

CITATION: *Featherby v Northern Territory of Australia* [2013] NTMC 021

PARTIES: CLIVE FEATHERBY
v
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: LOCAL COURT

JURISDICTION: Civil

FILE NO(s): 21324665

DELIVERED ON: 29 July 2013

DELIVERED AT: Darwin

HEARING DATE(s): 27 June 2013

JUDGMENT OF: Dr John Lowndes

CATCHWORDS:

LOCAL COURT – APPEAL AGAINST REFUSAL OF COMMISSIONER OF POLICE TO GRANT A WHOLESALE FIREWORKS DEALER’S LICENCE – APPROPRIATE PERSON TEST – TREATMENT OF “CRIMINAL INTELLIGENCE” – RELIABILITY OF “CRIMINAL INTELLIGENCE” AND WEIGHT TO BE GIVEN TO IT – APPEAL DISMISSED

Regulations 5M (5), (7), (9) and (11) of the *Dangerous Goods Regulations*
K Generation v Liquor Licensing Court [2009] 237 CLR 501 applied
Henrie v Canada (Security Intelligence Review Committee) [1989] 2 FC 229 considered

REPRESENTATION:

Counsel:

Appellant: Mr Stevenson
Respondent: Mr Maurice QC

Solicitors:

Appellant: Ace Solicitors
Respondent: Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	[2013] NTMC 021
Number of paragraphs:	102

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21324665

BETWEEN:

CLIVE FEATHERBY
Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Defendant

REASONS FOR DECISION

(Delivered 29 July 2013)

Dr John Allan Lowndes:

1. On 27 June 2013 I confirmed the decision of the Commissioner of Police not to provide a certificate that Mr Clive Featherby is an appropriate person to whom a licence may be granted. I indicated that I would provide my reasons for decision at a later date. These are my reasons for decision.

THE NATURE OF THE APPEAL

2. This is an appeal brought by Mr Featherby (the appellant) pursuant to Regulation 5M(1) of the *Dangerous Goods Regulations*. The appellant is appealing a decision of the Commissioner of Police not to provide a certificate that he is an appropriate person to whom a licence may be granted. That decision was set out in a letter dated 5 June 2013 from the Commissioner to Ms Melissa Garde NT WorkSafe:

I am advised there are sufficient grounds to object to the issuing of a licence pursuant to regulation 5H(4) of the *Dangerous Goods Regulations*:

(4) A licence under this Division to sell shopgoods fireworks, other than by retail to the public during a retail purchase period, must not be granted unless the Competent Authority receives a certificate from the Commissioner of Police stating that, in the Commissioner's opinion, the relevant person in relation to the application is an appropriate person to whom the licence may be granted.

I hereby advise that Mr Featherby is not, in my opinion, an appropriate person to whom a licence may be granted.

3. In appealing that decision, the appellant relies upon the following grounds:¹
 1. The appellant is currently licensed to sell fireworks in every Australian State and was deemed to be a fit and proper person to hold a licence in each of those States.
 2. The appellant was deemed an appropriate person to hold an explosives licence in the 2012 season and was granted such a licence. No conditions of this licence were breached and there are no other facts which have occurred since this time which might affect the decision as to whether or not the appellant is an appropriate person to whom a licence may be granted.
 3. The appellant is a current holder of a Northern Territory shooter's licence.
 4. The appellant has extensive experience in the explosives field, and has an exemplary safety record in this field.
 5. There is nothing in the appellant's criminal history which would deem the appellant an inappropriate person to hold a firework's licence.

¹ An appellant is required by the provisions of Regulation 5M(2)(b) to set out the grounds on which the person makes the appeal.

6. The appellant is otherwise an appropriate person to hold an explosives licence.
4. In hearing this appeal:
 1. The Local Court must conduct a hearing, in the manner it thinks fit into the reasons for the Commissioner having made the decision appealed against.²
 2. The Local Court hearing an appeal has all the powers, duties and functions of the Commissioner of Police.³
 3. The Local Court must determine the appeal by:
 - (a) confirming the decision of the Commissioner;
 - (b) varying the Commissioner's decision in any manner as it thinks fit;
 - (c) substituting the Local Court's own decision for the decision of the Commissioner; or
 - (d) disallowing the Commissioner's decision.⁴
 5. The Local Court hearing an appeal pursuant to Regulation 5M stands in the shoes of the primary decision maker:
 6. The respondent made various submissions to the effect that the Court may have regard to not only the evidence that was available to the Commissioner at the time he made his decision, but also such further relevant evidence that the Commissioner may provide to the Court:

[16] On an appeal from the Commissioner's decision not to provide a certificate, the Local Court has "all the powers, duties and functions of the Commissioner": reg 5M(5). The Court's function is no different from

² See Regulation 5M(4).

³ See Regulation 5M(5).

⁴ See Regulation 5M(6).

the Commissioner. It, too, cannot issue a certificate unless it forms the opinion that the relevant person is an appropriate person to hold a licence. The Court, too, is obliged to consider all relevant materials available to it, hearsay or not, proven or not, including criminal intelligence and the fact, if it be the fact, of the pendency of charges against the applicant

[19] At the end of the day, the question for the Court is: having regard to the criminal intelligence placed before the Court by the Commissioner, can the Court be satisfied that Mr Featherby is an appropriate person to hold a wholesale licence to possess, store and sell fireworks?⁵

7. It is clear from the provisions of Regulations 5M(5) and (6) of the *Dangerous Goods Regulations* that the Local Court “stands in the shoes” of the primary decision maker.⁶ However, on a proper construction of Regulation 5M the Court is not restricted to the material that was before the Commissioner when he made his decision. The Court may make its decision on new material that was not before the Commissioner.
8. There is nothing in Regulation 5M – the provision which grants the right of appeal – to restrict the material available to the Court (as the appellate body) or limit the powers of reconsideration. As noted by Groves and Lee:

The terms of the statute are critical in each case. Nonetheless, unless the legislation specifies otherwise, review will be de novo.⁷

9. As explained in *Re Coldham; Ex parte Brideson* (1990) 170 CLR 267 at [14]:

...it is well settled that, when the legislature gives a court the power to review or hear an “appeal” against the decision of an administrative body, a presumption arises that the court is to exercise original jurisdiction and to determine the matter on the evidence and law applicable as at the date of the curial proceedings. Nevertheless, whether the right of appeal against an administrative decision is given to a court or an administrative body, the nature of the appeal must ultimately depend on the terms of the statute conferring the right.

⁵ See page 4 of the respondent’s written submissions.

⁶ The Regulations are in comparable terms to section 43 of the *Administrative Appeals Tribunal Act* which also places the Tribunal “in the shoes” of the original decision maker: see Groves and Lee *Australian Administrative Law: Fundamentals, Principles and Doctrines* Cambridge University Press p 84.

⁷ See Groves and Lee n 6, p 85.

10. The presumptive position is in great part due to the absence of a hearing before the primary decision maker.⁸
11. In my opinion, there is nothing in Regulation 5M or any other regulation of the *Dangerous Goods Regulations* that has the effect of displacing the presumptive position.

THE “APPROPRIATE PERSON” TEST AND RELEVANT CONSIDERATIONS

12. In forming the opinion that a person is an appropriate person to whom a licence may be granted the Court (standing in the shoes of the Commissioner) must have regard to the following matters:
 - (a) whether a criminal history check discloses that the applicant for a licence has been found guilty of a disqualifying offence;
 - (b) any other material available to the Commissioner (for example criminal intelligence about a person associated with the applicant or the fact that the applicant is on bail in relation to pending charges) that the Commissioner considers appropriate.⁹
13. Regulation 5M(7) provides that if an appeal is against a decision by the Commissioner of Police not to provide a certificate that an applicant is an appropriate person to whom a licence may be granted, the Local Court must take steps to maintain the confidentiality of classified information provided to it by the Commissioner, including steps to receive evidence and hear argument about the information in the absence of the parties to the proceedings, their representatives and the public, if the Court considers the classifies information is criminal intelligence.

⁸ See Groves and Lee n 6, p 85.

⁹ See Regulation 5H(5) of the *Dangerous Goods Regulations*.

14. Regulation 5M(9) provides that if the Local Court considers classified information is not criminal intelligence, the Court must allow the Commissioner of Police to withdraw the classified information from consideration.
15. “Classified Information” is defined as meaning “information the Commissioner of Police classifies as criminal intelligence”.¹⁰
16. “Criminal Intelligence” is defined to mean:
 - (a) information relating to actual or suspected criminal activity (whether in the Territory or elsewhere) the disclosure of which could reasonably be expected to:
 - (i) prejudice a criminal investigation; or
 - (ii) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
 - (iii) endanger a person’s life or physical safety; or
 - (b) information the disclosure of which could reasonably be expected to reveal, and prejudice the effectiveness of, any of the following:
 - (i) police information- gathering or surveillance methods;
 - (ii) police procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law.¹¹
17. As pointed out by counsel for respondent, the preconditions for obtaining a licence – the licensing standards – are set very high:

¹⁰ See Regulation 5M (11) of the *Dangerous Goods Regulations*.

¹¹ See Regulation 5M(11) (a) and (b) of the *Dangerous Goods Regulations*.

Essentially, only persons whose probity is beyond question, who are above suspicion so far as their regard for the law is concerned, are to be considered appropriate persons to hold a licence.¹²

18. Whether or not a person is an appropriate person to hold a licence is inextricably linked to questions of probity and regard for the law. In determining the appropriateness of a person to hold a licence the relevant regulations give a mandate to the Commissioner (and the Local Court hearing an appeal), as counsel for the respondent put it, to have “regard to confidential criminal intelligence and unproven charges, and subordinating an applicants’ private commercial interests to the public interest in maintaining confidentiality in criminal intelligence”.¹³
19. In deciding whether particular material is “appropriate” pursuant to Regulation 5H(5) the material (including “criminal intelligence”) must be relevant¹⁴ - it must bear upon the “appropriateness” of the person to whom a licence may be granted. Therefore, in order for “criminal” intelligence to be relevant, it must bear upon the person’s probity and regard for the law, particularly with respect to the licensing requirements of *Dangerous Goods Regulations*. It must bear upon a person’s capacity to operate within the relevant licensing regime and to comply with the terms and conditions of any licence issued to him or her. In the present case, it must bear upon the capacity of Mr Featherby to conduct himself in accordance with a wholesale licence to possess, store and sell fireworks and to fully comply with the terms and conditions of such a licence, if he were to be granted such a licence.
20. As submitted on behalf of the respondent, the “fact that the material may be hearsay does not preclude its consideration by the Commissioner”.¹⁵
Furthermore, “it follows that suspicion of involvement in criminal activity

¹² See [8] of the respondent’s written submissions.

¹³ See [6] of the respondent’s written submissions.

¹⁴ See [12] of the respondent’s written submissions.

¹⁵ See [12] of the respondent’s written submissions. Similarly, the fact that the material may be hearsay does not preclude its consideration by the Local Court.

where the suspicion is based on hearsay, or based on being the subject of pending charges in respect of which the presumption of innocence applies, may properly amount to impediments to the formation of an opinion that the relevant person is an appropriate person to hold a licence”.¹⁶

21. In considering the present appeal, the Court needs to recognise that the formation of an opinion that an applicant is not an appropriate person to whom a licence may be granted is fundamentally different from a decision-making process that requires the Commissioner (and hence the Court) to grant a certificate unless satisfied the applicant is an inappropriate person.¹⁷ The starting point in each case is different. In the latter case there is a presumptive entitlement to a licence until such time that the Court is satisfied according to the civil standard of proof – namely on the balance of probabilities - that the applicant is an inappropriate person to hold a licence owing to discrediting factors. In the former case there is no presumptive entitlement to the grant of a licence. As submitted by counsel for the respondent, appropriateness to hold a licence of the type sought by the appellant must be demonstrated to the satisfaction of either the Commissioner, or the Court (as is the case here).¹⁸ There must be a state of reasonable satisfaction (on the balance of probabilities) to enable either the Commissioner or the Court to form the positive opinion that Mr Featherby is an appropriate person to hold the relevant licence.¹⁹
22. In hearing and determining the present appeal, the Court’s task is to decide whether, having regard to all of the material before the Court – confidential or non-confidential – Mr Featherby is an appropriate person to hold the licence sought by him.

¹⁶ See [14] of the respondent’s written submissions.

¹⁷ See [10] of the respondent’s written submissions.

¹⁸ See p 11 of the transcript of proceedings on 24 June 2013.

¹⁹ See p 11 of the transcript of proceedings on 24 June 2013.

23. The body of criminal intelligence placed before the Court by the Commissioner may properly amount to an impediment to the Court forming the relevant opinion. Whether or not that material impedes the formation of an opinion that Mr Featherby is an appropriate person to hold a licence depends upon the weight accorded to the criminal intelligence.

THE CLASSIFIED INFORMATION PLACED BEFORE THE COURT BY THE COMMISSIONER

24. At the hearing of the appeal, the Commissioner placed before the Court a body of classified information – namely information the Commissioner classified as “criminal intelligence”. In accordance with the provisions of Regulation 5M(7) and consistent with a series of relevant authorities referred to in the respondent’s written submissions, the Court considered the information in private in the absence of the parties and their legal representatives (with one exception), with a view to deciding whether the classified information amounted to criminal intelligence.²⁰ During this process evidence was received from Assistant Commissioner Kershaw who was questioned by the Court as to the nature of the classified information and why it was considered to amount to “criminal intelligence” within the definition of the Regulation 5M(11). Assistant Commissioner was also questioned as to the reliability of the information and the weight it should be accorded.²¹ Furthermore, the Court heard argument from Assistant Kershaw about the information. The evidence and argument was, with the approval of the Commissioner and the prior agreement of the parties’ legal representatives and the Court, recorded in writing “in confidence” by Ms Elizabeth Reed counsel assisting Mr Maurice QC, leading counsel for the

²⁰ Regulation 5M(7) impliedly accepts that the Court may itself inquire into the classification of the information. See *K-Generation v Liquor Licensing Court* [2009] 237 CLR 501 at 75 where similar view was taken of section 28A(5) of the *Liquor Licensing Act 1997*(SA).

²¹ The power conferred by Regulation 5M(7) upon the Court to receive evidence and hear argument about the information clearly includes a power to inquire as to the reliability of the sources from which the information has been obtained: see *K-Generation v Liquor Licensing Court* [2009] 237 CLR 501 at [75] per French CJ.

respondent.²² Ms Reed performed no other function nor any other role during the in camera proceedings. This process was undertaken to maintain the confidentiality of the classified information provided to it by the Commissioner and to receive evidence and hear argument regarding the information in a confidential setting.

25. To the extent that the Regulations might permit the appointment of a counsel assisting,²³ I considered that it was not necessary to do so. In my opinion, the Court did not need a counsel to assist to arrive at a decision:

1. as to whether the classified information is criminal intelligence; or
2. whether, notwithstanding the criminal intelligence provided to the Court, the Court feels able to provide a certificate certifying that, in its opinion, the appellant is an appropriate person to whom a wholesale licence to possess, store and sell shop goods fireworks may be granted.

26. The classified information said to amount to “criminal intelligence” was set out in the confidential affidavit of Richard Bryson sworn 14 June 2013²⁴ and in the confidential affidavit of Reece Kershaw sworn 21 June 2013.²⁵

27. The claimed “criminal intelligence” was set out in paragraphs 4.1 to 39 inclusive, as well as paragraph 41 of the affidavit of Richard Bryson sworn 14 June 2013, as is evident from the redacted version of the deponent’s affidavit. The “criminal intelligence” was further contained in a number of annexures to Richard Bryson’s affidavit, namely annexures RB 2 to RB15. The reasons for the Commissioner classifying the information contained in those paragraphs and annexures were also set out in the body of Richard

²² I overlooked having this “in –confidence” transcript marked as an exhibit during the course of the hearing of the appeal. I have now marked the transcript Exhibit 18.

²³ See [41] of the respondent’s written submissions.

²⁴ Marked for “The Eyes of Dr Lowndes SM only” and tendered as Exhibit 3. A redacted version of this affidavit which excluded the criminal intelligence was marked Exhibit 4 and provided to the appellant.

²⁵ Tendered as Exhibit 6. A redacted version of this affidavit which excluded the criminal intelligence was marked Exhibit 14 and provided to the appellant.

Bryson's affidavit. The reasons for the classification were expounded upon in the affidavit of Reece Kershaw sworn on 21 June 2013.

28. After carefully considering the material contained in the affidavits of Richard Bryson and Reece Kershaw, and taking into account the evidence given by Reece Kershaw and submissions made by him in relation to the classified material,²⁶ I formed the opinion that, with a few exceptions, the information contained in annexures RB 2 to RB 15 satisfied the definition of "criminal intelligence" as set out in Regulation 5M (11) of the *Dangerous Goods Regulations*. In my opinion, the material satisfied one or more of the definitional elements prescribed by Regulation 11.
29. The material that I did not consider fell within the definition of "criminal intelligence" is recorded in Exhibit 18, and was, in my opinion, sufficiently disclosed to the appellant in paragraph 3 of the further affidavit of Reece Kershaw sworn on 21 June 2013²⁷ and in Exhibit 8, being the redacted crime report dated 1 October 2010.
30. Accordingly, except for the information disclosed to the appellant via the affidavit of Reece Kershaw sworn on 21 June 2013 and the redacted crime report, the material contained in annexures RB 2 to RB 15 amounts to "criminal intelligence".
31. In an affidavit sworn on 24 June 2013 Reece Kershaw (Exhibit 13) deposed as follows:

Police contacted the Queensland Department of Natural Resources and Mines on Friday 21 June 2013 regarding the information contained in paragraph 3(b) of my affidavit.²⁸ The Department of Natural Resources and Mines were able to advise that there was no further detail apart from no prosecution taking place against the appellant.

On Friday 21 June 2013 I contacted the Australian Customs and Border Protection Service (ACBPS) regarding information contained in paragraph

²⁶ The evidence and submissions are recorded in the transcript (Exhibit 18).

²⁷ Rather than withdraw this information the respondent agreed to disclose the information to the appellant.

²⁸ This is the affidavit sworn on 21 June 2013 (Exhibit 12).

3 (c) of my affidavit. ACBPS relied on the provisions within Section 18 of the *Customs Administration Act* (Cth) 1985 to lawfully disclose to the Northern Territory the additional information regarding the circumstances described in paragraph (c). The NT Police has been advised by the ACBPS that any further disclosure to the appellant would not be authorised.

32. I was satisfied that any additional information as referred to in the affidavit of Reece Kershaw sworn 24 June 2013 would fall within the definition of “criminal intelligence”.
33. The respondent also relied upon part of an email sent by Noel Erichsen to David Overall on 12 June 2013 as containing “criminal intelligence”. The email containing the claimed “criminal intelligence” was Exhibit 9. A redacted version of that email became Exhibit 10 and was disclosed to the appellant. I was satisfied that the parts of the email deleted or obscured in the redacted version squarely fell within the definition of “criminal intelligence”.

THE OTHER MATERIAL BEFORE THE COURT

34. The criminal intelligence referred to above was not the only material put before the Court for the purposes of the appeal.
35. The respondent provided the Court with the following non-classified material.
36. Shayne Lester Maines, Deputy Commissioner of Police, swore an affidavit on 18 June 2013 (Exhibit 5). The purpose of this affidavit was to outline the considerations, from a law enforcement agency perspective, which make it necessary to have an “appropriate person” test for applicants who apply for a wholesale licence pertaining to “shop goods fireworks” as defined in subregulation 70(1) of the Regulations, and to provide material relevant to the appeal which was not classified as criminal intelligence within the meaning of Regulation 5M(11) of the Regulations.

37. Addressing “appropriate person considerations under the Dangerous Goods Regulations” Deputy Commissioner Maines deposed as follows:

There are significant public safety concerns with the sale of fireworks which is why restrictions apply in the Northern Territory, and why other States and the Australian Capital Territory have banned the importation and possession of fireworks.

One of the primary reasons it is illegal to sell or possess fireworks is because the danger they pose to public safety. Fireworks are dangerous explosive devices and if not handled correctly by expertly trained workers can cause serious injuries and even death. Given the risks that fireworks imported into the Northern Territory will fall into the hands of unskilled unqualified people contrary to laws of the States and Territories it is considered necessary by law enforcement agencies that the sale of fireworks be carefully regulated and licensed only to those people considered appropriate to hold a licence.

The fact that fireworks are illegal to possess or sell except in prescribed circumstances by all States and Territories has lead to the following unlawful activity:

1. the illegal exportation out of the Northern Territory to other States and the Australian Capital Territory;
2. undeclared profit from the sale of illegal fireworks.

38. Melissa Garde, Acting Director Permissioning and Advisory Services NT WorkSafe, swore an affidavit on 21 June 2013 (Exhibit7). This affidavit deposed as to the following:

1. that a certificate of approval to import and export explosives had been issued to the appellant on 15 May 2012 and that the certificate provided approval to the appellant to import explosives into the Northern Territory to be delivered and stored at Casey House Darwin and
2. that Northern Territory WorkSafe had no records pertaining to an application from the appellant for an Export Notice for explosives in 2012 or record of approval to export explosives.

39. As previously stated, Reece Kershaw swore an affidavit on 21 June 2013 (Exhibit 12) disclosing certain non –classified information, comprising the following:

1. In 2003 Mr Featherby committed the offence of failing to declare currency greater than \$10,000 into Australia;
 2. In 2003 Queensland Department of Mines Inspectors seized restricted explosives from a magazine owned by Mr Feathery in Yandina;
 3. In 1999 Australian Customs seized approximately 20 boxes of banned fireworks imported by KC's Fireworks Displays (Mr Featherby's company).
40. As also previously stated, a redacted crime report dated 10 October 2010 relating to the theft of fireworks from Mr Featherby's business premises at Image Flat was tendered and marked Exhibit 8.
41. Again as previously stated, a redacted version of the email sent by Noel Erichsen to David Overall was tendered and marked Exhibit 10. The email reads as follows:

Clive Featherby is a fireworks operator and the nominated fireworks operator for KC's Fireworks. The following licences are held:

Store Licence

Fireworks Operator

Sell (F) Display type fireworks

Import Fireworks, Distress Flares

KC Fireworks holds a fireworks contractor licence 0410191 and two explosives transport licences for trailers 1100546 and 1100568.

Clive Featherby has openly joked with inspectors when being inspected that he is selling illegal fireworks just down the road – this is usually an attempt to get a rise from an inspector. There is no evidence to support this.

KC's Fireworks has been prosecuted for a fire in a workshop where mixed explosives and welding was taking place. A safety breach.

Jaye Featherby, son of Clive, was prosecuted for illegal possession of fireworks after police conducted a vehicle check – there were other occupants in the vehicle. The source of the fireworks has never been identified.

Currently KC's Fireworks is being investigated in relation to a fire that occurred when he was undertaking a display for educational purposes at a school. He is also being asked to explain to the Explosives Inspectorate safety issues arising from New Years Eve displays. These may result in action under the department's compliance policy.

All of the matters are related to safety with the exception of Jaye Featherby.

There is no adverse information in regard to Clive Featherby. If you have any further enquiries feel free to contact either myself or Martin.

42. The next non-classified information provided by the respondent was Exhibit 11 being the Gazettal Notice dated 28 May 2012 relating to approval of periods for purchasing, possessing and for throwing, igniting or exploding shopgoods fireworks.
43. Exhibit 15 (which was tendered by the respondent) was an email from Doug Phillips to Fleur O'Connor sent on 11 June 2013 in relation to a miscommunication as to the status of Mr Featherby's licence application.
44. The final non classified information put to the Court by the respondent was Mr Featherby's licence application (Exhibit 16).
45. The appellant also put material before the Court which comprised two affidavits, the first sworn on an unspecified date (Exhibit 2) and second sworn on 13 June 2013 (Exhibit 1).
46. In his first affidavit (Exhibit 2) Mr Featherby deposed as follows:
 1. I am 52 years old and the Owner and sole Director of K.C's Fireworks Displays (Aust) Pty Ltd.
 2. I have held a Professional Fireworks licence since late 1988.

3. I am currently licensed to conduct fireworks displays in every state in Australia except ACT and Tasmania.
4. I have at my own expense voluntarily attended regular fireworks safety courses run by the PGI in the United States of America and have also arranged for many staff members (again, at my own expense) to attend these safety conferences which are strictly voluntary.
5. As part of my Queensland licence I, and all of my other staff, are required to complete and retain current qualifications in the Nationally Accredited Fireworks safety Course which is run through the Toowoomba Tafe College and I currently hold these qualifications.
6. I have personally conducted over 2000 professional fireworks displays across twelve different countries including USA, UK Hong Kong, Malaysia, New Zealand Fiji to name a few.
7. I was the first person to ever construct a manufacturing fireworks factory in Queensland Australia and was the first ever Queensland company to export Queensland made fireworks to USA and China.
8. I invented and patented, and then later sold patent to the now worldwide used world famous water proof fireworks fuse Sticky Match which is now used by virtually every fireworks firm in the world.
9. In the mid nineties I paid for (at my own expense) and arranged for leading fireworks experts from around the world to attend and hold fireworks conferences designed to educate the entire industry in fireworks safety and responsibilities. These were attended by most of the industry, including most government authorities.

10. Prior to selling fireworks in Darwin I had sold and wholesaled fireworks to the public in ACT for many years, prior to their becoming illegal for sale. Have never had any major incidents relating to this.
11. Last year, I obtained a licence to sell fireworks and other relevant licences in the Northern Territory.
12. I sold fireworks to many outlets, and as far as I know there were no incidents whatsoever and I did not receive any complaints other than complaints from other operators that I might have obtained too large a market share.
13. K.C's Fireworks Displays conducts over 260 fireworks professional displays each year around Australia including the NT, most of which are conducted by me.
14. K.C's Fireworks Displays directly and indirectly employs about sixteen staff.
15. NT Territory Day is a major part of our business not only as a revenue source, but also a major promotion for our newly formed NT Agency established in Darwin only four months ago and run by my local businessman Gary Pendlebury.
16. K.C's Fireworks Displays donates many thousands of dollars to charities such as Make a Wish Foundation, Save the Tassie Devil Appeal, and also conducts well over twenty fireworks displays for such events as School Fete Fundraisers, surf clubs, Give Me Five For Kids and various local community groups each year.
17. I appear as a guest speaker speaking about my work and fireworks safety to school kids at over 150 schools across Australia.

18. I believe I am regarded as one of the countries longest serving most experienced safety conscious operators.
19. I have never been refused a licence or fireworks permit in any State in the country until now.
20. I am currently a licensed fireworks operator in each of the fireworks states in Australia (not including the ACT).
21. To the best of my knowledge each of those States has to do a national police check and form an opinion that I am an appropriate person to hold licence in those States.
22. I am currently a licensed fireworks operator in the Northern Territory and am authorised to conduct fireworks displays in the State until 30 June 2013 when my licence runs out.
23. Exhibit "A" is a copy of this licence.
24. I have never been intentionally engaged in any type of major criminal activity and am unaware of any reason or possible reason whatsoever as to why the Commissioner of Police would not consider me an appropriate person to hold a licence.
25. I have always taken my role as one of the countries (and even the worlds) leading fireworks operators very seriously. I believe that I am an appropriate person for a licence to be granted to.
26. The matters stated in the affidavit that are within my personal knowledge are true.
27. All other matters stated in this affidavit are true to the best of my knowledge, information and belief.
28. Where I give any estimate in the application, it is based on knowledge, information and belief and given in good faith.

47. In his second affidavit (Exhibit 1) Mr Featherby deposed as follows:

1. I refer to my previous affidavit.
2. I have no idea whatsoever why the Commissioner of Police would think I am not an appropriate person to hold a fireworks licence.
3. I have never been refused any other fireworks licences that I have ever applied for in any State in Australia in the 26 years.
4. I have held such licences.
5. The 2012 Territory Day celebrations was the first time that I actually sold retail fireworks in the Northern Territory, although I had previously done many fireworks displays in the State and had wholesaled fireworks in the state.
6. During this time, I have struck up a very good working relationship with the NT WorkSafe inspectors who are the governing body of the firework industry in the Northern Territory.
7. On July 6 2012 I actually sent a detailed email suggesting several changes which I believed were in the best interests of the industry.
8. Exhibit "A" is a copy of the email.
9. The purpose of this email was to make suggestions and improvements to the Northern Territory legislation, which I believe would help safeguard and protect the public. They would not provide any financial gain to me whatsoever.
10. I understand from my discussions with NT Worksafe officers that the inspectorate is considering and has implemented many of the recommendations I suggested.

11. It is not uncommon for me to recommend these changes to the different governing bodies across the country, as I am very vocal in suggesting changes to the legislation which are in the best interest of the public.
12. In fact, in the early nineties, at my own costs, I arranged many of the experts in fireworks safety to be flown to Gatton, Qld for a series of conferences which were designed to educate the entire fireworks industry including government officials from 5 different States in fireworks safety.
13. I have always taken the attitude that public safety in the industry is an important consideration.
14. I currently hold an import and export certificate issued from NT WorkSafe. This is issued in the KCs Fireworks.
15. KCs Fireworks is the trading name of my company. I am the sole director and shareholder of this company.
16. However, as I understand the situation in NT, KCs Fireworks is the business name which is registered in the Northern Territory. This means that this particular licence is in my own name personally.
17. This licence was last renewed and issued by NT WorkSafe on 10 April 2013.
18. Exhibit "B" is a copy of this import/export Authority.
19. Exhibit "C" is a copy of my NT Shotfirers licence and many other licences which I currently have in my possession.
20. In relation to my applications for a retail shop outlet, I have been advised by the NT WorkSafe officer who is handling this matter that these will be issued in time for Territory Day celebrations and prior

to July 1 2013, when I advised them whether I would be using myself as a wholesaler or whether I will be using a different wholesaler.

21. At this time I have tentatively arranged alternative wholesalers in order to reduce my liability if this court were to rule against my appeal.
22. From a financial point of view, and from a fireworks safety point of view, obviously I prefer to use my own fireworks to sell at Territory Day and obviously I would not be able to wholesale fireworks to other retailers.
23. It is now too late for me to wholesale to most retailers because they have already arranged other alternatives.
24. Part of the process for applying for a retailers licence (which is done each Territory Day season) involves me advertising the wholesaler of the fireworks that the retail shops are using and the type of fireworks they are using. I can not do that until the current situation is sorted out and I know who the wholesaler will be.
25. In relation to my wholesale licence, the whole purpose of my wholesale licence is for sale to retail shops. This licence is not needed for any time other than the purposes of Territory Day.
26. I need the wholesale licence because some of the retail shops that I have arranged are NT residents and employees. This is due to the way the licensing system is structured in the Northern Territory.
27. In relation to the retail shop that is solely in my name, I am advised by NT WorkSafe that I need to attach a wholesaler to it, even if I am that wholesaler and there is not any actual wholesaling transaction.
28. On 30 May 2013, I received an email from NT WorkSafe in relation to my wholesale licence which is the subject of the current decision.

29. Exhibit "D" is a copy of this email.
30. I do not know of any reason why the Police Commissioner might have changed his opinion that I am an appropriate person, since this date.
31. The only thing that I can think of that I have done since this time is that I have been quite vocal of my intention to offer my fireworks at very cheap prices, which might effectively cut out the business of many other fireworks wholesalers, but I do not see why this would affect whether or not I was appropriate person to hold a licence.
32. When the Commissioner first refused my wholesale licence, I immediately asked Rodney Paterson to apply for a wholesalers licence (In case I am unable to get my licence) as Mr Paterson would be able to buy some of the fireworks I am importing and distributing to any of the retail shops.
33. This was done in consultation with NT WorkSafe but the problem is it is unlikely that he will get his certificate from the Police Commissioner in time for Territory Day as I am advised that they are taking about 6 weeks or so to do this.
34. Rodney's wife advised me that she had spoken to NT WorkSafe and they told her that they were advised that it was unlikely that they would support his application because he is associated with me.
35. Exhibit "E" is a copy of his current fireworks licence.
36. I have over the years had some minor transgressions with some government officials in Queensland and can think one particular incident on New Years Eve this year where I had a difference of opinion with a mines department official over interpretations of the Qld Code of Explosives. However, I have always cooperated with

the authorities investigating this matter and that investigation is ongoing.

37. This particular incident, I believe, was not helped by the fact that I was suffering from a severe migraine and this is something which I have received assistance from my family doctor to prevent and I have been placed on medication for this.
38. I do have a problem with migraines and this has resulted in some temper problems in the past. However, it is something that I am currently working through with my doctor.
39. Exhibit "F" is a copy of a letter I received from my doctor in relation to my headaches.
40. To the best of my knowledge, this incident with the mines department has been mostly sorted out, although there has been some delay in discussions and investigations between myself and the Queensland Mines Department due to both being in America for a large portion of last year and also due to health problems being experienced by the Queensland Chief inspector, Geoff Downes. We have agreed to meet in August to discuss and finalise these issues.
41. I was involved in another fireworks incident, where some bushland was burnt down at a fireworks demonstration voluntarily performed for local school children. This fire was caused due to defective fire works item that was sold to me by Fireworks Australia.
42. This matter was fully investigated by the Queensland Mines Inspector and my insurance company and no action was taken against me because I did everything that could be done in the circumstances. I understand that my insurance company is currently employing the matter against Fireworks Australia (who are a NT Licensed wholesaler and a reputable company).

43. I did have a problem with one of my previous agents, Cameron Ratcliffe. Cameron was licensed for 2 to 3 years and he would do fireworks on behalf of my company when those shows were in or near Rockhampton.
44. Unknown to me, Cameron was illegally storing fireworks at his property with some of his antique guns and he was caught with these illegally stored fireworks. Some of these fireworks were mine that he claimed he had not used in shows, while others were not my fireworks and were not of a type I had used recently.
45. As a result of this incident, I terminated my working association with Mr Ratcliffe.
46. This matter has been fully investigated by the appropriate authorities. I haven't spoken with him since I terminated his services.
47. In recent times, I have been involved in a personal feud with a man in the fireworks industry by the name of Rod Shaxon. This has been an ugly feud which involves allegations of me sleeping with his de facto wife and girlfriend.
48. I have made threats to Mr Shaxon after I believed that he had broke into my house and took photos and generally stalked me. This was shortly after Mr Shaxon administered a severe beating to his wife which resulted in her obtaining domestic violence orders.
49. Any threats I have made to Mr Shaxon are unfounded and have been aimed at attempting to ensure the safety of myself and my family. I have not acted upon these and so not believe that these would be unlawful in the circumstances.

50. I don't believe that these would affect my appropriateness to hold an explosives licence.
51. Although I do not really have anything to base it on, it would not surprise me if Mr Shaxon had made unfounded and untrue allegations against me.
52. Throughout my business I have employed many people.
53. I certainly would not consider my association with these people to be any reason to suggest I would be an inappropriate person to hold a licence. Most of these people are usually licensed persons or local business owners in the various areas I do business in.
54. I am unaware, obviously, of the character of some of the persons who go through my retail shops and I cannot vouch for them. However, I can say that all persons that received fireworks at any of my retail stores did so only as they were entitled to do under the Act and under my licence conditions.
55. I have previously expressed some concern about the quantities of fireworks some people are buying from some retail outlets (not just mine) to officials but have been advised, that so long as they are buying less than the allowed limit, there are no problems.
56. I find the decision of the Commissioner to refuse to disclose the grounds of his refusal to be a particular concern.
57. I know that I have not ever intentionally breached any firework legislation, and in fact, if there were legitimate concerns over any aspect of my appropriateness, I would, as my record supports work hand in hand with government officials to rectify this area and ensure that the public interest is served.

58. To give an example, I have recently made a conscious decision to commence anger management counselling and one of the main reasons is that I have noticed that I am having growing arguments over the phone and in person with different people and I do not want them to ever escalate to anything more.
59. It is concerning to me that I cannot fix any perceived problems and I do not possibly see how the public interest is served by preventing me from doing this.
60. In relation to whether or not the material obtained is criminal intelligence, I note that unlike most other people in my situation, fireworks are not my sole source of income.
61. I deny engaging in any form of illegal activity but if I were involved in such activities, obviously the sheer denial of my licence would have alerted me to this and this in itself would have prejudiced the criminal intelligence obtained or investigations being conducted as this presumably would likely result in me refraining from continuing such activity.
62. There is no doubting that I have the capacity to live and support myself through legitimate business interests and operations and it would seem completely incomprehensible for me to continue to engage in any illegal activities that I now would know I am under surveillance for.
63. I cannot even imagine any illegal activities that I might be alleged to be involved in that would make it economically viable to risk my proven legitimate business interests.
64. In relation to the economic losses I am currently suffering, the situation is unclear.

65. I have had several retail shops cancel their association with me and advise that they will be no longer selling fireworks on Territory Day or putting in applications for retail shop licences.
66. Retail shop licences as a general rule are supposed to be in before this Monday, but NT WorkSafe have indicated that they will likely process these applications after this date due to the extenuating circumstances.
67. Each retail shop always sells a substantial amount of fireworks, usually in the tens of thousands of dollars or more, depending on the location and other factors.
68. Exhibits “G” is a copy of emails I have received, although obviously much of the discussion is done by phone and I am desperately trying to convince these retailers to change their mind, as well as to convince others to come on board.
69. All Fence and Gates is a local NT business run by Craig Roberts.
70. I met Craig as he was a fencer on the Sunshine Coast and I knew him from the gym and our church group. I have had regular contact with him in the last 6 months and I am hopeful that I will convince him to change his mind but the situation is not yet clear.
71. Palm City Spa’s and Pool’s is a local business run by Wylie Fulton.
72. I was only introduced to Wylie about 5 or so weeks ago.
73. Wylie has also showed me that he holds a current gun licence issued by the NT government and he is in the process of applying for a full dangerous goods licence to do proper sized displays.
74. He has previously approached me about assisting him with training him to get these licences. And he had previously indicated to me that

he might be interested in buying all his display products from me when he gets licensed.

75. I think I may have smoothed it over with him as he has since advised me that he has spoken with his solicitor and decided that he will be submitting a retail shop application, although at this time he is using a different wholesaler.
76. I have, however, managed to convince him to assist in fireworks displays at Northline Speedway this Saturday.
77. When I think back after this, I do think he is a little strange as he did always seem to laugh and joke about things such as wanting to get hold of big fireworks for himself and there was always a lot of puffery between the two of us.
78. Obviously this puffery style of conversation is something that does happen in this industry.
79. Although he does seem a little strange in hindsight, this is just probably my own paranoia and gives an example of the difficulties I now have in forging new business associations in the Northern Territory as the Police Commissioner's actions have me paranoid about everyone.
80. The current period is generally particularly important because this is the time I use to educate, train and bring on board the local retail merchants and assist them with obtaining retail licences.
81. The loss of the last couple of weeks has meant that I have not been able to do so this and there is no doubt that this has meant substantial economic loss as I will not be able to grow from my position of last year.

82. There is also the problem in that the current delays have caused severe limitations on my ability to advertise properly at the moment.
83. Nearly every person I have spoken to has linked me with illegal activity due to media reports of this matter and use of the word criminal intelligence. There is no doubt that this has had a substantial effect on my business, particularly in the Territory.
84. As a result of this, we virtually have no chance of running any style of work in the Territory because of the link with criminal intelligence.
48. Mr Featherby also gave oral evidence at the hearing of his appeal, first on 21 June 2013 and then on 24 June 2013 with specific reference to the non-classified information provided to the appellant by way of Exhibit 12.
49. In relation to his failure to declare over \$10,000 in currency in 2003, Mr Featherby stated that on that occasion he was returning to Australia from Los Angeles. Before he left Los Angeles he was so ill that he did not think he would be allowed on get on the plane for the return trip. He said that he had simply shoved tens of thousands of dollars in his pockets. When questioned by Customs officers he admitted that he had not declared the amount of money he was carrying. He was informed that it was an offence not to declare amounts of money in excess of \$10,000. However, he was not charged with an offence and was allowed to retain the money. He stated that he had previously regularly travelled overseas and on returning to Australia had declared amounts of money in excess of \$10,000.
50. Mr Featherby was in effect saying that his failure to declare the currency was an aberration and an oversight occasioned by his ill health at the time.
51. With respect to the seizure of restricted explosives by the Queensland Department of Mines in 2003, Mr Featherby gave evidence that on “quite a few times” he had had fireworks seized. He went on to give evidence to the

effect that that he had brought some single shot crackers into the country of which he advised a departmental inspector who then informed him that they were illegal. Mr Featherby said that he voluntarily surrendered the fireworks. Mr Featherby said that had the fireworks been manufactured in Queensland he would have been allowed to use them.

52. Mr Featherby went on to give this evidence:

We also had a major shipment of 197 cartons of skyrockets seized at the same time as well which we notified the Chief Inspector that these were coming in and once they got into the State of Queensland they were deemed to be illegal to import into Queensland. They were actually coming to be sent to Fiji, there are no boats that go to Fiji direct from China...they were going ...from China to Fiji but they had to come into Queensland first but under our legislation again skyrockets were imported into Queensland and they looked at the legislation again and they said that they had actually made an error which they noted they'd made the error, but silly as it sounds, they took the 190-odd cartons of fireworks and destroyed them. Again, I wasn't charged because it was their error and then there was another one again when customs took 20 cartons of my fountain fireworks, they were deemed illegal export because when they came into the country – a firework fountain has a clay base inside it – a dirt soil base – they seen this, it was in the bottom, it was meant to a synthetic clay they actually used a real dirt clay which, obviously under quarantine and customs law is an illegal import. The Chinese people had done that so again that was deemed an illegal import so they were seized and again, on none of these occasions have I ever been charged and they're just some of many through our legislation where we do have fireworks seized on – and so do all other fireworks companies.²⁹

53. Mr Featherby gave evidence that he knew of two other fireworks operators in the Northern Territory that had been charged with offences, but still granted a wholesaler's licence.

54. Mr Featherby said that he could not think of any reasons why he had been refused a licence.

²⁹ See pp 5-6 of the transcript of proceedings on 24 June 2013.

55. Finally, Mr Featherby relied upon a number of testimonials, which were marked as one exhibit, namely Exhibit 17.³⁰

HOW TO EVALUATE AND WEIGH INFORMATION IN THE NATURE OF CRIMINAL INTELLIGENCE

56. Once the Court has decided that the information has been correctly classified as “criminal intelligence” the Court must then determine its relevance to the application for a licence, the reliability of the information and the weight (if any) that should be given to it.
57. As made clear by French CJ in *K-Generation v Liquor Licensing Court* [2009] 237 CLR 501 at 77, where a court is satisfied that information is properly classified as “criminal intelligence”, the court is not required to accept or act upon the information. The discretion of the court is at large:

In deciding whether to accept or reject or simply not to rely upon such information, the Court may have regard to: (i) its relevance to the question it has to decide; (ii) its reliability – a judgment which may be made by considering the nature of the sources from which the information has been obtained and the extent to which it is supported from more than one source; (iii) its weight – if, for example, the information offers little more than suspicion or innuendo relating to an applicant or associated persons, the Court may decide that it should not act upon it. In this context the Court may have regard to the fact that the information has not been able to be tested by cross-examination.³¹

58. As mentioned earlier, the criminal intelligence must foremost be relevant – it must bear on the question of whether Mr Featherby is an appropriate person to hold a licence of the kind sought. It must relate to Mr Featherby’s capacity to operate within the relevant licensing regime and to comply with the terms and conditions of a wholesaler’s licence.

³⁰ Exhibit 17 consisted of references from Peter Wellington MP, Shane Berry, Rebecca Cuthill, Chris Condon, Tim Fitzpatrick, Roy Wood, Lyn Winch, Stuart Copeland, Lew Osborne, Annie Scanlon, Teresa Cordwell, Tracey Unold, Peter Williams, Janike Finch, Damon Phillips, Robyn Reddacliff, Terry Duff, Jarrod Bleijie MP. Exhibit 17 also included a number of certificates of appreciation presented to KC’s Fireworks.

³¹ See *K-Generation v Liquor Licensing Court* [2009] 237 CLR 501 at [77]. There is nothing to prevent the Court from taking into account the fact that the information has not been able to be tested by or on behalf of an applicant, in assessing its weight: at [76]. In some cases, a court may feel disinclined to place great weight on material which an applicant has been unable to test, or even see.

59. The next important aspect of “criminal intelligence” is its reliability. The reliability of the information is primarily evaluated in terms of its source. Its reliability is assessed by reference to specific questions posed and answers received about the reliability of the source or sources of information. The reliability, and therefore accuracy, of “criminal intelligence” is enhanced when a single piece of relevant information is corroborated by more than one independent source or when the “criminal intelligence” consists of a number of individual pieces of relevant (though uncorroborated) information from a number of different independent sources over a significant period of time. Secondly, the reliability of “criminal intelligence” is to be assessed by reference to the detail of the information.
60. The third aspect of “criminal intelligence” concerns the weight it is to be accorded. The rational probative value of “criminal intelligence” – and hence the weight it should be accorded - is of course primarily dependent upon the reliability of the sources from which the information has been derived. In estimating the weight, if any, to be given to “criminal intelligence” regard may be had to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
61. As “criminal intelligence” is invariably hearsay in nature, the relevant factors or considerations for determining the weight to be attributed to hearsay evidence apply equally to the weighing of “criminal intelligence”. In determining what weight is to be accorded to the information the Court needs to ask itself the following questions:
1. Was the source of the information anonymous?
 2. Whether it would have been reasonable and practicable to call the maker of the original statement as a witness?

3. Whether the original statement was made contemporaneously with the occurrence or existence of the matters stated?
 4. Whether the information involves multiple hearsay?³²
 5. Whether the information goes beyond mere suspicion or innuendo or unsourced rumour?
 6. How likely is it that the original account was distorted?³³
 7. Whether any person had any motive to conceal or misrepresent matters?
 8. Whether the original statement was an edited account or was made in collaboration with another or for a particular purpose?
 9. Whether the circumstances in which the information is adduced as hearsay are such as to suggest an attempt to prevent a proper evaluation of its weight?
 10. Whether or not the evidence adduced by the party is consistent with any evidence previously adduced by the party?
62. Given the legislative protection of “criminal intelligence” the second consideration is not a consideration at all.
63. What needs to be borne in mind is that in hearing this appeal the Court may act on hearsay evidence and any other information that is rationally probative, whether or not it would be admissible in a court of law. In deciding whether to accept or act upon information in the nature of “criminal intelligence” it is a matter for the Court to attach such weight to

³² In other words “how many tellers has it passed through before reaching the Court”: see Forbes *Justice in Tribunals* 3rd edition at [12.45].

³³ See Forbes n 32 at [12.45].

the information as it sees fit, having regard to the considerations referred to above.³⁴

64. As observed by Forbes the Court :³⁵

The uses and abuses of hearsay evidence in tribunals were considered by Brennan J in *Re Poochi and Minister for Immigration and Ethnic Affairs* (1979) 26 AR 247 at 256 – 257 where his Honour concluded that the *Wednesbury* (rationality) principle does not forbid its use:

[The rationality principle] does not mean, of course, that the rules of evidence...creep back through a domestic procedural rul...[H]earsay “has a wide scale of reliability” and there is no reason why logically probative hearsay evidence should not be given credence. However, the logical weaknesses of hearsay may make it too insubstantial, in some cases, to persuade the tribunal of the truth of serious allegations.

65. As also pointed out by Forbes, “hearsay may be the basis of a tribunal’s decision where it can be fairly said to be reliable’ but sometimes its weight will be so slight that it would be irrational to act upon it”.³⁶ Forbes goes on to say:

In that event it is the *Wednesbury* principle that is applied, rather than the hearsay rule. “Unsourced rumour” alone would hardly be capable of sustaining a serious charge.³⁷

66. As again as stated by Forbes:³⁸

...the principle of rationality (the “*Wednesbury* principle”³⁹) is “one of the most active and conspicuous among the doctrines which have vitalised administrative law.”⁴⁰ A decision is void if it is “so unreasonable that no reasonable person could have reached it”,⁴¹ “manifestly unreasonable”,⁴²

³⁴ See Forbes n 32 at [12.64]:

But in the final analysis:

If [hearsay] is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.

³⁵ See Forbes n 32 at [12.64].

³⁶ See Forbes n 32 at [12.64] where the author cites the following authorities: *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624 at 633 per Maugham J; *Wajnberg v Raymor* [1971] VR 665 at 678; *Gardiner v Land Agents Board* {1976} 12 SASR 458 at 474.

³⁷ See Forbes n 32 at [12.64].

³⁸ See Forbes n 32 at [6.33].

³⁹ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁴⁰ See HWR Wade and CF Forsyth *Administrative Law* (7th edition OUP 1994) 390.

⁴¹ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, cited with approval in *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 327.

⁴² See *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65 at 87.

illogical...or lacking a basis in findings or inferences of fact supported on logical grounds”,⁴³ or if “looked at objectively [it is] so devoid of any plausible justification that no reasonable body of persons could have reached it”.⁴⁴

67. At the end of the day, the Court has a fundamental, overarching obligation to act lawfully, rationally and fairly.⁴⁵

PECULIAR DIFFICULTIES FACING THE COURT WHEN ANALYSING AND EVALUATING THE EVIDENCE AND GIVING ITS REASONS FOR DECISION

68. This appeal presents the Court, as decision maker, with some unique difficulties by reason of the provisions of Regulation 5M(8) of the *Dangerous Goods Regulations*. As stated earlier, the subregulation requires the Court to take steps to maintain the confidentiality of classified information provided to it by the Commissioner. That obligation must inevitably carry over into the decision making process, and the Court’s reasons for decision need to be written in such a way as to avoid inadvertently revealing the confidential classified information.
69. Previous courts have had to grapple with the problem of providing reasons for decision in cases where the court has received confidential classified information.
70. In *Henrie v Canada (Security Intelligence Review Committee)* [1989] 2 FC 229⁴⁶ the Court expressed itself as follows:

It would in these reasons be improper for me to comment directly on any particular document or piece of evidence as there would be a serious risk that such comments might serve to identify the evidence and its source to any knowledgeable person who might be or whose organisation might be a target of the investigation.

⁴³ See *R v Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [52].

⁴⁴ See *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821; *East Melbourne Group v Minister for Planning* [2008] VSCA 217.

⁴⁵ See *Wajnberg v Raynor* [1971] VR 665 at 677-679 per McInerney J.

⁴⁶ Affirmed by the Federal Court of Appeal (A-1107-88).

71. Similarly in *MCI v Singh, Iqbal (FCTD; DES -I-98)* August 11 1998, the Court said:

By reason of paragraph 40, I am not permitted to disclose the security intelligence report or other evidence which I have heard in the absence of the respondent or his counsel, because disclosure would be injurious to national security or to the safety of persons.

72. Accordingly, when giving its reasons in support of its decision, the Court should be careful when referring to the “criminal intelligence” before it to refer to that evidence in very general terms and to avoid inadvertently revealing information that has been found to amount to “criminal intelligence” as well as commenting directly on any particular document or piece of evidence. However, notwithstanding the difficulties occasioned by regulation 5M(8) of the *Dangerous Goods Regulations*, the Court must still give adequate reasons for its decision in order to avoid appellable error.

CONSIDERATION OF THE WHOLE OF THE EVIDENCE AND DETERMINATION OF THE APPEAL

73. The undeniably difficult task of the Court is to consider all of the evidence put before the Court, comprising the “criminal intelligence” relied upon by the respondent, the non classified material provided to the Court by the respondent and the evidence presented to the Court by the appellant. The Court’s job is to evaluate all the evidence in terms of its relevance or its rational probative value, reliability and weight. In undertaking this exercise, it is, in my opinion, inappropriate to approach the determination of the appeal from the perspective of one of the parties carrying a burden of proof. The question is purely and simply whether the Court is satisfied, on the whole of the evidence, that Mr Featherby is an appropriate person to hold the licence that he seeks. The standard of proof is the civil standard – the balance of probabilities. That standard requires the Court to be reasonably satisfied that it is more probable than not – or as sometimes expressed as more likely than not - that Mr Featherby is an appropriate person to hold the relevant licence.

74. The obvious starting point is an evaluation of the “criminal intelligence” that was put before the Court.
75. At the outset, I have been careful to ensure that all of the “criminal intelligence” relates to either Mr Featherby or his company KC’s Fireworks.⁴⁷
76. In my opinion, the “criminal intelligence” that was available to the Commissioner at the time of his decision was relevant or rationally probative. I have also formed the same opinion in relation to the subsequent “criminal intelligence” that was made available to the Court. In my opinion, annexures RB 2 – RB 15 to the affidavit of Richard Bryson (Exhibit 3) adversely reflect upon Mr Featherby’s probity and regard for the law, such as to seriously call into question his capacity to operate within and in accordance with the Northern Territory licensing regime, and to fully comply with the terms and conditions of a wholesaler’s licence in the event he was granted such a licence.
77. In my opinion the information contained in the “criminal intelligence” is adequately sourced and not anonymous.
78. Although specific pieces of “criminal intelligence” are not corroborated by more than one independent source, there is a body of “criminal intelligence” that comes from a number of different sources over a significant period of time that lends credence to each separate piece of “criminal intelligence”. In my opinion that enhances not only the reliability of each individual piece of information but also the totality of the “criminal intelligence”.
79. Furthermore, the evidence that was given by Assistant Reece Kershaw during the “in camera” proceedings disclosed that certain pieces of

⁴⁷ This is in response to a submission made by the appellant’s counsel at p 34 of the transcript of proceedings on 24 June 2013.

“criminal intelligence” should be regarded as particularly reliable.⁴⁸ I am inclined to accept the reliability of those pieces of information.

80. Applying each and every criteria for the weighing of hearsay evidence, I consider that although each individual piece of “criminal intelligence” should only be accorded minimal weight, when the “criminal intelligence” is considered as a whole it should be accorded significant weight, despite the fact that Mr Featherby has not been given the opportunity of testing that information by cross-examining the various sources of information and adducing evidence to directly rebut that information. In my opinion, the “criminal intelligence” gains collective weight because of a pattern of serious allegations against Mr Featherby, which seriously call into question his probity and regard for the law, and in particular his capacity to operate within the licensing scheme and to fully comply with the terms and conditions of any licence that might be issued to him under the *Dangerous Goods Regulations* – and hence his appropriateness to hold a licence.
81. My final analysis of the “criminal intelligence” is that it goes beyond mere suspicion innuendo and rumour, and comprises a body of rationally probative evidence that the Court can ill-afford to ignore in considering Mr Featherby’s appropriateness to hold a licence.
82. For these reasons I feel confident about acting on the “criminal intelligence” viewed as a whole. The question that remains to be answered is what effect does that information have on the appropriateness of Mr Featherby to be granted a wholesaler’s licence, because regulation 5H (5) mandates both the Commissioner and the Court to have regard to such information in forming the relevant opinion about an applicant for a licence.
83. Before answering that all important question the Court needs to consider the balance of the evidence that was made available to the Court during the course of the appeal. The Court needs to consider all of the countervailing

⁴⁸ See Exhibit 18.

evidence as to the appropriateness of Mr Featherby be granted the licence he sought.

84. With a view to demonstrating his appropriateness to be issued a wholesale licence, Mr Featherby relied upon the contents of his two affidavits as well as the oral evidence he gave during the hearing of his appeal. He also relied upon the bundle of testimonials, which became Exhibit 17.
85. In *K-Generation v Liquor Licensing Court* [2009] 237 CLR 501 at [78] French CJ suggested how an applicant for a licence might counter the effect of unseen “criminal intelligence” in cases where a court is inclined to accept or act upon such evidence:

There is nothing to prevent an applicant faced with unseen “criminal intelligence” from tendering comprehensive evidence about his or her own good character and associations. To the extent that the Commissioner of Police seeks to maintain the confidentiality of criminal intelligence provided to the Court, that confidentiality may limit the extent to which such character evidence may be tested by cross-examination.

86. As material classified as “criminal intelligence” can bear on the question of whether an applicant is an appropriate person to hold a licence, an applicant can adduce character evidence to rebut an inference that he or she is not an appropriate person. In deciding what weight to give such evidence the Court is again able to take into account the forensic disadvantages facing the applicant.
87. Without limiting its generality, the material that Mr Featherby relied upon by way of rebutting the inference that he is not an appropriate person to hold a wholesale licence to possess, store and sell fireworks Mr Featherby included the following:

1. His possession of various other licences in the Northern Territory and elsewhere in Australia;
2. His excellent safety record within the industry;

3. The high regard with which he is held within the industry for his expertise, professionalism and high profile;
 4. His reputation within the general community as disclosed by the many testimonials comprising Exhibit 17;
 5. His high regard for the licensing scheme demonstrated by his good working relationship with licensing authorities in Queensland and the Northern Territory and elsewhere in Australia and the contributions he has made to ensuring that the various licensing requirements are met by those operating in the industry;
 6. The fact that he has never been refused a licence or fireworks permit in any State of Australia;
 7. The fact that he has only had minor transgressions with government officials over the years and has always co-operated with the relevant authorities as regards investigations.
88. At the outset, it needs to be said that regardless of whatever licences Mr Featherby has, he must now be considered an appropriate person to hold the licence he now seeks to be granted.
89. It should also be noted that a person's appropriateness to be granted a licence may change over time, and indeed from time to time. The fact that a person has previously been granted the same or a similar licence is not conclusive of their appropriateness to hold a subsequent licence. For example a licence may have been previously granted on the basis of incomplete or then unavailable information, or the kind of information that a licensing authority may take into account when granting a licence may have changed since the grant of an earlier licence. There are all of these variables.

90. Mr Featherby's excellent safety record is accepted by the Court. Therefore, there is no concern over public safety if Mr Featherby were to be granted a licence.
91. It is also accepted by the Court that Mr Featherby is held in high esteem within the industry. This is clearly a matter that the Court needs to take into account when considering the appropriateness of Mr Featherby to be issued with a wholesale licence.
92. It is true that many people in the community, from diverse backgrounds, speak very highly of Mr Featherby's expertise and professionalism. However, as submitted on behalf of the respondent:

I think the other matter I wanted to deal with...are the references that have been handed up. There are a number of contemporary ones and there's a number of old ones. Basically...all they tell you is that – all they confirm is material that's already in Mr Featherby's affidavits, one, is that he's very good at putting on fireworks displays, that's something which he's got a long history of doing successfully and to the satisfaction of various organisations which pay him to put on fireworks displays. He puts on good displays and he's very competent and, as far as one can gather, he is safe – he does it with a considerable degree of safety. They also disclose that he is good at putting on events involving the use of monster trucks in which we've heard he has quite an interest. And indeed, I think he told us today that he travels overseas to do that a number of times per year.

They tell us that he pays his debts on time and his dealings with the people from whom he puts on displays are professional and satisfactory. They also tell us...that he is sometimes generous with his time and his resources and has been involved in charitable works.

...you would not I would say, with great respect, expect the people who have provided these references to know of matters that might be the subject of intelligence – criminal intelligence – because if they did they wouldn't have supplied them – they wouldn't have been asked to supply them and it is, of course, always meritorious (sic) that people who may be the subject of criminal intelligence – and quite properly so- on the surface live normal lives, fit into the community and form relationships with law abiding citizens.⁴⁹

⁴⁹ See pp 58-59 of the transcript of proceedings on 24 June 2013. I think "meritorious" should read "notorious".

93. Clearly, the material contained in the various testimonials, insofar as it pertains to Mr Featherby's appropriateness to hold a licence, has its limitations. However, I am once more mindful of the forensic difficulties confronting the appellant.
94. Mr Featherby's apparent high regard for the licensing scheme in the Northern Territory as reflected in his email to Melissa Garde sent on 6 July 2012, making suggestions and improvements to the Northern Territory legislation, can, as submitted on behalf of the respondent, be viewed in a number of ways – one which is that it was designed to ingratiate Mr Featherby with the local regulatory authorities.⁵⁰ In considering how to view this email and its underlying purpose it is important to have regard to the "criminal intelligence" before the Court, and to make some assessment as to how the email sits alongside the confidential information. The "criminal intelligence" suggests that the email should not be taken at face value.
95. Although the fact that Mr Featherby has never been refused a licence or fireworks permit in any State of Australia is relevant to an assessment of his appropriateness to hold a wholesale licence, the focus of this appeal is on Mr Featherby's appropriateness to hold such a licence having regard to the "criminal intelligence" and all the other relevant material before the Court.
96. Mr Featherby's claim that he is an appropriate person to hold a licence on the basis he has only had minor transgressions with government officials over the years, and has always co-operated with the relevant authorities as regards investigations, needs to be considered along with the "criminal intelligence" and the non- classified information contained in Exhibit 12.
97. Mr Featherby gave explanations for his failure to declare the currency in 2003 and the seizure of fireworks in his possession in 1999 and 2003, which

⁵⁰ See p 14 of the transcript of proceedings on 24 June 2013.

were not challenged by the respondent. Whilst it is accepted that these matters – given their age and the attendant circumstances - alone may not present an impediment to the Court forming the opinion that Mr Featherby is an appropriate person to hold a wholesale licence, they assume far greater significance when viewed alongside, and in light of, the “criminal intelligence”. The non –classified information in combination with the “criminal intelligence” raises considerable concern about Mr Featherby’s probity and regard for the law and its observance.

98. There are other aspects of this appeal which, although by themselves may not present an impediment to the Court forming the relevant opinion, when viewed alongside and in light of the “criminal intelligence” raise real concerns about Mr Featherby’s appropriateness to hold a licence.
99. The first matter relates to Mr Featherby’s working relationship with Cameron Radcliffe and Mr Radcliffe’s illegal storage of fireworks.⁵¹ The second matter relates to Mr Featherby’s sister’s transgressions of the law and the connection between his company and his sister’s company.⁵² The third matter relates to the prosecution of Mr Featherby’s son (Jaye Featherby) of possession of illegal fireworks.⁵³ Although these matters by themselves cast no more than suspicion (by association) on Mr Featherby, their rationally probative value is increased when they are viewed in conjunction with, and in light of, the “criminal intelligence”.
100. In determining this appeal, the Court, like the Commissioner, cannot issue a certificate under Regulation 5H(4) unless it forms the opinion that the relevant person is an appropriate person to hold a licence. In forming the relevant opinion the Court must have regard to not only the “criminal intelligence” provided to the Court, but also to all the other relevant material before the Court. Appropriateness must be demonstrated, and the

⁵¹ See [43] – [46] of Exhibit 1.

⁵² Although separate entities the two companies bear the same name and share insurance in relation to some matters.

⁵³ See Exhibit 10.

Court must be satisfied that Mr Featherby is an appropriate person to hold a wholesale licence.

101. In my opinion the “criminal intelligence” provided to the Court is so out of the ordinary as to attract significant rational probative value, and such that the Court can confidently act upon it. The “criminal intelligence” along with other aspects of the case (referred to in the body of this decision) presents an impediment to the Court forming the opinion that Mr Featherby is an appropriate person to hold a wholesale licence. The Court is unable to be reasonably satisfied that Mr Featherby is a person whose probity is beyond question and who has a high regard for the law and its observance. In particular, the Court is unable to be reasonably satisfied that Mr Featherby has the capacity to operate within the Northern Territory licensing system and to conduct himself in accordance with the terms and conditions of a wholesale licence to possess, store and sell fireworks.
102. Having been unable to form the opinion that Mr Featherby is an appropriate person to hold a licence, the Court is precluded from issuing a certificate under Regulation 5H(4). Accordingly, I confirm the decision of the Commissioner of Police not to provide a certificate that Mr Clive Featherby is an appropriate person to whom a licence may be granted.

Dated this 29th day of July 2013.

Dr John Allan Lowndes
DEPUTY CHIEF MAGISTRATE