

# **NORTHERN TERRITORY LICENSING COMMISSION**

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

<b>APPLICANT:</b>	Rosemary Johnson
<b>DECISION UNDER REVIEW:</b>	Chairperson's decision to dispose of the seized Toyota Corolla Hatchback NT 528 481 by gifting it to a suitable applicant approved by the Acting Chairperson or [by tender], if no suitable tender is received, then a destruction order is to be issued.
<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>	16 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. Mrs Johnson purchased a Toyota Corolla Hatchback NT 528481 on 9 September 2004. On 17 September 2004 it was seized by Police in connection with a restricted area offence. It was being driven along the Daguragu service road at the time by Mrs Johnson's brother, Herman Morris. When Police stopped the vehicle they noted that Mr Morris seemed intoxicated (BAC of 0.268) and they found 47 cans of Victoria Bitter on the floor in the front of the vehicle. There were 5 adults and two children in the vehicle at the time. Herman Morris was convicted on 17 November 2004 for bringing liquor into a restricted area. 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.

2. Mrs Johnson was notified of her right to seek the return of the vehicle and on 8 February 2005 KRALAS made an application pursuant to section 101 of the *Act* for the return of the vehicle. KRALAS advised that Mrs Johnson had lent the vehicle to her brother so he could take her kids for a drive and a swim. KRALAS asserted that Mrs Johnson did not lend the vehicle to her brother to transport liquor nor did she have any reason to suspect that the vehicle would be used for this purpose. The Police were asked for their comments on the potential return of the vehicle to Mrs Johnson and the Officer-in-Charge (OIC) of Kalkaringi Police Station provided detailed reasons why he considered that the vehicle should not be returned to Mrs Johnson. Among other things, the OIC asserted that the vehicle was “known as a ‘grog running’ vehicle” and that Mrs Johnson would have known of Mr Morris’ history of alcohol related offences, which included restricted area offences. This information was provided to KRALAS for comment and a detailed response was received, including advice that Mrs Johnson had only owned the vehicle for eight (8) days at the time it was seized. KRALAS dismissed the comment that the vehicle had gained a reputation as a grog running vehicle as being preposterous. KRALAS also asserted that Mrs Johnson was not aware of Mr Morris’ criminal history and, in any event, he had only been convicted of two restricted area offences – one in 1991 and the other in 1997.

3. On 21 March 2005 the Acting Chairperson of the Licensing Commission (the Commission) decided to dispose of the vehicle by “*gifting it to a suitable applicant yet to be determined and further approved by the Acting Chairman [or by tender] and if no suitable tender is received, then destruction order to follow*”. The Chairman noted the Police opposition to the return of the vehicle and also made the following comments:

*On the balance of probabilities, I have formed the view that Ms Johnson must have or should have been aware of the offender’s reputation in respect of his drinking in relation to restricted areas. I consider that the owner of a vehicle resident in or near a restricted area or with close connections to those who reside in a restricted area has an onus to exercise considerable care in lending their vehicle – irrespective of the reason given for the request. I do not see that Ms Johnson exercised any such care in these particular circumstances.*

*Further, any consideration given to the return of a vehicle where that vehicle could continue to be used by a person found guilty of offences would be considered highly inappropriate.*

4. On 18 April 2005 KRALAS wrote to the Acting Chairperson requesting a review of the decision under the *NT Licensing Commission Act*, and providing detailed reasons for the request. At its June 2005 meeting, the Commission decided to conduct a review of the decision as requested.

5. At the hearing of the review application, the Commission heard oral evidence from Mrs Johnson. Her evidence was that:

- She lives at Kalkaringi and currently works as a cleaner at the Club;
- She bought the vehicle in Katherine on 9 September 2005 and stayed in Katherine for a couple of days before returning to Kalkaringi;
- Her brother, Herman Morris, asked to borrow the vehicle. She refused his request initially, telling him that she needed the vehicle for her kids (grandson, nephew and niece);
- When he kept asking her she relented, telling him that he could borrow the vehicle if he took the children for a swim;
- It was about 4.30pm on the Friday afternoon when he borrowed the vehicle. They were outside the Club at the time;
- He did not say that he would be going drinking or that he would bring grog back into the community;
- She knew he was a drinker but didn't think he was a "drunk" or a grog runner;
- Her understanding was that he would "cruise around" in the vehicle and take the children swimming;
- She didn't know that he would take other passengers;
- He didn't return the children or the vehicle. She found out that the children were staying the night at Daguragu and located Herman Morris at a card game. He told her that he'd left the vehicle at The Grid (a local drinking spot on the boundary of the restricted area);
- It was not until the next day that she found out that the Police had seized the vehicle;
- She said she didn't know much about her brother's background, including whether he had a driver's licence and whether he had a criminal record for restricted area offences and driving offences. She said that she did not know much about him going to Court even though the Court sits regularly in Kalkaringi;
- Her brother lives in Daguragu (8 miles away) but works in Kalkaringi;
- She sees her brother everyday when he comes to her place to have smoko and lunch, to watch videos and television and to talk about family; and
- The only other person she had lent the vehicle to was a niece who was learning to drive.

6. The Commission also heard evidence from two Police officers: Brevet Sergeant Shane Warden who is currently OIC at Kalkaringi Police Station; and Sergeant Des Green who was at Kalkaringi in the period January 2003 to January 2005.

7. Brevet Sergeant Warden said that he was not involved in this particular seizure but was in a position to provide the Commission with general evidence regarding the alcohol problems at Kalkaringi. He said that:

- Grog running is a big problem in the area;
- Liquor offences are the most common types of offences;

- Friday night is the busiest night for grog runners;
  - The grog is usually purchased from Top Springs Hotel or Katherine; and
  - Everyone in the Community knows what's going on.
8. Sergeant Warden advised that, in preparing his comments to the Licensing Inspector (as cited in paragraph 2 above) he had relied on his own observations, had looked at Mr Morris' criminal history, spoken to Sergeant Green (the previous OIC), and taken into account the fact that Rosemary Johnson was a drinker and that she and Herman Morris were very close.
  9. Sergeant Warden explained that a lot of vehicles in the community are known as "grog running vehicles" and that these vehicles are often bought with royalty money. He said that a vehicle can get a reputation as a grog running vehicle within a few days if it is used to run back and forth repeatedly to Top Springs. He said that this is why his description of Mrs Johnson's vehicle as a "known grog running vehicle" was valid; despite the fact that she had only owned the vehicle for 8 days at the time it was seized. Sergeant Warden believed that the vehicle would again be used for grog running if it was returned to Mrs Johnson.
  10. He said that both Mr Morris and Mrs Johnson were well known to Police as drinkers, members of grog running families and associates of some of the most active grog runners. He described Mr Morris and Mrs Johnson as "harmless drinkers" and said that he had often seen them in cars coming back from Top Springs. In addition, he had seen Herman Morris in another known grog running vehicle.
  11. Sergeant Des Green gave evidence by telephone. He said that he was stationed at Kalkaringi for 2 years in the period January 2003 to January 2005 and was involved in the seizure of Mrs Johnson's vehicle. He said that Herman Morris had a reputation as a drinker and a grog runner. He had previously seen Mr Morris with alcohol inside the restricted area and had found alcohol in houses where he had been living.
  12. Sergeant Green advised the Commission not to place much weight on the fact that Mr Morris only had a couple of previous restricted area convictions. He said that the vast majority of grog runners in Kalkaringi were never caught, therefore the number of convictions a person had would not reflect their level of activity. Herman Morris had been charged a couple of times and was a known associate of some very active grog runners, one of whom was in the vehicle with him on this occasion. Sergeant Green said that the Kalkaringi Police Station has only two staff members and this makes policing the restricted area provisions very difficult. He said that when they come across alcohol (which they frequently do) they routinely tip it out but have to use their judgement about whether to pursue formal charges against the people involved.

13. Sergeant Green said that the Kalkaringi and Daguragu based grog runners regularly drive to Top Springs on pay days and buy alcohol for themselves and for other people. They usually bring the alcohol to the edge of the restricted area where people binge drink. They will then often jump in their vehicles and transport the rest of the alcohol into the community.
14. The Commission was provided with a copy of Herman Morris' criminal history which confirmed the evidence that, among other things, Mr Morris had convictions for driving offences and two earlier restricted area offences.
15. Sergeant Green was asked whether it was likely Mrs Johnson would have known of Mr Morris' criminal history and reputation. He said that it would be reasonable to expect that she would have, given that Kalkaringi was a tight knit community where everyone knew everyone else and because of her close relationship with Mr Morris.
16. Sergeant Green advised the Commission that, on the night before the vehicle was seized, Rosemary Johnson had brought the vehicle to the Police Station because she was being humbugged. The Commission was provided with a copy of "Promis Record 1152497" dated 16 September 2004. The Promis Record read as follows:

*Rosemary Johnson reports that she is being humbugged for lifts to the grid and they are threatening to smash her car, she has attended the police station.*

*Members Green/Parsons report locating Rosaleen [sic] and other community people. Persons told to leave the area near police station and headed back towards the community. Rosaleen's [sic] vehicle was secured for the night. Members then patrolled the grid and Daguragu Community and Kalkaringi all in order on departure.*

17. Given that this was new evidence, Mrs Johnson was recalled to answer additional questions. She confirmed that on the night in question two of her nieces were humbugging her because they wanted to go to The Grid. They wanted her to go and drink more grog at the Grid but she said she didn't want to go. She said her nieces were arguing over her vehicle keys but she was worried that they might use the vehicle to smuggle grog into the Community. She knew they had more grog at the Grid. She asked the Police to look after her vehicle for the night and went back to pick it up at 9.00am or 10.00am in the morning. In view of this evidence, she was asked again whether she was concerned about lending the vehicle to Mr Morris the next day, however, she maintained her earlier answers. She said that she had not known what he was up to – that she could not be expected to read his mind.

## THE LEGISLATION

18. 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.*

19. 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.*

20. 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.*

21. 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.
22. 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**

### ***Was Mrs Johnson not knowingly involved in the act constituting the offence as a result of which it was forfeited?***

23. It was clear from the evidence that Mrs Johnson was not present when the restricted area offences were committed and that she was not directly involved in those offences, so this part of the test which the Minister must consider is met.

### ***Did Mrs Johnson have no reason to suspect that it might be used in connection with such an offence?***

24. 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."*

25. In this case, Mrs Johnson's lawyer argued strongly that, when she lent the vehicle to Mr Morris, Mrs Johnson had no reason to suspect that her vehicle might be used in connection with a restricted area offence. This was based on the assertion that Mrs Johnson had not known about Mr Morris' reputation and criminal history and on the explicit agreement she had reached with him about what the vehicle would be used for – to cruise around and take the children swimming. After considering all the evidence, the Commission did not accept that Mrs Johnson was ignorant of Mr Morris' alcohol related behaviour, associations and/or history. The Commission found, on the balance of probabilities, that she knew there was a risk that he might use the vehicle inappropriately. All the evidence indicated that Mr Morris and Mrs Johnson knew each other very well and spent a great deal of time in each other's company. Mrs Johnson's own evidence also indicated that she had initially resisted Mr Morris' efforts to get her to lend him the vehicle and only relented on the condition that he, in addition to "cruising around", took her children swimming. It is not unreasonable to infer that at least part of her resistance was based on a concern about what he might use the vehicle for. It is clear from the evidence that Mrs Johnson was under considerable pressure from a variety of people who wanted to use her vehicle. The Promis Record from the previous night is indicative of this, as was Mrs Johnson's evidence that she feared her nieces would use the vehicle to bring grog back from The Grid to the community.
26. While there are elements of this case which we did not consider sufficiently made out, such as Mrs Johnson's vehicle being a "known grog running vehicle", the Commission did not consider that it could confidently conclude that Mrs Johnson *"had no reason to suspect that [her vehicle] might be used in connection with such an offence"*.

27. This means that Mrs Johnson's application does not satisfy the second test to be considered by the Minister. The Commission considered that it would be a futile exercise to use its discretion to decide to return the vehicle to Mrs Johnson, given that the Minister might have great difficulty, under the circumstances, satisfying himself that this second statutory test was met.

***Other relevant factors***

28. The Commission noted that there were other relevant aspects of this case which added weight to the arguments against returning the vehicle to Mrs Johnson. These included the seriousness of the alcohol related problems at Kalkaringi and the amount of alcohol involved in the offence. That said, the Commission is not without sympathy for Mrs Johnson and acknowledges the cultural and family pressures she was under in this situation and the price she has paid for her decision to lend her brother the vehicle.

29. After carefully weighing up all the evidence and having 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, the Commission decided that the vehicle should not be returned to Mrs Johnson.

**DECISION**

30. The Commission decided to affirm the decisions of the Acting Chairperson.

31. This means that Mrs Johnson's application for a review of the Chairperson's decision was not successful.

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Jill Huck  
Presiding Member  
11 November 2005