

# **NORTHERN TERRITORY LICENSING COMMISSION**

## **OFFICE OF THE CHAIRMAN**

### **Decision with Reasons**

*Liquor Act 1978 – Section 101. Disposal of forfeited things - Vehicle  
Application by Registered Owner - Ms Nellie Marks*

#### **Appearances**

Senior Sergeant Don Eaton for the Northern Territory Police  
Mr Kim Kilvington for the Applicant, Ms Nellie Marks

1. Police seized Ms Marks' vehicle, a Toyota Landcruiser, registration number 621-433, on 7 January 2002. It is agreed that Ms Marks is the owner of the vehicle.
2. Also seized were five (5) five-litre casks of wine and one (1) carton of VB beer. Police located two of the casks in the rear of the vehicle, in the area behind the back seat. Three casks and the carton of beer were concealed under a blanket, on the floor of the vehicle, in the area behind the passenger-side front seat.
3. Ms Marks was a passenger in the vehicle at the time of seizure. Other persons in the vehicle included Ms Marks' daughter, her son-in-law and her husband, Mr Jimmy Jabaltjari.
4. Mr Jabaltjari, who from the evidence in this hearing, concealed the three casks and the carton under a blanket and between his feet, was convicted in the Papunya CSJ on 19 February 2002 for the offence of controlling liquor in a restricted area and fined \$500. Mr Jabaltjari was convicted for a similar offence some twenty years previously on 13 August 1981.
5. Section 101 of the *Liquor Act 1978* provides:

*All things forfeited under this Part may be destroyed or otherwise disposed of in such a 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 words “as the Chairman thinks fit” were inserted into s101 by amendment in 1998. The section provides a discretion as to how vehicles forfeited under s96 of the Act can be disposed of and does not fetter that discretion except where the Chairman decides to dispose of the vehicle to its owner. On any such occasion, the Chairman must first obtain the approval of the relevant Minister.
7. The respective roles and powers of the Minister and the Chairman are contained in *Ninnal v Minister for Racing, Gaming & Licensing & Anor (2001) NTSC 68*.
8. In this decision His Honour, Chief Justice Martin ruled that:

*Under s101 it is only the Chairperson who has the power to destroy or otherwise dispose of a forfeited vehicle, and that, as he or she thinks fit. In my opinion it is plain that the decision to sell or otherwise return a forfeited vehicle after it has been forfeited falls within the discretion of the Chairperson and can only be made by the Chairperson. The implementation of the decision, however, is conditioned upon the Chairperson first obtaining the approval of the Minister. The Ministerial approval is conditioned upon the Minister forming the requisite opinions going to the state of mind of the owner.*

9. The Chairman’s opinion as to the state of mind of the owner can be regarded as irrelevant, for as His Honour makes plain:

*The opinion of the Chairperson on the question of the owner’s state of mind is of no effect in the statutory scheme.*

10. Nevertheless the Chairperson is able to present material to the Minister that can be used by him to form the requisite opinion of the owner’s state of mind prior to his approval or otherwise of the Chairperson’s decision to dispose of the vehicle to its owner.

11. His Honour ruled to this effect as follows:

*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.*

12. On the balance of the evidence presented in this hearing I have decided to return the vehicle to Ms Marks and pursuant to the requirements of s101 will seek the approval of the Minister.
13. Consistent with His Honour’s ruling I will gather and present such material to the Minister as may assist him to form the opinions required by s101.

14. Mr Kilvington for the applicant Ms Marks submits that the vehicle should be returned because in his view the seizure provisions of the *Liquor Act* are in various ways unfair, unreasonable and draconian. Mr Kilvington's submissions in this regard highlight the fact that a person, not guilty of an offence nor having any involvement in, or prior knowledge of the likelihood of an offence, can have their property forfeited to the Territory.
15. In my opinion any determination upon the reasonableness of legislation lies with a higher Court and not with the Chairman of the Northern Territory Licensing Commission. Accordingly I am not moved to consider disposal of the vehicle to Ms Marks on these grounds alone.
16. It is however clear from the evidence presented by Mr Kilvington that Ms Marks' husband, the offender whose actions led to the seizure of the vehicle, and her son-in-law, went to considerable lengths to conceal the liquor they say was purchased from the Todd Tavern, from discovery by Ms Marks. Indeed it is very clear from the testimony of the husband, the son-in-law and from Ms Marks herself that she would be extremely angry if they were found in possession of liquor, particularly in her vehicle. It is clear that both her husband and son-in-law respect Ms Marks' capacity for rightful anger and know that it is best avoided.
17. It is also of interest, that upon the inspection of the vehicle at the roadside during the Marks' journey home, the Police did not immediately locate the liquor, given its thorough concealment by the husband beneath blankets in the rear passenger area of the vehicle and the rear cargo area.
18. Another passenger, picked up at the roadside during the homeward journey testified as to his being unaware that liquor was contained within the vehicle.
19. It is of further interest that Ms Marks' husband is not in any respect a known or suspected "grog runner". Information provided by the Police shows that his only previous conviction for "Control Liquor Restricted Area" was twenty-one years previously on 13 August 1981 even though he has at regular intervals since, been a person of interest to the Police. His record of convictions runs to six pages of predominantly vehicle-related offences in the twenty-one years since his only prior restricted area conviction.
20. The case for the Police rests to a considerable extent on the evidence of Constable Joy who testified that while on other business in the vicinity of the Northside Foodland and Hoppy's Store, he observed liquor being passed into the vehicle in question and that Ms Marks' observed the passage of the liquor from a position on the adjacent footpath. It was on the basis these observations that Constable Joy in the company of other Police detained the vehicle later in the evening. Such observations if left undisturbed by other evidence may well have been sufficient for a determination to dispose of the vehicle other than to Ms Marks.

21. In their evidence Ms Marks' husband and their son-in-law plainly stated that upon arrival in Alice Springs they left Ms Marks, together with her daughter and her daughter's children at the Northside Foodland to undertake shopping for the family and that prior to returning to collect Ms Marks, they purchased a carton of VB beer and five (5) five-litre casks of wine at the drive-through bottleshop of the Todd Tavern.
22. The crucial questions arises then as to what was being passed into the rear (and other areas) of the vehicle while parked outside the Northside Foodland, and who observed its passing.
23. From the evidence presented it appears that it was during the late afternoon that Constable Joy's observations were made and that Ms Marks' vehicle was parked about five, perhaps six parking bays distant from Constable Joy's vehicle. Constable Joy did not speak to the applicant Ms Marks or to any other person in the group, he did however testify that one of the offenders waved to him at the same time as he observed liquor being passed into the vehicle. Further, Constable Joy testified that he observed Ms Marks watching the liquor being loaded.
24. Ms Marks' is adamant that she was not positioned as observed by Constable Joy and that she remained in the store to finalise her purchases while her daughter took the initial load to the vehicle. Ms Marks' daughter attended the Hearing and could be observed to be of similar appearance to her mother.
25. Although the conscientious approach taken by Constable Joy in his observations and the performance of his duties is not in doubt, the evidence given raises questions of doubt as to its ultimate accuracy, particularly when weighed with the alternative and thoroughly plausible explanations provided by the evidence of the applicant.
26. In a contested matter such as this application, it is appropriate in my view that in order to find against the applicant I must be positively persuaded on the balance of the evidence, in favour of the Police case.
27. I am unable on the balance of the evidence to find that it was and could only have been liquor that was passed into the rear of the vehicle and that it was and could only have been Ms Marks observing from the footpath and accordingly the approval of the relevant Minister will be sought in order that I may dispose of the vehicle to its lawful owner, Ms Nellie Marks.

**Peter R. Allen**  
**CHAIRMAN**

**27 January 2003**