

NORTHERN TERRITORY LICENSING COMMISSION

REVIEW OF CHAIRPERSON'S DECISION

APPLICANT:	Peter Billy
DECISION UNDER REVIEW:	Chairperson's decision not to return seized vehicle Holden Commodore NT 703 598 to Mr Billy and to dispose of that vehicle by tender.
RELEVANT LEGISLATION:	Sections 95, 96, 100A and 101 of the <i>Liquor Act</i> Sections 27, 28 and 29 of the <i>Licensing Commission Act</i>
MEMBERS:	Ms Jill Huck (Presiding Member) Mr Craig Spencer Ms Annette Smith
DATE OF HEARING:	18 August 2005, 10 October 2005
APPEARANCES:	Ms Kirsty Howey, Katherine Regional Aboriginal Legal Aid Service (KRALAS), for the applicant Ms Mary Chalmers for the Police Craig Smyth, Counsel-Assisting the Licensing Commission

Background

1. On 31 July 2004 Mr Billy's vehicle was stopped by Police inside the Ngukurr Restricted Area and about 16.6 kilometres from Ngukurr. The driver was Gerry Ashley. Mr Billy was not in the vehicle. Upon searching the vehicle Police found a bladder of red wine (which was approximately one third full) under the front passenger seat. The vehicle was seized pursuant to section 95 of the *Liquor Act* (the Act). On 16 August 2004 Mr Billy applied for the return of his vehicle under section 100A of the Act on the grounds that he had nothing to do the offence. No decision appears to have been made on this application, although further information was sought from both Police and Mr Billy.
2. On 16 September 2004 Mr Ashley was convicted of bringing liquor into a restricted area contrary to section 75 of the *Liquor Act* and the vehicle was forfeited to the Territory.

3. On 29 September 2004 the Katherine Regional Aboriginal Legal Aid Service (KRALAS) wrote to the Licensing Inspector handling this matter on Mr Billy's behalf. The letter provided Mr Billy's account of the events leading to the seizure of the vehicle and specifically addressed issues raised by Police in an email to the Licensing Inspector dated 17 August 2004. On 5 October 2004 the Licensing Inspector recommended to the Chairperson that the vehicle not be returned to Mr Billy.
4. On 30 December 2004 the Chairperson decided pursuant to section 101 of the *Liquor Act* not to return the vehicle to Mr Billy and to dispose of the vehicle by way of tender. The Chairperson's reasons read, in part:

Unlike the Minister in a s101 situation, the Chairperson is not required as a matter of law to form any opinion on, or make any findings on, any person's state of knowledge of the offence or its likelihood.

On the balance of probabilities, I accept that Mr Billy must have or should have been aware of the offender's reputation in respect of his drinking in relation to restricted areas. In my view, the owner of a vehicle resident in or near a restricted area has an onus to exercise reasonable care in lending a vehicle to any person for whatever ostensible purpose, much more care than Mr Billy exercised in this instance.

Further the offender told police that he was the owner of the vehicle, which strongly suggests a relationship between offender and claimant and /or offender and vehicle whereby the offender would be likely to gain some benefit from disposal of the vehicle back to Mr Billy.

5. On 11 April 2005 a letter was written on behalf of Mr Billy to the Licensing Inspector indicating that Mr Billy had not received the Chairperson's decision and that it appeared that the vehicle had already been sold. Given that there had been an "administrative oversight" in not advising Mr Billy or KRALAS of the Chairperson's decision, Mr Billy was given an extension of time to seek a review of the Chairperson's decision under s.27 of the *Licensing Commission Act*.
6. This application is a result of the request for a review received on 18 May 2005. Due to serious injuries received in a motor vehicle accident, Mr Billy was not able to attend the review hearing in person and it was decided to deal with the matter by way of written submissions. Submissions were received from KRALAS, Counsel for the Police and Counsel-Assisting the Commission.

7. The Commission reconvened on 10 October 2005 to consider the written submissions. At this stage additional information was also obtained from Ms Howey about Mr Billy's medical condition, which was that Mr Billy's head injuries had rendered him unable to give instructions or provide further information and that it was likely he would remain hospitalised (in Katherine or elsewhere) indefinitely. Ms Howey did not know whether adult guardianship proceedings had been initiated.
8. In her written submission Ms Howey provided an analysis of the evidence and the legal issues and asked the Commission to revoke the Chairperson's decision and substitute a decision that an ex-gratia payment be made to Mr Billy equivalent to the price he had paid for the vehicle, an amount of \$3000.
9. In her submission on behalf of the Police, Ms Chalmers noted that the Commission was entitled to rely on its corporate knowledge of the alcohol problems at Ngukurr. She stated that Mr Billy should have been aware of Mr Ashley's offending history and therefore would have had reason to suspect that his vehicle might be used in a restricted area offence. Ms Chalmers acknowledged that the only evidence before the Commission regarding Mr Ashley's reputation or criminal history was a comment in an email from a Police constable to a licensing inspector dated 17 August 2004. Police had not been asked to produce any further evidence regarding Mr Ashley's offending history.
10. Ms Chalmers asked that the Commission make the following findings in respect of the Police role in the holding and disposal of the vehicle:
 - (a) *Police formally delivered Mr Billy's vehicle into the custody of the Chairman of the Licensing Commission on or about the first week of August 2004 by sending the Chairman the notice appearing at folio 1 of the hearing brief being Notice of Delivery no. 06560.*
 - (b) *Following delivery of the vehicle to the Chairman, Police retained physical possession of the vehicle as a bailee pursuant to a bailment pending any instructions from the bailor (being the Chairman) as to the vehicle's disposal ...*
 - (c) *In or around early 2005 the Chairman instructed Police at Ngukurr, inter alia, to deliver the vehicle to a 3rd party (by allowing that party to collect the vehicle from the Police).*
 - (d) *In accordance with the Chairman's instructions, Police subsequently released Mr Billy's vehicle to the 3rd party in accordance with the terms of the bailment.*
11. Regardless of the outcome of the review, the Commission was comfortable with making these findings. Clearly the Police were not responsible for the sequence of events which resulted in the vehicle being sold by tender before Mr Billy was notified of the Chairperson's decision.

12. Based on the information before it, the Commission made the following findings of fact:

- Mr Billy bought the vehicle for \$3000 about a month before it was seized;
- He lent it to Mr Gerry Ashley on Friday 30 July 2004 so that Mr Ashley could watch a Ngukurr Bulldogs football match in Katherine;
- Mr Ashley was intending to watch family members play in this match, he was not participating in the match as previously communicated by KRALAS;
- Mr Ashley has a history of alcohol related offences, although the details are unknown to the Commission. In particular, there was no information before us as to whether any of Mr Ashley's prior offences were restricted area offences;
- Mr Billy's instructions to his KRALAS lawyer before his accident were that he had no knowledge of Mr Ashley's alcohol related offences;
- Part of Mr Billy's explanation to KRALAS regarding his lack of knowledge of Mr Ashley's offending history was that he (Mr Billy) lived mainly at the Castello Outstation so was not aware of everything that happened in Ngukurr. While a local Police constable had disputed this, neither were available for further questioning;
- Mr Billy was expecting Mr Ashley to bring the vehicle back to Ngukurr on the morning of 31 July 2004;
- Mr Billy was not involved in the offence which resulted in the vehicle's seizure;
- Mr Billy advised KRALAS that he had not suspected that Mr Ashley would use the vehicle to bring alcohol into the Ngukurr Restricted area;
- The quantity of liquor in the vehicle when it was seized was the equivalent to 1/3 cask of red wine and it was located under the front seat;
- Mr Ashley admitted at the time that the alcohol belonged to himself and "Daisy". He also advised that he had told Daisy to hide the wine near the Roper Bar Crossing but she had not done so;
- It is unclear from the evidence whether Mr Ashley knew that the alcohol was still in the vehicle at the time it was seized;
- At the time the vehicle was seized, Mr Billy believed that the vehicle was at Roper Bar with a flat battery, having received a telephone call from Mr Ashley to this effect. Mr Billy had told Mr Ashley to leave the vehicle there and he would come to Roper Bar with a new battery;
- Roper Bar is just outside the restricted area;
- Mr Billy had obtained a new battery and was on his way to Roper Bar with it when he saw the Ngukurr Police driving his vehicle back towards Ngukurr;

- Mr Billy made an application for the return of his vehicle shortly after it was seized;
- The Chairperson made a decision on 30 December 2004 not to return the vehicle to Mr Billy and to dispose of the vehicle by tender;
- In making his decision to dispose of the vehicle by way of tender the Chairperson acted, in part, on a belief that Mr Ashley had claimed ownership to the vehicle and might benefit from its return. In fact, Mr Ashley had claimed ownership of the alcohol, not the vehicle;
- The Chairperson may have also been influenced by information supplied by the licensing inspector suggesting that Mr Billy account lacked credibility because: he was a permanent resident of Ngukurr and therefore would have known of Mr Ashley's reputation; and he had claimed to have lent the vehicle to Mr Ashley so that Mr Ashley (who is in his 50s) could play at the football match. The accuracy of this information has since been disputed and it has been conceded that Mr Billy did not claim that Mr Ashley was intending to play in the match;
- The vehicle was sold by tender for \$500;
- Mr Billy did not receive notification of the Chairperson's decision regarding the disposal of the vehicle until after the vehicle had been sold by tender;
- In early 2005 Mr Billy was involved in a motor vehicle accident;
- Mr Billy received serious injuries in the accident including an acquired brain injury. His injuries have rendered him unable to provide further instructions to his lawyer or further information or comment to the Commission; and
- Mr Billy is permanently disabled and now unlikely to return to Ngukurr.

13. In addition to these findings of fact the Commission made the following findings in relation to the role of the Police:

- Police formally delivered Mr Billy's vehicle into the custody of the Chairman of the Licensing Commission on or around the first week of August 2004 by sending the Chairman the notice appearing at folio 1 of the hearing brief being Notice of Delivery no. 06560;
- Following delivery of the vehicle to the Chairman, Police retained physical possession of the vehicle as a bailee pursuant to a bailment pending any instructions from the bailor (being the Chairman) as to the vehicle's disposal;
- In or around early 2005 the Chairman instructed Police at Ngukurr, inter alia, to deliver the vehicle to a 3rd party (by allowing that party to collect the vehicle from the Police); and

- In accordance with the Chairman's instructions, Police subsequently released Mr Billy's vehicle to the 3rd party in accordance with the terms of the bailment.

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.

19. The circumstances of Mr Peter Billy's case required the Commission to consider the effect of making a decision to revoke the Chairperson's original decision given that the vehicle had already been sold by tender to a new owner. At the Commission's request, Mr Smyth prepared a submission specifically addressing this issue. The relevant parts of the submission are quoted below:

11. An issue arises as to whether the Commission, in reviewing the Chairperson's decision has the power to do so, once the vehicle has been disposed of, that is, is it futile to review the decision if the vehicle cannot be returned to Mr Billy.

12. *The Liquor Act does not expressly require notice of the Chairperson's decision under s 101 to be made. However, s 28(1) of the Northern Territory Licensing Commission Act clearly contemplates that notice of the decision should be given:*

"A person aggrieved by a decision may, not later than 28 days after receiving notice of the decision, apply to the Commission for a review of the decision."

13. *Further, in the circumstances of a right to seek review, the requirement that notice of the decision be given would undoubtedly be a minimum requirement of natural justice.*

14. *It is submitted that the Commission clearly has jurisdiction to hear the application for the review, as there is a "decision" and there is an "aggrieved person". It is submitted that under the Northern Territory Licensing Commission Act once the Commission has jurisdiction to hear the review it must "conduct a review in a manner that is fair and expeditious and must give proper consideration to the issues" (see s 29(1)).*

15. *It is further submitted that in determining the review, that is, in coming to a decision to "affirm, vary, revoke or substitute" the Chairperson's decision the Commission should primarily focus on the correctness of the decision in the light of all of the circumstances. It is secondary to the aspect of correctness of the decision that issues such as the futility of a possible order should be considered. Further it is only in circumstances where a decision to "revoke, substitute or vary" the original decision is made that the issue of possibly futility arises. That is, if a decision to affirm the Chairperson's decision is made such a decision is not futile.*

16. *In the circumstances where a decision to return Mr Billy's vehicle might be made it is possible to draw an analogy with the discretionary power of a Court to order relief in circumstances where the order might be futile. In certain circumstances, the Courts have recognised that such orders, despite their apparent futility, may still serve a valid purpose. In *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 the High Court of Australia discussed the futility of making an order quashing the suspension of a greyhound trainer in circumstances where the suspension had already elapsed. In *Stollery* at page 528 Gibbs J said:*

"The period of disqualification imposed by the Board has now expired. The Board's finding, however, may still have continuing serious consequences for the applicant. For example, if he should again apply for registration the Board might claim to refuse to register him on the ground that it was of the opinion

that it was in the interests of greyhound racing to refuse to register a person found guilty of conduct detrimental to the proper control and regulation of greyhound racing--see r. 17. Although the direct effect of the Board's decision is now spent, it may have indirect consequences and ought not to be allowed to stand."

17. Similarly in these circumstances the Chairperson's decision may also have continuing serious consequences. For example, should Mr Billy ever be placed in circumstances where another vehicle is seized, a prior adverse decision refusing to return a vehicle to him would no doubt be detrimental to any future application to have a vehicle returned? Further, in the event that the Commission decides to return his vehicle, and the Minister approves it, a favourable decision might support a request from Mr Billy for compensation or an ex gratia payment equivalent to the value of his vehicle.

18. Thus, the continuation of the Chairperson's decision, in circumstances where the Commission decides that it was not correct but nevertheless does not alter it, might have continuing serious consequences for Mr Billy, and therefore in that respect it ought not to be allowed to stand.

19. Further, a common sense approach to these types of anomalous situations dictates that there must be some flexibility in relation to the exercise of the discretion under s 101 of the Liquor Act. For example, if a fire ravaged the police compound where a vehicle was being held pending a review, or if the vehicle was stolen, it would be unfair if the Commission refused to revoke, substitute or vary the original Chairperson's decision in the light of evidence which clearly showed that the decision was erroneous. In these circumstances it is submitted, that the fact that the vehicle had been mistakenly disposed of before the owner was notified of the decision is an analogous situation.

20. The Commission adopts Mr Smyth's reasoning on this issue and decided that there was no barrier to it considering whether the Chairperson's decision to dispose of the vehicle by tender should be revoked.

Discussion of the evidence and application of the law

Was Mr Billy knowingly involved in the act constituting the offence as a result of which the vehicle was forfeited?

21. It was clear from the evidence that Mr Billy was not physically involved in the offence and it has never been suggested that he was involved in any other way.

Did Mr Billy have any reason to suspect that the vehicle might be used in connection with such an offence?

22. This is a more difficult question. In making the original decision, the Chairperson had concluded that Mr Billy should have suspected that the vehicle might be used in connection with a restricted area offence. The Chairperson based this conclusion partly on the claim that Mr Billy must have, or should have, been aware of Mr Ashley's reputation in respect of his drinking. The Chairperson had also inferred that there was some sort of close relationship between Mr Billy and Mr Ashley. This inference seems to have been based on a misreading of the Police Précis in that the Chairperson states that Mr Ashley told Police he owned the vehicle; in fact, Mr Ashley told Police he owned the alcohol (not the vehicle). Before his accident, Mr Billy's instructions to KRALAS had been that he had not been aware of Mr Ashley's offending history and had not had reason to suspect that the vehicle might be used to bring alcohol into the restricted area. Part of Mr Billy's explanation for this lack of knowledge was that he normally lived at the Castello Outstation and therefore was not aware of everything that went on in Ngukurr.
23. Before determining this issue, we would have liked to have had more information from Mr Billy in the following areas: his patterns of residence; his relationship with Mr Ashley; his knowledge of Mr Ashley's liquor related offences; and the circumstances in which he agreed to lend his vehicle to Mr Ashley. Unfortunately, Mr Billy's acquired brain injury now makes it impossible to obtain this information from Mr Billy and we must reach our conclusions on this issue without the benefit of this further information. We are left with the information gathered to date, including at least one item (the issue of where he resided) never having been put to Mr Billy for comment. The unsatisfactory nature of the information available for making a decision on this issue includes the fact that we have no official information on Mr Ashley's alcohol-related criminal history and the only information from the Police on what might have been Mr Billy's state of mind at the time is limited to comments in an email from a Police constable at Ngukurr to the licensing inspector.
24. Whatever the limitations of some of the evidence, there was another aspect of this case which had relevance to our consideration of the "*no reason to suspect*" test. Ms Howey has consistently put forward the argument that, at the time of the offence, Mr Billy had no reason to suspect that the vehicle was even within the Ngukurr restricted area boundaries. It is not in dispute that Mr Billy had received a telephone call from Mr Ashley to say that the vehicle had a flat battery and was stranded at Roper Bar, just outside the restricted area. It is also not in dispute that Mr Billy had told Mr Ashley to wait at Roper Bar and he would bring a replacement battery out to him. As we now know, Mr Ashley received assistance from another person and did not wait for Mr Billy to arrive.

25. The standard of proof utilised by the Commission is the “balance of probabilities” rather than “beyond reasonable doubt”. Taking all the evidence into account, including the evidence about what Mr Billy did or did not suspect at the time he lent the vehicle to Mr Ashley and on the day the offence was detected, the Commission concluded that, on the balance of probabilities, Mr Billy did not have reason to suspect that his vehicle might be used in connection with a restricted area offence. Having reached this conclusion, the Commission went on to consider some other factors which might support or undermine the rationale for changing the Chairperson’s decision.

Other relevant considerations

26. The Commission noted that there were other relevant factors in this case which added weight to the arguments in favour of revoking the Chairperson’s decision. These factors included the following:

- Mr Billy was an “innocent party” in this matter. He was not involved in the offending and had nothing to gain from it;
- The amount of alcohol involved in the offence was very small (one third of a wine cask);
- There were a number of errors made in the information which was used to make the original decision; and
- The failure to advise Mr Billy of the Chairperson’s decision before the vehicle was disposed of, meant that Mr Billy did not have the opportunity to seek a review of the decision before it was too late.

27. The Commission, having had regards to the purpose of section 101, the specific tests which the Minister must consider and some of the circumstances which are unique to this case, as well as the Objects of the *Liquor Act* and the purpose the Part VIII provisions, decided to revoke the original decision to dispose of the vehicle by tender.

28. Having reached the position that the original decision must be revoked, the Commission turned its mind to the issue of an ex-gratia payment to compensate Mr Billy for the fact that the vehicle cannot now be returned. The Commission has no power to grant such a payment. That power lies with the Minister. The Commission decided to strongly recommend to the Minister that an ex-gratia payment of \$3,000 be made to Mr Billy on the basis that there was a significant amount of error involved in the handling of this case and the outcome had been unjust. We also accepted Mr Howey’s advice that, although a successful outcome will not give Mr Billy back his vehicle, an ex-gratia payment might go some way to providing some improvements in the quality of life available to Mr Billy in his current circumstances. This sum of \$3,000 is based on the amount of money Mr Billy paid for the vehicle about a month before it was seized.

Decision

29. The Commission decided to revoke the decisions of the Chairperson to refuse the return of the vehicle to its owner and to dispose of the vehicle by public tender. Given that the vehicle has been legally disposed of and is therefore not able to be returned to Mr Billy, the Commission strongly recommends to the Minister that an ex-gratia payment of \$3000 be made to Mr Billy to compensate him for the loss of the vehicle.

Jill Huck
Presiding Member
7 November 2005