

**INQUIRY INTO LIQUOR AMENDMENT (MUSIC  
FESTIVALS) REGULATION 2019 AND GAMING AND  
LIQUOR ADMINISTRATION AMENDMENT (MUSIC  
FESTIVALS) REGULATION 2019**

**Organisation:** Dont Kill Live Music

**Date Received:** 16 August 2019

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**DONT KILL LIVE MUSIC  
SUPPLEMENTARY SUBMISSION  
NSW LEGISLATIVE COUNCIL MUSIC FESTIVAL INQUIRY 2019**

**SUMMARY**

This is a supplementary submission into the impact and implementation of the Liquor Amendment (Music Festivals) Regulation 2019 and Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019 (the Regulations).

This supplementary submission considers that as a result of hearing evidence at the public inquiry located in the on Tuesday 13 August 2019, that:

- There is mounting evidence that the Regulations do not accord with, or achieve the objects of the primary legislation under which they were made;
- Certain administrative law, and policy making processes were likely not followed; and that actions of decision makers were potentially not in compliance with statutory requirements as set out at schedule 1 of the *Subordinate Legislation Act 1989* (NSW);
- The material the minister relied upon to produce the statement of compliance with schedule 1 of the Subordinate Legislation Act 1989 which is annexed to this submission (Annexure A), should be obtained by way of orders for papers to assess whether the statement of compliance in respect of these regulations meets the compliance requirements set out in schedule 1 of the *Subordinate Legislation Act 1989* (NSW); and material that supports the minister's reasons be examined.
- There is *prima facie* evidence that in consulting upon and making of the Regulations, and in the conduct of NSW Government agencies (and potentially Ministers) that certain procedural, policy and statutory requirements were not complied with.
- These deviations from statutory and other procedural requirements could constitute breaches under the *Independent Commission Against Corruption Act 1988 No 35* (ICAC Act), and that investigation into actions of administrative decision makers, and persons in public office who had obligations to act in accordance with the rules should be considered;
- Such an investigation should occur to see whether any person stood to obtain personal benefit or other gain from their conduct, including any political gain; in the context of the timing of the NSW Election 2019, and the Caretaker period commencing on 1 March 2019.
- Proper investigation of this matter is required to restore public trust, and confidence in NSW Liquor and Gaming, and the Independent Liquor and Gaming Authority (ILGA), and the ability of these organization to act impartially for the common good (public interest) when making administrative decisions, exercising statutory powers, meeting statutory responsibilities, and in complying with general NSW government policies, codes of conduct, and rules that act as a check and balance upon regulation making.

To add emphasis to these recommendations, it is likely the opinion of the NSW public, and in the public interest that NSW Parliament works to assist other commissions assess the legal reasoning and justification behind how

a decision was arrived at to implement “non-significant” subordinate legislation in relation to 2 illicit drug deaths<sup>1</sup> as a regulatory amendment to legislation, for which the primary intention of parliament was not to use the legislation to control harms from illicit substances.<sup>2</sup>

### **Australia’s independent professional medical organizations were not consulted**

In the making of the regulation the NSW Government failed to consider Australia’s relevant peak medical associations, and professional bodies. In most other consultations regarding significant health issues these stakeholders are normally engaged and their expert consensus and opinion is requested, and generally offered. The following organizations were not directly consulted (it is stated in the Premier’s report, although one group was indirectly “consulted”, this allegedly occurred for less than a few hours). These medical professional groups do not report to the NSW Minister for Health, and are the representative of unbiased medical expert opinion and expertise in the area how to reduce the harms from illicit substances. These organizations have all released statements or open letters since the Premier’s Expert report regarding the Premier’s stance on drug-checking (pill-testing). These statements represent the broad consensus of Australia’s medical professionals. These documents speak for themselves and state there is sufficient evidence to commence medical-supervised drug checking to prevent harms to young people. We have annexed to this supplementary submission for the following organizations:

- Royal Australasian College of Physicians (Annexure B)
- Australian Medical Association (Annexure C)
- Australasian Chapter of Addiction Medicine (Annexure D)

It is stated in Annexure D:

*“We note that NSW has not had a comprehensive drug and alcohol strategy since 2010, and encourage the NSW Government to develop a new strategy that comprehensively addresses drug demand, supply and harm minimisation, in consultation with practicing clinical health professionals.”*

### **The Secondary drug and alcohol market effects of the regulation do not achieve the objects of primary legislation – Investigation Required to find out Ministerial Reasons for making of Regulations**

*“This will cost us hundreds of thousands of dollars to comply with a policy where we and every other event in this state have had zero opportunity to have any consultation or input”<sup>3</sup>*

*Peter Noble the Director of Bluesfest on 12 February 2019*

These regulations increase costs to businesses through red-tape costs (regulatory burden), contrary to the statements of the Hon. Catherine Cusack on page 14 of the Inquiry transcript. These costs are passed on to the consumer at festivals through higher prices to maintain profit margins, or absorbed by the business and reduce profitability to a business; reduced profitability means reduced resilience to financial shocks, cost over-runs in project management, and ability to re-invest retained profits and expand and grow local economies. This is basic micro economics, but also has macro level implications.

Of more importance, is that additional costs lead to market changes in ticket or alcohol prices, the two main revenue streams for events. Changes in prices of goods cause consumers to change how they optimise their consumption of good, especially through the substitution effect; documents concerning peer reviewed expert evidence about the substitution effect were tabled at the Inquiry, and are preferable evidence to the assertion of

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<sup>1</sup>Not an unusual occurrence

<sup>2</sup> see Liquor Act 2007, second reading speech

<sup>3</sup> Sydney Morning Herald (Jenny Noyes), ‘**Nothing to worry about’: Premier says new festival rules don’t apply to Bluesfest**’ February 12, 2019, <https://www.smh.com.au/national/nsw/nothing-to-worry-about-premier-says-new-festival-rules-don-t-apply-to-bluesfest-20190212-p50xdb.html>

FARE representative Ms Hepworth that the substitution effect is “mythology” or a “myth”, see transcripts of Inquiry. We noted that no peer reviewed evidence was tabled by Ms Hepworth before the inquiry that supports her statement, however that peer reviewed evidenced was tabled before the inquiry that supports the statement that the substitution effect is a consumer optimizing behavior that must be considered in the making of sound drug and alcohol policies that consider that harm of both licit and illicit substances, and how regulated markets and black-markets price effects are interactive. Further, some of Ms Hepworth’s other statements (see below) suggest that the regulation’s ability to distort market prices for alcohol inside of a festival the compared to outside of a festival would relevantly have been considered by a competent administrative decision maker, as lesser harm may in fact be caused without the regulation due to the regulations creating market conditions that augment “pre-loading” of patrons before arrival at licensed venues.

By increasing in regulatory burden and re-tape costs these regulations are likely to increase “pre-loading” on alcohol and also substitution towards illicit substances, both of which will likely cause more harm as a result of this legislation. This has not likely not been considered in the making of this regulation, despite requirements to exercise powers under Liquor Act 2007, and Gaming and Liquor Administration Act 2007 having regard to the objects of both acts. There is a duty to consider how the making of the Liquor Amendment (Music Festivals) Regulation 2019, and the Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019 achieves the objects of both of those pieces of primary legislation (*“the Music Festival Regulations”*).

“Pre-loading” and substitution effects in both drug and alcohol markets are reasonably likely consequences of the regulations. Pre-loading is the practice of drinking at a home environment prior to going to a licensed environment occurs because of *difference between the price of alcohol at retail outlets and licensed premises*. This regulation will considerably increase the cost of regulatory burden at events, this is a cost that must be passed on to the consumer. A comprehensive literature review of 33 peer reviewed journal articles, published in the journal *Alcohol and Alcoholism*, by Foster and Ferguson 2014 found that:

*“A consistent finding was that [pre-loading] is associated with greater alcohol consumption, intoxication and alcohol-related risks. The price of alcohol and achieving intoxication were the main motivations for [pre-loading]”.*<sup>4</sup>

This indicates that any regulation made under the Liquor Act that would cause an increase in the price of alcohol within a music festival or licensed environment, leaving retail and wholesale alcohol prices constant, will reasonably and probably increase the level of intoxication of patrons before they enter an event zone, total levels of intoxication, and alcohol related risks generally. It is firmly established in the significant weight of evidence of peer reviewed scientific literature<sup>5</sup> that increasing the price of alcohol in licensed environments leads to more harm through pre-loading. Therefore a reasonable decision maker has a duty to consider this effect when exercising administrative powers or in administrative decision making, or in exercising any administrative discretion – whether their action either directly or indirectly increases the price of alcohol inside of licensed area, could reasonably lead to increased harm, and would therefore be an administrative decision that is contrary to the objects of the Liquor act 2007, and therefore unlawful.

There is an implied duty to consider the objects of the Liquor Act 2007 when the administrative decision is made to make a regulation under section 47 of the Gaming and Liquor Administration Act 2007 No 91, that relates to “gaming and liquor legislation” (*which includes the Act 2007*), as the Authority has the functions conferred or imposed on it by or under:<sup>6</sup>

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4 John H. Foster, Colin Ferguson, Alcohol ‘Pre-loading’: A Review of the Literature, *Alcohol and Alcoholism*, Volume 49, Issue 2, March/April 2014, Pages 213–226, <https://doi.org/10.1093/alcalc/agt135>, <https://academic.oup.com/alcalc/article/49/2/213/205233>

5 A comprehensive bibliography can be supplied upon request to the committee upon request.

6 See sections 4, 9, 47 of the Gaming and Liquor Administration Act 2007 No 91

*(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*

That is to say, a regulation cannot be made that does not accord also with the objects of the Liquor Act 2007. It would be inconsistent to make regulations that do not accord with and act to achieve the objects of the Gaming and Liquor Administration Act 2007 No 91 (Liquor Administration Act) at section 2A, including:

- (b) to ensure that the Authority is accessible and responsive to the needs of all persons and bodies who deal with the Authority*
- (c) to promote fair and transparent decision-making under the gaming and liquor legislation.*
- (e) to promote public confidence in the Authority's decision-making and in the conduct of its members.*

It must be established that in making the regulation the effect of these regulations on pre-loading has been considered by the Responsible Minister. A competent and reasonable administrative decision maker would most certainly consider this factor, as it is a topic often discussed by regulators, experts, and society generally. For example, at the Inquiry on 9 August, it is stated on the transcript that Ms Patricia Hepworth Director of Policy and Research, Foundation for Alcohol Research and Education (FARE) stated p 39:

*"There is definitely a culture and quite a dangerous culture in Australia around preloading. We know that people who tend to drink a substantial amount of alcohol before they go out are at much greater risk of the whole gamut of alcohol harms, from nausea and passing out through to getting into fights and getting into accidents. Definitely, preloading is a thing. Preloading is a behaviour that is common across a lot of people who drink, especially young people, who drink before they go out. It is at festivals, before they go out to nightclubs, before they go out to the pub. It is not something that is specifically related to illicit drug taking; it is a very common behaviour amongst young people in Australia"*

Referring to the objects of the Act, at section 3(2):

*"In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following: (a) the need to minimise harm associated with misuse and abuse of liquor including harm arising from violence and other anti social behaviour)"*

Therefore, it should be investigated, and made public available, what information was considered and the a statement of reasons justifying how the administrative decision to make these regulations was arrived at for the decision maker who exercised statutory powers to make the regulation, including the responsible minister. This process should thoroughly examine how each decision maker took the objects of the primary legislation into consideration to ensure that the Music Festival Regulations were made lawfully under the powers of the primary legislation.

Further, the other administrative decisions to determine that 14 music festivals only were high risk prior to the NSW election, must also be subject to this process, to ensure that these actions were lawful and valid administrative decisions, that did not operate contrary to the objects of either: the Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019; or the Liquor Act 2007.

Normal practice is to document decision in a statement of reasons, or similar document, that states the relevant considerations the Minister or their delegate, or other authorized persons has considered to justify the exercise of the powers to make these regulations, being:

- For the Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019, documentary evidence of any ministerial statement of reasons showing how the minister took into account when making that

regulation under the Gaming and Liquor Administration Act 2007, including sections 13A and 47 (the general regulation-making power)

- For the Liquor Amendment (Music Festivals) Regulation 2019 under the Liquor Act 2007; documentary evidence of any ministerial statement of reasons showing how the minister took into account when making that regulation under the Liquor Act 2007, including sections 10 (1) (g), 11 (1) (b), 40 (4) (b) and (d), 41 (3), 45 (4), 55 (5), 60A (3) (b) and 159 (the general regulation-making power).

This process works as a check and balance on the exercise of administrative power and discretion, and is a process that is generally employed for the common good, to ensure that a decision maker has beneficial public interest as their prime consideration in making a decision.

The foundation *Foundation for Alcohol Research and Education* (FARE) speak to the importance of alcohol prices in the FARE National Alcohol Strategy July 2018<sup>7</sup>. In this document, FARE spoke about the relationship between the price of alcohol and consumption levels, stating:

*“Adjusting the price of alcohol is one of the most effective measures to reduce alcohol harm. Price is an important driver of consumption, especially for young people and those that drink at the most harmful levels. Low prices and high affordability lead to higher levels of consumption, while higher prices and reduced affordability lead to lower levels of consumption... Cheap alcohol products are a concern because they encourage underage drinking and higher levels of consumption, including heavier drinking and binge drinking.”*

The Regulation will increase the cost of alcohol at events by increasing the total fixed costs of running an event. This effect is exacerbated by the ‘*NSW Police Cost Recovery and User Charges Policy*’, the inquiry heard evidence from Ms Scott on page 5 of the transcript “It is also the case that particularly for music festivals, the increasing cost of user-pays policing has had an impact on their financial viability. New South Wales police received more than \$20 million per year over the past two years for this service. As a result, we have seen music festivals facing dramatic increases year on year.’

Further to this effect the price of MDMA has been decreasing year on year, and the price of the types of alcohol that the target demographic for music festivals drink has been increasing. This is supported by evidence from the Ecstasy and Related Drugs Reporting System (EDRS). Table 1 below is extracted from tab “Figure 7” from the Microsoft excel publication, National Drug and Alcohol Research Centre (NDARC - UNSW) *Australia Australian Drug Trends 2018: Key findings from the Ecstasy and Related Drug Reporting System (EDRS) Interviews, Supplementary data tables*, November 2018. The table shows that the prices of both crystal and powder ecstasy has been declining since 2013.

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<sup>7</sup> Foundation for Alcohol Research and Education (FARE) NATIONAL ALCOHOL STRATEGY ANALYSIS OF ALCOHOL INDUSTRY SUBMISSIONS July 2018 Revised 25 July 2018, <http://fare.org.au/wp-content/uploads/National-Alcohol-Strategy-Industry-Submissions-Report-Revised-25-July-2018.pdf>

Table 1: MDMA/Ecstasy Prices have declined from 2013 to 2018<sup>8</sup>

**Figure 7: Median price of ecstasy crystal and powder per point and gram, nationally, 2013-2018**

	Point (crystal)	Point (powder)	Gram (crystal)	Gram (powder)
<b>2013</b>		30	260	250
<b>2014</b>	30	30	250	250
<b>2015</b>	30	30	250	250
<b>2016</b>	30	27.5	200	200
<b>2017</b>	25	25	200	200
<b>2018</b>	25	22.5	200	150

*Note. Among those who commented. Data collection for price of ecstasy crystal gram and point started in 2013 and 2014 respectively. \* $p < 0.050$ ; \*\* $p < 0.010$ ; \*\*\* $p < 0.001$  for 2017 versus 2018.*

Market conditions of the relative price of alcohol compared to MDMA, and the relative price of alcohol inside a festival compared to outside of a festival, and a labor wage with low wage growth for young persons are ideal market conditions to strongly influence consumption behavior optimization and substitution. This affect is being exacerbated by a global decline in the price of MDMA – to quote from the Journal of Substance Use “The affordable and declining cost of MDMA has made the drug appealing to new groups of users and likely contributed to increased use and fatalities”.

This has not been considered by the NSW Government in the making of the Regulations. The National Drug and Alcohol Research Centre warned about this in 2011, when in response to the National Binge Drinking Strategy published March 2008 and the 70 per cent increase in the excise accruing to RTDs beverages researchers stated “Missing from debates about the use of pricing policy to reduce binge drinking was recognition of the possibility that young Australians will replace their alcohol consumption with illicit drugs. Nor was there evidence of a clear understanding of the implications of alcohol price for alcohol consumption in subgroups of the Australian population”.<sup>9</sup> At the inquiry, FARE representative Ms Hepworth stated:

*“There is also a question about generalised alcohol pricing as well. Realistically, the absolute cheapest thing that anybody can do to alter their state of mind is to preload on alcohol. You can buy a four litre cask of wine*

<sup>8</sup> Table 1 is based upon Microsoft Excel tab “Figure 7” from the Microsoft excel publication, National Drug and Alcohol Research Centre (NDARC - UNSW) *Australia Australian Drug Trends 2018: Key findings from the Ecstasy and Related Drug Reporting System (EDRS) Interviews, Supplementary data tables*, November 2018. <https://ndarc.med.unsw.edu.au/resource/australian-drug-trends-2018-key-findings-national-ecstasy-and-related-drugs-reporting>

<sup>9</sup> NDARC, Australian Research Council - Linkage Project|LP110100263 - Drunk, high or sober: How do alcohol and illicit drug prices affect young Australians' plans for Saturday night?, <https://ndarc.med.unsw.edu.au/project/drunk-high-or-sober-how-do-alcohol-and-illicit-drug-prices-affect-young-australians-plans>

*in Aldi for about \$8 or \$9, which is basically enough to kill you if you drank it all. So there is no substance, licit or illicit, that is going to be cheaper than preloading on alcohol before you hit up a festival."*

We note that the price of wine at Aldi is in fact relevant to the subject of this inquiry, as increasing the costs of attending or consuming alcohol at events through unnecessary regulation where the costs and benefits have not been adequately considered will lead to higher ticket and alcohol prices at events, which will in turn cause more pre-loading to occur prior to event attendance and also more substitution towards illicit substances. We thank Ms Hepworth for identifying that due to the considerable difference between alcohol prices inside events, and the price of alcohol outside and events and illicit substances, and that the Regulations are likely to increase harms at events.

Further, Between 13 August 2019 and 16 August 2019 we contacted several persons who manage the bars at, and own music festivals. We asked them the question "What is the proportion of wine sales as a total of alcohol sales at your events with a target demographic between 18-24?". The response received ranged from 0.07% to 2% of total alcohol sales; this is an insignificant proportion of total alcohol sales within licensed areas, so the price of wine is of little significance to this market segment. This means that roughly 98% of alcohol consumption at festivals is in the beer and spirits category.

The Foundation for Alcohol Research (FARE) conducted research into alcohol affordability and created an index between 2000-2017; FARE calculations are based on ABS Cat. No. 6345.0 – Wage Price Index, Australia, Jun 2017; and ABS Cat No. 6401.0 – Consumer Price Index, Australia, Sep 2017. Figure 4 of the document Affordability Index of Alcohol, 2000 to 2017; It is evident that for the beer and spirit categories in since 2007 affordability of these products declined.<sup>10</sup> FARE also state, "*Figure 3 demonstrates affordability indexes for spirits, wine and beer, as well as alcohol more generally in Australia since the introduction of the WET in 2000. This measure reflects the average ordinary wages divided by consumer price indexes for each product. As displayed, the affordability of beer and spirits have reduced marginally over the period*".<sup>11</sup> This is evidence consistent with market conditions to create substitution towards other intoxicants, or decreased consumption generally. This effect has been strengthening for more likely to be happening in the specific context of music festival's where wine is not a large component of consumption.

There continues to be downward pressure of affordability of the regulated good, due to stagnant wage growth and deteriorating conditions in labour markets (RBA 2019). In April 2019 the Reserve Bank held a conference specifically on the topic of low wage growth. The wage price index has deteriorated from 4% 2008 to around 2% year ended 2018. ACIL Allen Consulting, Economic modelling commissioned for the Australian Brewing Industry showed that in 2017-18 in April 2019, based on 4.9% alcohol by volume the single most expensive ingredient in Australian beer is Australian Government tax. Tax accounts for almost half (42%) of the price of a typical full-strength beer.

### **Lack of Public Accountability for administrative decisions made: reasons have not been provided**

On 6 February 2019, the NSW Government held a stakeholder forum in which industry representatives were told that from March 1 2019, a new risk-based music festival license would apply to all music festivals and events based upon the 'NSW Health Guidelines for music festival event organisers' that were published at that time online.

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<sup>10</sup> Foundation for Alcohol Research and Education (FARE), Pre-budget submission 2018-19, December 2017, page 11: <http://fare.org.au/wp-content/uploads/FARE-Pre-budget-submission-2018-19.pdf>

<sup>11</sup> Ibid, page 10.



On approximately 12 February 2019 Peter Noble Director of Bluesfest, a festival located in the electorate of Ballina, stated regarding the interim Guidelines for Music Festival Event Organisers: Music Festival Harm Reduction *"It represents their (Department of Health, Police, and Liquor and Gambling) concerns and those concerns should be discussed but my industry has never been asked to attend a meeting, to sit down, to work out something... we are the industry professionals, we are the people that are presenting events at the highest levels, We mean Bluesfest has just been inducted into the NSW Tourism Awards hall of fame."*<sup>12</sup>

Also on 12 February 2019 the NSW Premier Gladys Berejiklian stated *"That festival has been going for 29 years, it's a fantastic festival, it's low risk so they don't have anything to worry about... The changes that come in from March are to do with those high-risk events where we've seen death, or serious injury and that's where we expect people to raise their standards."*<sup>13</sup>

According to a the Sydney Morning Herald article published that day, *"Bluesfest chief operating officer Steve Romer stated that according to the criteria provided by the government, after adding up the risk points from just four categories... the festival had already hit the number of points indicating "extreme risk". The festival's size (more than 50,000 patrons), the fact that it is a music festival, that it takes place over multiple days, and that it has on-site camping, immediately places Bluesfest over 110 points."*<sup>14</sup>

Between 12 of February and 23 February 2019, ILGA must have made administrative decisions that the "new licensing scheme for festivals" would only apply to '14 high risk festivals". This was made immediately prior to the commencement of the caretaker period and NSW election, and may have been done as a directive from the Ministers Office. Bluesfest was not listed as one of the high-risk festivals on this list.

It was announced by Minister for Racing Paul Toole through a media release on 23 February 2019:

*"Higher risk festivals are festivals where a serious drug related illness or death has occurred in the past three years or where the Independent Liquor & Gaming Authority has determined, having regard to expert advice from NSW Health and NSW Police, that there may be a significant risk of serious drug related illness or death... these changes to the scope of the scheme followed consultation with music festival operators and other stakeholders, and would mean that no festival, other than the 14 specified higher risk festivals, will be affected by the new licensing scheme."*

A death occurred at Bluesfest on 19 March 2016, which means that at the time of this announcement, Bluesfest would have been consider a "high risk" event given that a death had occurred 2 years, 11 months, 4 days prior to this announcement. This should have considered this as per the regulations as a death within the previous 3 years, potentially triggering the need to apply for a music festival license.

These decisions mentioned above are significant administrative decisions where public interest must be at the core of decision making,. The decisions also materially affect persons rights and obligations, and have potential influences upon harms to human health, and have the potential to affect markets an increase the risk of death to individuals it would be the public expectation that such administrative decisions are well documented at all levels

of government, within the responsible Ministers Office; and in the case of the making of the regulation by the Executive, and Governor.

Bluesfest was omitted from that list and is situated in an electorate that would potentially determine the outcome of the NSW election; lower regulatory costs would also provide this company a market advantage. Of significance to this inquiry should be answering the question of why Bluesfest was not included upon this initial list of 14 high risk festivals despite having a death occur at that festival on Saturday 19 March 2016 - being 2 years, 11 months and 4 days prior to the regulation coming into effect. Clause 35A 2(b) of the Liquor Amendment (Music Festivals) Regulation 2019 states that "whether a death has occurred in the State on a previous occasion at the music festival or in connection with the music festival in the last 3 years" is a factor that ILGA may consider when forming an opinion about whether a music festival license is required.

Below is an image of the uncorrected version of the inquiry transcript, and is written transcript of the conversation between the Hon. John Graham and Mr Phillip Crawford (Chair of the Independent Liquor and Gaming Authority), on Tuesday 13 August 2019.

**The Hon. JOHN GRAHAM:** It did not follow the process you have outlined, did it?

**Mr CRAWFORD:** It subsequently did exactly follow the process. Each of the 14 promoters were invited then to meet with us.

**The Hon. JOHN GRAHAM:** You have then written to them and taken them through the process you have referred to.

**Mr CRAWFORD:** The process that was assigned to us under the regulation, which was to meet with them and to talk to them about the process.

**The Hon. JOHN GRAHAM:** As a result, some are on the list and a small number are not, after the process you followed.

**Mr CRAWFORD:** I do not think there is any list. As far as I am concerned, what there is, is those that were required to apply for the licence.

**The Hon. JOHN GRAHAM:** Well, the Minister disagrees with you in this ministerial release titled "New South Wales Government releases list of high-risk music festivals".

**Mr CRAWFORD:** So, there were 14 referred to us but we do not keep a list and we did not approach it that way. In fact, we went to some length to point out in our first meetings with them that the regulation does not have any reference to high-risk itself. What happened then was, we had a day set aside and we met with all the promoters one after another.

**The Hon. JOHN GRAHAM:** I have some sympathy for the evidence you put in front of the committee and as I listened to you describe it, part of the trouble we have got ourselves into here is a very different description in public by the Minister of a process that then is sitting behind that you and others are responsible for. I do not ask you to comment on that, that would be my observation.

Annexure E to this submission is a document titled "Music Festivals Data". Annexure E was obtained from an employee of NSW Liquor and Gaming by way of email on 1 July 2019 as part of proactive release of certain information in connection with a Government Information (Public Access) Act 2009 application. On page 2 of that document it states:

"Between October 2018 and February 2019 17 music festivals were considered lower risk and 18 higher risk."

It would be reasonable to suspect that if there has been consideration to which festivals are high and lower risk, than a list would exist to document this consideration and would be kept as an official government record and held by the NSW government. It is also likely that this list was discussed, or shared between NSW Liquor and Gaming and ILGA as part of the regulation making process and consultation.

Mr Crawford stated at the inquiry:

*“So, there were 14 referred to us but we do not keep a list and we did not approach it that way. In fact, we went to some length to point out in our first meetings with them that the regulation does not have any reference to high-risk itself. What happened then was, we had a day set aside and we met with all the promoters one after another.”*

The words said by Mr Crawford at the inquiry, alongside the words contained within the document Annexure E deserve the attention of this inquiry and NSW Parliament.

Mr Crawford also stated at the inquiry:

*“Yes, we had very interactive discussions about the sorts of issues we were looking at—there are eight of us on the board and we sit around the table like this and they were all invited. We do not write the long decision like we do in some of the matters we deal with, which often have various rights of appeal to the Supreme Court or NSW Civil and Administrative Tribunal [NCAT]. There is a letter informing them of the decision but it does not go into chapter and verse on reasons.”*

It is not clear why Mr Crawford would not write the reasons behind decisions made about which festivals, businesses or persons, should or should not be included on this list, thereby affecting their material interests, before informing those persons about why they have been included on the list of 14 high-risk festivals that were announced by the Minister.

### **Orders for Papers Justified to Scrutinize Procedures, and Conduct of Agencies**

We recommend that NSW Parliament examine further these circumstances by way of the power of the house to order the production of state papers, this power was confirmed by the High Court of Australia in *Egan v Willis* (1998) 195 CLR 424. Under standing order 52, any member of the House may give notice of motion for an order for papers. Usually, the notice will relate to a particular decision of Government that has become a matter of broad public interest. If the House agrees to the motion, the Director General of the Department of Premier and Cabinet is advised of the order and coordinates the preparation of the Government response – that is, the return to order.

It has been firmly established that this is a matter of broad public interest, and significant controversy. This is a current public inquiry into whether these regulations are made in the public and for the common good. We believe there is sufficient *prima facie* evidence that a person, or several persons, have not acted in good faith to carry out certain statutory duties, or acted lawfully according to statutory authorizations, or have ignored norms and standards of best practice.

Further, the making of these regulations on 23 February 2019, and the timing of the making of this regulation and publication<sup>15</sup> immediately prior to the caretaker period commencing on 1 March 2019, is peculiar and diverts from

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<sup>15</sup> Liquor Amendment (Music Festivals) Regulation 2019 under the Liquor Act 2007, published LW 28 February 2019 (2019 No 123); Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019 under the Gaming and Liquor Administration Act 2007, Published LW 28 February 2019 (2019 No 123).

normal government practices. This justifies the use of parliamentary orders to produce papers is justified, as it should be examine whether any particular person<sup>16</sup> has acted in a manner that would amount to “*corrupt conduct*” within the meaning of Independent Commission Against Corruption Act 1988 No 35, including but not limited to:

- Section 8(1)(b) *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions.*
- Section 8(2)(a) *official misconduct (specifically “fraud in office” and “nonfeasance”)*
- section 8(2)(y) Any conspiracy or attempt in relation to any of the above

Further, it is appropriate that NSW Legislative Council employ parliamentary standing order 53. Documents from the Governor to order the production of documents concerning the royal prerogative, and dispatches or correspondence to or from the Governor, about the Music Festival Regulations. This is appropriate as the Governor generally exercises the powers and functions of their office relying on the advice of their Ministers of State. Further, this is required to examine whether the statutory powers in several pieces of primary legislation were exercised lawfully to make the regulations, and whether any of the responsible ministers actions were in fact *ultra vires* actions and unlawful.

Further, there is a strong public interest case in making an order for papers, due to the manner in which the Music Festival Regulations have been consulted upon, the provisions within the legislation itself, the implementation of the regulations, and the apparent diversion from regular administrative procedures prior to, during, particularly as this inquiry relates to the use of public resources, conduct, and administrative decisions immediately in the immediate lead up to the NSW election, during the caretaker period, and after the NSW election in the lead up to a public inquiry.

The NSW public trust has been compromised by the actions of the NSW Government in the making and implementation of these regulations, the public have:

- Reduced confidence in the Independent Liquor and Gaming Authority (ILGA);
- Legitimate concerns that either officers of, governance and the Members of ILGA, or the responsible minister may not acted in the common good and public interest.
- Concern that the necessary procedural and legal requirements have been met or followed in the making of the Music Festival Regulations, including the requirements of schedule 1 of the Subordinate Legislation Act

It is recommended that the Music Festivals Regulation Inquiry Committee that orders for papers are motioned to understand and assess the lawfulness of:

- The Music Festival Regulations achieve the objects of the numerous pieces of primary legislation mentioned through this supplementary submission;
- The reasons for the exercise of powers in making decisions at Cabinet, Ministerial and Delegate levels<sup>17</sup>

This should be done to restore public confidence in NSW Liquor and Gaming, and ILGA and in assessing whether the Liquor Amendment (Music Festivals) Regulation 2019 and the Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019, due to the extreme level of public attention that has led to this inquiry occurring. We ask the inquiry to consider the orders for the production of papers under standing orders 52 and 53, so that a proper independent assessment of the conduct of all persons exercising official functions, or statutory powers in the making of these regulations can be examined thoroughly to restore public confidence in NSW Liquor and Gaming, ILGA, the manner in which subordinate legislation is made, and open government and public consultation

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<sup>16</sup> This is not particular allegation; We have been afforded to access the documents We would require to be able to form a reasonable belief about the conduct of particular persons, despite in my opinion the existence of *prima facie* evidence that usual government procedures likely have not been followed.

<sup>17</sup> Including delegates under section 13 of the *Delegation of Authority's functions Gaming and Liquor Administration Act 2007 No 91*

as an integral component of advancing a system of responsible and representative democratic government that is open, accountable, fair and effective.<sup>18</sup>

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<sup>18</sup> This is in accordance with the objects of the Government Information (Public Access) Act 2009 No 52, to “advance a system of responsible and representative democratic Government that is open, accountable, fair and effective”.

Please pass further information on to the committee that I am concerned that decisions made in the exercise of powers in making of administrative decisions, and also in the exercise of prerogative power by the NSW Governor in making the Music Festival Regulations, may constitute a form of "Wednesbury Unreasonableness", and these decisions are potentially open to a judicial review process. This judicial review extends to potential judicial review of the prerogative power exercised by the NSW Governor.

It would be prudent for the committee to consider that it is in the public interest to disallow these regulations to eliminate the potential for a costly, and lengthy judicial process, that could occur if a person challenged the validity of these regulations, or decisions made in relation to them.

I base my concerns upon the precedent established in the case of Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9, in which Lord Diplock stated:

"By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Please add this information to the supplementary submission, and ask the committee to consider this issue.