

# **NORTHERN TERRITORY LICENSING COMMISSION**

## **REVIEW OF CHAIRPERSON'S DECISION**

<b>APPLICANT:</b>	Claudia Hudson
<b>DECISION UNDER REVIEW:</b>	Chairperson's decision not to return a seized vehicle to Ms Hudson and to dispose of that vehicle by public tender.
<b>RELEVANT LEGISLATION:</b>	Sections 95, 96 and 101 of the <i>Liquor Act</i> Sections 27, 28 and 29 of the <i>Licensing Commission Act</i>
<b>MEMBERS:</b>	Ms Jill Huck (Presiding Member) Mr Paul Costigan Dr Alan Clough
<b>DATE OF HEARING:</b>	31 January 2005
<b>APPEARANCES:</b>	Ms Jodie Truman for the applicant

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1. Ms Claudia Hudson and her partner, Mr Paul Shambrook, live in the Darwin Rural Area, and Ms Hudson regularly visits Top End remote communities in her role as the Community Child Health Nurse. On 17 February 2004 they purchased a white 1994 Toyota Hilux dual cab utility for the sum of \$17,500. This vehicle was then registered in both their names. The vehicle was seized by Police 90 kilometres from Maningrida on or around 23 July 2004. Mr Shambrook was driving the vehicle to Maningrida to visit Ms Hudson at the time it was seized. He was charged with a number of offences in connection with drink driving, possessing and consuming liquor in a restricted area and bringing liquor into a restricted area.
2. It is not disputed that, before setting out on his road trip to Maningrida, Mr Shambrook had purchased a 30 can carton of mid-strength beer (Fourex Gold) and a 700ml bottle of Bundaberg Rum. It is also not disputed that he consumed 7 cans of the mid-strength beer on the journey; had 23 cans of beer and the unopened bottle of spirits in his car when arrested 90 kilometres from Maningrida; that when asked by Police why he had brought liquor into a restricted area he had replied that he was "going to a party"; and that he had a blood alcohol reading of 0.123 when he was tested at the Maningrida Police Station.

3. On 9 September 2004 he was found guilty of three liquor related charges in the Local Court, with the charge relating to bringing liquor into a restricted area being withdrawn. Under section 96 of the *Liquor Act* (the Act) a vehicle which has been seized under the Act is automatically forfeited to the Territory if a person is found guilty of an offence in connection with which it was seized. In this case, although the charge relating to bringing alcohol into a restricted area was withdrawn, there remained a strong connection between the seizure of the vehicle and the charges for which Mr Shambrook was found guilty.
4. Ms Hudson unsuccessfully applied for the return of the seized vehicle under section 100A of the Act and, subsequent to the conviction, the application was considered under section 101 of the Act. In her application seeking the return of the vehicle Ms Hudson argued that there were mitigating circumstances for Mr Shambrook's offending and that, in any event, she had no prior knowledge that he would attempt to bring alcohol into the restricted area.
5. Section 101 of the Act reads as follows:

*All things forfeited under this Part may be destroyed or otherwise disposed of in such manner as the Chairperson thinks fit, including, with the approval of the Minister where, in the case of a vehicle, vessel or aircraft, the Minister is of the opinion that the person was not knowingly involved in the act constituting the offence as a result of which it was forfeited and had no reason to suspect that it might be used in connection with such an offence, by selling or otherwise returning it to a person who, immediately before the forfeiture, had a legal or equitable interest in the vehicle, vessel or aircraft.*

6. The Chairperson of the Licensing Commission considered Ms Hudson's application under section 101 but decided to refuse the application and to dispose of the vehicle by public tender. The Chairperson summarised his reasons for the decision as follows:

*To return the vehicle to the applicant would be to return the use of it to the offending co-owner, and there are no circumstances to justify such an outcome. The co-owning offender was fully aware of the law, and the proffered explanation of going to a party does not give rise to any special consideration.*

7. On 4 October 2004 Ms Hudson requested a review under the *NT Licensing Commission Act* of the Chairperson's decision and provided detailed reasons for her request.
8. At the hearing of the review application, the Commission heard evidence from both Ms Hudson and Mr Shambrook. The thrust of this evidence was that:

- they had a great deal of experience working in Aboriginal communities, including Maningrida where they had previously lived and worked for 4 years;
- they had direct experience of the adverse impact of alcohol on Aboriginal communities;
- they supported alcohol restrictions and had always complied with such restrictions;
- they were aware that Maningrida was a restricted area and had held liquor permits when they lived there;
- they were aware that the Police had the power to seize vehicles connected with alcohol-related offences in restricted areas;
- they had never supplied an Aboriginal person with alcohol in a restricted area;
- neither were heavy drinkers;
- they had planned to spend the weekend fishing with friends (Karen and Bob) who lived at Maningrida and although the visit would have coincided with Karen's 51st birthday, there had been no talk of having a party;
- there was no discussion about Mr Shambrook bringing alcohol with him to Maningrida and it did not occur to Ms Hudson that he might do this. She knew that he knew that Maningrida was in a restricted area;
- Mr Shambrook is physically unwell with rheumatoid arthritis and, at the time of the offences, he also had a gastric condition;
- Ms Hudson had suggested that he delay driving to Maningrida until the gastric condition resolved;
- the gastric condition, combined with him not been eating or drinking sufficient fluids and him working all day in a non air-conditioned warehouse, had resulted in him becoming dehydrated;
- Mr Shambrook was also under a great deal of work-related and health-related stress at the time;
- he has little memory of, or insight into, the events that lead to the charges;
- in particular, he does not remember purchasing the alcohol or thinking about the fact that he had alcohol in his car as he drove towards Maningrida. He was very relieved to be away from work, and not really thinking about what he was doing;
- the alcohol Mr Shambrook purchased was not the type or brand he, Ms Hudson or their Maningrida friends usually drank;
- other aspects of his behaviour at the time of the offences were also very out of character and difficult to explain rationally: he did not telephone Ms Hudson before he set out; he made no arrangements for the family dog: he was drinking as he drove; and he drove at night;
- when Mr Shambrook advised Ms Hudson that he had been arrested for bringing alcohol into the restricted area, she was so surprised that she initially thought he was joking;
- Mr Shambrook has been very shaken by the events associated with the charges and has, among things, changed his drinking patterns;

- although he has little memory of the events of that day and night, he had pleaded guilty to the charges;
  - the loss of his licence for 6 months has had a major impact on both their work lives given that, if Ms Hudson is not there to drive him to work, Mr Shambrook has to travel long distances to and from work by bicycle and bus. This is difficult for him because of his health problems; and
  - Ms Hudson's work is being affected as, because of the transport problems, she has had to cut down on her travel to remote communities.
9. Counsel for Ms Hudson drew the Commission's attention to the published decisions of the Chairperson in the cases of *Ms Nellie Marks* (2003) and *Ms Angela Ninnal* (2002), as well as the decision of Chief Justice Martin in *Ninnal v Minister for Racing, Gaming & Licensing & Anor* (2001) NTSC 68.
10. While pointing out that the Chairperson had an open discretion to dispose of a seized vehicle as he or she thought fit, Counsel acknowledged that the return of a vehicle to a person who before the forfeiture had a legal or equitable interest in the vehicle, was conditional on the approval of the Minister and that the Minister is required to form an opinion on whether "*the person was not knowingly involved in the act constituting the offence as a result of which it was forfeited and had no reason to suspect that it might be used in connection with such an offence*". Counsel accepted the fact that a positive decision by the Commission would not result in the return of the vehicle unless the Minister was satisfied that the criteria were met and therefore approved the return of the vehicle.
11. She argued that *Marks* clearly supported an argument that the mere fact that the applicant owner and the offender were closely related (wife and husband respectively) did not preclude the Chairperson from deciding to return a vehicle to that owner (and therefore the use of the offender).
12. Counsel asserted that Ms Hudson and Mr Shambrook were credible witnesses who had provided the Commission with frank and honest evidence, much of it very private in nature. She argued that the Commission should set aside the Chairperson's decision and substitute a decision that the vehicle be returned to Ms Hudson.
13. She argued that the state of mind of an owner or owners at the time of the offending behaviour was a relevant consideration. She said that the evidence indicated that Mr Shambrook was physically ill and emotionally stressed at the time of the offences and that his behaviour was completely out of character. She said that his poor memory of the events supported a conclusion that he was not fully aware of what he was doing at the time. She said that it was clear from the evidence that Ms Hudson had not known and could not have suspected that her

husband would bring alcohol with him in the vehicle. She said that it was relevant that the Police had accepted that Ms Hudson was not implicated in the commission of the offences and was unlikely to have had reason to suspect that the vehicle would be used in connection with the offences (Police views reported in 25 August 2004 memorandum from a Licensing Inspector to the Chairperson).

14. She said that the loss of the vehicle represented a severe financial penalty for both Mr Shambrook and Ms Hudson, but particularly for Ms Hudson who had taken no part in the offence. While it could not be denied that Mr Shambrook would have access to the vehicle if it was returned to Ms Hudson, Counsel argued that a decision not to return the vehicle would be unfair to Ms Hudson who was not involved in the offence.
15. She said that the Commission should also take into account the fact that the quantity of alcohol involved was small, consistent with it having been purchased for personal consumption, and that there were no allegations of grog running.
16. She said that the case law on seized vehicles indicated that matters should be considered on a case by case basis and that the circumstances of this case were such that the return of the vehicle to Ms Hudson would not communicate any negative message to the community.

## **Findings**

17. Having listened carefully to all the evidence, the Commission was prepared to accept that Mr Shambrook was ill, that his behaviour was out of character and that his judgement was impaired at the time of the offences. However, in the absence of any contemporary medical evidence as to his state of mind or decision-making capacity, we did not consider that there was sufficient evidence to conclude that his state of mind was such that he had no responsibility at all for his actions at the time. This is particularly the case given that, on his own evidence, he knew that Maningrida was a restricted area and had had years of experience working and living on Aboriginal communities where liquor restrictions applied.
18. On the other hand, we did consider the evidence was strong enough to conclude that Ms Hudson did not know, and had no reason to suspect, that her partner would bring alcohol into the restricted area. We accepted her evidence that she was genuinely taken unawares by Mr Shambrook's actions.

## **Application of the law**

19. In his ruling in *Ninnal* Justice Martin found that the Chairperson (and therefore the Commission standing in the Chairperson's shoes at the

time of review) is not limited to considering the same statutory test as the Minister when making a decision about how to dispose of a seized vehicle. The Chairperson has an open discretion to make a decision on the disposal of a vehicle “as the Chairperson thinks fit”. Paragraph 13 of the decision reads as follows:

*It is inherent in s101 that the Chairperson had come to a decision that the vehicle should be sold or otherwise returned to the owner for it would only be in those circumstances that the approval of the Minister must be obtained. The opinion of the Chairperson on the question of the owner’s state of mind is of no effect in the statutory scheme. In the ordinary course of public administration, however, it is not likely that the Chairperson would be precluded from gathering and presenting to the Minister material, including any representations from the owner, upon which the requisite opinion of the Minister could be formed. But the only opinion countenanced by the legislature is that of the Minister.*

20. In reconsidering the exercise of the Chairperson’s discretion in Ms Hudson’s case, we decided that it made sense for the Commission to consider, among other things, some of the same issues which must be considered by the Minister. It would seem pointless for the Chairperson to make a decision to return a vehicle to its previous owner(s) without considering that there was some reasonable likelihood that the Minister might be able to form a positive opinion on the relevant criteria.
21. If Mr Shambrook and Ms Hudson’s situations were to be considered separately, we concluded that it was unlikely that the Minister would be satisfied that the statutory tests were met in Mr Shambrook’s case; however, we did consider that there would be a reasonable prospect that the Minister might form an opinion that Ms Hudson’s situation met the requirements. Given that this is Ms Hudson’s application for the return of the vehicle, our speculation on this issue is not irrelevant to this review.
22. The complications in this matter arise from the joint ownership of the vehicle and the fact that the co-owner is the offender. The co-ownership of the vehicle would appear to distinguish this case from that of *Marks* where, as far as we can ascertain from the written decision, the applicant non-offender (the wife) owned the whole of the vehicle.
23. In considering whether to exercise the discretion to return the vehicle to Ms Hudson, we could see the logic of the Chairperson’s argument when he refused Ms Hudson’s application - that to return the vehicle to the applicant co-owner in this case would be effectively to return the vehicle to the use of the offending co-owner and therefore to negate any penalty to him arising from the seizure. On the other hand, we could also appreciate Counsel’s argument that, in the circumstances of

this case, the seizure of the vehicle had deprived an innocent party of her share of the vehicle.

24. The Commission was therefore left with a King Solomon's style dilemma: a fair outcome in this case would be to divide the vehicle in half, returning Ms Hudson's half of the vehicle to her while refusing the return of Mr Shambrook's half of the vehicle. For obvious reasons, a physical division of a vehicle in this way would be absurd. However, the legislation does provide a potential route for achieving a practical solution to the Commission's dilemma in that it allows the Chairperson to decide to *sell* a vehicle to a person who, immediately before the forfeiture, had a legal or equitable interest in the vehicle (section 101). The Commission decided to offer Ms Hudson an opportunity to regain the ownership of the vehicle by allowing her to purchase the vehicle for *half its current market value* (that is, the cost of Mr Shambrook's share of the vehicle). In effect, this means that Ms Hudson would gain total ownership of the vehicle by buying out Mr Shambrook's portion of the vehicle. It seemed to the Commission that this decision offered the advantage of allowing Ms Hudson and Mr Shambrook to regain the use of the vehicle without totally undermining the penalty.

25. The possibility of selling the vehicle to Ms Hudson was put to Ms Hudson's counsel at the review hearing, however not in the exact terms of the preceding paragraph. The option was not greeted with enthusiasm at the time of the hearing; the preferred decision being the return of the vehicle to the sole ownership of Ms Hudson without any costs or other conditions attached. Given that we have now taken the position that such a non-conditional return of the vehicle is inappropriate, Ms Hudson should have the opportunity to reconsider her position on this issue.

## Decision

26. The Commission decided to set aside the decisions of the Chairperson to refuse the return of the vehicle and to dispose of the vehicle by public tender. The Commission substituted a decision that the vehicle be sold to the applicant for *half its current market value*. Such a sale of the vehicle to Ms Hudson will only occur with the approval of the Minister.

27. Should the Minister approve of the sale of the vehicle to Ms Hudson and Ms Hudson refuse to purchase the vehicle, the effect of the Commission's decision is that the vehicle remains the property of the Territory and the Chairperson of the Commission will need to make a new decision about the disposal of the vehicle.

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Jill Huck  
Presiding Member  
28 February 2005