

Licensing Board of Tasmania	Decision
Legislation:	<i>Liquor Licensing Act 1990</i>
Applicant:	Commissioner for Licensing
Nature of application:	Cancellation of liquor licence
Premises: Name	Heat Night Club t/a Players Sports Bar
Premises: Address	121 Macquarie St, Hobart
Name of decision	Heat Night Club
Date and place of hearing:	13 November 2006 at Hobart
Date of decision	13 November 2006
Members of the Board:	Kerry Sarten (Acting Chairperson) Louise Finney (Member)

## **Preliminary**

Procedural directions were agreed prior to the hearing for exchange of proofs of evidence and submissions.

The Commissioner for Licensing provided a submission on 19 October 2006, and on 8 November 2006 Ms Hernan provided her submission.

## **Application**

The Commissioner for Licensing applies for the cancellation of the on licence # 73220307 issued to Samantha Joy Hernan in respect of Heat Nightclub, currently trading as Players Sports Bar, 121 Macquarie St, Hobart.

The application is made under s42 (1) (l) of the *Liquor Licensing Act 1990*, on the grounds that an associate of the licensee, Mr Colin Latham, is not, or is no longer a person of good repute, having regard to character, honesty and integrity.

The Commissioner for Licensing (The Applicant) was represented by the Director of Liquor and Gaming, Mr B Elson.

Ms Samantha Hernan and Mr Colin Latham were represented at the hearing by Mr S Chopping of Council. Representation was permitted by the Board pursuant to s213 (6) of the *Liquor Licensing Act 1990*

## **The Law**

This application is for the cancellation of a general licence under s 42 (1) (l) of the *Liquor Licensing Act 1990*.

S42 of the *Liquor Licensing Act 1990* provides the criteria by which the Commissioner may apply to cancel a liquor licence. For the purposes of this hearing it is s42 (1) (l), the associate provision, and s3A. (1) and (2), which provide the meaning of an “associate” that are most relevant, in that providing that these criteria are satisfied, the application to cancel the license may be granted.

### ***Meaning of “associate”***

- 3 A. (1) *For the purposes of this Act, a person is taken to be an associate of an applicant for a liquor license or of a licensee if the person –*
- (a) holds, or will hold, any relevant financial interest, or is, or will be, entitled to exercise any relevant power (whether in right of the person or on behalf of any other person) in the business of the applicant or the licensee and, by virtue of that interest or power, is able, or will be able, to exercise a significant interest over, or with respect to, the management or operation of that business; or*
  - (b) holds, or will hold, any relevant position, whether in right of person or on behalf of any other person, in the business of the applicant or licensee; or*
  - (c) is a relative of the applicant or licensee.*
- (2) *In this section –*
- “relative”** *means a spouse (including a defacto spouse), parent, child or sibling, whether full blood or half blood;*

**“relevant financial interest”**, in respect of the business, means –

- (a) any share in the capital of the business; or
- (b) any entitlement to receive any income from the business;

**“relevant position”**, in respect of the business, means –

- (a) the position of director, manager or other executive position or secretary, however that position is designated in that business;  
or
- (b) if that business is conducted in premises in respect of which a liquor licence is in force the licensee;

**“relevant power”** means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others

–

- (a) to participate in a directorial, managerial or executive decision; or
- (b) to elect or appoint any person to any relevant position.

### ***Cancellation and suspension***

**42.** *The Commissioner may apply to the Board for a hearing to cancel or suspend a liquor licence if the Commissioner is satisfied that –*

- (a) ....
- (b) ....
- (c) ....
- (d) ....
- (e) ...
- (f) ...
- (g) ...
- (h) ....
- (i) ....
- (j) ....
- (k) ....

(l) *The licensee or an associate of the licensee is not, or is no longer, a person of good repute, having regard to character, honesty and integrity.*

It is worthwhile noting that s3A and s42 (1) (l) were introduced in September 2003 and that at this time s22 (1) (b) also assumed its current form from previously having been:

### **Qualifications for liquor licence**

22. (1) *A person is not qualified to be granted a liquor licence unless the person is a natural person -*
- (a) *who has attained the age of 21 years; and*
  - (b) *who has satisfied the Commissioner that the person -*
    - (i) *is a **fit and proper person** to hold the licence; and*

altering to -

22. (1) *A person is not qualified to be granted a liquor licence unless the person is a natural person –*
- (a) ....
  - (b) *Who has satisfied the Commissioner that the person and each associate of the person is of good repute, having regard to character, honesty and integrity;....*

The alteration of the principal definition from “**fit and proper**” to “**good repute**” in s22, which term is also employed in the newly added s42 (1) (l) is significant in this application. This is so because it would appear from the changes that the intent when the changes were made was to determine the suitability of both applicants and associates via a test of “good repute” rather than that of “fit and proper”. The new provisions would seem in some instances to provide a lesser test, in effect making the bar easier to hurdle than the latter, or indeed than the combination of the two. Refer *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 where the “*question of fit and proper is one of a value judgement. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker*”.

The current test is however one of repute, rather than a question of being a fit and proper person. Repute, or reputation, is not defined in the act and its ordinary everyday meaning should be applied. The Macquarie Dictionary defines repute as;

*noun* **1.** estimation in the view of others; reputation: *persons of good repute.*

The question of repute, or reputation, has been considered judicially by the NSW Supreme Court in the decision of *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392 where it was stated that;

*"...a person's reputation is to be found in the estimate of his moral character, entertained by a specific group of people - such as those who live in the neighbourhood of his residence, those who work with him or those with whom he associates with in his occupation or profession."*

Clearly the test to be applied is what is the standing or reputation of the associate *in the view of others*, and by extension those who have *actual* knowledge of the reputation the associate has either in the community at large or in a certain, relevant section of it – i.e. people from the industry in which he works. In *YJ v Chief Executive Officer, WorkCover Authority* [2006] NSWADT 264 the statement that “A simple assertion that a person is not of good repute, without more, is therefore of little assistance” gives weight to the proposition that evidence should be provided by the applicant of the actual reputation of the associate for the application to have any real prospect of success.

## **Representations**

The Applicant relied solely on the written submission forwarded to the Board and the other party on 19 October 2006. This identified four factors claimed to be relevant to the application:

1. That Mr Latham is an associate of Ms Hernan.
2. That Mr Latham had misrepresented himself in the consent for associates document provided to the Commissioner.

3. That Mr Latham had avoided the provisions of an operating agreement consented to by licence holders within the Hobart CBD which could be referred to as “the lockout rule”.
4. A document from Tasmania Police asserting that Mr Latham was not a person of good repute due to previous convictions.

Ms Hernan gave evidence which included:

- Ms Hernan is in a defacto relationship with Mr Latham and expecting their child,
- she had been a licence holder for eight years for various establishments in Hobart, and currently is the licence holder and sole proprietor of Heat Nightclub trading as Players Sports Bar,
- that Ms Hernan was her “own woman”, however acknowledged that there were joint decisions she made with Mr Latham,
- that the stamping of potential patrons hands had been a practice prior to “the lockout rule” coming into effect, and therefore was not introduced to circumvent or undermine the agreement (refer to (3) above), and
- that Ms Hernan hoped to sell the business soon.

Mr Latham gave evidence to the effect that:

- The Commissioner was aware of his prior criminal convictions from July 2004 and that there had been no objections or action taken until this date,
- That while he was philosophically opposed to the restrictions of the agreement among Hobart CBD licensees he was prepared to comply, however claimed minimal compliance by a number of operators. Mr Latham stamped people for entry at around 9-9.30pm, which stamp was intended to allow them to bypass the entry queue. It was not intended to bypass the lockout arrangement,
- That he had been involved in association with Ms Hernan for a number of years and the reason for being the spokesperson was due to the changes in the business which may have upset Ms Hernan’s family,
- That there has never been any illegal, or close to illegal practices at the premises and indeed Mr Latham had been told that it was “cleaner” than similar premises,

- Mr Latham’s role includes media adviser, PR consultant, operations and part-time DJ,
- Mr Latham acknowledged that he had been convicted in Tasmania in 1992 and served 6 months for assault for a matter that was in his opinion a matter of self defence for which he claimed he was wrongly convicted,
- Further Mr Latham acknowledged that he had been charged in 1998 for an offence in Victoria committed in 1996 of rape and indecent assault, which he alleged would have attracted the lesser charge of aggravated sexual assault in Tasmania, and
- That the only offence since this time has been a minor misdemeanour with a driving under the influence of alcohol with a reading of 0.06. Mr Latham said there were no other outstanding matters or charges relating to his conduct.

In summation Mr Elson for the Commissioner reiterated the position that Mr Latham was an associate of Ms Hernan, that the Commissioner believed the evidence submitted to the Board demonstrated that Mr Latham was no longer of good repute. Mr Elson also commented that the information concerning Mr Latham only came to the Commissioner’s attention recently due to the (withdrawn) application to transfer the licence which led to the investigation of Mr Latham as an associate.

Mr Chopping acknowledged that there is a defacto marriage relationship between Ms Hernan and Mr Latham, and that indeed Mr Latham was an associate of Ms Hernan, as determined by the meaning given in the Act. Mr Chopping submitted that Mr Latham’s reputation was not sufficiently smeared by previous events given the passage of time and behaviour since.

## **Conclusions and the Decision**

Mr Latham is an associate of Ms Hernan’s under s3A (1) (c) due to the defacto spouse relationship they have. This was not disputed.

Of the matters raised in the application of the Commissioner the Board considered that three of the factors did not contribute towards evidence of repute. The suggestion of avoiding the “lockout rule” may have been relevant to character, however without

evidence that this practice by Mr Latham was in the public domain and had actually caused others to consider Mr Latham to have a bad reputation as a result of this action, it provided little assistance to the Board in determining whether Mr Latham is or is not of good repute. Similarly the allegation regarding the inaccurate completion of the licensing form in not acknowledging prior convictions, and the document from Tasmania Police with the assertion that Mr Latham is of bad repute in their opinion did not in themselves provide sufficient evidence to the Board that this would have reasonably led to Mr Latham being considered in fact of bad repute by the community at large, the industry or his peer group. Had the test been that of “fit and proper” this evidence would have been of more relevance.

The prior convictions are of a more serious and relevant nature, and as such the Board considered this relevant to the test of repute. After consideration as to:

- the nature of the offences, which are serious regardless of in which jurisdiction they occurred,
- the passage of time (significant),
- the assertion of Mr Latham that he is reformed and aside from one relatively minor drink driving charge has not committed any offence in 10 years, that he has no intention of exhibiting the behaviours which had led to past convictions in the future as he had “learnt his lesson”,
- that Mr Latham has been associated with Ms Hernan in running licensed establishments for a period of 8 years with no evidence that there had been any problems or issues to date associated with the management of the various licensed premises,
- without any further evidence or witnesses to dispute these assertions, or
- the absence of any evidence that as a result of these convictions Mr Latham is considered to be of “bad repute” in the community, or by his peer group, or by the industry, and
- the fact that there should be no question over the issue of “bad repute” given the serious ramifications of such a finding in favour of the applicant as to the impact on Ms Hernan, (that is, a reasonably high standard of proof on the balance of probabilities is appropriate),

the Board considered there not to be sufficient evidence to find that Mr Latham was not of good repute.

In conclusion, for an application pursuant to this section of the Act, as it currently stands, the applicant would need to present some tangible evidence as to the actual bad reputation of the associate (or licensee) in question. To support this one would assume that oral evidence would be adduced by the Commissioner, of the associate's alleged bad reputation.

Again it is noted that as the question is one of repute there is no need to demonstrate that the reputation asserted is either true in fact or deserved. A person may have a terrible reputation in the community which is entirely undeserved and based on matters which are untrue - it is the existence of the reputation, not the basis for that reputation, which is in issue. As such this is a substantially different test to the "fit and proper" test, or indeed the combination of the two tests.

After considering all the evidence presented, the Board determined that:

- (a) Mr Colin Latham is an associate in accordance with s3A (1) of the *Liquor Licensing Act 1990*, and
- (b) There was insufficient evidence presented for the Board to be satisfied that Mr Latham is not of good repute, having regard to character, honesty and integrity.

The Board in accordance with s214 (1) of the *Liquor Licensing Act 1990* refused the application.

**K Sarten**  
**Acting Chairperson**

**L Finney**  
**Member**

**Appendix:**

**Extracts from tribunal decisions and provisions in some similar legislation**

**Extract A: similar legislation: Tasmanian Gaming Control Act: “Good repute”.**

Tasmanian Consolidated Acts

GAMING CONTROL ACT 1993 - SECT 74

74. Determination of application

(1) The Commission must determine an application for listing on the Roll by either granting or refusing the application and must notify the applicant in writing of the decision.

(2) Without limiting the matters which the Commission may consider in determining whether to grant an application in respect of an applicant other than a minor gaming Roll applicant, the Commission must consider whether –

(a) the applicant and each associate of the applicant is of good repute, having regard to character, honesty and integrity; and

(b) any of those persons has any business association with any person, body or association who or which, in the opinion of the Commission, is not of good repute having regard to character, honesty and integrity or has undesirable or unsatisfactory financial resources; and

(c) each director, partner, trustee, executive officer and secretary and any other officer or person determined by the Commission to be associated or connected with the ownership, administration or management of the operations or business of the applicant is a suitable person to act in that capacity.

(2A) Without limiting the matters which the Commission may consider in determining whether to grant an application in respect of a minor gaming Roll applicant, the Commission must consider whether the applicant and each associate of the applicant is of good repute, having regard to character, honesty and integrity.

(3) The Commission is not required to give reasons for its decision on any application under section 71 but may do so if it thinks fit.

**Extract B: similar legislation: Western Australia Liquor Licensing Act: “Good repute – and – fit and proper”.**

corporate that holds a licence, approve the occupation of that position in the body corporate by that person.

- (6) Where the licensing authority is to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that holds a licence, or to approve a natural person as a manager or trustee —
- (a) the creditworthiness of that person;
  - (aa) the character and reputation of that person;
  - (b) the number and nature of any convictions of that person for offences in any jurisdiction;
  - (c) the conduct of that person in respect to other businesses or to matters to which this Act relates; and
  - (d) any report submitted, or intervention made, under section 69,

shall be taken to be relevant and amongst the matters to which consideration should be given.

- (6a) In making a determination under subsection (6), the licensing authority may require a person to demonstrate knowledge relevant to managing licensed premises, and may require a

**Extract C: Chandler v Ministry of Transport [2004] NSWADT 49 (10 March 2004)**

If an applicant for an authority is of good repute then it must also be found that "in all other respects", that is, in all respects other than their reputation, the applicant is a fit and proper person to be the driver of a public passenger vehicle before an authority is issued. Whether a person is of good repute is an issue related to but different from whether a person is fit and proper for a particular purpose. Being considered to be of good repute is a threshold status in section 11(2). If a person is not of good repute there is no need to consider whether they are a fit and proper person to be the driver of a public passenger vehicle.

31 Mr. Chandler does not fail to be of good repute simply because of convictions. In *Saadieh v Director-General, Department of Transport* [1999] NSWADT 68 the Deputy President of this Tribunal made clear at paragraphs 14 and 15 that an assessment of repute is a matter for the Tribunal, weighing all the evidence. All the circumstances of the case must be taken into account in assessing a person's suitability to retain an authority.

32 Repute is what others think. A person's reputation, in fact and in law, is to be found in the estimate of his moral character entertained by some specific group of people, such as those who live in the neighbourhood of his residence, those who work with him or those with whom he associates in his occupation or profession: *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392 per Waddell J at page 393.

33 Whether a person's history is known in the community will be a factor in assessing what weight to give to the evidence of repute. A positive estimation in spite of knowledge of a blemished history would ordinarily weigh in favour of the person.

**Extract D: Director General, Department of Transport v Z (No.2) (GD) [2002] NSWADTAP 37 (22 November 2002)**

**ERROR OF LAW APPEAL**

15 The Director-General objected to the second Tribunal decision on two primary grounds: misapplication of the test as to 'good repute' under s 11(2)(a) of the Act; and misapplication of the tests as to whether the applicant was a 'fit and proper person' under s 11(2)(a) of the Act. As noted at para [7] above, the power to cancel under s 14 may be exercised having regard to the purpose of the authority. Section 11(2) provides:

11. Authorities

(1) ....

(2) The purpose of an authority under this Division is to attest:

(a) that the authorised person is considered to be of good repute and in all other respects a fit and proper person to be the driver of a public passenger vehicle; and

(b) that the authorised person is considered to have sufficient responsibility and aptitude to drive the vehicle or vehicles to which the authority relates:

(i) in accordance with the conditions under which a public passenger service is operated; and

(ii) in accordance with law and custom.

(3) ....' (emphasis added)

16 The Director-General, as had the Tribunal below, referred to the oft-cited explanation given by Waddell J as to the meaning of 'good repute' and how it differs from the requirement to be in all other respects a 'fit and proper person': *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392.

17 In *Re T*, a couple had been refused entry into the State adoption register on the basis that the husband was not a person of 'good repute'. The evidence showed that the man had a number of convictions for offences associated with the consumption of alcohol the last of which was approximately two years before the application for entry on the register. The major countervailing evidence was that over the two years, the man and his wife had cared well for a number of foster children, and the man now led a sober and responsible life. There was also a requirement that a person be a 'fit and proper person' to adopt children. In this case the administrator relied solely on the ground that the man was not of 'good repute'. There was no claim that otherwise he was not a 'fit and proper person'.

18 Waddell J explained that under the statutory scheme in that case it was necessary to be satisfied that a person was of 'good repute' before going on the question of being otherwise 'fit and proper' to be permitted to adopt children. The facts of the case highlighted the distinction. There was evidence that the man was quite capable of carrying out the duties connected with adoption. This had been demonstrated by the good appraisals he and his wife had received for their foster care work over the two years. But in this case the concern related solely to whether he could be said to be of good repute because of the history of alcohol-related offences.

19 The Court said at 395:

'... A distinction must be drawn between 'repute' or 'reputation' and 'character' or 'disposition'. The word 'character' is sometimes used as meaning a person's reputation, but 'reputation' is not ordinarily used to mean character. ... [various authorities cited] ... In some cases, evidence of a person's reputation may be admissible as hearsay testimony relevant to his actual character. In other cases, the nature of a person's reputation is itself, as it is in this case and defamation cases, a question in issue.

... The distinction mentioned is, in my opinion, clearly preserved by [the relevant statutory provision] ... [T]he Court is concerned with two distinct matters, the reputation borne by the applicant or applicants, and his or their suitability to fulfil the responsibilities of a parent. To illustrate, an applicant might be a person of good repute but, unknown to those who hold such an opinion of them, have deficiencies in his moral character which would make him not a fit and proper person to fulfil the responsibilities of a parent. A person might not be of good repute, because of a widespread but mistaken belief that he was dishonest but, in fact, have all the personal qualities necessary to make him fit and proper to fulfil the responsibilities of a parent. In either case, the Court, if so satisfied, would be obliged to refuse an application by him for the adoption of a child.'

20 At 399 Waddell J said:

'This definition ['reputation', Shorter Oxford Dictionary, 1973, 1083] makes it clear, as is the law, that a person's reputation is to be found in the estimate of his moral character entertained by some specific group of people, such as by those who live in the neighbourhood of his residence, those who work with him, or those with whom he associates in his occupation or profession.'

21 At 401 his Honour referred to the way in which old convictions are dealt with in ascertaining reputation in defamation law, and cited with approval the dicta of Lord Denning MR in *Goody v Oldhams Press Ltd*[1967] 1QB 333, where he said:

'[Previous convictions] stand in a class by themselves. They are the raw material upon which bad reputation is built up. They have taken place in open court. They are matters of public knowledge. They are accepted by people generally as giving the best guide to his reputation and standing. They must of course be relevant, in this sense, that they must be convictions in the relevant sector of his life and have taken place within a relevant period such as to affect his current reputation. ...'

22 In the case Waddell J ultimately concluded, on the basis of additional evidence placed before him that had not been available to the administrator, that the man's current reputation was, despite his earlier history, now a good one. The appeal was allowed.

23 The Director-General submitted that the Tribunal erred in three ways in its application of the requirement of good repute and character to the facts.

.....

38 Good Repute: The approach to be adopted in considering 'good repute' is well explained by Waddell J in *Re T*. The Appeal Panel also considers it in a forthcoming decision, *Lo -v- Director-General, Department of Transport* [2002] NSWADTAP 39. 'Good repute' refers to the way reasonably-minded people assess an individual's current reputation, with reasonably precise knowledge of those matters that put the person's reputation in doubt. The fact that the person produces evidence from witnesses who vouch in general terms for the person's reputation can not be conclusive. Equally, care must be taken, as we see it, not to use the 'good repute' requirement as a way of bringing into consideration stereotypes or assumptions which offend, for example, against human rights or anti-discrimination standards.

.....

51 Counsel for the Director-General referred in his submissions to *Hughes and Vale Pty Ltd v New South Wales* (1955) 93 CLR 127. In that case the officer with equivalent powers under the legislation of that time to those exercised by the Director-General in this case could refuse a licence for a public motor vehicle (such as a delivery van) if the applicant was not a fit and proper person to hold such a licence. One of the questions that the High Court considered was the nature of the administrative discretion. At 156-57 Dixon CJ, McTiernan and Webb JJ said:

'The expression 'fit and proper person' is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their purpose is to give the widest scope for judgment and indeed for rejection. 'Fit' (or 'idoneus') with respect to an office is said to involve three things, honesty knowledge and ability ... . It is evident that the commissioner is invested with an authority to accept or reject an applicant the exercise of which depends on no certain or reliable criteria and which in truth involves a very wide discretion.'

**Extract E: YJ v Chief Executive Officer, WorkCover Authority [2006]  
NSWADT 264 (7 September 2006)**

11 Applications for licences are to be made in accordance with clause 29. Clause 30 sets out the general requirements for obtaining a licence. Relevantly it provides:

'(1) Before a licence is granted, the regulatory authority must be satisfied that:

(a) the applicant, and if the applicant is a corporation, at least one person engaged in the management of the corporation:

(i) is of or above the age of 18 years, and

(ii) is a fit and proper person to hold the licence and is otherwise of good character, and

(iii) has the qualifications, experience and knowledge necessary to hold the licence, and

(b) ...

(2) Without limiting any other reason that the regulatory authority may refuse to grant a licence to an applicant, the regulatory authority must refuse to grant a licence if a report relating to the applicant under section 13 of the Act contains a recommendation from the Commissioner of Police that the applicant should not be granted the licence on the basis of criminal or security intelligence or other information available to the Commissioner.'

.....

the conclusions drawn by the authority and, if appropriate, the Commissioner's s.13 report. Assessments of repute, character and trustworthiness are however matters of judgement that, in my view, require more than a simple yes or no answer, to enable a consideration of whether the judgement is correct and preferable. For example an assessment of whether a person is of good repute, requires the assessor to consider how "reasonably-minded people assess an individual's current reputation, with reasonably precise knowledge of those matters that put the person's reputation in doubt" (Director General, Department of Transport v Z (No.2) (GD) [2002] NSWADTAP 37). The fact of criminal convictions is not determinative of the issue, although they are an important consideration: Re T and the Director of Youth and Community Services [1980] 1 NSWLR 392 per Waddell J at 402. A simple assertion that a person is not of good repute, without more, is therefore of little assistance.

....

32 A further consequence of that submission would be that licence applicant's such as YJ are effectively deprived of their right, granted by s.24 to seek a review of the assessment of their fitness and character by the regulatory authority, because a negative assessment as to repute and character resulting in an adverse recommendation by the Commissioner must result in a mandatory refusal. These considerations point to a conflict between the provisions of clause 30(1)(a)(ii) and clause 30(2) if the regulatory authority's view of what constitutes a recommendation under s. 30(2) is accepted, because the Commissioner's report and recommendation on the issue of character and repute is, in effect, taking the place of the regulatory authority's assessment of fitness and character in circumstances where regulatory authority's assessment is established by the Regulation as determinative of those issues. Because I have found that there was no recommendation to which clause 30(2) applies in this case, it is not necessary to resolve that conflict.

## Fit and proper and otherwise of Good Character

33 In addressing this issue I propose to:

- consider the meaning of these terms;
- then to review the evidence as it applies to the issues; and,
- finally to consider whether YJ is fit and proper and of good character to hold an unsupervised handling licence.

34 The Law - Assessment of whether a person is fit and proper to be the holder of a licence is different from, but related to, an assessment of whether a person is of good character.

35 In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Chief Justice Mason explained that, at 380:

‘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.’

Toohy 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."

36 A person's fitness is to be gauged in the light of the nature and purpose of the activities that the person will undertake. In *Hughes and Vale Pty Ltd v New South Wales* (No. 2) (1955) 93 CLR 127 the High Court said (at 156-7):

"The expression 'fit and proper' is of course familiar enough as traditional words when used with reference to offices and perhaps vocation. But their very purpose is to give the widest scope for judgment and indeed for rejection. 'Fit' (or 'idoneus') with respect to an office is said to involve three things, honesty, knowledge and ability ... When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters

which may legitimately be inquired into; each case must depend upon its own circumstances."

37 In *Sobey v Commercial and Private Agents Board* 20 SASR 70 Walters J said:

"In my opinion what is meant by that expression is that the applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities evolving upon him as the holder of a particular licence ... 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 ... as a person to be entrusted with the sort of work which the licence entails."

38 Fitness and propriety are flexible concepts. A consideration of whether a person is fit and proper involves an assessment of their knowledge, honesty and ability in the context of the role they are seeking to undertake. Thus in *Obradovic -v- Commissioner for Fair Trading, Office of Fair Trading (GD)* [2006] NSWADTAP 18 the Appeal Panel agreed that a formerly licenced building contractor should have his application for a new licence refused because, despite there being no evidence that he was dishonest or of bad repute, evidence that he had been extremely tardy and intransigent in dealing with customer complaints, and the regulator, when he held a licence, was sufficient to conclude that he was not fit and proper for the role. In that case the licensing scheme was among other things, designed to protect consumers and to provide them with adequate means of redress against licenced contractors. In *Bond* the assessment occurred in the context of whether the applicant was a fit and proper person to hold a licence under the Broadcasting Act 1942 (Cth).

39 In *Haining v Commissioner of Police, NSW Police Service* (1999) NSWADT 6 at [41] the President of this Tribunal made the following comments on the issue, in the context of the security industry:

‘Whether a person is ‘fit and proper’ to hold a licence in a regulated industry will be affected by general considerations relating to the character of the person, special considerations that take account of the nature of the industry in issue and the public policy objective leading the legislature to regulate the industry.’

In *LJ v Commissioner of Police* [2003] NSWADT 230 at [27] Judicial Member Montgomery found that:

A higher standard is applicable to licensees in the security industry because of the special role it plays in ensuring that public order is maintained, in safeguarding community assets and private property and in ensuring that the public and public venues are safe.

40 The discretion vested in a decision maker in determining whether a person is fit and proper, in any given context, was said by the Full Court of the Federal Court in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 589 at 389, per Northrop, Miles and French JJ, to "give wide scope for judgement and allow broad bases for rejection."

41 The importance that criminal convictions play in the assessment was highlighted by then President of the Victorian Civil and Administrative Tribunal, Kellam J, in *Raymond Robbins v Business Licensing Authority* (2000) VCAT 457, a case involving an applicant for a licence to sell motor cars. His Honour said:

"The nature, the number and the date of the convictions is relevant to the issue of whether or not the applicant is a fit and proper person to be permitted to deal with the public in a motor car sales capacity ... In the circumstances of this case the conduct of the applicant is such that he cannot be seen as presently fit to deal with members of the public in the motor car trade. The convictions and his behaviour go to the very heart of matters of honesty, integrity and reliability of a motor car trader. The Act has established a system which entitles a purchaser of a motor car to rely upon the honesty and integrity of a motor car trader or salesperson. If that is undermined, the very structure of the Act is eroded. The offences in this case were not of a trivial or minor nature such as, some minor failure to keep proper books or records or of trading outside hours which were not permitted. The offences in this case are such that they are capable of eroding the confidence the community should have in relation to the motor car trade and in relation to the legislation which is structured to protect the public who might buy or sell motor cars."

42 As was made clear by Toohey and Gaudron JJ in *Bond*, issues of character and reputation may play a determinative role in deciding whether a person is fit and proper. Their Honours also clearly highlighted that there is a difference between the two. They explained that an assessment of character is relevant because it is an indicator of a person's likely future conduct when considering how a person might act in the context of the role they are seeking to undertake. Reputation on the other hand, provides an indication of the public perception of future conduct in that role. In *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392, Waddell J explained, at 393:

"A distinction must be drawn between "repute" or "reputation" and "character" or "disposition". The word "character" is sometimes used as meaning a person's reputation, but "reputation" is not ordinarily used to mean character. The distinction has been referred to in many decisions of the courts."

In *Melbourne v The Queen* [1999] 198 CLR 1 at 15 McHugh J explained:

"... character refers to the inherent moral qualities of a person or what the New Zealand Law Commission has called "disposition -- which is something more intrinsic to the individual in question". It is to be contrasted with reputation, which refers to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person."

43 In *Ex Parte Tziniolis; Re Medical Practitioners Act* (1966) 67 SR (NSW) 448 Walsh JA, at 450, said that in determining questions of character:

"... the court is required to consider matters affecting the moral standards, attitudes and qualities of the Applicant and not merely to consider what is his general reputation."

That case was concerned with an application for registration of a medical practitioner. His Honour went on to explain that the Court was entitled to inquire into personal misconduct, as well as professional misconduct, in considering whether the applicant was a man of good character:

"... whilst recognizing that there may be some kinds of conduct deserving of disapproval which have little or no bearing on whether or not it shows the applicant for registration as a medical practitioner is a person of good character. In this respect, I think, that some assistance can properly be obtained as to the mode of approach to be made from the observations made in cases where the was whether or not that a person was fit and proper to be a barrister, such as those in *Ziems v Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279*."

Thus, as with fitness and propriety, assessment of character is to be made in the context of the nature and purpose of the activities that the person is seeking to undertake.

44 A person's character is not fixed and is capable of change and rehabilitation. In *Clearihan v Registrar of Motor Vehicle Dealers in the Australian Capital Territory (1994) 122 ACTR 25 Miles CJ* considered an appeal against a decision of the ACT AAT to affirm the refusal by the Registrar to issue a motor vehicle dealer licence on the basis that the appellant was not of "good fame and character". Chief Justice Miles said (at 30 –31):

"It is a matter of common experience that a person's character is capable of development over time. At one end of the scale, a person who commits an isolated act of misconduct may afterwards indicate that he or she has learned from the experience, so that any mark on character brought about by that lapse may fade relatively quickly. At the other end of the scale, even people who have demonstrated evil character are capable of reform. A whole philosophy of sentencing for serious criminal offences is built on that principle. When character is under consideration for a purpose connected with a trade or profession different considerations apply according to the nature of the trade or profession."

45 In contrast to character, reputation as Waddell J explained in *Re T* at 389:

"...is to be found in the estimate of his moral character entertained by some specific group of people, such as by those who live in the neighbourhood of his residence, those who work with him, or those with whom he associates in his occupation or profession. The importance of a person's reputation is that it is an estimate of his character, or some aspect of his character, upon which the persons in such a group are generally, although not necessarily unanimously, agreed. It is this essential nature of reputation which makes it a reliable guide to a person's character. See, generally, *Wigmore on Evidence*, 3rd ed., vol 5, p 486 et seq, pars 1615, 1616; p 479 et seq, par 1610. As is pointed out by Wigmore, a person might not have a general reputation in the neighbourhood where he lives, but may have established a reputation in another group of persons: p 472 et seq, par 1606. It is, I suppose, possible that a person might

not have any reputation at all, simply because he does not participate in the activities of any group of people who have any necessity to form an estimate of his character.

46 In *Director General, Department of Transport v Z (No.2) (GD)* [2002] NSWADTAP 37 the Appeal Panel explained:

'Good repute' refers to the way reasonably-minded people assess an individual's current reputation, with reasonably precise knowledge of those matters that put the person's reputation in doubt. The fact that the person produces evidence from witnesses who vouch in general terms for the person's reputation can not be conclusive. Equally, care must be taken, as we see it, not to use the 'good repute' requirement as a way of bringing into consideration stereotypes or assumptions which offend, for example, against human rights or anti-discrimination standards.

47 In *Re T Waddell J* (at 399) discussed how reputation is to be proved by evidence from those who know the person well, and who know how the person is generally regarded in the community in which he lives. At 401, his Honour said that:

"...evidence of particular acts of conduct on the part of the person whose reputation is in issue is not admissible to prove the nature of that reputation."

However evidence of prior convictions is cogent evidence going to reputation, but, at 402:

"In each case, the nature of the crime of which the person has been convicted, and the circumstances, must be considered before inferring that as a result he would have acquired a bad reputation. For instance, the conviction might have been for an offence, or in circumstances, which did not detract from the general good estimate of his character held by persons who knew him. Further, it might appear unlikely from the nature of the offence, and the circumstances, that the conviction would become known to those with whom the person had a reputation. It might be shown that knowledge of the conviction had not come to such persons."