



Civil and Administrative Tribunal
New South Wales

Case Name: Commissioner of Police v EMB

Medium Neutral Citation: [2021] NSWCATAP 63

Hearing Date(s): 12 February 2021

Date of Orders: 16 March 2021

Decision Date: 16 March 2021

Jurisdiction: Appeal Panel

Before: L Pearson, Principal Member
S Goodman SC, Senior Member

Decision: (1) Leave to appeal is granted;
(2) The appeal is allowed;
(3) The decision under appeal is set aside;
(4) The matter is remitted to the Tribunal as originally constituted for reconsideration in accordance with these reasons, without further evidence.

Catchwords: APPEAL – administrative review – firearms licence – child sexual assault charges withdrawn – finding that conduct occurred – whether applicant fit and proper person– public interest

Legislation Cited: Administrative Decisions Review Act 1997
Child Protection (Offenders Registration) Act 2000
Civil and Administrative Tribunal Act 2013
Evidence Act 1995
Firearms Act 1996
Firearms Regulation 2017

Cases Cited: Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321
Bronze Wing International Pty Ltd v Safe Work New South Wales [2017] NSWCA 42
Collins v Urban [2014] NSWCATAP 17

Commissioner of Police, NSW Police Force v EMB
[2020] NSWCATAP 262
Commissioner of Police, New South Wales Police v
Mercer [2005] NSWADTAP 55
EMB v Commissioner of Police, NSW Police Force
[2020] NSWCATAD 255
Hijazi v Commissioner of Police, NSW Police Force
[2015] NSWCATAP 82
Khan v Minister for Immigration and Ethnic Affairs
[1987] FCA 457; (1987) 14 ALD 291
McDonald v Director-General of Social Security (1984)
1 FCR 354
Minister for Immigration and Citizenship v Li (2013) 249
CLR 332
Minister for Immigration and Multicultural Affairs v Yusuf
(2001) 206 CLR 323
NAJT v Minister for Immigration and Multicultural and
Indigenous Affairs [2005] FCAFC 134 (2005) 147 FCR
51
Re Russell and Secretary, Department of Families,
Housing, Community Services and Indigenous Affairs
[2011] AATA 52
Ward v Commissioner of Police, New South Wales
Police Service [2000] NSWADT 28
Zhang v Canterbury City Council [2001] NSWCA 167;
(2001) 51 NSWLR 589

Texts Cited: Nil

Category: Principal judgment

Parties: Commissioner of Police (Appellant)
EMB (Respondent)

Representation: Counsel:
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C Nowlan (Respondent)

Solicitors:
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File Number(s): 2020/00371166 (AP 20/48252)

Publication Restriction: Pursuant to s 64(1)(a) of the Civil and Administrative Tribunal Act 2013 publication or disclosure of the name of the respondent to the appeal, or any of the other individuals named or identifiable in the evidence before the Tribunal (other than police officers), is prohibited.

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal
Jurisdiction: Administrative and Equal Opportunity Division
Citation: [2020] NSWCATAD 255
Date of Decision: 20 October 2020
Before: N Isenberg, Senior Member
File Number(s): 2020/00152964

REASONS FOR DECISION

- 1 The Commissioner of Police, NSW Police Force, appeals from a decision made by the Tribunal on administrative review under the *Administrative Decisions Review Act 1997* (the ADR Act) of a decision to refuse to grant a Category AB licence to EMB under the *Firearms Act 1996* (the Firearms Act).
- 2 EMB had been licensed to possess and use firearms from 1993. On 30 May 2017 his Category ABC licence was suspended and, while suspended, expired. On 19 June 2019 he applied for a Category AB licence. That application was refused on the basis that it was not in the public interest for him to hold a firearms licence. He applied for internal review, and on 22 May 2020 applied to the Tribunal for review of a deemed refusal of the licence.
- 3 On 20 October 2020 the Tribunal set aside the decision and substituted a new decision to grant a category AB licence to EMB for the genuine purpose of “sport/target shooting”: *EMB v Commissioner of Police, NSW Police Force* [2020] NSWCATAD 255.
- 4 The Commissioner lodged an internal appeal from that decision on 16 November 2020, and applied for a stay of the decision on the same date. The

stay was refused on 10 December 2020: *Commissioner of Police, NSW Police Force v EMB* [2020] NSWCATAP 262.

- 5 In these reasons the appellant, who was respondent in the proceedings below, is referred to as the Commissioner; and the respondent, who was applicant in the proceedings below, is referred to as EMB.

The Appeal

- 6 The internal appeal is brought as of right on any question of law, and with leave on any other grounds: *Civil and Administrative Tribunal Act* 2013 (NCAT Act), s 80(2)(b).

- 7 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

- (1) issues of principle;
- (2) questions of public importance or matters of administration or policy which might have general application; or
- (3) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
- (4) a factual error that was unreasonably arrived at and clearly mistaken; or
- (5) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

- 8 The Notice of Appeal identifies three grounds of appeal based on questions of law:

- (1) The Tribunal erred in its consideration of s 11(3)(a) of the Firearms Act by:
 - (a) Not taking into account a mandatory relevant consideration, being the principles relating to the assessment of the applicant's fitness and propriety in failing to give those principles real and genuine consideration;
 - (b) Misapplying and/or misconstruing the principles relating to the assessment of the applicant's fitness and propriety;
 - (c) Misconstruing the requirement in s 11(3)(a) of the Firearms Act that the Tribunal be satisfied that the applicant is a fit and proper person;

- (2) The Tribunal erred in its consideration of the issue of the public interest under s 11(7) of the Firearms Act, by giving insufficient weight to the nature and substance of the conduct relating to the charges concerning child sexual assault laid against the applicant in 2017; and
 - (3) The Tribunal's conclusion to grant the application was manifestly unreasonable.
- 9 The Commissioner applied for leave for the appeal to be extended to the merits of the decision, on the ground that the Tribunal's decision that the grant of the application for a firearms licence would not be contrary to the public interest was unreasonably arrived at.
- 10 In the Reply to Appeal EMB contended that there was no error of law in the Tribunal's identification of the relevant principles in considering whether EMB was a fit and proper person, or in the conclusion that there was no reason on public interest grounds for EMB not to hold a licence. The respondent contended that the decision could not be viewed as manifestly unreasonable.

Material before the Appeal Panel

- 11 The parties provided detailed written submissions on the appeal. The Commissioner provided a bundle of documents which includes:
- (1) EMB's application to the Tribunal for administrative review of the decision to refuse the issue of a licence;
 - (2) Documents before the Tribunal, being:
 - (a) The Commissioner's documents provided pursuant to s 58 of the ADR Act;
 - (b) Affidavit of EMB sworn 10 August 2020;
 - (c) Character testimonials provided by EMB;
 - (d) Statement of Detective Senior Constable David Turner dated 10 September 2020;
 - (e) Submissions provided by the parties to the Tribunal; and
 - (3) Transcript of the Tribunal hearing on 8 October 2020.

The decision under Appeal

- 12 After summarising the factual background, the Tribunal referred to the general principles in s 3 of the Firearms Act, and identified the relevant criteria:

11 General restrictions on issue of licences

..

- (3) A licence must not be issued unless:
- (a) the Commissioner is satisfied that the Applicant is a fit and proper person and can be trusted to have possession of firearms without danger to public safety or to the peace, and

...

- (7) Despite any other provision of this section, the Commissioner may refuse to issue a licence if the Commissioner considers that issue of the licence would be contrary to the public interest.

13 The Tribunal identified the issues for determination:

6. In addition to its original contention that it is not in the public interest for the Applicant to hold a firearms licence, the Respondent also contended that the Applicant is not a fit and proper person to hold a firearms licence. It relied on the Applicant having been charged with a number of serious offences concerning child sexual assault (although the charges were ultimately withdrawn); that the Applicant had been found guilty of common assault in the ACT (which occurred in 2007); that the Applicant has a substantial history of traffic offences (both in NSW and the ACT); and the Applicant had failed to properly identify his genuine reasons for using or possessing firearms. Each is discussed in turn.

14 The Tribunal summarised the child sexual assault offences in the following terms:

7. In 2017 the Applicant was charged with a number of offences pursuant to the Crimes Act 1990 including:

- (1) three offences pursuant to s 61O(2) of the Crimes Act 1900, in that he committed an aggravated act of indecency with a victim under 10 years of age;
- (2) two offences pursuant to s 61O(2) of the Crimes Act 1900, in that he incited a victim under 10 years of age to commit an indecent act;
- (3) an offence pursuant to s 61M(2) in that he committed an aggravated indecent assault against a person; and
- (4) an offence pursuant to s 66A(1) in that he had sexual intercourse with a person under the age of 10 years.

8. The offences date from approximately 2004, when the alleged victim was aged 5 or 6. She is a close relative of the Applicant. The Applicant denied the charges and continues to do so.

15 The Tribunal noted that there were further complaints made by another alleged victim of aggravated sexual assault and aggravated indecent assault by the applicant in 2011/2012 when she was eight years old.

- 16 At [9]-[15] the Tribunal summarised the evidence contained in the brief of evidence annexed to DSC Turner's statement, including the witness statements.
- 17 The prosecutions on the charges of child sexual assault were withdrawn. At [15]-[18] the Tribunal considered how the Tribunal was to deal with the charges that had been withdrawn, but on which the Commissioner relied. The Tribunal stated the applicable approach in the following terms:

16. It is clear from *Joseph v Commissioner of Police, New South Wales Police Force* [2017] NSWCAT 31 at [62]-[64] that, irrespective of whether charges were proved beyond reasonable doubt, the Tribunal is to take into account matters indicating criminal conduct even though the particular offences charged have not been proven or have been dismissed. It is the conduct rather than the conviction that is of concern to the Tribunal: *Esterman v Commissioner of Police, New South Wales Police Force* [2014] NSWCATOD 70 at [30].

17. The Applicant referred to *Manning v Commissioner of Police* [2020] NSWCATAD 111 where SM Emeritus Professor Walker discussed, at [33], that the relevant standard of proof applying in these proceedings is the civil standard, that is, the balance (preponderance) of probabilities, and observing that these are not adversarial proceedings.

- 18 The Tribunal then considered, and rejected, EMB's submission that the presumption of innocence applied:

19. It was submitted on the Applicant's behalf that while the rules of evidence do not apply in the Tribunal the "presumption of innocence" does. Such a submission is misplaced; there is no burden or onus of proof in the Tribunal: *Nakad v Commissioner of Police, New South Wales Police Force* [2014] NSWCATAP 10 at [28]-[34]. Under s 28(2) of the *Civil and Administrative Tribunal Act 2013* the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. I have observed that there was no evidence from the Applicant, other than his affidavit which focused on his history as a shooter.

- 19 The Tribunal considered at [21]-[30] the evidence as to the reasons why the charges were withdrawn, by reference to the decision of the Appeal Panel in *Commissioner of Police, New South Wales Police v Mercer* [2005] NSWADTAP 55:

21. In *Commissioner of Police, New South Wales Police v Mercer* [2005] NSWADTAP 55 at [20], the Appeal Panel also observed:

It is quite possible that material considered in a criminal proceeding will be relevant to the exercise of a licensing discretion even though the particular offences charged have not been proven. The Tribunal is entitled, and duty bound, to take into account any relevant material going to the question of what is the correct and preferable decision in connection with the particular administrative decision. The mere fact that a court has dismissed charges is of no great moment. It is the **reasons** why the charges were dismissed that matter. If an offence has failed on a technical point, ... the statements of prosecution witnesses may retain high probative value for the purposes of the exercise of the licensing discretion. (Tribunal emphasis)

20 The Tribunal concluded:

29. The Applicant, in his statement did not address the conduct which gave rise to the criminal charges at all, and for the purposes of criminal consideration, neither is he obliged to comment. However, as observed, my task is to consider his conduct on the balance of probabilities. The only evidence I have before me in relation to the alleged child sexual assault allegations is that provided in the Police brief of evidence, notably the detailed complaint of the first alleged victim. It is not necessary for me to determine if the Applicant was, even on the balance of probabilities "guilty" of the charges against him; I am to consider the conduct that gave rise to those charges. I do not need to find the charges proven on the civil standard, only that the conduct complained of was proved to the civil standard. Again, I observe that the only evidence I had before me was the Police brief of evidence; there was no contradictory evidence by the Applicant. I find that, on the balance of probabilities, that the conduct complained of was true.

30. I was less satisfied in relation to the 2nd alleged assault because there were fewer details about why that matter did not proceed. However, once again, that the only evidence I had before me was the Police brief of evidence; there was no contradictory evidence by the Applicant. On balance, again, I find the conduct complained of was true.

21 The Tribunal then considered the evidence as to the finding of guilt on a charge of common assault in 2007(at [31]), EMB's history of traffic infringements (at [32]-[34]), and his failure to identify in his application that he sought the licence for the reason that he was a primary producer (at [35]-[37]).

22 The Tribunal then turned to the fit and proper person criterion in s 11(3)(a) of the Firearms Act, stating the applicable test to be that in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321:

39. In *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, Mason CJ explained, at 380, that:

The question whether a person is fit and proper is one of value judgment. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring the person whose fitness and propriety are under consideration.

40. Toohey and Gaudron JJ said at 380:

The expression "fit and proper person", standing alone, carries no precise meaning. **It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities.** The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question. (Tribunal's emphasis)

23 The Tribunal noted that the child sexual assault charges did not involve a firearm; the common assault offence did not involve a firearm; and there were a number of character references from persons who spoke highly of the applicant, while observing that the references did not demonstrate an awareness of the sexual assault charges. The Tribunal continued:

49. A person's fitness is to be considered in the light of the activities that the person will undertake: see *In Hughes and Vale Pty Ltd v New South Wales (No.2)* (1955) 93 CLR 127 at 156-7, *Re Percival and Australian Securities Commission* (1993) 30 ALD 280, at 290, *Re Brennan & Australian Casino Surveillance Authority* (1995) 38 ALD 794, at [41].

50. The Respondent did not consider the Applicant failed the fit and proper person test at the time his recent application for a firearms licence. The explanation for it now being raised was that the Applicant had raised it in his submissions. I do not think this to be a satisfactory explanation, but ultimately nothing turns on this change of position.

51. I have found that the Applicant engaged in conduct which can only be described as abhorrent. However, it did not involve firearms, nor have there been any incidents whatsoever in his capacity as a gun owner, nor in relation to firearms at all. The conduct does not lead me to

a view that the Applicant is not a fit and proper person to hold a firearms licence.

- 24 After considering the applicant's traffic history, described as being poor between the years 1982 to 2005, and observing that the most recent of the offences was over 6 years ago and that none resulted in the applicant losing his licence, the Tribunal concluded:

Conclusion in relation to fit and proper person test

58. In summary, therefore, I do not accept that the Applicant fails the fit and proper person test.

- 25 The Tribunal next considered the public interest criterion in s 11(7) of the Firearms Act:

59. The expression "public interest" is not defined in s 11(7) or elsewhere in the Act, but it is well established that the Tribunal will have regard to the context in which the term appears: *CIC Insurance Limited v Bankstown Football Club* (1997) 187 CLR 384, 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381. A decision in relation to the public interest in this context is particularly informed by the underlying principles and objectives of the Act and the strict controls under the Act in relation to licensing. In *Commissioner of Police v Toleafoa* [1999] NSWADTAP 9, at [25], the Appeal Panel said that the 'public interest' is an inherently broad concept giving the Commissioner (and hence the Tribunal on review) the ability to have regard to a wide range of factors in choosing whether to exercise a discretion adversely to an individual. Public safety is to be given paramount consideration: *Hill v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 218 at [24].

60. The Applicant seeks a firearms licence because clay shooting has been his "only real passion" since he was 13 years old, a total of 43 years, he said. He competed in the sport while at school, and trained with a former world champion who was one of his teachers. As an adult, he has competed in interstate competitions. He trains a disabled athlete who has, under his coaching, become a world champion. He is a current member of the Sporting Shooters Association of Australia and, until his suspension, has been a member of a gun club. I accept that the Applicant has a substantial interest in holding a firearms licence for the genuine reason of 'sport/target shooting'.

61. Private interests are not the only matters taken into account; the interests of the whole community are matters for consideration: *Comalco Aluminium (Bell Bay) Ltd v O'Connor* (1995) 131 ALR 657 at 681. Consideration of public interest allows for matters going beyond the applicant's character to be taken into account. They include public protection, public safety and public confidence in the administration of the licensing system: *Constantin v Commissioner of Police, New South*

Wales Police Force [2013] NSWADTAP 16 at [33]. The concept includes standards acknowledged to be for ‘the good order of society and for the well-being of its members’: *Director of Public Prosecutions v Smith* [1991] VicRp 6; (1991) 1 VR 63.

62. Hennessy DP in *Ward v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 28 (Ward) at [28] said that in terms of public safety, “the Tribunal must be satisfied that there is virtually no risk”, while acknowledging that the Tribunal could never be totally satisfied that a person would never pose any risk to public safety. Although Ward was a case on the “fit and proper person” test, the formulation has been held to also apply to the public interest test as well: see *Hoffman v Commissioner of Police, New South Wales Police Service* [2003] NSWADT 89 at [23] and *Masterson v Commissioner of Police, New South Wales Police Force* [2017] NSWCATAP 206 at [130]. The question of risk is not to be viewed as requiring an applicant to discharge an almost impossible burden of proving a near absolute negative, but, in a nuanced way, taking account of all the circumstances, including attitudes, character and prior conduct, with an overriding focus on public safety: *Martin v Commissioner of Police, New South Wales Police Force* [2017] NSWCATAD 97, at [64] – [66].

63. The principle in *Ward* is to the effect that the licensing regime is not about punishment but rather about protecting the public. It is about identifying the possible risks to the public, and then making decisions that are consistent with the need to reduce any risks to a minimum. See also *Petas v Commissioner of Police, NSW Police Force* [2013] NSWADT 137 at [36]. Since *Ward*, Hennessy DP has cautioned against applying that language in a mechanistic way: see *AML v Commissioner of Police, New South Wales Police Force* [2013] NSWADT 5 at [7].

26 At [65]-[68] the Tribunal identified as factors that weighed in the applicant’s favour that while he was charged with serious offences, none involved a firearm; that he had never been charged with a firearms offence despite holding various licenses over 25 years; that there was no evidence that his holding a licence had ever created any danger; that while he had a poor traffic history for about 20 years until 2005 with one further offence in 2014, there had been nothing since, concluding that that history did not indicate a current ongoing disregard for the law; and that as to the genuine reason for seeking a firearms licence there was no evidence to suggest any subterfuge or misunderstanding of his obligations under the Firearms Act.

27 The Tribunal concluded:

Conclusion as to the public interest test

69. The underlying principles of the Act stated in s.3(1) emphasise that firearm possession and use is a privilege conditional on the overriding need to ensure public safety. In all the circumstances, I am reasonably satisfied, based on public interest grounds, that there is no reason for the Applicant not to hold the firearms licence for which he has applied.

Whether the Tribunal erred on a question of law

The Commissioner's submissions

- 28 The Commissioner submitted that the Tribunal erred in law in misconstruing the statutory “fit and proper person” test to be applied under s 11(3)(a) and the “public interest” test under s 11(7), and thereby misdirected itself.
- 29 The Commissioner submitted that the gravitational point of the appeal was the Tribunal’s finding at [51] and [58] that EMB did not “fail” the “fit and proper person” test, notwithstanding the finding that the child sexual abuse conduct had occurred and that it was “abhorrent”. The Commissioner’s complaint as to that finding was first, that the Tribunal did not make the positive finding it was required to make under s 11(3)(a) of the Firearms Act, and secondly that the Tribunal erred by conducting its analysis from the premise that the applicant was a fit and proper person unless and until the evidence satisfied the Tribunal that the applicant failed to meet that standard. The Commissioner submitted that that was an inversion of the fit and proper person test.
- 30 The Commissioner submitted that the Tribunal erred in finding that the child sexual abuse conduct was not relevant to the determination of fitness and propriety to hold a licence because it did not involve firearms. It is significant that a conviction for any of the offences identified in the Firearms Act under s 11(5), 22(2), 29(3) and 35(1)(c) and reg 5 of the Firearms Regulation 2017, including sexual offences under the Crimes Act 1900, disqualifies a person from the holding of a firearms licence or permit. Evidence that the conduct has occurred is therefore relevant to the person’s fitness and propriety irrespective of whether a conviction has been entered. Most of the offences identified in the firearms legislation and the conduct making up their elements, do not involve the use of firearms. The Commissioner submitted that if the person’s driving record is a lawful and relevant consideration for the purpose of determining whether an applicant harbours what the Tribunal described as “a disregard for a regulatory scheme aimed at ensuring public safety”, a proposition which the

Commissioner supports, the Tribunal erred by excluding the child sexual assault conduct as irrelevant to the same assessment.

- 31 The Commissioner submitted that the source of that error was the Tribunal's emphasis on the High Court's observation in *Bond* that the test had to be contextualised by reference to the particular licensing regime in which it was applied. That emphasis led to a disregard of the applicant's lack of moral integrity and his lack of candour simply on the basis that it was conduct unrelated to firearms.
- 32 The Commissioner submitted that there is a necessary relationship between a person's regard for the standards of the criminal law, and the person's moral integrity and his or her capacity, propensity and willingness to fulfil regulatory obligations. In support of that proposition the Commissioner relied on s 3(1)(a) of the Firearms Act, and its requirement that licensees be persons who can be relied upon to observe their obligations in contexts where they are not supervised and in respect of items (firearms) which may present danger to public safety or the means of criminal activity. The Commissioner submitted that disregard for the criminal law represents a disregard which is dangerous to the system of firearms regulation.
- 33 The Commissioner submitted that the Tribunal's findings on the public interest criterion are also undermined by the discounting of non-firearms related charges. The finding that the child sexual assault conduct occurred demonstrates EMB's disregard for the criminal law, which undermines the Tribunal's application of the test in *Ward v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 28.
- 34 The Commissioner contended that the Tribunal's decision was manifestly unreasonable, first in its consideration of EMB's driving record as relevant to the question of his disregard for a system of regulation designed to achieve public safety (which did not involve firearms) but disregarding the child sexual assault conduct because it did not involve firearms; and secondly in the outcome.
- 35 In written submissions the Commissioner contended that the Tribunal's failure to consider the applicant's lack of candour in his disclosure of past personal

conduct in its fitness and propriety finding, in particular the circumstance that not one of the 17 character references submitted in support of the review application made reference to the child sexual assault conduct, was an error of law. In oral submissions the Commissioner accepted that there is no positive onus on an applicant, and conceded that the Commissioner was aware of the charges.

EMB's submissions

- 36 EMB submitted that the Tribunal had properly identified the fit and proper person test, and had made a finding that he was a fit and proper person by virtue of ordering the Commissioner to issue a firearms licence. In oral submissions EMB submitted that while not stated in those terms, such a positive finding can be inferred from the terms of the Tribunal's order. The finding in para [51] and [58] was reasonably open to the Tribunal, and dissatisfaction with it does not change it into a question of law. The reference to the disqualification offences in the firearms legislation does not assist the Commissioner, as EMB was not convicted.
- 37 EMB submitted that the Tribunal correctly identified the public interest test and relevant authorities. EMB was not convicted and was not serving a sentence in relation to the child sexual assault charges, and nor was he convicted for the common assault. The Tribunal decision had a clear factual and legal basis and cannot be viewed as manifestly unreasonable.
- 38 In response to the contention that he had not led evidence to contradict the police case, EMB relied on the fact that the indictments were withdrawn and submitted that he was not required to prove a fact that was not in dispute. The Commissioner was already aware of the allegations, and cannot claim that the Tribunal was unaware of those allegations. The Tribunal had considered the child sexual assault conduct, and notwithstanding that had found that EMB was a fit and proper person. An unproven allegation is not equivalent to a conviction for the purposes of the firearms legislation. The prohibition in s 11(5) of the Firearms Act on the issue of a licence to a person who has been convicted in the last 10 years or made subject to a good behaviour bond in relation to an offence prescribed by the regulations, or is subject to an AVO if is a registrable

person under the *Child Protection (Offenders Registration) Act 2000*, does not apply to EMB.

- 39 EMB submits that the Commissioner has misconstrued the test stated in *Sobey v Commercial Agents Board* [1979] 22 SASR 70, and that having regard to decisions such as *Nguyen v Commissioner of Police, NSW Police* [2007] NSWADT 16 and *Axiotis v Commissioner of Police, NSW Police* [2004] NSWADT 112, the proper approach is that a licence holder in a non-professional capacity must provide “some surety that the individual would carry out the obligations of a licence with integrity and propriety” (*Nguyen v Commissioner of Police, NSW Police* [2007] NSWADT 16 at [37]). The Commissioner’s proposed broader and higher standard of generic “moral integrity” is so vague that no one could ever meet it.

Discussion and findings

- 40 No issue was taken by the Commissioner with the Tribunal’s statement of the relevant principles for the administrative review, or with the focus on the conduct of the applicant and the Tribunal’s finding that the child sexual assault conduct occurred.
- 41 EMB submitted that the Tribunal had not found every detail of the alleged conduct to be true, rather had made a general finding that the conduct was true; and noted that the evidence was untested and that EMB had exercised his right to remain silent. EMB submitted that the reliance on the Police brief of evidence, in circumstances where the police witnesses were not tested in cross examination before the Tribunal and the Tribunal heard none of the defence evidence, and thereby had no option but to find the sexual abuse conduct complained of was true, was a grossly unfair situation for EMB. The jury was not given the opportunity to return a verdict of not guilty because the indictments were withdrawn by the DPP. The potential for a second charge was a sufficient explanation for the absence of evidence from EMB before the Tribunal.
- 42 The application before the Tribunal was for administrative review under the ADR Act of the Commissioner’s refusal of the licence. The Appeal Panel is satisfied that the Tribunal correctly stated the basis on which such a review is

conducted, including that the task of the Tribunal is as stated in s 63 of the ADR Act, to reach the “correct and preferable decision” on the basis of the material before it. There is no error in the Tribunal’s statement at [16]-[17] as to how the Tribunal is to take into account evidence of criminal conduct, where there has been no conviction, and where a finding as to whether particular conduct has occurred is relevant to the issues to be determined. The Tribunal was correct to identify that in administrative review proceedings it is the conduct that is relevant, rather than any conviction.

- 43 There is no formal onus of proof in administrative review proceedings: *McDonald v Director-General of Social Security* (1984) 1 FCR 354. The Tribunal was correct to reject EMB’s reliance on a presumption of innocence, relevant in proceedings in which there is such an onus. While there is no formal onus of proof, there may be cases in which facts may be peculiarly within the knowledge of a party, or where there is evidence before the decision-maker pointing one way, such that a party risks an unfavourable inference being drawn if no, or no contradicting, evidence is provided. The general principle is that absent such circumstances, there is no evidential onus unless the relevant legislation provides for it. There may, however, be a “practical onus” arising from the requirement that a decision-maker be satisfied as to particular facts so it can determine the matter: *Re Russell and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 52 at [35]. That is not a question of candour, as put by the Commissioner, but rather a factor of how the Tribunal is to make findings of fact on issues relevant to the review.
- 44 EMB was legally represented before the Tribunal, and the transcript of the hearing confirms that there was no request that DSC Turner be available for cross examination. In the absence of any counter evidence, there was no error in the Tribunal relying on the evidence provided by the Commissioner in the form of the prosecution brief of evidence, including statements by witnesses, in order to satisfy itself whether the child sexual assault conduct occurred, or in relying on DSC Turner’s statement as to the reasons for the withdrawal of the prosecutions. The Tribunal acknowledged, in its reference at [18] to the Court of Appeal decision in *Bronze Wing International Pty Ltd v Safe Work New*

South Wales [2017] NSWCA 42, that the strength of evidence needed to establish a fact or facts may vary according to the nature of what it is sought to prove, particularly where the allegations are serious and the consequences if those allegations are found to be established are serious. While EMB took issue with the way in which the Commissioner characterised the Tribunal's finding as to the conduct the subject of the child sexual assault charges, other than a criticism of the Tribunal's reliance on the police brief, he did not identify any error in the Tribunal's examination of the evidence in support of its finding that that conduct occurred.

- 45 In *McDonald v Director-General of Social Security* (1984) 1 FCR 354 the Federal Court emphasised the primacy of the statute in identifying whether it is the existence or non-existence of any particular circumstance that is determinative. In the case of the Firearms Act, s 11(3)(a) requires the decision-maker, whether the Commissioner or the Tribunal on review, to form a positive state of satisfaction that an applicant "is a fit and proper person and can be trusted to have possession of firearms without danger to public safety or to the peace". Absent such a state of satisfaction, a licence cannot be issued.
- 46 The Tribunal stated at [38] the requirements of s 11(3)(a), however the reasons indicate that that was not the test it applied, rather the conclusions expressed at [51] and [58] are framed in terms that the Tribunal was not persuaded that the applicant is not a fit and proper person. This involves an inversion of the statutory test, which required that the Tribunal address the question whether the applicant was a fit and proper person, rather than whether it should conclude that he was not. The fact that the ultimate order of the Tribunal was that the applicant should be issued a licence does not overcome that error. That error was an error in the application of the statutory test, and thus an error of law.
- 47 That conclusion is sufficient basis on which to allow the appeal. However, the other grounds of challenge are relevant to the question of the course that should be adopted on the appeal and are considered below.
- 48 The Appeal Panel agrees with the Commissioner that the Tribunal's application of the principle stated by the High Court in *Bond* was too narrowly based. The

term “fit and proper” itself carries no precise meaning, and takes its meaning from its context, the activities in which the person is or will be engaged, and the ends to be served by those activities. That the consideration is not limited to the specific functions or activities enabled by the holding of a licence appears in the High Court’s reference to character and reputation. That is reflected in the decision of Walters J in *Sobey v Commercial Agents Board* [1979] 22 SASR 70 at 76:

The issue whether an appellant has shown himself to be "a fit and proper person", within the meaning of s. 16(1) of the Act, is not capable of being stated with any degree of precision. But for the purposes of the case under appeal, I think all I need to say is that, in my opinion, what is meant by that expression is that an applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities devolving upon him as the holder of the particular licence under the Act, but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails.

- 49 The relevance of an applicant’s honesty and personal integrity to a consideration of whether they are fit and proper, as discussed in *Sobey*, is regularly reflected in decisions of the Tribunal such as *Axiotis v Commissioner of Police, NSW Police* [2004] NSWADT 112 at [26].
- 50 It was put to the Tribunal below in oral argument (transcript p 10) that even if the Tribunal is not making a finding that a person has committed a criminal offence, and instead is making a finding as to whether or not a person’s behaviour was criminal conduct, in the context of the Firearms Act that is relevant both to the fit and proper person test, as conduct that one would not expect of a licence holder; and to the public interest test, as it is not conduct consistent with protecting public safety or because it demonstrates a disregard for public safety. It was further put (transcript p 17) that criminal conduct regardless of the context or type is relevant if that conduct demonstrates the applicant’s attitude towards and social expectations with respect to public safety.
- 51 Those propositions are consistent with the underlying principles of the Firearms legislation as provided in s 3 of the Firearms Act, para (a) of which states that firearm possession and use are “a privilege that is conditional on the overriding

need to ensure public safety”. As acknowledged by the Court of Appeal in *Kocic v Commissioner of Police, NSW Police Force* [2014] NSWCA 368 at [1], the power to grant an application under the Firearms Act is tightly constrained, and in particular, significant emphasis is placed upon the need to control risks to public safety, with the concomitant need to assess the trustworthiness of an applicant.

- 52 While not developed at the level of detail at which it was argued on the appeal, the proposition that the considerations relevant to whether a person found to have engaged in conduct that would constitute a criminal offence is fit and proper are not limited to offences against the firearms legislation, or offences involving the use of a firearm, was put to the Tribunal. The offences prescribed under reg 5(1)(e) of the Firearms Regulation 2017 as offences which disqualify a licence applicant include offences under Div 10 of Part 3 of the *Crimes Act 1900*, including in Subdiv 5 offences involving sexual assault of children.
- 53 The Appeal Panel agrees with the Commissioner that in focussing on conduct associated with possession or use of a firearm, and discounting the child sexual assault conduct found to be true because it did not have such an association, the Tribunal adopted an unduly narrow approach to the construction of the term “fit and proper” in its statutory context. That conduct was potentially relevant for the same reasons as was the applicant’s traffic history, as evidence going to the applicant’s attitude towards, and social expectations with regard to, public safety.
- 54 That contention was expressed in the Notice of Appeal in terms that the Tribunal failed to give “real and genuine consideration” to the principles relevant to assessment of EMB’s fitness and propriety. In the hearing of the appeal, it was put in terms that the Tribunal had erred in reading down the moral integrity requirement for the fitness and propriety standard, and had failed to consider EMB’s lack of candour about significant personal misconduct as a matter relevant to his fitness and propriety.
- 55 There is authority for the proposition that the obligation to “take into account” a relevant consideration requires the decision-maker to give “proper, genuine and realistic consideration” to the relevant consideration(s): *Khan v Minister for*

Immigration and Ethnic Affairs [1987] FCA 457; (1987) 14 ALD 291 at 292; *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at 601 [62]; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 367 [138]; *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 (2005) 147 FCR 51 at 92-93 [212]. However, in *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 Basten JA at [51] warned that the assessment of whether a decision-maker gave proper, genuine and realistic consideration to a mandatory matter must be approached with caution and with care to avoid an impermissible reconsideration of the merits of the decision.

- 56 The obligation to give “proper, genuine and realistic consideration” will not be satisfied where the decision-maker’s consideration is merely a formulaic reference. The obligation requires the decision-maker to give consideration to the particular matter in a realistic and genuine sense, involving an “active intellectual process”, though not necessarily to treat it as a fundamental element in the decision-making process: *Azriel* at [49]; *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389; (2001) 109 FCR 152 at [52] - [59].
- 57 EMB characterised the Commissioner’s challenge as going to the weight given by the Tribunal to the child sexual assault conduct, and thus based on an impermissible challenge to the merits. The Appeal Panel does not agree. In contrast to the careful consideration of the weight to be given to EMB’s traffic history, and to the absence of any awareness in the character references of the circumstances giving rise to the refusal of the firearms licence, the Tribunal’s conclusion at [51] does not reflect an appropriate engagement with the significance of the child sexual assault conduct in the context of the statutory regime.
- 58 A similar issue is apparent in the Tribunal’s consideration of the public interest as required by s 11(7) of the Firearms Act. In its consideration at [65]-[68] of the specific factors relevant to the applicant, the Tribunal placed emphasis on the fact that the child sexual assault offences did not involve a firearm and that

EMB had not been charged with any firearms offence in the 25 years in which he had held a licence.

- 59 The public interest criterion in s 11(7) is framed differently to the fit and proper person criterion in s 11(3)(a), and confers a discretion on the Commissioner, and the Tribunal, to refuse to issue a licence if satisfied that to issue a licence would be contrary to the public interest. The Appeal Panel in *Hijazi v Commissioner of Police, NSW Police Force* [2015] NSWCATAP 82 discussed the “public interest” in the following terms:

29. In *O’Sullivan v Farrer* (1989) 168 CLR 210, the High Court was considering the meaning of s 45(1)(c) of the *Liquor Act 1982* (NSW) which allowed objections to be made to an application for the removal of an off-licence to sell liquor from certain premises. The Court described that legislation in the following terms at 214:

“ . . . s45 specifies a number of grounds of objection that may be taken to the grant of an application, including, as is expressly recognized by s45(1)(c), an application for the removal of an hotelier’s licence and an off-licence (retail) from one location to another. S45(1)(c) permits objection on the ground that “for reasons other than the grounds specified in para(a) and para(b) and subs(2) and subs(3), it would not be in the public interest to grant the application”.

31. The Court went on to say at 216, that:

The public interest considerations which may ground an objection under s45(1)(c) are, in terms, confined to considerations “other than the grounds specified in para(a) and para(b) and subs(2) and subs(3)”. But, these limits aside, the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view”: *Water Conservation and Irrigation Commission*, per Dixon J at 505.

32. In a different statutory context, the Court of Appeal has held that there is no “bright line” between the public interest factors and other factors: *Kocic v Commissioner of Police, NSW Police Force* [2014] NSWCA 368. In that case the Court of Appeal was interpreting the Firearms Act in the context of a licence being issued or refused under s

11 rather than in the present context which involves the revocation of a licence under s 24(2). Section 11(3) and (7) state that;

(3) A licence must not be issued unless:

(a) the Commissioner is satisfied that the applicant is a fit and proper person and can be trusted to have possession of firearms without danger to public safety or to the peace, and

...

(7) *Despite any other provision of this section*, the Commissioner may refuse to issue a licence if the Commissioner considers that issue of the licence would be contrary to the public interest. (Emphasis added)

33. One issue in *Kocic v Commissioner of Police, NSW Police Force* was whether the public interest considerations in s 11(7) include the applicant's fitness or character which are mentioned separately in s 11(3)(a). Basten JA held at [41] that there is no "bright line" that can be drawn between the factors relevant under subs (7) and those which must be addressed under the other subsections." His Honour went on to say that, "there may be characteristics of the applicant which do not lead the Commissioner to refuse a licence under one of the other provisions, but nevertheless permit the refusal of a licence under subs (7)." Leeming JA at [93] and White J at [106] agreed that "the matters that can be taken into account in making an assessment of the public interest pursuant to s 11(7) are not limited to matters not otherwise dealt with by s 11(3)." In White J's words at [106]:

Such considerations may include an applicant's fitness or character if that is relevant to an assessment of the public interest (as it would usually be), notwithstanding that an applicant's fitness or character is a separate matter to be considered under s 11(3)(a).

...

36. In *Commissioner of Police v Toleafoa* [1999] NSWADTAP 9 the ADT was dealing with s 15 of the Security Industry Act 1997 (NSW) which regulates the issuing of security licences. Two grounds on which the decision maker must refuse a licence under s 15 are that the person "is not a fit and proper person to hold the class of licence sought" and ". . .if the Commissioner considers that the grant of the licence would be contrary to the public interest." In relation to that provision, the Appeal Panel stated that at [25] that:

"The 'public interest' is an inherently broad concept giving an appellant the ability to have regard to a wide range of factors in choosing whether to exercise a discretion adversely to an individual. As the possibility of refusing an application on the ground of character is dealt with in the same section, it is reasonable to infer that the parliament intended that the public

interest discretion operated in areas to which the character ground was not relevant or, possibly, in circumstances where an objection on character grounds would not be sufficient in its own right to warrant refusal.

37. In *Ward v Commissioner of Police* [2000] NSWADT 28, the ADT expressed the view that at [33] that these comments apply equally to the Firearms Act.

38. The relationship between fitness grounds and yet another public interest ground has also been considered in the context of s 11 of the Firearms Act relating to the issuing of licences. In *Constantin v Commissioner of Police* [2013] NSWADT AP 16 the Appeal Panel of the ADT was considering the fitness ground in s 11(3) and another public interest ground – s 11(5A). The Commissioner found that the appellant was not a fit and proper person to be granted a licence and the licence was refused under s 11(3)(a). In addition or alternatively, the Commissioner found that it was not in the public interest for him to be granted such a licence and relied on s 11(5A). The Appeal Panel held at [33] that:

The public interest allows, we consider, for issues going beyond the character of the applicant to be taken into account. These may include concerns in relation to public protection, public safety and public confidence in the administration of the licensing system.

- 60 There is no issue with how the Tribunal explained the concept of the “public interest” at [59]–[61] of its reasons, namely that that expression is to be considered in context, informed by the underlying principles and objectives of the Firearms Act, and having regard to the interests of the whole community. However, while the Tribunal gave detailed consideration at [67] to the relevance of EMB’s traffic history to the question of whether it is contrary to the public interest for EMB to hold a firearms licence, and at [68] to the Commissioner’s concerns about his genuine reason for seeking a firearms licence, the only reference to the child sexual assault charges was the statement at [65] that those offences did not involve a firearm. While s 11(7) confers a discretion, and while it is, subject to considerations of unreasonableness, for the decision maker to determine the weight to be given to any relevant consideration, the Appeal Panel is not satisfied that the discretion was properly exercised in the sense referred to in *Azriel*.
- 61 The Appeal Panel concludes that in adopting an unduly narrow approach to the relevance of the child sexual assault conduct to both the consideration of

whether EMB has the moral and personal integrity to be found to be a fit and proper person to hold a firearms licence, and the consideration of whether the issue of a licence to him would be contrary to the public interest, the Tribunal failed to engage in the “active intellectual process” referred to in *Azriel and Singh*. Even if not characterised as legally unreasonable or irrational in the sense considered by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, that was a failure to give proper, genuine and realistic consideration to whether the child sexual assault conduct was relevant as evidence of EMB’s disregard for the standards of the criminal law and his moral integrity, and propensity and willingness to fulfil regulatory obligations.

Whether leave to appeal on grounds other than questions of law

62 The Appeal Panel is satisfied that the Tribunal’s failure to engage appropriately with the question of the relevance of the child sexual conduct to the consideration of whether EMB was a fit and proper person to hold a firearms licence, or whether the issue of a licence to him would be contrary to the public interest, warrants leave to appeal being granted in accordance with the principles explained in *Collins v Urban* at [84(2)]. The Tribunal’s findings as to those criteria were unreasonably arrived at and clearly mistaken, and the fact finding process was conducted in such a way that it is in the interests of justice for it to be reviewed.

Disposition of the appeal

63 The Tribunal’s failure to make a positive finding of satisfaction that EMB is a fit and proper person meant that it failed to address the statutory precondition imposed under s11(3)(a) for the issue of a firearms licence. That failure, together with the failure to give adequate consideration to the relevance of the child sexual assault conduct to the fit and proper requirement and the public interest mean that the appeal should be allowed and the decision set aside.

64 The Commissioner submitted that if the decision under appeal is set aside, the Appeal Panel should determine the matter itself, rather than remit to a single member. EMB’s position was that the matter could be remitted. The Appeal Panel agrees with the Commissioner that the evidentiary findings are not contested, and to that extent a reconsideration of whether EMB is a fit and

proper person as required by s 11(3)(a), and whether the issue of a licence would be contrary to the public interest under s 11(7), can be viewed as a relatively confined task. However, the Appeal Panel is of the view that that for the Appeal Panel to determine the matter itself would require the Appeal Panel to engage afresh with the detailed evidence, which would not be consistent with the mandates of s 36 of the NCAT Act. The preferable course is that rather than dealing with the appeal itself by way of a new hearing under s 80(3) of the NCA Act, the matter should be remitted under s 81(1)(e) of the NCAT Act to the Tribunal for reconsideration, with no further evidence.

65 Orders were made by the Tribunal under s 64 of the NCAT Act prohibiting publication of the name of the applicant, documents provided to the Tribunal on a confidential basis, and the hearing of the confidentiality application. The documents before the Appeal Panel include material in evidence below, including documents that identify witnesses in the child sexual assault proceedings. The Appeal Panel has continued the anonymisation of the respondent to the appeal, and makes an order under s 64(1)(a) of the NCAT Act prohibiting disclosure of the name or identifying information of any of the persons referred to in that material, other than the police officers involved in those proceedings.

Orders

66 The orders of the Appeal Panel are:

- (1) Leave to appeal is granted;
- (2) The appeal is allowed;
- (3) The decision under appeal is set aside;
- (4) The matter is remitted to the Tribunal as originally constituted for reconsideration in accordance with these reasons, without further evidence.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.