SUPREME COURT OF QUEENSLAND

CITATION:	*Mustercliffe Pty Ltd v Mackenroth*; *Harburg Investments Pty Ltd v Mackenroth* [2004] QSC 446
PARTIES:	**MUSTERCLIFFE PTY LTD ATF THE SPRING HILL TRUST** **(applicant)** **v** **THE HON. TERENCE MICHAEL MACKENROTH THE MINISTER, QUEENSLAND TREASURY** **(respondent)** **HARBURG INVESTMENTS PTY LTD ATF PETER VICTOR FRANCIS HARBURG** **(applicant)** **v** **THE HON. TERENCE MICHAEL MACKENROTH THE MINISTER, QUEENSLAND TREASURY** **(respondent)**
FILE NO/S:	BS5533 of 2002 BS9225 of 2002
DIVISION:	Trial Division
PROCEEDING:	Applications for Statutory Orders of Review
DELIVERED ON:	16 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2004
JUDGE:	Mullins J
ORDER:	**1. In respect of BS5533 of 2002, the application is dismissed.** **2. In respect of BS9225 of 2002, the decision of the respondent made on 22 July 2002 is set aside and the appeal of Harburg Investments Pty Ltd from the decision of the Queensland Gaming Commission made on 22 May 2002 is referred to the respondent for further consideration, according to law.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – BREACH OF RULES OF NATURAL JUSTICE – WHAT CONSTITUTES – application for statutory order of review in respect of Minister's decision to dismiss appeal against decision of the Queensland Gaming Commission refusing gaming licence –

whether there was a breach of the rules of natural justice caused by the Minister taking into account the Commission's decision when there was an allegation of reasonable apprehension of bias in respect of the Commission's decision – whether there was any factual basis for the reasonable apprehension of bias – whether the Minister made an independent assessment of the materials – no breach of the rules of natural justice

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – application for statutory order of review – whether the Minister's decision to dismiss the appeal against the Queensland Gaming Commission's refusal of a gaming licence was an improper exercise of power – whether the Minister's decision was so unreasonable that no reasonable person in his position could have made the same decision – whether the Minister took into account irrelevant considerations or failed to take into account relevant considerations –whether the Minister took into account an unpublished policy and failed to have regards to the merits of the case – no improper exercise of power found

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – RELEVANT AND IRRELEVANT CONSIDERATIONS – application for statutory order of review – whether Minister's decision on appeal from Queensland Gaming Commission's decision refusing gaming licence failed to take into account relevant considerations – where Minister gave same reasons for decision on appeal as the Commission had given for its decision – where one of those reasons relied on community concerns without identifying them – where there was a preponderance of evidence to show those concerns were without substance – whether Minister failed to take into account that preponderance of evidence – Minister failed to take into account relevant considerations

Gambling Legislation Amendment Act 2000
Gaming Machine Act 1991
Judicial Review Act 1991

Adrenalin Sports Brisbane Pty Ltd v Mackenroth [2003] QSC 184
Buck v Bavone (1976) 135 CLR 110
R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group (1969) 122 CLR 546

Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
O'Sullivan v Farrer (1989) 168 CLR 210

COUNSEL: R V Hanson QC and A K Herbert for the applicant in each application
P J Flanagan SC and D L K Atkinson for the respondent in each application

SOLICITORS: Connor O'Meara for the applicant in each application
C W Lohe, Crown Solicitor for the respondent in each application

[1] **MULLINS J:** These applications for statutory orders of review under the *Judicial Review Act* 1991 were heard together as similar issues were raised in each application. Mustercliffe Pty Ltd ("Mustercliffe") was proposing to establish a "Cheers Tavern" at Slacks Creek. Mustercliffe was granted a general liquor licence. Its application for a gaming machine licence was recommended for approval by the Executive Director of the Office of Gaming Regulation ("the OGR"), but rejected by the Queensland Gaming Commission ("the Commission") on 27 March 2002. An appeal to the respondent was disallowed on 28 May 2002. By application filed on 18 June 2002, Mustercliffe seeks to review the decision of the respondent ("the Slacks Creek decision") that disallowed its appeal against the Commission's decision.

[2] Harburg Investments Pty Ltd ("Harburg") was proposing to establish a Cheers Tavern at Kenmore. The applicant was granted a general liquor licence by the Liquor Appeals Tribunal ("the LAT"). An application for a gaming machine licence was refused by the Commission on 22 May 2002. On 22 July 2002 the respondent disallowed the appeal. Harburg's application filed on 8 October 2002 seeks to review the decision of the respondent ("the Kenmore decision") that disallowed its appeal against the Commission's decision.

Grounds of the applications

[3] Identical grounds in general terms are set out in each application as follows:

> "1. a breach of the rules of natural justice happened in relation to the making of the decision; including giving weight to the decision of the Queensland Gaming Commission which decision was made in circumstances that give rise to a reasonable apprehension or suspicion of a lack of impartiality;
>
> 2. the making of the decision was an improper exercise of the power conferred by the *Gaming Machine Act 1991*, the enactment under which it was purported to be made as:
>
> (a) the Respondent took irrelevant considerations into account in the exercise of the power;
>
> (b) the Respondent failed to take relevant considerations into account in the exercise of the power;

(c) the Respondent exercised his power in accordance with a policy without regard to the merits of the case;
(d) the decision was so unreasonable that no reasonable person could have reached that decision;"

[4] From the further and better particulars which have been provided by Mustercliffe, the bases for challenging the Slacks Creek decision can be summarised as:

(a) the respondent took into account the following irrelevant considerations:
  (i) the decision of the Commission;
  (ii) an unpublished policy that discourages the approval of small to medium sized taverns that do not have more than one bar and specifies the benchmark for determining when there is a strong dependence on gambling ("the unpublished policy"); and
  (iii) the objection by the Logan City Council;
(b) the respondent failed to take into account relevant considerations:
  (i) report, letter and supplementary report of Professor Boreham dated 8 October 2001, 11 December 2001 and 27 May 2002 respectively;
  (ii) the report of Planning Australia dated 27 May 2002;
  (iii) the decision of the Logan City Council to grant development approval for the tavern including an area for gaming;
  (iv) the recommendation of the Executive Director of the OGR;
(c) the decision was made in accordance with the unpublished policy and without regard to the merits of the case which were:
  (i) the facility would have the same range of facilities as most taverns throughout Queensland;
  (ii) the gaming facilities proposed would be low key and did not include linked jackpots;
  (iii) the premises would not provide a TAB or Keno facilities;
(d) the decision was so unreasonable that no reasonable person could have made it as:
  (i) the proposed tavern would contain the same range of facilities found in most taverns throughout Queensland;
  (ii) there were no grounds to conclude that the tavern, without linked jackpots, a TAB or Keno, had a strong dependence on gambling;
  (iii) the conclusion of Professor Boreham that all available evidence on the area from which the tavern would draw its customers indicated that there were no significant socio-economic factors which would lead to refusal to grant an application for a gaming machine licence at the proposed site, that available data showed that unemployment and education and income levels in the area did not differ significantly from comparable areas across south east Queensland and that the area did not appear to experience higher rates of crime in comparison to other comparable areas;
(e) the rule against bias was breached in that the chairman of the Commission had a conflict of interest and arranged for the other members of the Commission to inspect the Cheers Tavern at Spring Hill;
(f) the hearing rule was breached in that Mustercliffe was not given an opportunity to be heard in related to the unpublished policy.

[5] From the further and better particulars which have been provided by Harburg, the bases for challenging the Kenmore decision can be summarised as:

(a) the respondent took into account the following irrelevant considerations:

(i) the decision of the Commission;
(ii) an unpublished policy that discourages the approval of small to medium sized taverns that do not have more than one bar, specifies the benchmark for determining when there is a strong dependence on gambling and discourages detached bottleshops ("the unpublished policy relating to Kenmore");

(b) the respondent failed to take into account relevant considerations:
(i) town planning report prepared by Planning Australia and economic need assessment prepared by Winter Consulting for the Liquor Licensing Division;
(ii) town planning report prepared by Planning Australia, economic need assessment prepared by Winter Consulting and social impact report prepared by Brannock & Associates for the LAT;
(iii) the decision of the LAT dated 11 January 2002;
(iv) the report of Professor Boreham dated March 2002;
(v) the analysis of objections prepared by Planning Australia dated 29 April 2002;
(vi) the letter of Harburg's solicitors to the OGR dated 13 May 2002;
(vii) the report of Planning Australia dated 9 July 2002;

(c) the decision was made in accordance with the unpublished policy relating to Kenmore and without regard to the merits of the case which were:
(i) the facility would have the same range of facilities as most taverns throughout Queensland;
(ii) the gaming facilities proposed would be low key and did not include linked jackpots;
(iii) the premises would not provide a TAB or Keno facilities;

(d) the decision was so unreasonable that no reasonable person could have made it:
(i) as the proposed tavern would contain the same range of facilities found in most taverns throughout Queensland;
(ii) as there were no grounds to conclude that the tavern, without linked jackpots, a TAB or Keno, had a strong dependence on gambling;
(iii) having regard to the conclusions of Professor Boreham;
(iv) as the objections relied upon as a ground of refusal were based solely on anecdotal evidence and were not supported by data;
(v) having regard to the conclusions of Planning Australia upon analysing the objections;

(e) the rule against bias was breached in that the chairman of the Commission, Mr Liam Walsh, is a solicitor whose firm acted for the Weller Hotel Group ("Weller"), the owners of the Kenmore Tavern, which objected to the grant of the liquor licence to Harburg and who therefore had a conflict of interest and he arranged for the other members of the Commission to inspect the Cheers Tavern at Spring Hill;

(f) the hearing rule was breached in that Harburg was not given an opportunity to be heard in relation to the unpublished policy relating to Kenmore.

Background

[6] Mr Peter Harburg is the sole director and shareholder of Mustercliffe, Harburg and Goldpalm Pty Ltd which collectively own and operate the chain of taverns which are known as Cheers Taverns. Gaming licences had been granted by the OGR for

Cheers Taverns at Spring Hill (in 1995), Sunnybank (in 1997), Aspley (in 1999) and Surfers Paradise (in November 2001).

[7] Mr Harburg describes that the concept for Cheers Taverns emerged from his intention to provide taverns that were themed to capture the "intimate atmosphere" of the restaurants/bars that were popular in the Boston area of the United States of America in the early 20th century and a friendly "lounge room" atmosphere that was not found in the larger hotels.

Evidence

[8] The parties relied primarily on the affidavits filed in connection with each application. Mustercliffe relied on affidavits of Mr Harburg, its solicitor Mr Michael Connor, town planner Mr Denis Brown and Professor Paul Boreham who is the head of the School of Political Science and International Studies at the University of Queensland. The same deponents provided affidavits for Harburg. Some short further evidence-in-chief was elicited from Professor Boreham in relation to the Kenmore decision.

[9] In connection with Mustercliffe's application, the respondent filed affidavits of the following members of the Commission: Mr Liam Walsh, Ms Tracy Dare, Mr Michael Wilson, Ms Karyn Walsh, Mr Geoffrey Airo-Farulla, Mr Dale Hennessy and Professor Janice McMillen. Those affidavits were also relied on by the respondent in connection with the application by Harburg. In each of the applications the respondent relied on an affidavit of Mr Terence Watts. Mr Watts is a principal policy officer attached to the OGR and was able to exhibit to each affidavit copies of the relevant decisions, statements of reasons, guidelines and all documents included in the Commission's statement of reasons.

[10] The only deponent who was cross-examined was Mr Walsh.

Legislative regime

[11] Each of the applications for a gaming machine licence was made pursuant to s 56 of the *Gaming Machine Act* 1991 ("the Act"). Under s 55(1)(a) of the Act, the Commission may, having regard to any recommendation of the chief executive and to such other information or material as the Commission considers is relevant, grant or refuse to grant gaming machine licences. Section 55(2) of the Act expressly provides that, without limiting s 55(1)(a) of the Act, the other information or material the Commission may have regard to includes information or material about social and community issues and relevant guidelines issued by the Commission under s 17 of the Act.

[12] The specification that the Commission could have regard to relevant guidelines issued under s 17 of the Act was inserted in the Act by the *Gambling Legislation Amendment Act* 2000 (No 51 of 2000) which commenced on 1 December 2000. That Act inserted s 398 into the Act which clarified that a guideline issued by the Commission under s 17 of the Act applied to an application for a gaming machine licence made, but not decided, before the commencement of s 398 in the same way it would, if the application were made after the commencement of s 398. It was therefore common ground on the hearing of these applications that the guidelines issued by the Commission in May 2001 ("the relevant guidelines") applied to the applications of Mustercliffe and Harburg.

[13] The Commission, in accordance with its powers to take into account social and community issues, directed the chief executive to investigate and make an assessment of the following matters in relation to an application for a new gaming machine licence:

(a) synergy with neighbouring businesses;
(b) in the case of a venue located in, or in close proximity to a shopping centre, the compatibility of the gaming venue with the character and general use of the shopping centre;
(c) proximity to other gaming venues;
(d) demand for gaming;
(e) primary purpose of the facility ie gaming or liquor;
(f) ratio of gaming floor space vis a vis total floor space of facility;
(g) relative size of the bar area in relation to other amenities;
(h) anticipated revenues from gaming in proportion to total revenue;
(i) range of amenities provided;
(j) proximity to child care centres, schools, places of public worship and community social services;
(k) location of ATMs and EFTPOS;
(l) visibility of gaming equipment to passing pedestrian traffic;
(m) marketing plans including signage and promotional activities; and
(n) quality of responsible gambling initiatives and implementation plan.

[14] The relevant guidelines also expressly set out that applicants should be aware of the Commission's attitude to the following aspects of location and type of facility:

Location –

(i) shopping centres, convenience locations and other public areas are generally considered inappropriate locations for gaming machines;
(ii) locations in close proximity to child care centres, schools, places of public worship and community social services are also considered inappropriate locations for gaming machine.

Type of facility –

(i) the total publicly accessible area of the facility must be of a sufficient size and capable from the outset of providing a range of amenities;
(ii) premises such as bar and grills, restaurants, cinemas, nightclubs, cabarets and bowling alleys are considered unsuitable as gaming venues;
(iii) the dominant purpose of the facility must either be the serving of alcohol in the case of a hotel or the provision of services to members in the case of a club;
(iv) the facility must also be a fully integrated facility, gaming must only be an ancillary service forming part of the fully integrated facility (detached gaming areas will not be acceptable);
(v) it must not be possible to access the gaming area without first accessing the general public areas of the

club or hotel (direct street access to gaming machines is generally unacceptable).

[15] Pursuant to s 52 of the Act, the Executive Director of the OGR has been delegated all the powers of the chief executive under the Act.

[16] A person who is aggrieved by a decision of the Commission under s 55 of the Act refusing to grant a gaming machine licence may appeal under s 29 of the Act against the decision to the Minister.

[17] Section 30 of the Act governs determination of appeals by the Minister. Subsections (1) and (2) of s 30 of the Act provide:

"**30.(1)** The Minister is to consider—
(a) the contents of the appeal under section 29 and information or material lodged with the appeal; and
(b) information or material that is—
(i) given to the Minister by the appellant; and
(ii) given to the Minister by any person referred to in section 29(4)(d); and
(iii) given to the Minister by the commission in respect of the appeal; and
(iv) given to the Minister by the chief executive in respect of the appeal;
within 14 days of the lodging of the appeal; and
(c) such other information or material as the Minister considers relevant;
and, if the Minister is satisfied that the integrity of gaming and the conduct of gaming will not be jeopardised and that the public interest will not be adversely affected, the Minister may direct—
(d) that the appeal be disallowed; or
(e) that the decision or determination appealed against be set aside or varied.
(2) If the Minister is not so satisfied, the Minister must direct that the appeal be disallowed."

History of Mustercliffe's application for gaming licence

[18] Mustercliffe's application for a gaming licence for 35 gaming machines was lodged with the OGR on 11 July 2000. It was accompanied by an extensive report addressing requirements of the OGR prepared by Peter Kleineberg Hotel & Tavern Consultants Pty Ltd ("Kleineberg"). The proposed site was 276-278 Kingston Road, Slacks Creek.

[19] Although the Logan City Council acknowledged that in March 2000 it had resolved to grant a development permit for material change of use of the proposed site for tavern and liquor barn, by letter dated 26 July 2000 the Council advised the OGR that the Council objected to the granting of a gaming machine licence to Mustercliffe. The objection was on the basis of lack of need for gaming machines in the area and it would be detrimental to the residential amenity of the surrounding area and the economic/social structure of the surrounding area for the licence to be granted. When Mustercliffe's response to that letter was sought by the OGR, Kleineberg provided the Council with the report which it had prepared in support of

Mustercliffe's application for a gaming licence. Kleineberg also expressed surprise to the OGR at the Council's objection, as the plans which formed the basis of obtaining the development permit from the Council showed gaming machines on the premises and the issue of gaming machines had been discussed with Council officers at meetings relating to the development approval.

[20] By letter dated 23 July 2001, the OGR identified for Mustercliffe the issues which would be of concern to the Commission and sought a response. These issues included that the site would have an overly high reliance on gaming activity on the basis that projections indicated that gaming would account for 33.8% of trading profit from activities conducted at the site; that the Average Daily Turnover ("ADT") for Logan of $891.52 for May 2001 was above the State average of $603.25 for the same period; that the Logan unemployment rate at 11.6% was unfavourable with unemployment of 8.9% for Queensland; the proposed premises may be considered a "convenience gambling" facility with the gaming area of 84m² compared to the total publicly accessible area of the premises of 481m²; and the objections from Logan City Council and those that were lodged against the granting of the liquor licence which related directly to gaming.

[21] The Member for Woodridge sent a letter dated 29 July 2001 to the OGR expressing opposition to the application on the basis that it would not be in the best interests of the local community, because Logan City had a high number of gaming machines and the area was made up predominately of young families, many of whom were on relatively low incomes. By further letter dated 30 August 2001 the Member for Woodridge advised the OGR that there was widespread concern about any additional gaming machines in the area. That letter and the objections lodged by charitable and sporting organisations were referred to Mustercliffe for a response by the OGR's letter of 10 September 2001.

[22] The response to the letters of 23 July and 10 September 2001 was made in Mustercliffe's solicitors' letter dated 8 October 2001 to the OGR. That advised that the application would be amended by reducing the number of gaming machines to 30 which would result in gaming activities estimated at accounting for 27.9% of trading profit for the tavern and would also have the consequence of reducing the gaming area from 84m² to 54.3m², which would result in the area for gaming being 11.3% of the publicly accessible area of the tavern. Professor Boreham's report of 8 October 2001 was enclosed. The letter from Planning Australia dated 8 October 2001 which traced the history of the development application was also enclosed. The calculation done by the OGR was that the reduction to 30 machines would result in the percentage of trading profit estimated from gaming being 29.5%.

[23] There were two applications for gaming machine licences in the vicinity of Mustercliffe's site that the OGR was considering at the same time. It sought assistance from the Department of Families in respect of social infrastructure, family needs, social policy needs and any specifically identified related risks with regard to gambling in Logan. That report was provided to OGR on 6 December 2001. It stated that the central districts of Logan City have some of the highest levels of unemployment, people dependent upon government pensions and payments, public housing and sole parent families in the State. It noted that emergency relief and financial counselling services reported high demand on resources from clients who engage in frequent and habitual gambling activities.

[24] Mustercliffe's response to that report from the Department of Families was sought. A further report was obtained by Mustercliffe from Professor Boreham dated 11 December 2001 that was provided to the OGR. Professor Boreham made the point that with current machine densities in Logan City, an additional 30 machines could result only in a negligible net increase of problem gamblers in Logan City. Professor Boreham observed that the proposed primary trade area for the Cheers Tavern was the Statistical Area of Slacks Creek which has an unemployment rate of 6.2% which was below the State average. Professor Boreham did concede that parts of the secondary trade area were more disadvantaged. Professor Boreham considered there was no evidence that any of the levels of disadvantage experienced in Logan City as a whole would in any way be exacerbated by the approval of Mustercliffe's application.

[25] The Executive Director of the OGR prepared a report for the Commission dated 12 December 2001 which was in the nature of an overview of the Logan area for the purpose of the five pending applications which the OGR then had for sites within Logan, including that of Mustercliffe, as the Commission had expressed concern at considering the applications for the Logan area in a piecemeal manner. The report was comprehensive and concluded that Logan City had not been identified as having an oversupply of gaming machines. It was noted that Mustercliffe's application and that of McCawley's Tavern related to sites within the Central District of Logan and that approval of both applications would represent a 53% increase in the number of gaming machines operating in hotels in that area which was of concern, having regard to the adverse social factors associated with the Central Logan District that were identified in the report.

[26] The Executive Director also prepared another report for the Commission dated 12 December 2001 on Mustercliffe's application for gaming licence. Although the Executive Director acknowledged that the Logan Central District has high rates of unemployment and crime, he also noted that it has the highest percentage of workplaces in Logan and that it was reasonable to assume that the Central District draws people from surrounding districts and perhaps other Local Government Areas. The Executive Director therefore recommended that the Commission consider the Local Government Area as a whole, rather than taking into account statistics for the Logan Central District alone. The Executive Director relied on the indication from the statistics of the high ADT of the area and the low ratio of gaming machines per 10,000 adults to conclude that there was an undersupply of gaming machines in the area. The Executive Director gave significant weight to Professor Boreham's assertions that Logan is not a comparatively high risk location for gaming related problems, the provision of an additional gaming machine licence at Slacks Creek was unlikely to place any measurable additional burden on the provision of community welfare services and there was no evidence to suggest that the balance of outcomes for the economic and social structure of the community would be negative. The Executive Director therefore recommended that the application be approved, subject to the condition that the gaming machines be installed within 12 months of being advised of the Commission's decision and that conditions be attached to the licence that no gaming equipment be readily visible to passing pedestrian traffic, no ATM's or EFTPOS machine be located in, or in close proximity, to the gaming area, any ATM installed on the premises must be available only for the use of debit cards and gaming must not dominate any external signage or any marketing or promotional activity undertaken to promote the premises.

[27] Mr Walsh made a suggestion to the Executive Director that members of the Commission inspect Cheers Tavern at Spring Hill before the meeting that was scheduled for 2.30 pm on 6 February 2002. That was organised by the Executive Director's secretary contacting Mr Harburg on 29 January 2002 who agreed to the inspection. Members of the Commission (apart from Mr Walsh) and the Executive Director attended for the inspection on 6 February 2002.

[28] Mr Walsh can recall that in or about late February 2002 he was told by the Executive Director that there was a specific request from Mustercliffe that he not be involved in considering its application for a gaming licence. In any case, Mr Walsh had another conflict of interest that precluded him from deciding Mustercliffe's application. He was the solicitor for Rochedale Rovers Soccer Club Ltd which had a pending application for an increase in the number of gaming machines for its premises in Logan.

[29] Mustercliffe's solicitors sent a letter to the OGR dated 11 March 2002 providing some additional comments in support of Mustercliffe's application. The following comment was made in that letter about the inspection of the Cheers Tavern at Spring Hill:

> "We understand that some members of the Commission recently visited the Cheers Tavern at Spring Hill and we hope, would have benefited from that inspection in noting the different amenity and character that a Cheers Tavern is designed to provide."

[30] That letter also advised that Mustercliffe's instructions were that if gaming were not available, it would be highly unlikely that the facility would proceed, as the cost of providing a new facility such as a Cheers Tavern was such that gaming facilities were required to sustain its long term viability and attractiveness.

[31] Mustercliffe's application for a gaming licence was on the agenda for determination at the Commission's meeting on 27 March 2002. Mr Walsh was absent from that meeting for the whole of the discussion in respect of Mustercliffe's application. The Commission resolved to refuse Mustercliffe's application, on the balance of the information and material available to the Commission and in accordance with the statement of reasons attached to the minutes of that meeting. The findings of fact made by the Commission and set out in the statement of reasons were:

> "Numerous objections have been lodged against the application including objections lodged by the local MP, local Councillor, Logan City Council and local community organisations.
>
> The premises has a small publicly accessible area with a limited range of facilities, including lounge bar, bistro, gaming and liquor barn.
>
> The local community area of the proposed tavern is the Central District of the Logan Local Government Area which has high levels of unemployment and crime, and low levels of income compared with State averages."

[32] The statement of reasons set out as the reasons for the decision to reject the application:

> "The premises, with a relatively limited range of facilities and a strong dependence on gambling is considered an inappropriate type of facility in an area experiencing high unemployment and other social problems, including higher rates of crime.
>
> Strong community objection from the local MP, local Councillor, Logan City Council and local community organisations against the provision of gaming machines in a premises located in an area experiencing high unemployment and other social problems."

[33] The Commission noted in the statement of reasons that it gave significant weight to the matters that were set out in its reasons for the decision and lesser weight to Professor Boreham's report supporting the application, the Executive Director's recommendation that the application be approved and the letter dated 11 March 2002 from Mustercliffe's solicitors providing more information in support of the application.

[34] Mustercliffe lodged an appeal against the Commission's decision with the respondent on 29 April 2002. The grounds set out in the notice of appeal were that the installation and use of gaming machines on the subject premises would not affect adversely the nature or character of the premises, the general use of the premises or the enjoyment of persons using the premises or the public interest. Pursuant to s 30(1)(b) of the Act, any information or material that Mustercliffe wanted the respondent to consider on the appeal had to be provided to the respondent within 28 days of the lodging of the appeal. Mustercliffe's solicitors prepared an extensive letter to the respondent dated 27 May 2002 under which they forwarded the reports of Planning Australia and Professor Boreham both dated 27 May 2002 and an extensive brief of material that was compiled for the respondent's consideration that largely duplicated material that was on the Commission's file relating to the application and had been provided by the Commission to the respondent. The briefing note to the respondent in respect of the appeal was dated 27 May 2002. The respondent decided to approve option A contained in the briefing note (disallowing the appeal). That decision of the respondent was made on 28 May 2002.

[35] The Slacks Creek decision was communicated to Mustercliffe's solicitors under cover of letter from the OGR dated 6 June 2002. It was conveyed that the respondent was not satisfied that the public interest would not be adversely affected and the respondent's reasons for disallowing the appeal set out in that letter were recorded in identical terms to those reasons set out for the Commission's decision in its statement of reasons.

History of Harburg's application for gaming licence

[36] Harburg's application for a gaming licence for 35 gaming machines for premises to be known as Cheers Tavern located at 1/9 Marshall Lane, Kenmore was lodged with the OGR on 15 November 2000. It was accompanied by a report prepared by Kleineberg. The tavern was proposed to be situated within altered existing buildings that operated at the time of the application as a Sizzler's Restaurant and a Kentucky Fried Chicken ("KFC") outlet. It was proposed that the Sizzler's Restaurant would be adapted for re-use as a Cheers Tavern and that the KFC building would be adapted for a bottle department/liquor barn operation.

[37] Harburg was proceeding at the same time with its application for a general liquor licence.

[38] The Member for Moggill wrote to approximately 1000 households in the vicinity of the proposed Cheers Tavern advising the residents of the applications for both a liquor licence and gaming machine licence and enclosed a community response form. The Member for Moggill received 419 responses in respect of the gaming machine licence proposal of which 414 were against the grant of a licence and 5 were for the grant of a licence.

[39] By letter dated 5 February 2001 from the Brisbane City Council, the OGR was advised that, for the purpose of consultation sought by the OGR, the Council raised no objection to the proposal to install gaming machines, but drew attention to the concerns raised by local Councillor de Wit. Councillor de Wit did not favour gaming machines in the proposed location and drew attention to the high level of public concern about the application.

[40] In connection with the application for a liquor licence, the Liquor Licensing Division organised an objectors' meeting on 6 February 2001 to which representatives of the OGR attended as observers. The file note made by the officers of OGR noted that there were approximately 300 objectors and that the tone of the meeting was that those in attendance did not want the facility.

[41] By letter dated 5 September 2001 the OGR sought responses from Harburg to the issues identified as of concern to the Commission in connection with Harburg's application, including the objections received by the OGR and the results of the survey undertaken by the Member for Moggill.

[42] Harburg's solicitors provided an interim response to that letter. Under cover of their letter dated 12 October 2001, they provided to the OGR copies of the reports prepared for the appeal to the LAT from Winter Consulting, Brannock & Associates Pty Ltd and Planning Australia.

[43] Harburg's appeal to the LAT was heard on 22 to 26 October and 3, 7, 10, 11 and 14 December 2001. The decision was given on 11 January 2002 by which the decision of the chief executive refusing the grant of a general licence was set aside and the application for a general licence was granted, subject to the conditions specified in the decision.

[44] Harburg's solicitors advised the OGR by letter dated 17 January 2002 of the decision of the LAT. By letter dated 30 January 2002 the OGR sought further information from Harburg's solicitors including a response to the possibility that the Commission may consider that, on the basis that projections indicated that gaming would account for 36.5% of trading profit, the site would have an overly high reliance on gaming activity and resemble a "convenience gambling" facility.

[45] A letter in response was provided by Harburg's solicitors dated 1 March 2002. Information on the area of the premises was provided. The publicly accessible area of the tavern would be 469m² of which the gaming area would comprise 71m². The publicly accessible area of the liquor barn would be 219.3m². Because of the further information that was obtained relating to trading figures as a result of the appeal to the LAT, Kleineberg considered that the projections submitted with the application were underestimated in relation to the takeaway liquor trade and

amended financial projections were provided that indicated that gaming would account for only 28.33% of trading profits.

[46] Under cover of letter dated 15 March 2002, Harburg's solicitors provided the OGR with the report of Professor Boreham prepared in March 2002 that addressed the issues raised by the objections.

[47] Professor Boreham analysed statistics for the locality that would be served by the proposed Cheers Tavern at Kenmore which included the suburbs of Kenmore, Chapel Hill, Kenmore Hills, Brookfield, Fig Tree Pocket, Pinjarra Hills, Bellbowrie, Moggill, Anstead, Pullenvale and Upper Brookfield. The estimated population for this locality in 2002 was approximately 39,000. Professor Boreham described the locality as having relatively high household income with average incomes 60% higher than the metropolitan average; homeownership levels 36% higher than for the whole of Queensland; well over twice the proportion of the population employed in professional or managerial occupations than for Queensland as a whole; the proportion of those with tertiary qualifications in the locality as more than twice that for the State; an unemployment rate significantly below the State average; domination by households inhabited by families with children and a significantly lower proportion of lone person households; and a broad representation of age groups with higher proportions of the population in the 45-64 age groups.

[48] Professor Boreham concluded that on the basis of available data there were no grounds to argue that the locality was oversupplied either with EGM venues or EGMs and that with current machine densities, the provision of an additional 35 machines, as proposed by Harburg, would see a negligible net increase of problem gamblers in the total adult population of the locality. Professor Boreham concluded that the data indicated that the proposed Cheers Taverns at Kenmore was not a high-risk location for gaming related problems based on machine densities and socio-economic levels and there was no evidence to suggest that the balance of outcomes for the economic and social structure of the community was negative. He also observed that there was no evidence to suggest an increase in criminal activity associated with a gaming facility such as that proposed by Harburg and that the likelihood of an increase in criminal activity by problem gamblers at the proposed site was negligible.

[49] As at 5 April 2002, 212 objection letters had been received by the OGR against the application of which 158 objections were in five standard formats. Copies of the standard letters together with copies of the 54 objections received in a non-standard format were provided by the OGR to the solicitors for Harburg on 5 April 2002, in order to give Harburg an opportunity to provide a written response to the objections. The solicitors for Harburg provided to the OGR a report completed by Planning Australia dated 29 April 2002 which undertook an analysis of the objections to Harburg's application for a gaming machine licence.

[50] That report analysed the objections according to the issues relied on in the objections. It stated that it was apparent that there was a moral or ethical dimension underpinning many of the objections and some of the concerns could not be maintained, when assessed against the facts. An example of that was the objectors who were concerned that people would resort to crime to support a gambling habit. The report observed that this was not the type of socio-economic area where such a

claim was credible and that was also borne out by Professor Boreham's analysis of socio-economic data for the locality. It was not a case of there being no gaming machines in the locality, as the Kenmore Tavern conducted by Weller had 35 gaming machines. The report concluded that there were no reasons arising from the objections to support a refusal of Harburg's application.

[51] The Executive Director prepared a report for the Commission dated 22 May 2002 on Harburg's application. The Executive Director recommended that the application be refused on the following grounds:

> "The premises, with a relatively limited range of facilities and a strong dependence on gambling could be considered an inappropriate type of facility in an area where there has been strong community objection from the local MP, local Councillor and members of the community against the application."

[52] In coming to that conclusion the Executive Director gave significant weight to the general layout and limited range of facilities and services to be provided at the premises and observed that the proposed tavern could be considered "a convenience gambling facility".

[53] Harburg's application for a gaming licence was on the agenda for determination at the Commission's meeting on 22 May 2002. Mr Walsh was absent from the meeting for the whole of the discussion in respect of Harburg's application. In fact, the minutes of that meeting also record that Mr Walsh had not sighted the relevant papers in relation to that application. The Commission resolved to refuse the application, on the balance of the information and material available to the Commission and in accordance with the statement of reasons attached to the minutes of that meeting. The findings of fact made by the Commission set out in the statement of reasons were:

> "1. The proposed premises are spread across two adjacent buildings, both formerly restaurants, rather than in integrated tavern.
> 2. The premises proposed for licensing for gaming machines provide a small publicly accessible area containing a limited range of facilities.
> 3. Numerous objections have been lodged against the application including objections lodged by the local MP and local Councillor.
> 4. While in an area which contains a range of shopping facilities, the premises are not in a shopping centre for the purposes of the Commission's Guidelines.
> 5. The area is not over-serviced by gaming machines, with only one venue (with 35 machines) within 2km, of the proposed site."

[54] The statement of reasons set out as the reasons for the decision to reject the application:

> "1. The premises, with a relatively limited range of facilities, a strong dependence on gambling and a non-integrated layout is an inappropriate venue for licensing for gaming purposes.
> 2. The strong community objections to the proposed site indicate a high level of community concern at the potential

> for negative impact of the proposed site on the local community."

[55] The Commission noted in the statement of reasons that it gave weight in arriving at its decision to refuse the application to the general layout and limited range of facilities and services to be provided, the non-integrated nature of the premises and the weight of community concerns as expressed by the objectors to the site. The Commission noted in the statement of reasons that it gave lesser weight to information contained in Planning Australia's report regarding the facilities to be incorporated in the premises, objections based on the premise of an over-supply of gaming machines in the area and objections based on the proximity of the site to shopping centres.

[56] The Commission in its statement of reasons did not provide any explanation for why it rejected Planning Australia's analysis of the objections (other than those based on the clearly incorrect premise that there was an oversupply of gaming machines in the area or those based on the proximity of the site to shopping centres). It was a fact that there were strong community objections to the grant of the gaming licence to Harburg that were supported by the local Member of Parliament and the local Councillor. What is curious about the second reason given by the Commission for its decision is that it relied on the indication from the community objections of "a high level of community concern at the potential for negative impact of the proposed site on the local community" without elaborating on what type of negative impact on the community was foreseen by the Commission.

[57] Harburg lodged an appeal against the Commission's decision with the respondent on 11 June 2002. The grounds set out in the notice of appeal were that the installation and use of gaming machines on the subject premises would not affect adversely the nature or character of the premises, the general use of the premises or the enjoyment of persons using the premises or the public interest. An amended notice of appeal was provided to the respondent on 19 June 2002 which included an additional ground of appeal that there were circumstances that gave rise to a reasonable apprehension or suspicion of a lack of impartiality on the part of the Commission. Reference was made to Mr Walsh's position as chairman of the Commission and as the solicitor for Weller in respect of the objection to the grant of a liquor licence for the proposed Cheers Tavern at Kenmore. The amended notice provided details of the role that Weller played in the appeal to the LAT and the circumstances of the inspection by members of the Commission of a Cheers Tavern, at the request of Mr Walsh.

[58] Pursuant to s 30(1)(b) of the Act, Harburg's solicitors provided further information to the respondent in connection with the appeal under cover of their letter dated 9 July 2002 which comprised 20 pages. The letter set out the history of Harburg's application and made submissions on the bias issue and why the Commission's decision was wrong. The letter was accompanied by a town planning report from Planning Australia dated 9 July 2002 that was prepared specifically for the appeal against the Commission's decision and copies of material in connection with Harburg's application that largely duplicated what was available on the Commission's file.

[59] The briefing note on Harburg's appeal that was prepared for the respondent misinterpreted the complaint made by Harburg about the inspection by members of the Commission of a Cheers Tavern at the request of Mr Walsh. The amended notice of appeal was referring to the inspection in February 2002 of the Cheers Tavern at Spring Hill. The briefing note referred to the allegation in terms that Mr Walsh "directed that the Commission carry out a site inspection of the applicant's premises". The briefing note correctly noted that there was no record of the Commission having conducted a site inspection of the Cheers Tavern site at Kenmore prior to consideration of Harburg's application, but did not refer to the fact that the Commission members, at Mr Walsh's suggestion, had inspected Cheers Tavern Spring Hill on 6 February 2002, in order to acquaint themselves with the concept of a Cheers Tavern whilst the applications for the Kenmore and Slacks Creek Cheers Taverns were pending. The letter from Harburg's solicitors to the respondent dated 9 July 2002 did refer however, to the inspection by Commission members (other than Mr Walsh) of the Cheers Tavern Spring Hill which was organised at the request of Mr Walsh.

[60] On 22 July 2002 the respondent disallowed the appeal. The Kenmore decision was communicated to Harburg's solicitors under cover of letter from the OGR dated 1 August 2002. It was conveyed that the respondent was not satisfied that the public interest would not be adversely affected and the respondent's reasons for disallowing the appeal set out in that letter were recorded in identical terms to those reasons set out for the decision of the Commission in its statement of reasons. A statement of reasons was provided by the respondent to Harburg dated 9 September 2002. In the statement of reasons the respondent expressly referred to the fact that he had taken into account the allegations of conflict of interest made against Mr Walsh and rejected them. Curiously in this statement of reasons, the reasons given for the respondent to disallow the appeal are in different terms from those reflected by the respondent's approval of option A in the briefing note to the respondent in respect of Harburg's appeal. In the statement of reasons reference was made to the report from Planning Australia dated 9 July 2002 and its conclusions that the Commission's reasons do not withstand scrutiny; there was no evidence that the locality would suffer negative impacts if the application was granted; and the refusal of Harburg's application could perpetuate an unfair competitive advantage for the Kenmore Tavern. The respondent noted that he took into account the arguments raised by Harburg's solicitors with respect to the information about the negative community comment and objections and rejected them. The reasons shown, however, for the decision to disallow the appeal were set out in the following terms:

> "1. The premises were unsuitable as a gaming machine venue for the reasons that had previously been adopted by the Commission for refusing to grant the gaming machine licence.
> 2. I was thereby not satisfied that the public interest would not be adversely affected by allowing the appeal."

It was only the first reason given by the Commission for its decision that can be characterised as a reason for why the premises were unsuitable as a gaming venue. The second reason given by the Commission is not repeated in these reasons.

[61] As the reasons for the respondent's decision that were communicated to Harburg's solicitors in the letter dated 1 August 2002 reflected the reasons approved by the

respondent on the briefing note, it is those reasons which should be considered for the purpose of this application, rather than the statement of reasons that were signed by the respondent subsequently on 9 September 2002.

Nature of appeal to the respondent

[62] Each of the appeals was decided by the respondent on the basis of one of the threshold issues of which the respondent had to be satisfied, before he even reached the stage where he could exercise his discretion in relation to the outcome of the appeal. Failure to satisfy the respondent on one of the threshold issues resulted in the respondent being bound to direct that the appeal be disallowed: s 30(2) of the Act.

[63] The grounds for each application for statutory order of review are therefore directed at the issue of whether the respondent was not satisfied that the public interest would not be adversely affected by the grant of the relevant gaming machine licence. That can be characterised as a "jurisdictional fact": *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [130] (*"Eshetu"*).

[64] It is usual to refer to the observations made by Gibbs J (as his Honour then was) in *Buck v Bavone* (1976) 135 CLR 110, 118-119 concerning decision-making which is dependent upon a state of satisfaction:

> "It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts."

[65] Gummow J commented on these observations in *Eshetu* at 654 [137]:

> "This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other

> matters, goes to establish or to deny, that the necessary criterion has been met was all one way."

[66] There is no definition of "public interest" in the Act. There had been a definition, but that was omitted by the *Gaming Legislation Amendment Act* 2000 with effect on and from 1 December 2000. The following observation as to what is meant by "public interest" was made in the majority judgment in *O'Sullivan v Farrer* (1989) 168 CLR 210, 216:

> "Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (N.S.W) v Browning* (1947) 74 C.L.R., at p.505, per Dixon J."

Bias

[67] Because in each appeal the factual basis for raising the allegation of reasonable apprehension of bias is the same, it is convenient to deal with that ground of appeal in respect of both applications.

[68] Mr Walsh who is a solicitor had been the chairman of the Commission since December 1997. He acted for Weller, the licensee of the Kenmore Tavern, which objected to the granting of the general liquor licence sought by Harburg for its Kenmore site, participated vigorously in the hearing before the LAT and encouraged residents of Kenmore to object to the grant of the liquor licence to Harburg. It was conceded on behalf of Weller at the hearing before the LAT that Weller had supported the residential objectors by meeting expenses for postage and paper and would give consideration when the LAT hearing had finished to meeting the objectors' general expenses including legal fees.

[69] During the cross-examination of Mr Walsh, it was established that he was at the objectors' meeting organised by the Liquor Licensing Division in respect of Harburg's application for a liquor licence.

[70] Mr Walsh was cross-examined on a pro forma letter that was an exhibit during the appeal before the LAT which had been distributed to Kenmore residents. The pro forma letter was addressed to the OGR and related to the application by Harburg for the gaming machine licence and recommended that the application be advertised. It was apparent that the letter had been drafted in the light of the terms of the relevant guidelines. It was suggested to Mr Walsh that he had prepared that pro forma letter. He stated in evidence that he did not prepare that pro forma letter. Mr Walsh was rigorously cross-examined. There was nothing that emerged from his evidence which cast any doubt on his evidence that he did not prepare that pro forma letter. I find that Mr Walsh did not prepare the pro forma letter.

[71] Mr Walsh explained his reason for suggesting that an inspection of a Cheers Tavern be organised for members of the Commission. He was aware that there were two applications relating to Cheers Taverns at Kenmore and Slacks Creek that were due to be determined by the Commission and, because the concept of a Cheers Tavern

was put forward as novel, he considered there was some value in Commission members experiencing for themselves what was meant by a Cheers Tavern.

[72] It was not unusual for inspections of proposed sites for gaming machine licences organised by the OGR at the request of the Commission or the chairman to be undertaken by Commission members. Mr Walsh stated that since 2000 Commission members had been involved in approximately 15 different site inspections over four or five occasions.

[73] Professor McMillen stated that she assumed that it was a Commission decision to visit the Cheers Tavern at Spring Hill. She stated that her decisions on the applications made by Harburg and Mustercliffe were not influenced by her visit to the Cheers Tavern at Spring Hill. Ms Karyn Walsh stated that her visit to the Cheers Tavern at Spring Hill did not influence her decision in relation to the applications relating to the Cheers Taverns at Slacks Creek and Kenmore. Mr Airo-Farulla did find the inspection of the Cheers Tavern at Spring Hill useful in providing information on the physical layout of the premises and imparting contextual information regarding the premises and those similar to it. Ms Dare was aware that the inspection of the Cheers Tavern at Spring Hill had been suggested by Mr Walsh, as he thought it may assist Commission members in making a decision on the applications relating to Cheers Taverns. Ms Dare had visited the Cheers Tavern at Aspley on a few occasions and she concluded from her inspection of the Cheers Tavern at Spring Hill that it was similar to the one at Aspley. Her inspection of the Cheers Tavern at Spring Hill reinforced the concerns that she had about the general Cheers Tavern layout. Mr Wilson was influenced by his visit to Cheers Tavern at Spring Hill, as he was impressed by the facilities and described that as a consideration in favour of granting the applications of Harburg and Mustercliffe.

[74] Mr Walsh stated in his evidence that he had nothing to say to any of the other members of the Commission about the applications for gaming licences by Mustercliffe or Harburg. That is confirmed by the other Commission members.

[75] Both Mustercliffe and Harburg and the respondent relied on *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 ("*Hot Holdings*"). That case concerned the decision of a Minister to grant a mining exploration licence. The allegation was that certain officers said to be involved or concerned in preparing either material for the minute or the minute for the Minister for the purpose of the Minister making the relevant decision had a pecuniary interest in the granting of the mining exploration licence. Neither the Minister nor the Director General who made the recommendation for the decision was aware of the interest of either officer. The High Court, by a majority, found that, in the circumstances, there was no reasonable apprehension of bias that affected the Minister's decision.

[76] Gleeson CJ stated at 447 [20]:

> "In order to resolve the problem presented by this case, it is not necessary to define comprehensively the circumstances which an administrative (or judicial) decision may be impugned upon the ground that some person, other than the decision-maker, associated with the process of decision-making, had a personal interest in the outcome of the process. That is a large question; and it may not have a single answer. At the same time, it is not sufficient to address the

> issue, at a high level of generality, by reference to ethical standards of public servants. The possibility that Mr Miasi's conduct may have been improper does not necessarily lead to a conclusion that the Minister's decision was invalid. It might expose him to disciplinary action, but the question is whether it exposes the appellant to the loss of its licence. Legal rights and interests are at stake, and the intermediate steps leading from the premise to the conclusion require scrutiny. Nor is it sufficient to characterise the "process" as "tainted", and note that an observer who knew some of the facts, but not others, might be suspicious about what had gone on. What is required is an identification, and application, of the principle upon which the challenge to the Minister's decision must rest."

[77] Gleeson CJ observed at 448 [22] that if the unfairness alleged was the actuality or the appearance of disqualifying bias, as a result of the conduct or circumstances of a person other than the decision maker, then the part played by that other person in relation to the decision would be important. In *Hot Holdings* Gleeson CJ concluded at 449 [24] that the relevant officer had a peripheral involvement and made no significant contribution to the Minister's decision, so that the officer's financial interest did not deprive the Minister's decision of the appearance of impartiality.

[78] Gaudron, Gummow and Hayne JJ found at 456 [52] that there was no sufficient factual basis to enable the conclusion that the Minister's decision was not impartial because he had acted on tainted advice.

[79] McHugh J also found that the peripheral role played by the officers was not sufficient to give rise to reasonable apprehension of bias, relying on the principle of bias by association. McHugh J stated at 461 [72]:

> "A court will not conclude that there was a reasonable apprehension of bias merely because a person with an interest in the decision played a part in advising the decision-maker. The focus must be on the nature of the adviser's interest, the part that person played in the decision-making process and the degree of independence observed by the decision-maker in making the decision. If there is a real and not a remote possibility that a Minister has not brought an independent mind to making his or her decision, the role and interest in the outcome of his or her officers may result in a finding of reasonable apprehension of bias."

[80] It is not suggested on behalf of either Mustercliffe or Harburg that there was any actual bias in the decision of the Commission, as a result of any influence by Mr Walsh. What is suggested is that there was a reasonable apprehension of bias, because of Mr Walsh's close association with Weller's opposition to the grant of the liquor licence to Harburg and that created an obligation on the respondent on the appeal to make an independent assessment of each of the applications, uninfluenced by the Commission's decision.

[81] A further argument in relation to bias was developed in oral submissions on behalf of Harburg that Mr Walsh had instructions from Weller to make sure that the application for the gaming licence by Harburg was not successful. Mr Hanson QC who appeared with Mr Herbert of counsel on behalf of Harburg submitted:

> "Really what your Honour has to ask yourself is how would an impartial objecting, observer regard the way in which our client was denied his licence knowing that the very head, the very chairman of the poker machine licensing authority had a brief from a commercial rival of our client to make sure it didn't happen. What would an ordinary impartial observer think of that decision making process, and may we venture to say they'd be appalled. It is appalling to think that the very chairman of the authority that knocked back this had a brief and acted upon it to make sure that it didn't go through."

There is no factual basis to support that submission. Mr Walsh deposed to being engaged by Weller to prepare an objection to the liquor licence which was being sought by Harburg in order to operate a Cheers Tavern from the Kenmore site and to represent Weller at the subsequent hearing before the LAT. In cross-examination Mr Walsh was referred to the affidavit of Mr Connor who described Mr Walsh's participation in the proceedings before the LAT. The following cross-examination then ensued:

> "Now, you had a retainer, of course, from Wellers Kenmore Tavern-----?-- Yes.
>
> -----to make sure if you could by any legal means, I suppose, stop this tavern; would that be right?-- To act for them in a proper and reasonable fashion, as I normally – as I always try to do.
>
> Very well. Now, as part of that retainer did you attend a residents' protest meeting, or objectors' meeting at some stage?-- Yes, along with 3 or 400 other people, I'd imagine.
>
> You see, we have the documents in the Court tell us – and I will show it to you if you want to see it – that on the 6th of February 2001 there was an objectors' meeting objecting to the grant of the liquor licence at the Chapel Hill State School?-- Mmm.
>
> You were there?-- I was.
>
> All right. You were there in your capacity, were you, as solicitor for the Kenmore Tavern?-- I was."

[82] Mr Walsh was given no opportunity in cross-examination to comment on the proposition that he was engaged by Weller to make sure that the application for the gaming licence by Harburg was not successful. It is a very serious allegation to make against Mr Walsh. There is no evidence whatsoever to show that Mr Walsh was retained by Weller for that purpose in respect of the gaming machine application or from which such retainer can be inferred. To the extent that the allegation of bias is based on such allegation, it must be rejected.

[83] The grounds relied on by Mustercliffe to appeal the Commission's decision did not include any allegation of reasonable apprehension of bias, as a result of Mr Walsh's conflict of interest in acting for Weller against Harburg. The respondent argues that because Mustercliffe failed to raise the allegation of bias in its notice of appeal to the respondent, Mustercliffe has waived any right to raise bias on this application.

[84] Theoretically, if the Commission's decision were tainted, as a result of reasonable apprehension of bias and the respondent's decision was largely influenced by the Commission's decision, the failure of Mustercliffe to raise the issue of bias on the appeal to the respondent may not preclude it being raised on an application for statutory review.

[85] In view of Mr Walsh's disqualification from being involved in deciding each of the applications of Mustercliffe and Harburg, it was not for Mr Walsh to concern himself in suggesting that Commission members inspect an existing Cheers Tavern, regardless of whether it was a good idea or not. The fact is that the Commission members (other than Mr Walsh) did inspect the Spring Hill Cheers Tavern, when each of Mustercliffe and Harburg was relying on what was described as the novel concept of a Cheers Tavern that was exemplified by the one at Spring Hill. How the Cheers Tavern at Spring Hill presented to the Commission members was not affected by the fact that the inspection took place at Mr Walsh's suggestion. Despite the initiation of the inspection by Mr Walsh, it is not possible to conclude that the undertaking of that inspection by Commission members which was pertinent to their task would give rise in the mind of a fair-minded and informed member of the public to a reasonable apprehension of a lack of partiality on the part of the Commission (when Mr Walsh did not participate in the relevant decisions or speak to the other members of the Commission about them): see *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546, 553-554.

[86] As the Commission's decision in respect of Mustercliffe's application was not tainted by reasonable apprehension of bias, it is unnecessary to consider whether Mustercliffe waived its right to raise bias on this application. Mustercliffe cannot succeed on its ground of review that relies on the alleged bias of Mr Walsh, as the Commission's decision was not affected by Mr Walsh's conflict of interest.

[87] Mr Walsh's competing interests were much stronger against Harburg, because of Mr Walsh's active role in acting on behalf of Weller in opposing Harburg's application for a liquor licence for the Kenmore site. That conflict was expressly drawn to the respondent's attention by Harburg's notice of appeal to the respondent and the material placed before the respondent.

[88] The complaint of Harburg is that it was incumbent on the respondent to make his own independent assessment of the matter and a decision which fully and carefully explained how he had done so, uninfluenced by the decision of the Commission. Harburg complains about the fact that in the respondent's statement of reasons, he noted the allegations of conflict of interest against Mr Walsh and rejected them.

[89] It does not follow from Mr Walsh's significant conflict of interest in respect of Harburg's application that the Commission's decision in respect of that application was tainted for reasonable apprehension of bias, when Mr Walsh did not participate in the decision making or attempt to influence the other Commission members in relation to the decision. As the matter of Mr Walsh's conflict of interest was raised as a ground of appeal, it had to be considered by the respondent. The mere fact, however, that the respondent has not given reasons for why he rejected that ground of appeal does not make the respondent's decision vulnerable on this application. The respondent's role on the appeal was to consider all the material and information that was before him pursuant to s 30(1) of the Act in deciding the threshold issues

and then, if necessary, whether to allow the appeal. There is no evidence that the respondent did not act independently in considering all that material and information to decide the threshold issue for the appeal which was the basis on which the appeal was determined. The court should be slow to infer that the respondent ignored or misunderstood his task, in the light of the respondent's position as the relevant Minister administering the Act and the briefing note which left the respondent in no doubt of what was required of him in dealing with Harburg's appeal: cf *Adrenalin Sports Brisbane Pty Ltd v Mackenroth* [2003] QSC 184 at para [13].

[90] Harburg therefore cannot succeed on its ground of review that relies on the alleged bias of Mr Walsh and its allegation that the respondent did not give independent consideration to Harburg's appeal.

Other grounds for Mustercliffe's application

(a) Irrelevant considerations

[91] In determining what matters the respondent should or should not have taken into consideration, the classic statement by Mason J (as his Honour then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40 ("*Peko-Wallsend*") must be applied.

[92] In respect of the ground of appeal that the respondent took into account irrelevant considerations, one of those irrelevant considerations that is relied on is the unpublished policy. Mr Watts swears that no such policy existed. He was not required for cross-examination. I therefore accept that there was no unpublished policy.

[93] What was in existence were the relevant guidelines. The reasons recorded by the respondent for the Slacks Creek decision touch on matters that fall within the relevant guidelines. The point is made on behalf of Mustercliffe that the range of facilities proposed by Mustercliffe for the Cheers Tavern at Slacks Creek was no different to the Cheers Taverns for which gaming licences had been obtained previously. The decision made by the Commission and the respondent in respect of the Slacks Creek Cheers Tavern was the first application for a Cheers Tavern disposed of after the commencement of the relevant guidelines and the amendments to the Act effected by the *Gambling Legislation Amendment Act* 2000 (No 51 of 2000). The framework for the decision-making had changed.

[94] It is difficult to see how Mustercliffe can contend that the Commission's decision was an irrelevant consideration for the respondent when deciding the appeal. The Commission's decision is part of the information or material that was given to the respondent either by the Commission or the chief executive in connection with the appeal: s 30(1)(b)(iii) and (iv) of the Act. The respondent had to consider the Commission's decision, in order to make sense of the appeal and the submissions made by Mustercliffe in connection with the appeal.

[95] To the extent that the submission was made on behalf of Mustercliffe that the respondent merely "rubber stamped" the Commission's decision and did not undertake the independent role required of the respondent on the appeal pursuant to s 30 of the Act, the process undertaken in respect of the appeal does not permit such a finding. The briefing note prepared by the Executive Director that was before the

respondent was comprehensive. It referred to the report dated 12 December 2001 from the Executive Director to the Commission recommending the approval of Mustercliffe's application. The Commission's statement of reasons which were before the respondent expressly acknowledged that the Commission gave lesser weight to the Executive Director's recommendation that the application be approved. The difference between the Executive Director's recommendation and the Commission's decision highlighted the policy tensions surrounding the application. All the material and information that the respondent was required to consider on the appeal was before him, including Mustercliffe's solicitors' extensive submissions.

[96] With respect to Mustercliffe's claim that the objection of the Logan City Council was an irrelevant consideration, it must fall within the wide ambit of "social and community issues" which the Commission was entitled to consider under s 55(2)(a) of the Act and therefore was also relevant for the respondent to consider.

(b) Relevant considerations

[97] Each of the matters which Mustercliffe relies on as a relevant consideration which it claims the respondent failed to take into account was disclosed in the material before the respondent. There is no evidence that the respondent failed to consider these matters. This Court cannot infer that the respondent did not carry out the task required of him under the Act, when there is no evidentiary support for the allegation.

(c) Failure to have regard to the merits of the case

[98] This ground of review alleges that the Slacks Creek decision was made in accordance with the unpublished policy and without regard to the merits of the case. To the extent that this ground relies on the unpublished policy which I have accepted did not exist, it must fail. To the extent that this ground relies on the merits of the case, the merits that are relied on are particular details of the set up and operation of the proposed Cheers Tavern at Slacks Creek. Those details were disclosed in the material that was before the respondent. There is no basis on which Mustercliffe can show that the respondent made his decision on the appeal without having regard to the details disclosed by Mustercliffe that were relied on in support of its application. This is not the sort of matter where taking into account the details of Mustercliffe's application could result only in a successful outcome. It is apparent that there were issues arising in connection with the application about which different views could be held.

[99] Another aspect of this ground of review that the Slacks Creek decision was made without regard to the merits of the case which emerged during submissions was that an inference should be drawn that the material submitted by Mustercliffe to the respondent on 27 May 2002 was either ignored or given only a cursory examination and not taken into account by the respondent in deciding the appeal, when the decision on the appeal was made on 28 May 2002. The briefing note to the respondent anticipated that it would be accompanied by any material forwarded by Mustercliffe by the due date of 27 May 2002. The letter dated 31 May 2002 advising Mustercliffe's solicitors that the respondent disallowed the appeal described the material that was before the respondent for consideration and referred to the submissions made by Mustercliffe's solicitors on 27 May 2002. No inference

adverse to the respondent should be drawn merely from the voluminous nature of the material that was before him on this appeal. The nature of the respondent's role requires him to make numerous decisions in a short space of time for which he is given a briefing note accompanied by the supporting material. In this particular case, the briefing note was written in such a way as to highlight for the respondent the issues, the relevant material that had to be considered and the various options for dealing with the appeal. In deciding Mustercliffe's appeal, the respondent made an administrative decision that he was not satisfied that the public interest would not be adversely affected by the grant of a gaming machine licence to Mustercliffe. It should not be inferred from the speed (or efficiency) with which the decision was made, after the solicitors for Mustercliffe provided submissions and additional reports and material, that the respondent did not take all of that into account.

(d) Unreasonableness

[100] The ground of review of unreasonableness requires Mustercliffe to show that the Slacks Creek decision was so unreasonable that no reasonable person could have come to it: see s 23(g) of the *Judicial Review Act* 1991, *Peko-Wallsend* at 41-42 and *Eshetu* at 627 [44].

[101] Mustercliffe's proposal for the Slacks Creek site was that the tavern would provide for a lounge bar, bistro, gaming and a liquor barn. There would be one circular bar servicing the lounge bar, public area and bistro. The relevant guidelines made it clear that the Commission required, in the case of a hotel, for the dominant purpose of the facility to be the serving of alcohol with gaming as an ancillary service and the total publicly accessible area to be of a sufficient size and capable of providing a range of amenities. It is a matter of degree as to what amounts to a "strong dependence on gambling", but it is relevant in this context that Mustercliffe made it clear to the Commission that the proposed tavern was unlikely to proceed, if a gaming licence were not granted, as that was required for the long term viability of a tavern. The anticipated 29.5% of trading profit being generated from gaming is not insignificant.

[102] The respondent's decision to disallow the appeal which adopted the reasons for the Commission's decision emphasised the significance of the social and community issues that had been raised in respect of the application, particularly the high unemployment and crime rates and other social problems in the area.

[103] Professor Boreham is a political scientist whose reports analysed statistics and suggested explanations for what would be likely to happen, if the licence were obtained by Mustercliffe, and addressed the issues that were flagged as being of concern to the Commission. Professor Boreham's reports represented his opinions on the various issues. The nature of Professor Boreham's expertise means that his opinions were not reached as a matter of scientific precision. The material before the Commission and the respondent disclosed other opinions on the same issues. Mustercliffe does not show that these other opinions have no validity.

[104] The fact that the Executive Director was persuaded by Professor Boreham's opinions to recommend that Mustercliffe's application be approved, did not foreclose the Commission from exercising its independent role to decide Mustercliffe's application otherwise than in accordance with the Executive Director's recommendation. The same course was open to the respondent in

considering the threshold issue on the appeal of whether the public interest would not be adversely affected by the grant of the gaming machine licence.

[105] Part of Mustercliffe's complaint is that neither the Commission's reasons nor the respondent's reasons explain why the Executive Director's dismissal of the social and community issues in making his recommendation for the approval of Mustercliffe's application was rejected. Although the Commission did not descend into a detailed analysis of the Executive Director's report, it did indicate to which opinions and reports it gave greater or lesser weight. Those reasons were before the respondent. It was not essential for the respondent to provide a detailed explanation for not acting on the Executive Director's recommendation for approval of Mustercliffe's application in carrying out the role required of the respondent on the appeal. Depending upon the weight given by the respondent to the various reports, opinions and objections that were before him, there was abundant material before the respondent to enable him to conclude that he was not satisfied that the public interest would not be adversely affected by the granting of Mustercliffe's application. It is not possible on this application to be satisfied that the respondent's disallowance of Mustercliffe's appeal was a decision which no reasonable person could have reached.

(f) Breach of hearing rule

[106] As this ground of review was based on an allegation that Mustercliffe was not given an opportunity to be heard in relation to the unpublished policy which I have found did not exist, Mustercliffe cannot succeed on this ground of review.

Other grounds for Harburg's application

(a) Irrelevant considerations

[107] One of the irrelevant considerations relied on by Harburg is the unpublished policy relating to Kenmore. Again, Mr Watts swears that no such policy existed and I therefore accept that was the position. The Commission's decision was also made after the commencement of the relevant guidelines and the *Gambling Legislation Amendment Act* 2000 (No 51 of 2000).

[108] The other irrelevant consideration relied upon by Harburg is the decision of the Commission. Although there must be the reservation about the Commission's reliance on the community concern at the potential for negative impact of the proposed site on the local community in ways that were not identified by the Commission, the decision of the Commission was a relevant consideration for the same reason that the identical ground was disposed of for Mustercliffe's application.

(b) Relevant considerations

[109] Harburg's claim about the failure of the respondent to take into account relevant considerations relies on the granting of the liquor licence to Harburg by the LAT and the lack of objection by the Brisbane City Council to gaming machines being placed on the Kenmore premises and that, if the respondent had truly taken these matters into account, the reasons of the respondent would have explained why the application for the gaming machine licence was dealt with differently to the application for the liquor licence.

[110] Even though the obtaining of a general liquor licence by Harburg was a pre-condition for its application for a gaming machine licence for the Kenmore site, the grant of the liquor licence had to comply with the provisions of the *Liquor Act* 1992 which is a separate legislative scheme than that provided for by the Act. The LAT was satisfied that it should exercise its discretion in favour of the granting of the application for a general licence, after having considered all the matters to which the LAT was required to have regard pursuant to the *Liquor Act* 1992. The conclusion of the LAT was expressed in the following terms:

> "We consider that the benefits to the residents of the locality in having available to them the facility of a medium-sized, congenial tavern outweigh, on balance, the possible detriment to the amenity of adjoining residential areas. We consider that undue offence will not be caused to those nearby residents, and we are satisfied that there will be no significant lessening of the amenity, quiet and good order of the locality. The impacts on the amenity of the community concerned are, in our view, not unacceptable impacts. We are confident that a Cheers Tavern will not diminish the character or amenity of the suburb of Kenmore to any significant extent."

[111] The LAT's decision to grant Harburg a liquor licence was a relevant consideration for the Commission (and the respondent on the appeal) to take into account in respect of Harburg's application for a gaming machine licence, but it is apparent from the LAT's reasons, that its decision on the liquor licence application did not dispose of the matters under the Act and the relevant guidelines, which were relevant to the Commission 's decision (and that of the respondent on the appeal) on Harburg's application for a gaming machine licence.

[112] It was not essential for the respondent to carry out the task required of him under s 30 of the Act to provide detailed reasons for why the application for the gaming machine licence had a different result for Harburg than its application for the liquor licence.

[113] The letter from the Executive Director dated 1 August 2002 that advised Harburg's solicitors of the outcome of the appeal to the respondent disclosed that all the material relied upon by Harburg on this application as relevant considerations which should have been taken into account by the respondent was before the respondent. That letter also disclosed that for the purpose of dealing with the threshold issue that was the basis on which the respondent determined the appeal, the respondent had considered all the material before him.

[114] The court should therefore not infer that the respondent did not carry out the task required of him under the Act, unless there is evidence from which such an inference can be drawn. In view of the second of the reasons given by the respondent for disallowing the appeal, the reports procured by Harburg relating to the issues raised by the Community objections were particularly relevant. There was abundant evidence put before the respondent on behalf of Harburg that there was no substance to the community objections: although the objections signalled clear and strong opposition from members of the community to another gaming venue being established in Kenmore, the objections did not translate into issues that could be shown to exist or, if they did exist, to have more than a negligible impact and that were relevant to whether a gaming machine licence should be granted to Harburg.

[115] Apart from the existence and numerical strength of the community objections, there was no material in the nature of reports or opinions contrary to those of Planning Australia and Professor Boreham that supported the existence of the issues raised by the objections. This was recognised in the Executive Director's report to the Commission which sought to rely on the fact that there were community objections, rather than any issue that was raised by the objections.

[116] It is therefore of concern that the respondent gave as a reason for his decision one that was in identical terms to that of the Commission and that referred to community concern at the potential for negative impact of the proposed site on the local community, without identifying the respects in which it was anticipated that there would be such negative impact. The inherent problems associated with that reason may have been confirmed by the abandonment of that as a reason for the respondent's decision on the appeal, when providing the formal statement of reasons to Harburg for his decision.

[117] I therefore infer that the respondent failed to have regard to a relevant consideration in reaching his decision on Harburg's appeal, namely the material relied on by Harburg that was directed at the topics raised by the community objections. This failure was significant and must result in the respondent's decision disallowing Harburg's appeal being set aside and referred back to the respondent for further consideration.

(c) Failure to have regard to the merits of the case

[118] This ground of review alleges that the Kenmore decision was made in accordance with the unpublished policy relating to Kenmore and without regard to the merits of the case. To the extent that the ground relies on an unpublished policy which I have accepted did not exist, it fails.

[119] This ground of review also relies on the proposed set up and operation of the Cheers Tavern at the Kenmore site as the merits to which it is alleged that the respondent failed to have regard. The details of this aspect of the application were part of the material before the respondent. There is no substance to this aspect of this ground of review, as there is no basis for concluding that the respondent made his decision on the appeal without considering the material relied upon by Harburg in support of its application.

(d) Unreasonableness

[120] The respondent made his decision on 22 July 2002 for two stated reasons. It is not possible to treat them as alternative reasons. As I have found that the reason given by the respondent which was based on strong community objections was reached after failing to take into account relevant considerations, it is not possible to properly deal with the unreasonableness ground of review at this stage.

(f) Breach of hearing rule

[121] As this ground of review was based on an allegation that Harburg was not given an opportunity to be heard in relation to the unpublished policy relating to Kenmore which I have found did not exist, Harburg cannot succeed on this ground of review.

Orders

[122] It follows that the orders which should be made are:

1. In respect of BS5533 of 2002, the application is dismissed.
2. In respect of BS9225 of 2002, the decision of the respondent made on 22 July 2002 is set aside and the appeal of Harburg Investments Pty Ltd from the decision of the Queensland Gaming Commission made on 22 May 2002 is referred to the respondent for further consideration, according to law.

[123] I will hear submissions on costs.