertain a reasonable apprehension that information or knowledge which has been independently acquired will influence the decision.

As a general rule, a judge or a member of a tribunal

that is
bound to act judicially should disclose his or her independent knowledge of factual matters that bear or may bear on the decision to be made. In some cases, it may be that he or she should stand down from the proceedings. However, precisely what should be disclosed and what, if any, other action should be taken may involve a consideration of the nature of the tribunal, its composition and organisation."

56. The test of apprehended bias is that of the informed observer who has some knowledge of the circumstances of the matter without knowing the integrity of the judge or the personalities of persons involved in the decision making process (Webb v R (1994) 68 ALJR 582 Deane J at p. 595):
"... That test, as so formulated, is whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that (the judge) might not bring an impartial and unprejudiced mind to the resolution of the question' in issue".

57. This concludes my summary of submissions made by counsel for the plaintiff as to the reasons for the appeal and the law the Court is asked to apply.

CONCLUSION
58. Natural justice and procedural fairness: I accept the following principles as expressed by Mr Basten QC as counsel for the second defendant.
a) That as a matter of statutory interpretation, Parliament intends the repository of power will only exercise that power in accordance with principles of procedural fairness.
b) It is necessary to identify in the individual circumstances of a particular situation precisely what the rules of procedural fairness require.

c) In the absence of an express statement in the legislation one should be very slow to draw the implication that the rules of procedural fairness do not apply in a particular situation.

59. I apply the principle expressed by Barwick CJ in Twist v Randwick Municipal Council (1976) 136 CLR 106 at 109:
"The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal: see Cooper v. Wandsworth Board of Works (1863) 14 CB (N.S.) 180 (143 ER 414) and R. v. Electricity Commissioners; Ex

parte London Electricity Joint Committee Co. (1920) Ltd. (1924) 1 KB 171 at p. 205. But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise. However, if that is the legislative intention it must be made unambiguously clear.

In the event that the legislation does not clearly preclude such a course, the court will, as it were, itself supplement the legislation by insisting that the statutory powers are to be exercised only after an appropriate opportunity has been afforded the subject who person or property is the subject of the exercise of the statutory power. But, if the legislation has made provision for that opportunity to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court, being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme."

60. I agree with the submission made by Mr Basten QC, counsel for the second defendant, that the Liquor Act accords procedural fairness in a particular way.

61. Section 33 of the Liquor Act provides as follows:

"(1) Subject to this section, the Commission may, from time to time by notice in writing, vary the conditions of the licence held by a licensee.

(2) A licensee may, within 28 days of the date on which the licensee receives a notice of a description referred to in subsection (1), by notice in writing lodged with the Registrar, request that the Commission conduct a hearing in relation to the conditions of his licence.

(3) Where, under subsection (2), a licensee requests that the Commission conduct a hearing, the Commission shall conduct a hearing in relation to the conditions of the licence of the licensee.

(4) After the Commission has conducted a hearing

pursuant to
this section, the Commission may -
(a) affirm, set aside or vary the decision made without a
hearing; and
(b) make such other order as it thinks fit.

(5) A variation of the conditions of a licence under this
section shall have effect on and from -
(a) where the licensee does not request, under subsection
(2), that the Commission conduct a hearing -
(i) the expiration of the period referred to in that subsection; or
(ii) such later date as the Commission may specify in the
notice referred to in that subsection; or
(b) where the Commission conducts a hearing pursuant to subsection (3) and the Commission affirms or varies the variation of the conditions of the licence -
(i) the date of the conclusion of the hearing; or
(ii) such later date as the Commission may specify at that
hearing."

62. This section provides that any variation to the terms and conditions of a license are not immediately effective they are initially contingent and provisional. The licensee is empowered to request that the Commission conduct a hearing in relation to the conditions of a licence. This hearing is neither an appeal nor a review. Under s33(4) it gives the Commission power to affirm, set aside or vary the decision made without a hearing.

63. A reading of the legislation indicates the legislature intended the Commission may make a decision but the Commission is required to have a hearing if within 28 days after receiving notice of the decision a hearing is requested by the licensee. The hearing is in relation to the conditions of the licence and the Commission may make such decision as it thinks fit whether that be affirming setting aside or verifying the initial decision made without a hearing.

64. I note that in this particular case, the Commission's decision to vary the terms and conditions of the plaintiffs' licence has never come into effect. This is because the plaintiffs sought a hearing as is their right under s33(2). The hearing was scheduled for 22 August 1994. This hearing before the Commission has not proceeded to date because the plaintiffs issued an Originating Motion in the Supreme Court.

65. The procedure at a hearing before the Commission is set out in s51 which provides as follows:
"(1) Where a hearing is to be conducted under this Act, the
Chairman shall fix a time and place for the hearing.

(2) The Chairman shall cause notice of the time and placed
fixed for the hearing, together with copies of all documents
relating to the subject-matter of the hearing and which have
been lodged with the Registrar under this Act, to be given
to the parties not less than 7 days before the date fixed

for the hearing.

(2A) Notwithstanding anything to the contrary in section 13(2), at a hearing under this Act the Commission may be constituted by -
(a) one member (whether or not the Chairman); or
(b) 3 members,
selected by the Chairman, and, where the Chairman is not one of the 3 members referred to in paragraph (b), the member nominated by the Chairman shall preside at the hearing.

(3) At a hearing under this Act -
(a) the procedure shall be within the discretion of the Commission;
(b) the Commission may take unsworn evidence or take evidence on oath or affirmation;
(c) the Commission shall give all parties an opportunity to be heard;
(d) the Commission shall not be bound by the rules of evidence but may inform itself in such manner as it thinks fit; and
(e) the member presiding may administer an oath or affirmation to a person who attends to give evidence.

(4) The Commission may adjourn a hearing from time to time and from place to place.

(5) Subject to subsection (6), a hearing shall be conducted in public.

(6) If the Commission is of the opinion that the conduct of a hearing in public is likely to cause undue hardship to a person, it may direct that the hearing or part of the hearing be conducted in private.

(7) Where the Commission has given a direction under subsection (6), a person shall not enter, or remain in, the room in which a hearing is taking place except with the permission of the Commission.

(8) A party may be represented at a hearing by a legal practitioner, or by another person, who may examine witnesses and address the Commission on behalf of the person for whom he appears.

(9) A legal practitioner appearing for a party at a hearing has the same protection and immunity as a legal practitioner has in appearing for a party in proceedings in the Supreme Court.

(10) A witness who gives evidence at a hearing has the

same
protection as a witness has in giving evidence in proceedings in the Supreme Court.

(10A) Where the Commission is constituted by one member, a party who is not satisfied with the decision of the Commission may apply, within 14 days after the decision, in writing to the Chairman for a new hearing.

(10B) Where a party applies, under subsection (10A), for a new hearing the Chairman may, if he thinks fit, cause a new hearing to be held.

(10C) Where a new hearing is held, under subsection (10B), the Commission -
(a) shall be constituted by not less than 3 members; and
(b) may make any decision that it could have made if a hearing had not previously been held.

(10D) A decision by the Commission under subsection (10C) shall be in substitution for the decision made at the hearing by a single member in respect of which the new hearing is being held.

(11) In this section, "party" means -
(a) an applicant for the exercise of a power, authority or discretion of the Commission;
(b) a person who has made an objection or complaint under section 48;
(c) a licensee who is, or a licensee of premises which are, the subject of an objection or complaint made under section 48; or
(d) the holder for the time being of a licence in respect of which an application has been made under section 41 for the transfer of that licence, as the case requires."

66. Amongst other things, this section makes it mandatory for the Commission to give all parties an opportunity to be heard.

67. Section 56 of the Liquor Act provides as follows:
"Subject to section 51, where a hearing has been conducted by the Commission under this Act, a decision of the Commission -
(a) shall be final and conclusive; and
(b) shall not be challenged, appealed against, reviewed, quashed or called into question in any court."

68. The Liquor Act provides a code of procedural fairness in relation to the variation of conditions of a licence held by the licensee.

69. If procedural fairness is not accorded, then there may be an opportunity

to set aside a decision because procedural fairness is a jurisdictional challenge.

70. The Liquor Act in its various sections, in addition to those already referred to, including s49(2)(c), s70, s72, s77(2), s82 and s92 all of which indicate an intent by the legislature to prescribe the procedural elements to accompany various forms of decision making by the Commission.

71. I do not accept the plaintiffs' submission that it has been denied natural justice or procedural fairness. The scheme of the Liquor Act clearly sets out in the provisions of s33 the steps to be taken to ensure the plaintiffs are accorded natural justice. The plaintiffs have sought a hearing before the Liquor Commission. There is no suggestion the Commission have refused to grant such hearing. In fact, dates had been allocated for a hearing before the Commission to proceed in August 1994. In my opinion, the plaintiffs should, if they wish to challenge the proposed variations to the terms and conditions of their licence, exercise the rights they have to a hearing before the Commission.

72. Unreasonableness: The test I have applied is that to find an error of law it must appear from the face of the record that those conditions are manifestly unreasonable.

73. The principle to be applied is expressed by Mason J in Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd and Ors (1985-1986) 162 CLR 24 at pp. 40-41:

> "(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: ..."

74. I agree with the argument presented by Mr Basten QC that the Commission were not required to accept the conclusion put forward by the Tennant Creek Council in a letter dated 23 March 1994 p. 689 of six volume brief included in Exhibit 1, that the "grog free day" had given rise to racial disharmony within the township of Tennant Creek. The proposed restrictions on licenses are very different to the closing of all licensed premises as occurred on the "grog free day". Similarly, the Commission did not have to accept as factually correct the statement by Mr Hallett in his letter to the Chief Minister (Exhibit 2) that the fact he had closed the hotel for the day, being the "grog free day", meant his financial circumstances rendered it difficult for him to obtain funds from the bank. The Commission may well have been sceptical of such a statement or alternately may have considered it as just one of the many problems that they had to balance.

75. The plaintiff, Mr Charles Hallett, still has an opportunity at a hearing before the Commission to present his case and call evidence as to the financial implications for the licensee of any proposed restrictions on his licence.

76. I do not consider on this basis the decision of the Commission following its meeting on 8 June 1994 can be held to be unreasonable.

77. With regard to the submission that the decision is unreasonable because it may place the licensees in breach of the Anti-Discrimination Act, I again

agree with the argument by Mr Basten for the second defendant. This Court is not being asked to determine whether or not such a condition would amount to a special measure or whether it is in breach of the Anti-Discrimination Act. I do not consider it appropriate for this Court to make any finding as to what would be the consequences if the licensees were subject to a complaint under the Anti-Discrimination Act. Whilst I can accept there may be very real practical difficulties in enforcing such restrictions, I do not consider the restrictions are manifestly unreasonable or so unreasonable that no reasonable person would make them.

78. At a hearing before the Commission pursuant to s33 Liquor Act the plaintiffs will be able to raise all of these concerns and ask the Commission to reconsider its decision. This very situation is specifically provided for in the legislation and the specific provisions of the Liquor Act.

79. Apprehended bias: I do not accept the submission made by counsel for the plaintiffs on this aspect. I agree with the argument put by Mr Basten QC for the second defendant. It is clear from a reading of s33 of the Liquor Act, that the express intention of Parliament was that variations to conditions of a licence will always be initiated by a decision of the Commission. The Commission then has the power to vary, affirm or set aside the initial decision after hearing from the licensees. It is obvious that the persons involved in the initial decision will or can be members who constitute the Commission at a subsequent hearing. There is a specific legislative scheme to that effect. In this particular matter the Liquor Commission are being asked to grapple with a range of conflicting interests. From information presented to the Commission it is clear the problems of alcohol abuse in Tennant Creek are significant. Whilst there may be general agreement in Tennant Creek as to the problems presented by alcohol abuse, the community are far from united in how the problem can be best addressed. The Liquor Commission charged with the responsibility of finding a solution have to tread through a mire of conflicting opinions and interests.

80. I accept the evidence of Mr Maley that he interpreted the letter from Mr Hallett to the Chief Minister (Exhibit 2) as a request for the need to find a resolution so that licensees knew where they stood. I also accept the evidence given by Mr Maley to the effect that it was obvious opinions in Tennant Creek were so divided on this issue the Commission had a responsibility to take the initiative and, as he says, to start the clock ticking. This the Commission did by calling a meeting on 8 June 1994.

81. The Commission proceeded in accordance with the legislative scheme of the Liquor Act. The fact that their meeting on 8 June 94 involved a lengthy deliberation and the decision was made after hearing from a number of persons is not to the point. The meeting on 8 June 1994, was not a hearing as envisaged by s33(3). The legislation makes specific provision which enables the Commission to affirm, set aside or vary the decision it made on 8 June 1994 at a subsequent hearing. The Commission were following the legislative mechanism that is provided by the Liquor Act for the variation of the terms and conditions of a licence.

82. I apply the principle expressed in Re Polites and Anor; Ex Parte the Hoyts Corporation Pty Ltd and Ors (1991) 173 CLR 78 at pp 86-87:

> "Again, the test in Livesey cannot be pressed too far when the qualifications for membership of the tribunal are such that the members are likely to have some prior knowledge of the circumstances which give rise to the issues for determination or to have formed an attitude about the way in which such issues should be determined or the tribunal's powers exercised. Qualification for membership cannot

disqualify a member from sitting."

83. I also apply the principle stated in Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 at 100:

" ... When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her. Thus, in Ex parte Angliss Group, the mere fact that the statement of reasons for a previous decision gave rise to the conclusion that members of the Conciliation and Arbitration Commission tended to favour the adoption of a principle of equal pay for both sexes as soon as it was economically and industrially practicable to do so was not a ground for disqualifying them from sitting on an application for an equalisation of rates of pay for male and female employees brought in reliance upon their reasons. This Court rejected the notion that a fair and unprejudiced mind was "necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it"."

84. All of the concerns expressed by the licensees can be put forward to the Commission at a hearing before the Commission.

85. The test to be applied is whether or not the Commission will alter their conclusions irrespective of the evidence or argument presented at the hearing.

86. I apply the test enunciated by Deane J in Webb v R (1994) 68 ALJR 582 at 595:

"That test, as so formulated, is whether, in all the circumstances a fair minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that (the judges) might not bring an impartial and unprejudiced mind to the resolution of the question in issue."

87. In my opinion, there is no basis for holding that a fair minded lay observer, with knowledge of the general circumstances in which the Commission operates, including the provisions of s33 of the Liquor Act, but without a knowledge of the integrity or personal qualities of the tribunal members, would apprehend bias.

88. The plaintiffs have not persuaded me that the ground of apprehended bias

is made out.

89. For these reasons, I do not consider the plaintiffs have established grounds for making the orders as sought by the plaintiffs in their originating motion.

90. Accordingly, the application by the plaintiffs is refused.

91. During the course of the hearing, counsel for the second defendant made an application to have the summons dismissed in respect of the fourth plaintiff who had not appeared at the hearing. I make an order that in respect of the fourth plaintiff the summons be dismissed.

92. The second defendant further makes an application that the fourth plaintiff pay the second defendant's costs up to and including 20 February 1995.

93. I do need to hear further from the second defendant as to the application for costs and will deal with the issue of costs in respect of the fourth plaintiff at the time of dealing with the question of costs in respect of the whole proceedings.

94. The parties have liberty to apply in respect of the question of costs of the whole proceedings and in respect of the second defendant's application for costs against the fourth plaintiff.