



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON ESTIMATES 2023-2024

Mr Mark Parton MLA (Chair), Ms Jo Clay MLA (Deputy Chair),
Mr Michael Pettersson MLA

ANSWER TO QUESTION TAKEN ON NOTICE DURING PUBLIC HEARINGS

Asked by Peter Cain MLA on Friday, 21 July 2023: Mr Rattenbury took on notice the following question(s):

[Ref: Uncorrected Proof Hansard Transcript 21 July 2023 pp 82-83]

In relation to: First awareness of conflict of interest matter

MR CAIN: Minister, I would like to ask you about a matter we discussed previously regarding the failure of the Fair Trading Commissioner to declare a conflict of interest in a timely manner. Minister, when were you or anyone in your office first made aware of an allegation that the Fair Trading Commissioner had a potential conflict of interest?

Mr Rattenbury: I would have to take that on notice, Mr Cain. You want a specific date?

MR CAIN: Yes.

MR CAIN: I guess my question is when did you first become aware of this conflict of interest?

Mr Rattenbury: Of the concern of a conflict of interest?

MR CAIN: Of the conflict of interest, yes.

Mr Rattenbury: As I said, I will have to take that on notice.

SHANE RATTENBURY MLA: The answer to the Member's question is as follows: –

I provided further information about this matter in a letter to the Committee at Attachment A.

Approved for circulation to the Select Committee on Estimates 2023-2024

Signature:

Date:

1/8/23

By the Minister for Consumer Affairs, Shane Rattenbury MLA



Shane Rattenbury MLA

Attorney-General

Minister for Consumer Affairs

Minister for Water, Energy and Emissions Reduction

Minister for Gaming

Member for Kurrajong

Mr Mark Parton MLA

Chair of the Select Committee on Estimates 2023-24

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Dear Mr ~~Parton~~ *Mark*

I am writing to you regarding a line of questioning relating to the Commissioner for Fair Trading (the Commissioner) during my attendance at the estimates committee on 21 July 2023 in my capacity as Minister for Consumer Affairs and Minister for Gaming. This letter also serves as a response to Estimates QTONs 62, 65 and 66.

Please note that at all times, I have tried to be open and transparent about this matter and to provide as much information as I can taking into account legal and privacy obligations. Therefore, to further support the Committee I wish to provide some additional context and clarification on the facts and circumstances around this matter.

Commissioner for Fair Trading

The Commissioner is a statutory role established under section 32 of the *Fair Trading (Australian Consumer Law) 1992*. The role is held by a public servant, appointed by the relevant Director-General. Many functions of the Commissioner are delegated to staff within Access Canberra. This includes decisions on licence applications, investigation and enforcement actions.

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On 18 January 2021, Ms. Derise Cubin was appointed as the Commissioner pursuant to *Fair Trading (Australian Consumer Law) Commissioner Appointment 2021 (No 1)*, Notifiable Instrument NI2021-31.

On 4 February 2021, the *Fair Trading (Australian Consumer Law) Acting Commissioner Appointment 2021 (No 1) Notifiable Instrument NI2021-60* was signed by the Director-General and appointed the occupant of the public servant position number E827 (Deputy Director-General, Access Canberra) to act as Commissioner in the event that Ms Cubin is absent, unavailable or is otherwise for any reason unable to exercise the functions of the Commissioner.

On 7 February 2023, Notifiable Instrument NI2021-60 was revoked by the *Fair Trading (Australian Consumer Law) Acting Commissioner Appointment 2023 (No 1) Notifiable Instrument NI2023-59*, which appointed Mr David Pryce by name as opposed to position number to act as Commissioner in the event that Ms Cubin is absent, unavailable or is otherwise for any reason unable to exercise the functions of the Commissioner.

Attendance at the 6 July 2021 meeting

While it is not appropriate to discuss specific matters relating to individuals, for the Committee's benefit I provide some additional context in relation to the circumstances of the meeting referred to in Mr Cain's questions on 21 July 2023.

In June 2018, the former Commissioner for Fair Trading initiated an investigation into a business as a result of consumer complaints in relation to that business. That investigation progressed but following confirmation that the business was to be deregistered, the former Commissioner determined that no further action would be taken and the investigation was subsequently closed in August 2020.

On 21 January 2021, the Territory was made aware of a potential claim for compensation in relation to the investigation.

On 27 May 2021, correspondence from the legal representative of the business sought to articulate a claim for compensation, but the proper basis of that claim was unclear. To progress the matter, the current Commissioner attended a *without prejudice* meeting on 6 July 2021 along with Government Solicitor's office representatives so that the legal issues in the matter and particulars of any potential claim against the Territory could be discussed.

It was made clear prior to the meeting that the Territory was not able to make settlement offers at this stage but did consider that a discussion between the parties should enable the progression of the matter. At this time the basis of the potential claim was not clear nor was it clear who would be the subject or respondent to any claim.

ACAT proceeding and Conflict of Interest disclosure

Separate to the potential legal claim mentioned above, on 4 November 2021, proceedings were filed in the ACT Civil and Administrative Tribunal (ACAT) seeking a range of orders, including the release of certain information.

These proceedings named the Commissioner for Fair Trading and other individuals as respondents.

As a result of the ACAT proceedings naming the statutory office and individuals, Ms Cubin completed a conflict of interest disclosure declaration relating to that matter on 24 November 2021.

In response to the conflict of interest declaration submitted by the Commissioner, the Head of Access Canberra, Mr David Pryce, endorsed the declaration form on 26 November 2021 and implemented a Standard Operating Procedure (SOP) in response to this matter on 30 November 2021.

Under this SOP, Mr Pryce (as the then occupant of position number E827) would exercise the functions of Acting Commissioner under section 32 of the *Fair Trading (Australian Consumer Law) 1992* in relation to specific matters involving certain individuals and corporate entities.

The ACAT proceedings were subsequently dismissed on 3 December 2021.

The SOP and Acting Commissioner appointment arrangements still remain in place.

Actions I took as Minister

I first became aware of an allegation that the Fair Trading Commissioner had a potential conflict of interest on 9 October 2022 via an email from an interested member of the public. In response, I sought advice from the Head of Service and the Public Sector Standards Commissioner about the actions taken by Access Canberra.

Following this, I subsequently wrote to Mr Cain on 6 February 2023 relating to this matter. I have enclosed a copy of my correspondence and also the letter I received from the Head of Service about this matter. I ask that these documents are tabled with my letter.

In response to specific questions raised at the Estimates hearing: my office emailed the Office of the Public Sector Standards Commissioner on 25 January 2023 and asked for an indication of the timeframe in which they were likely to provide their advice. The Office replied on 15 February 2023 saying that it would not usually provide further advice on a matter they are considering and that it was not possible to predict when the matter would be completed. I am uncertain of the exact time that I became aware that the risk of the potential conflict was amended by Mr Pryce, however I am aware that the declaration was released through a Freedom of Information request (2022-367) on 11 January 2023.

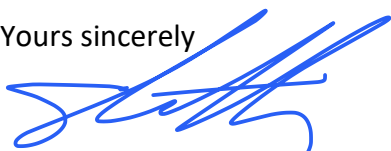
I trust that this letter and the attached correspondence satisfies the Committee's questions in relation to the matter.

I also note that the basis of the Select Committee on Estimates 2023-2024 to deal with witnesses is provided, *inter alia*, in Standing Order 264A. Of course, the powers of inquiry of the committee are those delegated by the Legislative Assembly, including the rules for the manner and form or questions to be put, contained, *inter alia*, in Standing Order 117. This Standing Order proscribes certain content of questions including the naming of persons unless strictly necessary, inferences, imputations or questions as to hypothetical matters.

Should the Committee have any further questions for me or my officials on this matter, I ask that they consider the basis for engagement as provided within the Standing Orders.

I trust this information helps to further clarify this matter and my involvement as Minister.

Yours sincerely



Shane Rattenbury MLA

31/7/23

Encl.

Head of Service letter of 6 February 2023

Letter to Peter Cain MLA of 9 February 2023



ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDD2023/487

Minister Shane Rattenbury MLA
Minister for Consumer Affairs
ACT Legislative Assembly
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CANBERRA ACT 2601

Via email: rattenbury@act.gov.au

Dear Minister

Request for advice – Access Canberra matter

You have asked for my advice on a matter at Access Canberra involving the Commissioner for Fair Trading.

I have looked into this matter and am satisfied that the actions of Access Canberra have been appropriate. In particular, the Commissioner's attendance at the meeting on 6 July 2021 was appropriate. I am also satisfied that Access Canberra has appropriately managed any subsequent potential for conflict of interest in this matter.

On this basis, I believe there is no action that you need to take, as the Minister responsible for relevant areas of Access Canberra, in relation to this matter.

Should you receive any further questions on this matter, it would be appropriate for you to refer them to me.

Yours sincerely

Kathy Leigh
Head of Service
6 February 2023



Shane Rattenbury MLA

Attorney-General

Minister for Consumer Affairs

Minister for Water, Energy and Emissions Reduction

Minister for Gaming

Member for Kurrajong

Ref: 22/167715

Mr Peter Cain MLA

Chair of the Standing Committee on Justice and Community Safety

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Dear Mr Cain 

Thank you for your correspondence of 7 December 2022, regarding a response to a Question on Notice I provided in the JACS Inquiry into Annual and Financial Reports 2021-22 regarding a conflict of interest declaration.

The function of the Commissioner for Fair Trading is a statutory position established under the *Fair Trading (Australian Consumer Law) 1992*. Decisions made by the holder of that position are made as the statutory officer, not as an individual. On 18 January 2021, Ms Derise Cubin was appointed as the ACT Commissioner for Fair Trading pursuant to *Fair Trading (Australian Consumer Law) Commissioner Appointment 2021 (No 1), Notifiable Instrument NI2021-31*.

On 4 February 2021, the *Fair Trading (Australian Consumer Law) Acting Commissioner Appointment 2021 (No 1) Notifiable Instrument NI2021-60* was signed and appointed the occupant of the public servant position number E827 to act as the Commissioner in the event that Ms Cubin is absent, unavailable or is otherwise for any reason unable to exercise the functions of the Commissioner.

On 22 November 2021 the Territory received notice that 86 Candles Pty Limited had filed proceedings in the ACAT against the Commissioner for Fair Trading and others as private individuals. As a direct result of the applicant joining other individuals to the matter Ms Cubin completed a conflict of interest disclosure under the CMTEDD conflict of interest policy on 24 November 2021 and a process was established to prevent any conflicts arising in the matter.

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As part of this process an alternative decision maker was established whereby the Head of Access Canberra acts as the Acting Commissioner for Fair Trading for dealing with the parties listed below. The scope of that protocol includes dealings with:

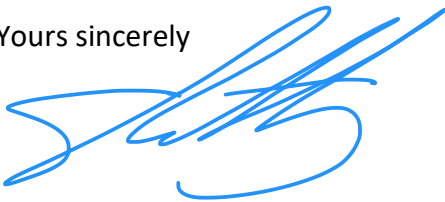
- a. Ms Louise Curtis;
- b. ACT Civil and Administrative Tribunal: Proceeding reference XD1027 of 2021;
- c. Pink Frosting/ Pink Frosting (ACT) Pty Ltd - ABN 92 164 538 783 - ACN 164 538 783;
- d. 86 Candles Pty Limited – ACN 607 264 586;
- e. Trustee for 86 Candles Unit Trust; and
- f. Lollypotz.

As I have previously indicated to you, I am committed to transparency and will assist where possible. However, I am conscious of personal privacy of all parties, including the complainant.

I would also like to inform you that on this matter I sought advice not just from Access Canberra, but also from the Head of Service, Ms Kathy Leigh, in order to receive an external perspective. Ms Leigh has looked into the matter and confirmed that Access Canberra has acted appropriately. I have attached the Head of Service's letter about this matter.

I trust this resolves your concerns.

Yours sincerely



Shane Rattenbury MLA
Minister for Consumer Affairs

9/2/23