

Gun Licence Appeals

EMB v Commissioner of Police [2021] NSWCATAD 247
ss7 & 11 Firearms Act 1996

Applications for firearms licences are considered by the Commissioner of the NSW Police Force. The Commissioner and his delegates have taken the view that no-one in NSW should have access to a firearm unless they are a police member. They regularly refuse applications on the flimsiest of reasons or on 'secret intelligence'. These refusals can be reviewed at the NSW Civil & Administrative Tribunal. This article aims to assist legal practitioners appearing in the Tribunal.

The Tribunal

The tribunal's role is to determine whether the Commissioner's decision is the correct and preferable one having regard to the underlying facts in the matter and the applicable law.¹ The tribunal is to review the merits of the original decision and is required to consider the evidence available at that time, together with any other or later material, so as to affirm the original decision, vary it or set it aside.²

Proceedings in the tribunal are thus in the nature of an administrative hearing de novo, not of judicial review or appeal in the usual sense. Any procedural defects at earlier stages are therefore largely immaterial, provided that a party is afforded procedural fairness before the tribunal itself.

The standard of proof applying in the Tribunal is the civil standard, that is, the balance (preponderance) of probabilities. But these are not adversarial proceedings. There is, accordingly, no burden or onus of proof on either party³ and the standards of proof in *Briginshaw*⁴ and s140 Evidence Act 1995 do not apply.

The 'Fit & Proper Person' Test

The firearms legislation provides two tests that must be satisfied. The first is the mandatory 'Fit & Proper Person' test in s11(3)(a) Firearms Act:

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,

...

This is usually demonstrated by character references and lack of criminal antecedents.

¹ s63 Administrative Decisions Review Act 1997

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 77

³ *Nakad v Commissioner of Police, New South Wales Police Force* [2014] NSWCATAP 10, [28] – [34]

⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 316

The 'Public Interest' Test

The second test is a broader, catchall discretion in s11(7) Firearms Act:

- (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.

So, while the Fit & Proper test is limited to the subjective features of the Applicant, the Public Interest test involves a discretionary value judgment that takes into account the purpose of the legislation and factors other than the character of the Applicant. The decision maker is to balance the interests of the individual against the interests of the whole community. Public safety is of primary importance, but the decision maker must have regard to public protection and public confidence in the licencing system.⁵

Confidential Material

The most frustrating part of these proceedings is that the police are able to tender to the Tribunal a confidential affidavit containing 'secret intelligence'. The police make an application and the Tribunal can make an order prohibiting disclosure of the material.⁶ This means the Applicant is not allowed to see the material much less respond to it.

Is the material accurate? You will never know as you don't get to see it. Even John Ibrahim couldn't get access to the secret material that the Tribunal relied on when refusing his application.⁷ We are simply asked to trust that the police and the Tribunal will do the right thing.

Submissions

So, it is up to the Applicant to source as many character references as they can to demonstrate they are a fit and proper person to hold a licence. In addition, they need material to demonstrate that they have a legitimate need for a firearm. Requiring a firearm for your employment is the most persuasive followed by recreational shooting. Don't bother claiming you need one for personal protection.

I'm available every day if you have any interesting issues.

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⁵ Constantin v Commissioner of Police, New South Wales Police Force [2013] NSWADTAP 16, [33].

⁶ 59(2)(b) Administrative Decisions Review Act 1997

⁷ Ibrahim v Commissioner of Police, NSW Police Force [2019] NSWCATAD 41