

# **NORTHERN TERRITORY LICENSING COMMISSION**

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

<b>APPLICANT:</b>	Geoffrey Barnes
<b>DECISION UNDER REVIEW:</b>	Chairperson's decision not to return seized vehicle Ford EF Falcon NT 716556 to Geoffrey Barnes and to dispose of that vehicle by "gift to a suitable applicant yet to be determined and approved by the Chairman or by tender, and if no suitable or actionable tender be received, then a destruction order to issue".
<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 Craig Spencer Ms Annette Smith
<b>DATE OF HEARING:</b>	17 August 2005
<b>APPEARANCES:</b>	Ms Kirsty Howey, KRALAS, for the applicant Ms Mary Chalmers for the Police Craig Smyth, Counsel Assisting the Commission

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### **Background**

1. This vehicle was purchased by the applicant on 20 October 2004 from Rusty's A1 Cars and Commercials in Katherine.
2. The vehicle was seized about 10.3 kilometres inside the Hodgson Downs restricted area on Thursday 25 November 2004 in connection with restricted area liquor offences. The vehicle was stationary at the time and Mr Barnes and three other people were in attendance, apparently waiting for other people to join them for a birthday party. Two passengers, Nicole Limmen and Jane Hall, admitted that they had bought the alcohol and they were charged with the offences of bringing liquor into a restricted area and controlling liquor in a restricted area. The alcohol found in the vehicle at the time consisted of:

- 88 cans of VB beer
  - 17 cans of Woodstock bourbon and cola
  - 24 cans of Jim Beam bourbon and cola
  - one 750 ml bottle of Bundaberg rum.
3. A Police précis of the incident records the following information about the “ownership” of the vehicle:

*The owner of the vehicle wasn't in the vehicle at the time it was seized, but her husband was with the vehicle as being in lawful charge of the vehicle.*

4. On 3 February 2005 a warrant was issued for Jane Hall when she failed to appear in Court in connection with the restricted area charges. Under section 96(3) of the *Liquor Act* (the Act) a vehicle which has been seized under the Act is automatically forfeited to the Territory in these circumstances. On 7 February 2005, a letter was sent to Mr Barnes advising him of his right to make an application for the return of the vehicle. When no application was received, the Acting Chairperson of the Commission made the following decision under section 101 of the *Liquor Act* to dispose of the vehicle.

*I direct that the Vehicle be disposed of by gift to a suitable applicant yet to be determined and approved by the Chairman or by tender, and if no suitable or actionable tender be received, then a destruction order to issue.*

5. On 15 April 2005 Ms Kirsty Howey, KRALAS, wrote to the Acting Chairperson on Mr Barnes' behalf applying for the return of the seized vehicle under section 101 of the Act. The Acting Chairperson wrote back to Ms Howey on 20 April advising her that the section 101 decision had already been made and advising that Mr Barnes had the right to seek a review of that decision pursuant to section 27 of the *Licensing Commission Act*.
6. On 17 May 2005 Ms Howey lodged a request for a review on Mr Barnes' behalf, arguing that Mr Barnes was not knowingly involved in the offence because, among other things he was from Lajamanu, was not familiar with the Hodgson Downs restricted area boundaries, was misinformed by the other people in the car and he was ill on the day in question.
7. At the hearing of the review application, the Commission heard evidence from Mr Barnes. Essentially his evidence was that:
- He normally lives at Lajamanu or Katherine and was only visiting friends at Hodgson Downs at the time his vehicle was seized;
  - He had visited friends and family at Hodgson Downs about 3 or 4 times over a two year period;
  - He knew Hodgson Downs was a restricted area and had seen the restricted area signs;

- He works for Katherine West Health Board, is a Council member at Lajamanu and sometimes does night patrol work. At the time of the vehicle seizure he was living in Katherine and working on night patrol.
  - He suffers from gout and ran out of medication when he was at Hodgson Downs. He was in a lot of pain and decided to go to Mataranka to see the doctor and get some more medication;
  - He asked Simon Marks and Jane Hall to drive him to Mataranka to see the doctor. Nicole Limmen and Anderson Jingili were also passengers;
  - When they arrived at Mataranka, he went straight to the health clinic and got some strong pain medication while the others went to the shop. He took more than the prescribed amount of Panadeine Forte and Voltaren and became very sleepy;
  - He knew that Simon Marks and the others intended to buy alcohol at Mataranka for a birthday party;
  - Simon Marks drove the vehicle back to Hodgson Downs while Mr Barnes slept most of the way in a passenger seat, waking in small bursts. The journey took about 2 ½ hours;
  - Mr Barnes knew they had alcohol in the car and said he asked them not to take it into the restricted area;
  - They stopped for a toilet break at the restricted area sign and Mr Barnes told them to hide the alcohol there;
  - The passengers told him that it was OK to drink further on, telling him to pay no attention to the sign and that the restricted area started “where all the mess” was;
  - They told him that the sign was an old sign and that the boundary for the restricted area had changed;
  - When they stopped at the clearing, he saw lots of beer cans around and thought Simon Marks must be telling the truth about it being OK to drink there;
  - He only realised that they were inside the restricted area when Police arrived at the scene and told him;
  - He was very angry with his companions when the Police seized the vehicle; and
  - He said the vehicle really belongs to his wife, Raylene Jingili.
8. In response to the Commission’s questioning, Mr Barnes acknowledged that there was a health clinic at Hodgson Downs. He said that it was shut for lunch at the time the pain started and he decided he could not wait until it reopened – thus the two hour drive to Mataranka. On further questioning he conceded that there had always been two main reasons for going to Mataranka – one being medical treatment and the other being so that his passengers could buy alcohol for their party. That said, he denied knowing that his passengers intended to bring the alcohol into the Hodgson Downs restricted area.

9. Ms Chalmers provided the Commission with a range of documents which described serious problems with alcohol abuse and “grog running” at Hodgson Downs. This information was contained in the following documents:

- An undated submission written by Brett Wenn, Acting OIC Mataranka calling for the appointment of an Aboriginal Community Police Officer (ACPO) at Hodgson Downs Community;
- A letter dated 13 November 2000 from the Alawa Aboriginal Corporation to the Commissioner of Police about alcohol problems at Hodgson Downs and seeking the appointment of an ACPO at Hodgson Downs;
- A letter dated 2 February 2004 from the Alawa Aboriginal Corporation to the Commissioner of Police again requesting an ACPO for the Community;
- A letter dated September 2004 from the Minyerri School Staff and the Minyerri School Council asking for a Police officer to be placed in the Minyerri Community; and
- A letter dated 26 May 2005 from the Alawa Aboriginal Corporation to the Commissioner of Police seeking the appointment of two ACPOs at Hodgson Downs.

10. Constable Chris Hand gave evidence that he had been the Officer in Charge at Mataranka Police Station for the period April 2003 to February 2005 and had been the second in charge for a period before that. Mataranka Police Station has responsibility for a wide area including Hodgson Downs. He said that Hodgson Downs was a community of some 600 to 800 people and that grog running was prevalent in Hodgson Downs. He said that when people have enough money they drive to Mataranka, purchase alcohol and return on the same day. Sometimes they hire someone’s new vehicle and drive back and forth for several days buying alcohol. He said that the “grog runners” could be quite organised if there was lots of money around from royalties. He said that there were difficulties for Police in policing the Hodgson Downs restricted area given the distance from Mataranka (approximately 145 Kilometres, or about 2 hours by road). Police do try to send patrols out there occasionally after hours, as was the case on Thursday 25 November 2005 when Mr Barnes’ vehicle was seized.

11. Constable Hand recounted the events of that evening. He said that the vehicle was off the road and five people were standing around the vehicle and there was one person in the vehicle – Anderson Jingili. Only the two women were drinking. He remembered talking to Geoffrey Barnes and made a record of his conversation with him. Mr Barnes advised that his wife owned the vehicle and that he had not known that they were within the restricted area. He claimed that Simon Marks had told him it was OK to drive there. When asked about the sign at the boundary over 10 kilometres away, Mr Barnes

had said “that mob told me it was an old sign and the boundary didn’t start until further up”. Constable Hand said Mr Barnes had pleaded with him not to seize the vehicle. Mr Barnes had said nothing about being sick, seemed to clearly understand what was happening and was lucid in his answers. Constable Hand did not notice whether he was limping. The two women readily admitted ownership of the alcohol and admitted that they knew they were in the restricted area. All three men denied ownership of the alcohol and Police used their discretion not to charge them.

12. Asked whether it was a regular drinking area, Constable Hand said that he had not seen people drinking there before and didn’t recall seeing any empty cans lying around. It was his colleague, Constable Fernandes, who had referred to the area in the reports as “a well known drinking spot”. He said the area was about half way between the Community and the restricted area boundary.
13. Constable Hand confirmed that there was a health clinic at Hodgson Downs. It was staffed with two nurses, two Aboriginal health workers and a doctor who visited about twice a week on a fly-in-fly-out basis.

### **The legislation**

14. 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.*

15. In *Ninnal v Minister for Racing, Gaming & Licensing & Anor* (2001) NTSC 68 Chief 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 tests as the Minister when making a decision about how to dispose of a seized vehicle. Chief Justice Martin considered that the Chairperson had an open discretion to make a decision on the disposal of a vehicle “*as the Chairperson thinks fit*” and that *the opinion of the Chairperson on the question of the owner’s state of mind is of no effect in the statutory scheme*. However, the Chief Justice went on to say that where the Chairperson is considering returning a vehicle to a person:

*...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.*

16. In considering the exercise of the Chairperson's discretion in this case, we also took some guidance in relation to the exercise of unlimited discretion from the High Court of Australia decision *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. Justice Mason stated at pages 39-40:

*What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.*

17. The *Liquor Act* specifically requires the Commission to have regards to the Objects of that Act in making any decisions under the Act. The Objects are found at sections 3 and 6 and include objectives such as harm minimisation, taking into account the public interest and the protection and promotion of community amenity, social harmony and well-being. Given that these objects are mainly focused on the regulation of the liquor industry, the Commission considered that it was also relevant to look at the facts of the matter as they related to the much more specific subject matter, scope and purpose of Part VIII of the Act - that is, that Part of the Act which contains the restricted area provisions (including section 101). Part VIII is specifically concerned with providing a process by which a community can apply to ban or severely restrict the availability of alcohol in that community and, if such an application is successful, for the enforcement of the ban or restriction to be enforced by the full weight of the law.

18. The Commission also considered that the Minister's second reading speech for the *Liquor Amendment Bill 1988* provided some specific guidance regarding the purpose of section 101. The Minister relevantly stated:

*There needs to be a compatible amendment after conviction to protect innocent parties who may not have had the opportunity to seek the return of their vehicle prior to the trial...*

*The weight of support I have encountered from [Aboriginal] communities has convinced me that offenders who breach the provisions of the restricted areas legislation should certainly continue to be punished but that discretionary powers need to be available for innocent parties.*

## **Discussion of the evidence, findings and application of the law**

*As Mr Barnes is seeking the return of the vehicle, did he have a legal or equitable interest in the vehicle immediately before the forfeiture?*

19. Mr Barnes purchased the vehicle and was the registered owner of the vehicle at the time of its seizure, so there is little doubt that he had a legal or equitable interest in the vehicle and could therefore apply for its return. There was, however, some evidence presented that Mr Barnes' wife, Raylene Jingili, may also have a claim to the vehicle. At this stage it is not necessary for us to make a finding on her claim to the whole or part of the vehicle.

*Was Mr Barnes not knowingly involved in the act constituting the offence as a result of which it was forfeited?*

20. It was clear from the evidence that Mr Barnes was there at the time the restricted area offences were committed and that he was directly involved in those offences. The issue to be considered by the Commission is whether he was "knowingly involved" in the offences. In the course of the hearing it was established that Mr Barnes knew that Hodgson Downs was a restricted area; he understood that it was an offence to bring liquor into a restricted area; he knew that his travelling companions intended to purchase liquor at Mataranka to bring back to the vicinity of Hodgson Downs (admitting that this one of the major reasons for the trip to Mataranka); he saw the restricted area signs; he knew that there was a large quantity of alcohol in the vehicle; and he had consented to his vehicle being used to carry the alcohol – at least as far as the restricted area boundary.

21. Mr Barnes claims that his companions mislead him about the location of the boundary for the restricted area. This claim is consistent with what he told Police on that day and it is possible that his companions mislead him. He also claimed to have been ill and made sleepy by the medication he had taken. We accept that this may have been the case: there is evidence that he did visit the Mataranka Clinic on that day and was given pain tablets; and he may have taken too many and slept part of the way back. On the other hand, his own evidence was to the effect that he saw the restricted area sign; urged his companions to hide the alcohol near the sign; and was sufficiently alert to converse with his companions about the location of the boundary. The Police evidence confirmed that he appeared alert and lucid when they spoke to him.

22. At its highest, the evidence would suggest that he might not have known as a certainty that he was involved in an act constituting an offence.

*Did Mr Barnes have no reason to suspect that it might be used in connection with such an offence?*

23. The second rung of the test the Minister must consider is much more difficult to satisfy because it requires the applicant to have no reason to suspect that the vehicle might be used in connection with an offence. In his 2002 decision regarding Ms Ninnal's application for the return of her vehicle (*Ninnal 2002*) the Chairman of the Licensing Commission, Mr Peter Allen wrote :

*"In my opinion, a decision as to whether Ms Ninnal "had reason to suspect" requires an objective assessment; an assessment of inferences able to be reasonably drawn from the circumstances of the matter. The word "might" suggests to me that Ms Ninnal is required to demonstrate "no reason to suspect" that there was any reasonable chance of her vehicle being used to transport liquor into a restricted area. For the purposes of further explanation the word "might" as used in the section can be compared with the word "would". In my opinion, the word "might" goes to chance, a reasonable chance that the vehicle might be used, whereas "would" goes to reasonable probability; a lesser degree of difficulty for Ms Ninnal if linked with "no reason to suspect", but one not afforded her by s101."*

24. In this case, Mr Barnes' own evidence was that he did have suspicions and concerns that the alcohol was being taken inside the boundary of the restricted area. He had seen the restricted area sign and he had urged his companions to hide the alcohol near the sign. He said that they had told him that the restricted area boundary had changed. His evidence was that he was not fully reassured until he saw the alcohol container litter at the spot where they eventually stopped, 10.3 kilometres inside the boundary. This is consistent with what he told the Constable Hand on the night.

25. This means that whatever conclusion the Commission might reach about whether Mr Barnes was knowingly involved in the offence, his application would not satisfy the second test to be considered by the Minister – that he "*had no reason to suspect that [his vehicle] might be used in connection with such an offence*". The Commission considered that it would be a futile exercise to use its discretion to decide to return the vehicle to Mr Barnes, given that the Minister might have great difficulty, in the circumstances, satisfying himself that this second statutory test was met.

*Other relevant factors*

26. The Commission noted that were other relevant aspects of this case which added weight to the arguments against returning the vehicle to Mr Barnes. These included the seriousness of the alcohol related problems at Hodgson Downs, the large amount of alcohol involved in the offence and the fact that it was brought well inside the restricted area boundaries. This was certainly not a case where the forfeiting of the vehicle would seem unjust because the amount of alcohol involved was small; and its presence in the vehicle accidental or unknown to the owner. Nor was it a case where the owner of the vehicle was an entirely innocent party who had nothing to do with the events that lead to the seizure.
27. The Commission, having had regards to the Objects of the *Liquor Act*, the purpose the Part VIII provisions, the purpose of section 101 and the specific tests which the Minister must consider, decided that the vehicle should not be returned to Mr Barnes.

**Decision**

28. The Commission decided to affirm the decision of the Chairperson to refuse the return of the vehicle and to dispose of that vehicle by “gift to a suitable applicant yet to be determined and approved by the Chairman or by tender, and if no suitable or actionable tender be received, then a destruction order is to be issued.
29. The Commission had been put on notice that, in the event that the decision was affirmed, there was a possibility that Mr Barnes’ wife, Raylene Jingili, might apply for the return of the vehicle. The Commission therefore directed that Ms Jingili be notified of the decision and that no action should be taken on the disposal of the vehicle until after the timeline for a request for a review by Ms Jingili has expired. In giving this direction, the Commission is in no way indicating the likelihood of success for any application from Ms Jingili. That would be entirely a matter for a fresh review panel and for the Minister.

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Jill Huck  
Presiding Member  
31 October 2005