

CITATION: *Yunupingu v The Commissioner of Police* [2009] NTMC 011

PARTIES: GALARRWUY JAMES YUNUPINGU

v

THE COMMISSIONER OF POLICE

TITLE OF COURT: FIREARMS APPEAL TRIBUNAL

JURISDICTION: Firearms Act (NT)

FILE NO(s): 20825292

DELIVERED ON: 17 April 2009

DELIVERED AT: Darwin

HEARING DATE(s): 2 & 3 April 2009

JUDGMENT OF: Commander Kate Vanderlaan, Mr Gareth  
Graham, Mr RJ Wallace SM (Chairperson)

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Appellant: JB Lawrence

Respondent: PM Barr QC

*Solicitors:*

Appellant: Bowden McCormack

Respondent:

Judgment category classification: B

Judgment ID number: [2009] NTMC 011

Number of paragraphs: 50

IN THE FIREARMS APPEAL TRIBUNAL  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No.20825292

BETWEEN:

**GALARRWUY JAMES YUNUPINGU**  
Appellant

AND:

**THE COMMISSIONER OF POLICE**  
Respondent

REASONS FOR JUDGMENT

(17 April 2009)

THE TRIBUNAL  
COMMANDER KATE VANDERLAAN  
MR GARETH GRAHAM  
MR RJ WALLACE, SM (CHAIRPERSON)

**INTRODUCTION**

1. This is an appeal against a decision of the Commissioner of Police brought pursuant to s 51(1) of the *Firearms Act*. The appellant, Mr Yunupingu, is a distinguished citizen who now lives mainly at Dhanaya, an outstation about 100 miles from Nhulunbuy in the East Arnhem region. Mr Yunupingu appeals against the decision dated 18 August 2008 and signed by Assistant Commissioner Mark McAdie, to refuse Mr Yunupingu's application for a shooter's licence. (Mr McAdie also refused Mr Yunupingu's application for a firearms employee licence, but the appeal against that decision was abandoned at hearing.)

## BACKGROUND

2. Mr Yunupingu had held a shooter's licence under the present *Firearms Act* (and we presume, under earlier *Firearms Acts*) for many years. In June 2006, an application under the *Domestic Violence Act* (now repealed) named him as defendant. The Court of Summary Jurisdiction in Nhulunbuy made interim orders restraining Mr Yunupingu and the orders were confirmed in July 2006. Mr Yunupingu appealed that decision, successfully. The orders were quashed in the Supreme Court. Meanwhile, as a consequence of the orders, pursuant to s 39 then s 40 of the *Firearms Act*, Mr Yunupingu's shooter's licence was first automatically suspended, then automatically revoked, by the making of the interim, then final restraining orders. Section 39 required Mr Yunupingu, once his shooter's licence was automatically suspended, to surrender the licence to police and to deliver up to the police the firearms held pursuant to that licence. Police contacted Mr Yunupingu with a view to having him comply with that requirement and it was at this point that it became apparent that there were irregularities in Mr Yunupingu's accounting for the firearms registered to him.
3. According to a Statutory Declaration by Senior Constable Phillip William Duffield, declared 20 July 2006 and admitted into evidence as Ex 9 before this Tribunal without demur, there were then 18 firearms registered to Mr Yunupingu. Six had come into the possession of police. Twelve had not. Mr Yunupingu later informed police that those 12 firearms were not in his possession and gave explanations as to what had happened to 11 of them. All of this was, to a greater or lesser degree, irregular.
4. Thus the cat was out of the bag and the Supreme Court's quashing of the restraining orders could not put it back in again. One recognises that it must have been particularly galling for Mr Yunupingu to be left with this *Firearms Act* problem as collateral damage from an action under the *Domestic Violence Act* which he won outright.

## **MR YUNUPINGU'S APPLICATION AND THE DECISION**

5. In or about late 2006, Mr Yunupingu applied for an Employee's Licence. That application was refused on 25 January 2007 by Superintendent Colin Smith. Mr Yunupingu did not appeal.
6. Instead, he later lodged a new application. A copy of Mr Yunupingu's application for a shooter's licence forms the first page of Ex 7 in the proceedings before us. There is no way to be sure whether its date is 26/7/07 or 26/9/07, but, whichever it was, the police took a long time to respond to it and Mr Yunupingu became understandably impatient. On 24 June 2008 he sent an email to the Commissioner, Mr White, (also copied in Ex 7). The email read:

Dear Mr White

I am writing to ask that you please investigate the current situation as to my gun licence.

I have repeatedly rang the NT Firearm Branch in Darwin requesting the status of my gun licence to be told that it is on the Commissioner's desk.

I understand that Commissioner has many duties to perform but this has been going on now for several months. I therefore would ask you to investigate this for me so that I can at least get a straight answer to:

1. Am I getting my gun licence back
2. When will I get my gun licence back
3. Why have I not get my gun licence now

I am a tradition owner in Arnhemland and require my rifles to hunt for traditional food and can see no reason for the NT Police to withhold my gun licence unless there is a reason that I am not aware of.

I look forward to receiving my licence or your early reply.

Many thanks.

Galarrwuy Yunupingu AM

Chairman

Gumatj Association Inc

7. A handwritten application on the printed email, perhaps in Mr White's writing and dated 24. (or, just possibly, 27) 6.2008 says:

“Pauline,

Please email A/C McAdie's letter to Mr Yunupingu”.

A/C McAdie's letter is evidently the one dated 20 June 2008, also copied and part of Ex 7:

Dear Mr Yunupingu

I refer to your applications for a Class A and B shooters licence and an employee licence, which I am minded to refuse on the following grounds.

I am not satisfied that you are a fit and proper person under s. 10(3)(b) of the *Firearms Act*; nor that you are able to meet the storage and safety requirements under 10(3)(d) of the Act. Additionally, under s. 10(4)(a) I have reasonable cause to believe that you may not personally exercise continuous and responsible control over firearms because of your way of living and/or domestic circumstances.

This opinion is based on your admissions about your lifestyle and circumstances in your statement dated 29 November 2006 which included details of your conduct and failure to properly account for the 12 missing firearms, the lack of assurance I have for your future conduct in regard to firearms safety and security and as permitted by s. 15 of the *Criminal Records (Spent Convictions) Act* and your spent convictions for offences of violence and a firearms offence.

I invite you to show cause within 28 days of the date of this letter, why I should not refuse your applications.

Yours sincerely

8. By coincidence, it would seem that letter must have been on Mr White's desk or screen at the time Mr Yunupingu's email came in. In his evidence, Mr Yunupingu was reluctant to believe in that coincidence – and who could blame him for being suspicious? – but we see no reason to doubt it.
9. Mr Yunupingu responded to A/C McAdie's letter via a letter from his solicitors, Messrs Bowden McCormack, dated 18 July 2008 and also part of Ex 7:

Dear Assistant Commissioner,

We act for Mr Galarrwuy James Yunupingu AO concerning his applications for Class A and B shooters licence and an employee licence.

We have your letter of 20 June 2008 advising that you are mindful to refuse the application.

Our client has instructed us that there are significant errors in your decision.

**1. Storage and safety**

Our client has had the Nhulunbuy police attend at his premises and certify that he is able to meet the storage and safety requirements under Section 10(3)(d) of the Act.

**2. Personal responsibility**

There is nothing in our client's history that indicates that he is not able to personally exercise continuous and responsible control of firearms. To the contrary our client has a long and noted history of responsible conduct in public life. He is the recipient of numerous national awards and honours and was the Chairman of Australia's largest land council, the Northern Land Council, for 21 years. The Chairman is the pre-eminent responsible person within the legislative scheme of the *Aboriginal Land Rights Act (Northern Territory)* and our client exercised personal responsibility with respect to this position for 21 years without blemish.

Moreover, our client is the senior responsible person within the Gumatj clan which totals about 900 persons. He exercises

continued personal responsibility over the clan and does so with recognized prestige and esteem. The Gumatj clan, for instance, is the land-holding group responsible for the annual Garma Festival. It is one of two clan groups that comprise the Yothu Yindi Foundation of which our client is the Chairman. It is the major land-owning group for the land upon which is situated the billion dollar Rio Tinto Alcan mine and refinery. Our client's day to day responsibilities and traditional obligations have been explained in detail in his application to you.

The currency of our client's responsible position within Australian society is not a matter of the past and its full weight should be taken into account.

During a period of political uncertainty last year our client was recognized by the Prime Minister of Australia and the then Leader of the Opposition for his leadership in relation to the Emergency Intervention in the Northern Territory. He negotiated personally with the Minister for Indigenous Affairs and the Secretary of the Department of Prime Minister and Cabinet effecting significant and valuable change to the provisions of the Emergency Intervention.

This week he hosts the new Prime Minister of Australia at Yirrkala. He meets regularly with the Chief Minister of the Northern Territory.

Mr Yunupingu is the recipient of the Order of Australia, the Centenary Medal and is recognized by the Nation Trust of Australia as a Living National Treasure.

It is, with respect, offensive in the extreme to decide that a man with our client's extraordinary record of public service and personal commitment to his clan and surrounding land-owning groups is unable to exercise personal responsibility over firearms, or is unfit to receive the licenses for which he has applied. It is also a decision that is contrary to the facts and the legislative framework.

### **3. Criminal Records (Spent Convictions) Act**

Our client is unsure what spent convictions you refer to. As a matter of procedural fairness, please advise the specifics upon which you rely. In any event, we cannot see how spent convictions are relevant to your decision making.

#### 4. Further matters

Our client undertook Security and Firearms training in 2007 resulting in the issue of a Certificate of Competency. This course was approved by the Commissioner of Police and appears to be a matter you have failed to take into account, along with the approval by the Nhulunbuy Police with respect to our client's compliance with the rules concerning the storage of firearms.

On behalf of Mr Yunupingu we ask that you reconsider the preliminary view you have taken and approve his application.

We advise that failing an approval as requested our client has instructed us to issue proceedings in the Supreme Court of the Northern Territory for a writ of mandamus, including an award of damages for the inconvenience and offence caused to our client and his reputation.

Please do not hesitate to contact the writer should you wish to discuss the matter.

Yours faithfully

We say nothing about Mr Bowden's apparently unilateral decision to promote Mr Yunupingu's rank in the order of Australia.

10. A month later, on 18 August 2008, Mr McAdie made the decision to refuse the applications and wrote a letter setting out his reasons to accompany the formal Notice of Refusal. That letter and the Notice of Refusal in respect of the application for a shooter's licence form Ex 2. The Notice reads (relevantly):

Dear Sir

Your application for a Shooters Licence has been refused on the bases that:-

I am not satisfied for the purposes of s.10(3)(b) of the *Firearms Act* that you are a fit and proper person to hold a shooters licence,

and

under s.10(4) of the *Firearms Act*, I have reasonable cause to believe that you may not personally exercise continuous and responsible control over firearms because of your way of living or domestic circumstances.

You have a right of appeal to the Firearms Appeal Tribunal under Part 9 of the *Firearms Act*.

In accordance with Section 43 of the Act, you are required to deliver any firearm/s in your possession to Police or to a person nominated by you and approved by Police, immediately on receipt of this notice. Disposal of the firearm/s may be by sale to a licensed dealer or a person who may lawfully own and possess the firearm/s or by deactivation or surrender to the Commissioner for disposal.

Yours faithfully

11. And the attached letter reads:

Dear Sir

I attach the Notices of Refusal of your applications for a shooter's licence and a firearms employee licence under sections 10(3)(b) and 10(4) of the *Firearms Act*.

I acknowledge receipt of the representations made on your behalf by your solicitor, Sean Bowden but note that they do not address the main factual issues set out in my letter of 20 June 2008.

In arriving at my decision under both subsections, I have taken into account that you do now have the facilities to satisfy the safe storage requirements of s.10(3)(d) of the Act; and that you have completed an approved firearms safety course. I have also taken into account, so far as it is relevant to this application, your position and personal standing in Australian society.

However, I must also take into account your record of failure to keep safe and account for 12 firearms, as admitted in your statement dated 29 November 2006 and sent to me under cover of Mr John Lawrence's representations on your behalf of 5 December 2006.

Additionally, you have not, since then, given me further information about these missing firearms nor have you provided me with meaningful reassurances that you will be able to exercise continuous and responsible control over firearms in future.

I am entitled under s 15(d) of the *Criminal Records (Spent Convictions) Act* to take account of spent convictions for violent offences. A number are recorded from 1976-1989, including a firearms offence. However on account of the age of these offences I have discounted them in making my decision. A full copy of your antecedents is available from the Business Information Reporting Branch of the NT Police upon completion of a signed authority.

You have a right of appeal against my decision to the Firearms Appeal Tribunal under section 51 of the *Firearms Act*. The appeal must be lodged with the Tribunal within 28 days of the date of the Notice of Refusal.

Yours faithfully

### **THE APPEAL**

12. Mr Yunupingu filed his appeal on 15 September 2008. The appeal, by virtue of s 52(1) of the *Firearms Act*, is in the nature of a rehearing. This Tribunal, when ruling on the appeal, stands in the place of the Commissioner of Police when he rules on an application. The relevant matters are, by virtue of s 52(2), the same.
13. Mr Yunupingu gave evidence before the Tribunal, as did a Mr Klaus Helms. A number of documents were tendered. That evidence and those documents comprise the only material considered by the Tribunal in coming to our decision. It is perhaps worth noting that the Tribunal has no knowledge of any previous convictions of Mr Yunupingu for violent offences or anything else, spent or otherwise. No party sought to put any such material before us. Accordingly, those matters (if there are any), had no effect on our decision.

### **THE FIREARMS ACT**

14. The *Firearms Act*, Act No 2 of 1997 was enacted by the NT Parliament in concert with legislation in the other States and Territories of the Commonwealth in a national response to community concerns about the misuse of firearms, the immediate catalyst for the national response being the Port Arthur massacre (28 April 1996).

15. One part of this national response was to ban ownership of particularly lethal firearms – repeating shotguns and heavy calibre rifles – by virtually everyone. Firearms thus rendered illegal were brought back by government from their owners.
16. A second part of the response was to reduce the number of persons licensed to possess firearms: by the imposition of more stringent tests of the knowledge and competence of applicants; by restricting the granting of licenses to those with real and legitimate reasons to need firearms; by increasing the cost (for, eg, gun safes) and bureaucratic impediments so that only the determined would persist with their applications.
17. A third part was to tighten up the official ie, police, oversight of the tracking of firearms from the time of their purchase from dealers, through changes of ownership, to eventual destruction.
18. Other strategies – in particular, an amnesty and buy-back scheme for unwanted or unaccountable firearms – were also implemented. It would appear that, to a large degree, these measures have achieved much of their aims. There are many fewer firearms about. Those that are, are less fearsomely lethal than they used to be. They are (mostly) in the hands of qualified licensed citizens. They are more safely kept when they are not being used. The authorities have a fairly complete idea who is in possession of what firearms at any given time.
19. Both legislative amendments and a more intense policing effort have contributed to these changes. As far as policing standards are concerned, both Mr Yunupingu and Mr Helms alluded in their evidence to older times when the laws in relation to firearms were often not strictly enforced out bush. We accept that that was the case, as it was (and is) with other laws – those relating to the roadworthiness of vehicles might be a current example. That toleration of bush practices, however, came to a sudden end after the Port Arthur massacre.

20. As far as changes in the laws were concerned, the *Firearms Act* could be viewed as the latest in a long series of statutes which have gradually reduced the freedom of citizens to do as they like in relation to the possession of firearms (there having been a time when there were no legal restrictions at all). However, it is probably more accurate to view the present position as one where the grant of a firearms licence (which carries with it the capacity to register and possess firearms) should be viewed as a privilege for which comparatively few will qualify, rather than a circumscribed right from which comparatively few will be disqualified.
21. Consistent with this view, it does not seem so strange that, in the case of Mr Yunupingu, his success on appeal against the restraining order did not revive his shooter's licence, which had been revoked pursuant to s 40, but rather forced him to make a fresh application for a new licence. The aim of the *Firearms Act*, to ensure that firearms are kept in the right hands, would welcome any chance to review any case. (Policies connected with combating domestic violence might be involved too, of course.) The situation may be contrasted with that in relation to drivers' licences under the *Traffic Act*. There, a successful appeal against a finding of guilt for a disqualifying offence, not only revives the licence, but the appeal process operates as a stay on the disqualification (*Traffic Act* s 43).

## **THE HEARING BEFORE THE TRIBUNAL**

22. Section 11 of the *Firearms Act* prescribes that:

### **11 Genuine reason for licence**

- (1) The Commissioner is not to grant a licence:
- (a) unless satisfied that the applicant has a genuine reason for possessing and using firearms;
  - (b) in respect of a category C firearm, category D firearm or category H firearm, unless satisfied that the applicant has a genuine need for possessing and using firearms of that category; and

- (c) unless satisfied that the applicant meets the requirements under this Act in respect of that reason or need.
- (2) The genuine reasons for possessing or using firearms are any of the following:
  - (a) sports shooting;
  - (b) recreational shooting or hunting;
  - (c) primary production;
  - (d) vertebrate pest animal control;
  - (e) business or employment;
  - (f) occupational requirements;
  - (g) animal welfare;
  - (h) firearms collection;
  - (j) museum display;
  - (k) inheritance;
  - (m) instruction in firearms use and safety;
  - (n) paintball operator or employee.
- (3) The Regulations may provide that the genuine reasons for possessing or using a specified category of firearm are limited to only one or some of the reasons specified in subsection (2).

23. In his evidence before us, Mr Yunupingu explained his reasons. He lives at Dhanaya Outstation, a place of some 6 houses inhabited by perhaps 20 families. The Outstation's population can rise to 300 or so people at times when ceremonies are being performed there. Mr Yunupingu explained that both residents and visitors like to eat fresh meat and that he, as the senior elder, likes to provide it and is expected to provide it.
24. This motive, in our view, clearly comes into the category of "recreational shooting or hunting". It was not all that clear on the evidence how often Mr Yunupingu personally does the hunting to obtain this meat, but we accept that he would choose to do so at least sometimes.

25. Mr Yunupingu is also involved in primary production. There is what he referred to as a cattle station at Port Bradshaw, apparently near Dhanaya. Again, the evidence was not all that clear as to how much hands-on involvement Mr Yunupingu has in the day-to-day operations of that cattle station, but again, we accept that he does spend at least some time on the ground involved in the station's business and anyone in that line of work may have a legitimate use for firearms now and again, for example, to put injured stock out of their misery, a purpose which presumably would qualify as "animal welfare" as well as "primary production".
26. Thirdly, Mr Yunupingu gave evidence of his desire to have firearms to protect himself and others against the threats posed by animals, in particular, crocodiles – the children at Dhanaya are given to playing in crocodile infested waters at the Outstation – but also awkward bulls on the cattle station and buffalo generally. Buffalo are well known to be rife and dangerous in the East Arnhem region; crocodiles are proverbially dangerous (read any newspaper) and Mr Yunupingu appeared to be speaking of a reality when talking of dangerous Brahmin bulls.
27. As an Aboriginal man living on his traditional land, Mr Yunupingu is permitted, as other citizens are not, to hunt native animals (including crocodiles) otherwise protected under the *Territory Parks and Wildlife Conservation Act* – see s 122 of that Act. Mr Yunupingu's expressed concern about his local crocodiles was somewhat eroded by his admission that he is in the habit of feeding one of them, his "pet" crocodile, as distinct from the "wild" ones (not that he trusts his "pet"). It is notable that the "genuine reasons" listed, apparently exhaustively in s 11(2) of the *Firearms Act*, protection from dangerous animals does not appear. Shooting a menacing buffalo may or may not be properly characterised as "vertebrate pest animal control". Shooting a menacing bull might or might not be properly characterised as "primary production". Simply as "protection", none of these purposes would, in our view, qualify as a "genuine reason"

within the meaning of s 11(2). Nor would the slightly alarming separate threat Mr Yunupingu apprehended in his evidence, that posed by “boat people”. As to that, it would seem that Mr Yunupingu’s imagination has run away with him.

28. Overall, even leaving aside all of these threats (however characterised), we are of the view that Mr Yunupingu has “genuine reasons” for possessing and using firearms to wit “hunting” and “primary production”. Indeed it is difficult to imagine any person living and working on the land who would lack such reasons, if he or she wanted to apply for a shooter’s licence.

### **FIT AND PROPER PERSON**

29. Section 10(3) and (4) of the *Firearms Act* read:

(3) Subject to subsections (6) and (6A), the Commissioner must not grant a licence unless satisfied the applicant or, for an application for a paintball operator licence, the representative:

- (a) is at least 18 years of age unless the licence applied for is a firearms club junior licence; or
- (b) is a fit and proper person; or
- (c) has completed an approved firearms training and safety course; or
- (d) is able to meet the storage and safety requirements under this Act; or
- (e) resides in the Territory or is about to become a resident of the Territory; or
- (f) has not, within the period of 10 years before the application for the licence was made, been found guilty in the Territory or elsewhere of a disqualifying offence; or
- (fa) has not, within the period of 5 years before the application for the licence was made, been found guilty in the Territory or elsewhere of an offence of violence; or

- (g) is not subject to a final domestic violence order or has not, within the period of 5 years before the application for the licence was made, been subject to a final domestic violence order; or
- (h) is not subject to an order, made in the Territory or elsewhere, to keep the peace.

(4) Without limiting subsection (3)(b), the Commissioner is not to grant a licence if the Commissioner has reasonable cause to believe that the applicant or representative may not personally exercise continuous and responsible control over firearms because of –

- (a) the applicant's or representative's way of living or domestic circumstances;
- (b) any attempts by the applicant or representative to commit suicide or cause a self-inflicted injury; or
- (c) the applicant's or representative's intemperate habits or being of unsound mind.

- 30. The particular provisions which call for consideration in Mr Yunupingu's application are (3)(b) and (4)(a).
- 31. It will be recalled that A/C McAdie, in his letter dated 18 August 2008 attached to the Notice of Refusal, noted, correctly, that the representations made by "your solicitor, Sean Bowden ... do not address the main factual issues set out in my letter of 20 June 2008". These "factual issues" are the issues relating to the firearms Mr Yunupingu was unable to hand into police in 2006 for one reason or another.
- 32. Mr Yunupingu had addressed those issues once, in a Declaration. In his evidence before the Tribunal he has addressed them again.
- 33. The Declaration, a copy of which became Ex 3 in the proceedings, is of uncertain date. The final page of the Declaration has it being signed on the blank day of November 2007. It is, however, clear that it was in existence before 2007 – Ex 3 bears dates from a facsimile transmission on 25/11/06 –

and the Declaration is referred to in Ex 1, a Notice of Refusal dated 20 January 2007, written by Superintendent Colin Smith. November 2006 seems a likely date for the Declaration to have come into existence.

34. The body of the Declaration reads:

“I Galarrwuy James Yunupingu, born 30<sup>th</sup> June 1948, of Dhanaya Outstation (approximately 80km out of the townsite of Nhulunbuy), Chairman of the Gumatj Association Incorporated, President of Marngarr Community Government Council and Senior Elder of the Gumatj Clan, do hereby state that the following information is true and correct.

On the 16<sup>th</sup> June 2006 an interim restraining order was made against me which I contested in the Nhulunbuy Court of Summary Jurisdiction.

The matter was tried and on the 25<sup>th</sup> July that order was confirmed and set for 6 months. That order was duly appealed which appeal was upheld on the 12<sup>th</sup> October 2006 by Chief Justice Martin. It no longer exists.

After the order of 25<sup>th</sup> July I was issued with a notice to hand in firearms listed on a Registered Firearms List.

Some of these firearms were found and handed in. The others I have investigated to the best of my abilities so far in order to ascertain their whereabouts so that they can be surrendered to the NT Police.

This has been a difficult job for me as many of the firearms go back a long way. Also my responsibilities through my position at work and as a tribal leader involve much travelling. On many occasions I have spoken to family members and others to try and trace all of these firearms.

On one occasion on the 2<sup>nd</sup> August at Garma I was visited and questioned by a Nhulunbuy Police Officer. He and I went through this list and I answered all his questions to the best of my ability.

I am not hiding or keeping anything from the NT Police as regards these matters. I have and will continue to try and recover more information as regards to each of them.

Many of the listed firearms I have, over the years, given away to family. Much of that is because of my position as a tribal leader.

I will continue to investigate these matters and report what I discover to the NT Police. The only reason this statement has taken so long is due to my taxing responsibilities, eg: running the Garma Festival, ceremony roles (many) and geography, plus my lawyer Mr John Lawrence has been too busy to actually sit down with me and go through the notice referred to.

As earlier stated I am and will continue to investigate the whereabouts of the firearms on that notice. To date this is what I can inform the authorities as regards each of the listed firearms”.

35. There then follows a table detailing the fate of 11 firearms, corresponding to 11 out of the 12 outstanding firearms listed in the Statutory Declaration of Senior Constable Duffield, mentioned in paragraph 3 of these Reasons. The twelfth firearm, not mentioned in Mr Yunupingu’s Declaration, is a BIRNO bolt action rifle, serial number 60852.
36. We have simplified the table somewhat, by removing details of model types, serial numbers, capacities and class of firearm and we have added the “Status Date” for each firearm. The Status Date is taken from a “screen dump” from police records. The screen dump formed Ex 8. The Status Date ought to be the date the firearm was registered, but, as can be seen, five firearms have the Status Date 12/3/1997. The *Firearms Act* first came into force on 13 March 1997. The closeness of these two dates seems to us to make it at least possible that these five firearms had been in Mr Yunupingu’s possession for some time before that. So altered, the table shows:

No	Make	Type	Calibre	Summation	Status Date
2	BAIKAL	Shotgun, single barrel	12 gauge	This gun is destroyed. It fell apart many years ago while shooting at GanGan Billabong. I will look for its	05/07/00

				remains the next time I get out there.	
3	BERETTA	Shotgun, under & over	12 gauge	This was a shotgun I gave years ago to a former employee, Mick, who is a helicopter pilot. I believe he took it to Queensland	18/08/98
4	BIRMINGHAM SMALL ARMS	Rifle, bolt action	243 Winchester	This rifle I gave to a family member, Dary Kantawarra, from Hermansberg, again years ago	12/03/97
5	BRNO	Shotgun, under & over	12 gauge	My best memory of this shotgun is I gave it to Mr John Ahkit. Again many years ago	01/10/01
8	FAUSTI	Shotgun, under & over	12 gauge	This weapon was sent to a gunsmith in Darwin for repairs. This was years ago. I never got it back. It may have been beyond repair	14/11/97
9	FRANCHI	Shotgun, under & over	12 gauge	This firearm was lost when it accidentally slipped over the	05/06/02

				side of a boat when family members were out fishing in a local creek	
11	MOSSBERG, OF & SONS	Shotgun, bolt action	12 gauge	This firearm didn't work properly so a family member just disposed of it in the ocean at Dhanaya outstation	03/02/98
14	RUGER (STURM, RUGER & CC)	Rifle, bolt action	308 winchester	This firearm was given, years ago, to Mr Wally Wunumarra. Sadly his son used it to shoot himself. I believe Mr Wunumurra then destroyed and disposed of that rifle	12/03/97
15	RUGER (STURM, RUGER & CC)	Rifle, bolt action	243 winchester	This weapon was destroyed in a fire at a Gunumurra house	12/03/97
17	SAKO	Rifle, bolt action	243 winchester	I am still enquiring regarding this rifle of family members here in the top end and in the centre. If I get more information of its whereabouts	12/03/97

				I shall pass it on to the authorities	
18	WINCHESTER	Rifle, lever action	44 magnum	Again with this rifle I am continuing to make enquiries of family members and if I get more information I shall pass it on to the authorities	12/03/07

37. Superintendent Smith, in his Notice of Refusal (Ex 1) commented on Mr Yunupingu's explanations in his Declaration and table:

The conduct outlined in your declaration indicates that you have not exercised continuous and responsible control over firearms. You have destroyed firearms, lost firearms and given away or otherwise disposed of firearms without notifying the Commissioner as per the provisions of the *Firearms Act*.

This conduct also identifies a number of offences you may have committed including, but not limited to:

- 1] Failing to meet storage requirements contrary to Section 46 of the *Firearms Act*.
- 2] Breach of licence conditions contrary to Section 85 of the *Firearms Act*.
- 3] Deliver firearms to unlicensed persons contrary to Section 88 of the *Firearms Act*.
- 4] Fail to notify the Commissioner in writing of the loss of a firearm within two working days of the loss contrary to Section 90(2) of the *Firearms Act*.

Due to the statute of limitations that applies to offences under the *Firearms Act* you cannot be prosecuted for the offences that have been identified.

38. It is impossible to disagree with any of that. Mr Yunupingu, in his evidence, conceded that there were many irregularities with his firearms handling. He said that he now better understood the importance of complying with his obligations as the holder of a shooter's licence. The general burden of his evidence was that he had learned a hard lesson by being deprived of a licence for more than two years. He would not want to imperil his licence again. The Tribunal could rely on his appreciation of his own interest in scrupulously abiding by the law in future.
39. Mr Yunupingu did not seem to be pretending to be particularly contrite over these irregularities. His explanation, generally, was that practices in relation to firearms used to be free and easy out bush. As an important man, he was expected to provide gifts to others and sometimes, for no particular reason, he had given firearms rather than something else. He had lent firearms to others, as a man in his position would be expected to, in this free and easy spirit. He recognised that there would have to be a thoroughgoing change in his practice. He said he would be able to refuse requests for loans or gifts of firearms.
40. As positive evidence of his inclination to comply with the letter of the law, he referred to the fact that gun safes complying with the standards required by the *Firearms Act* and Regulations had been installed both at Dhanaya, where he mostly lives and at Ski Beach, near Nhulunbuy, where he spends part of his time. Further, in December 2007 he took the trouble of attending an approved firearms handling and safety course and received a certificate of competency, Ex 4 in these proceedings.
41. Mr Klaus Helms, the only other witness in the matter, is a man who has lived in Nhulunbuy almost constantly since the late 1960s. He was a founding member of the Arnhem Gun Club and has been a shooter since his

teenage years. He has worked for Nabalco (later Alcan), for Perkins Shipping and now works as a Government Business Manager. His jobs have led him to have a lot of contact with Aboriginal people in the East Arnhem region and has been well acquainted with those peoples' practices with firearms. He has been involved in inspecting their firearms for safety and in destroying unsafe firearms, mostly by sawing them in half and throwing the pieces into the sea. He recalls doing that with a firearm – an unregistered one – as late as about 2001.

42. Mr Helms has known Mr Yunupingu for many years. He has had business dealings with him in the course of his employment and some social dealings, including some recreational and feral animal shooting. Mr Helms appeared to be an independent witness admirably qualified to give the evidence that he gave, which was to the effect that Mr Yunupingu has always handled firearms safely himself and that he now appears to understand the laws and the need to obey them. Mr Helms was aware of the gun safes at Dhanaya and Ski Beach and said that Mr Yunupingu had had them installed when the new laws came in. He said that he thought Mr Yunupingu had learned a lesson through being deprived of a shooter's licence, that it was a deprivation that made him a lesser person in his own eyes because he could not hunt, or clear feral animals off his land.
43. Mr Helms acknowledged that there is a lot of pressure on any traditional owner and that there had been and would be on Mr Yunupingu, applied by people who want to go hunting. Mr Helms' evidence was that he thought Mr Yunupingu realised he would have to stand up to that pressure.
44. That then was the case for Mr Yunupingu on appeal. The case against rests on the tiresome truth that the best predictor of a person's future behaviour is that person's past behaviour. In Mr Yunupingu's case, that past behaviour involved some years – decades perhaps – of paying no more attention to the firearms laws than anyone else out bush, followed by some years of paying

attention to some of the new laws – handing in his pump action shotguns, installing gun safes – and no attention to others.

45. There is also the matter of the 12 outstanding firearms. Mr Yunupingu's actions in relation to them offer another source of material from which the likelihood of his complying with conditions on a shooter's licence may be inferred.
46. His evidence was to the effect that he had done very little to pursue the whereabouts of any of those firearms. Taking them in the order they appear in the table above:
  - No 2 – the Baiikal shotgun that fell apart at GanGan Billabong. Mr Yunupingu's evidence was that it would be very hard to find the remains of that firearm in the mud there. It seems that he has not taken the trouble to look. Perhaps he has not been out there since writing (in late 2006) that he would look for the remains next time.
  - No 3 – the Beretta shotgun given to Mick the helicopter pilot. In respect of this firearm, Mr Yunupingu's evidence was that the summation in the table was mistaken, that Mick, far from being given this firearm, had stolen it. It is not hard to believe that a written statement might get such a detail wrong, nor that Mr Yunupingu might have carelessly signed a statement containing such a mistake. The Tribunal finds it worrying that it should have taken so long for this mistake to be corrected. A stolen firearm, even more so than one casually given away, is likely to remain outside all official knowledge and could be in anyone's hands.
  - No 4 – The BSA rifle given to Dary [?] Kantawarra of Hermannsburg. Mr Yunupingu gave no evidence of taking any steps to either retrieve that firearm, or get information about it from Mr Kantawarra or anyone else so that its possession could be regularised or its destruction confirmed.
  - No 5 – The BRNO shotgun, given to Mr John Ahkit “ ... many years ago”. We accept that Mr Yunupingu's memory is sincere and honest in respect of this. However, in the light of the Ex 8 screen dump establishing that this firearm was first registered on 1/10/2001, that is, during the currency of the *Firearms Act*,

not many years before, we conclude that Mr Yunupingu's honest and sincere memory is wrong. Two conclusions flow from this. First, in relation to this particular firearm, Mr Yunupingu has no idea and neither does the Tribunal, where it is now. It is utterly unaccounted for. Secondly, in general, Mr Yunupingu's memory is not to be trusted.

In his evidence, Mr Yunupingu did not give the impression of being very interested in; fascinated by or passionate about any particular firearm. On the contrary, he spoke of individual firearms and his firearms in general, with the indifference one would expect from a man who had registered 18 of them in 10 years or so, lost some and given others away. If he had had no particular attachment to any of his firearms, it is all the more understandable that he would not remember their individual fates. Thus, concerning the firearm that he thinks he gave to Mr Ah Kit, we are persuaded that it is very likely that he gave him one, once long ago (but how long?). As to the details, nothing would be certain. Probably Mr Yunupingu's memory could be trusted so far as the firearms being a shotgun, not a rifle. Possibly, but not probably, he might be correct in remembering it to have been a BRNO. Certainly he cannot be relied upon to remember which BRNO it was.

And the case is really the same with each of the other firearms in the table. In the absence of some corroborative evidence, or some clinching individual detail, all one can say is that this or that event happened, probably to a rifle or shotgun as the case may be. Which one it was, who can say? But, we continue with the table:

- No 8 – the Fausti sent to a gunsmith in Darwin for repairs. Mr Yunupingu's evidence was that he had tried to follow this up with managers in the office, one of whom had, he thought, sent the gun in. Somehow he had got the impression that the gun had never come back.

Objectively, it seems very unlikely that a gunsmith would not properly account (to the police) for a firearm beyond repair. That being so, this firearm is utterly unaccounted for. It could be anywhere.

- No 9 – the Franchi 12 gauge lost over the side of a boat. Again, we accept that this is the most Mr Yunupingu knows and with the reservation that there is a large doubt which gun it

was, this account, if true, (and its truth depends upon Mr Yunupingu's informants' honesty), causes no great concern.

- No 11 – the Mossberg shotgun disposed of in the ocean by a family member. In all respects, the case is the same with this firearm as with No 9.
- No 14 – the Ruger .308 given to Mr Wally Wunumarra. Mr Yunupingu's evidence was that the table was mistaken, in that he now understood that it was not this gun which Mr Wunumarra's son used to kill himself. It is easy to imagine how such a mistake could come about. However, it seems to flow from that change, that the firearm given by Mr Yunupingu to Mr Wunumarra would not necessarily have been seized by investigating police and is less likely to have been destroyed by Mr Wunumarra. We can only conclude that that firearm, whether it was the Ruger or not, is utterly unaccounted for.
- No 15 – the Ruger .243, destroyed in a fire at Gunumarra Outstation. Accepting that this is all that Mr Yunupingu knows, the case is in much the same category as Nos 9 and 11.
- No 17 the Sako .243 and No 18 the Winchester .44 – In the table, Mr Yunupingu wrote of pursuing enquiries to find out what had happened to these two firearms. He did not give any evidence of any vigorous pursuit of those enquiries and no new information has emerged. These two firearms could be anywhere, as could the twelfth, the BRNO rifle, not alluded to in the table.

47. Mr Yunupingu's irregularities in keeping and controlling of the missing dozen firearms would, in our view, be properly characterised as slack, lazy breaches of the firearms laws, not wickedness or anything else involving any serious criminal intent. But it is suggestive that his slackness has carried over through the period since the irregularities were discovered and that he has done virtually nothing to try to track down any of the missing firearms. It is particularly suggestive that his promises of further action in respect of firearms nos 2, 17 and 18 have either not been kept at all, or in the most nominal, lethargic fashion. Mr Yunupingu having done, in effect, nothing since he made his declaration in about November 2006 is in our view, a

powerful reason to doubt whether he would be strongly moved to keep to the conditions of his shooter's licence, should it be granted.

48. Mr Yunupingu really gave no adequate reason for his lack of action in pursuing these firearms. He is evidently a busy man, with multifarious responsibilities, even in his semi-retirement. For all that, the wider community which appears content with the strict firearms laws in the *Firearms Act* would, we think, expect more effort to chase down these last firearms from the man whose slackness caused them to slip out of the system. And the police, we think, would have expected Mr Yunupingu to try harder in respect of the particular promises he made in his declaration.
49. It should not be overlooked that Mr Yunupingu's irregularities went on, at intervals, for years and that during those years, he was having contact with the police and with the *Firearms Act's* procedures, every time he acquired and registered a new firearm, which is to say, fairly often. The totality of the irregularities makes his conduct thoroughgoing disregard for the requirements. The totality of his conduct since the irregularities were discovered gives us reason strongly to doubt that he can lastingly change his lax attitude to the laws.
50. In the terminology of s 10 of the *Firearms Act*, this Tribunal has reasonable cause to believe that Mr Yunupingu may not personally exercise continuous and responsible control over firearms because of his way of living or domestic circumstances. The Tribunal believes that there is a large chance that he would not exercise that control. In the light of that belief, we decided that Mr Yunupingu was not a fit and proper person to be granted a licence and for that reason, we indicated on 3 April 2009 at the conclusion of the hearing, that Mr Yunupingu's appeal would be dismissed.

Dated this 17th day of April 2009.

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**COMMANDER KATE VANDERLAAN**

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**MR GARETH GRAHAM**

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**MR RJ WALLACE SM**