

TRANSPORT LICENSING SEMINAR
PRACTICAL ASPECTS OF TRANSPORT LICENSING

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INTRODUCTION

1. At common law no restriction on right to carry goods or passengers for hire or reward.
2. In New Zealand greater part of that activity prohibited by Statute unless carrier licensed.
3. Two main purposes of licensing:
 - (a) Protection of Railways.
 - (b) Regulation of competition among carriers themselves.
4. Broad manner of achieving those purposes in relation to goods services is:
 - (a) Prohibition against carrying on "goods service" except in terms of a transport licence - Section 108.
 - (b) Deeming certain carriage whether for hire or reward or not to be a "goods service" if there is an available route for their carriage that includes 150k of open Government railway. There are a number of exceptions and extensions to the "deeming" provision - Section 109.
 - (c) Defining the meaning of "available route" - Section 110.
 - (d) Prohibiting the "linking-up" of services whereby what is in reality one journey (in breach of the Rail protection provisions) is converted into two or more apparently lawful journeys (Section 111) and providing for payment of rail freight in addition to any penalty on conviction for an offence (Section 112).
 - (e) Prescribing criteria for the granting of licences - Sections 123 and 179.
 - (f) Prescribing conditions in licence either by Statute (e.g. Sections 133, 135) or Regulation (e.g. Regs. 17, 20, 21, 23 and 24). The most significant restriction is imposed by Reg. 24(1) in every goods service licence unless expressly modified or exempted in the terms: "If there is an available route for the carriage of goods that includes at least 150k of open Government

railway, or in the case of logs the Murupara/Kawerau railway, the goods shall be carried only so far as is necessary to permit of their carriage by railway"

The restriction does not apply:

- (a) Where the route that includes the railway is longer by more than one-third than the shortest road route available for the carriage of the goods; or
- (b) Where the goods are carried on a route between terminal points as expressly authorised in the licence; or
- (c) To the carriage of certain specific goods listed in Regulation 24(2).

5. Basic sources of law:

- (a) Transport Act 1962 Part VII Sections 91-186.
- (b) Transport Licensing Regulations 1963.
- (c) Transport Licensing Appeal Decisions:
 - (i) Dixon Vols. 1 & 2 1942 to 1952.
 - (ii) Butterworths Vols. 1-5 (and part 6) 1953 onwards.
 - (iii) Individual printed decisions (ex Secretary Appeal Authority)

GOODS SERVICE APPLICATIONS

1. Preliminary Considerations

- (a) Is licence required at all:
 - (i) Is it a "goods service" under Section 2:
 - A. Hire or reward.
 - B. Letting on hire of vehicle plus driver.
 - C. Is it carriage by owner of his own goods.
 - (ii) Is it deemed to be a goods service under Section 109.
 - (iii) Is it exempt under Section 113.
 - (iv) Is it caught under Section 114 (e.g. Gazette Notice 13/3/72 as to carriage of road metal, gravel, shingle, scoria etc).
- (b) Over what area or areas is licence required:
 - (i) Goods service districts Reg. 19 and 4th and 5th Schedules; Caltex map.
 - (ii) Reg. 25 minimum area of operation; - Reg. 25A as to additional districts.

- (c) How many vehicle authorities required:
- (i) Condition of licence that VA be carried on each vehicle used under licence; but
 - (ii) Does not apply to trailer in respect of which load is borne in common;
 - (iii) Nor to any other trailer unless being used pursuant to provisions in the licence exempting carriage from Reg. 24(1).

(Regulation 20)

- (d) Is Rail exemption required:
- (i) Generally; or
 - (ii) For specific route, area or class of goods.
- (Section 109 Reg.24)

2. Alternatives to New Application

- (a) Purchase of existing business and obtain transfer of licence (or part).
- (b) Purchase of shares in company which already holds licence; but.
- (c) Not borrowing or using someone else's vehicle authority or licence.

(Section 130)

3. New Application

- (a) Preparation and Lodging:
- (i) Application to be in prescribed form - Section 116. None prescribed but see Regulation 4.
 - (ii) To be forwarded to Secretary for Transport. In practice sent to Secretary of Local Licensing Authority.
 - (iii) On new application practice to include form with financial details TL80 (not mandatory).
- (b) Proper Licensing Authority and Place of Hearing:
- (i) If in one district LA for that district.
 - (ii) If more than one district LA nominated by Secretary for Transport - Section 115.
 - (iii) Place of hearing - discretion of LA - Section 117(2).

- (iv) Advertising:
 - A. 14 clear days public notice;
 - B. Public notice not defined and Section 4 of Acts Interpretation Act applies;
 - C. Pre-requisite to jurisdiction (South Road Transport Association & Others v Allingham & Others A.1431/79 Auckland, 19/10/79, unreported).

4. Procedure at Hearing

- (a) LA regulates his own procedure - Section 106.
- (b) Most LAs are laymen but knowledgeable about the industry and anxious to be fair.
- (c) No notice of opposition required from objectors but:
 - (i) Road Carriers organisation and competing carriers probable;
 - (ii) New Zealand Railways definitely if Rail exemption sought.
 - (iii) M.O.T. sometimes.
 - (iv) Worthwhile endeavouring to find out whether opposition since it affects extent and nature of evidence to be prepared.
 - (v) If unexpected opposition:
 - A. Adjournment (if obtainable).
 - B. If not, balance withdrawal of application and fresh start against prospects of success as case stands.
- (d) Normal Procedure followed:
 - (i) Applicant opens and calls witnesses.
 - (ii) Objectors open and call witnesses.
 - (iii) Closing addresses in reverse order.
 - (iv) "No prima facie case" submission - unpopular but available.
- (e) Evidence can be adduced even if not admissible in Court of law (Section 117) - lets in supporting letters, reports, accounts etc.
- (f) Usual practice to have evidence in chief typewritten.

5. Statutory Criteria for Grant

- (a) Section 125 - discretion to grant or refuse; but subject to specific requirements of Section 123.
- (b) Sections 123 and 179.

Section 123

Deals with application in stages:

- (i) LA required to have regard to:
 - (a) Interests of public generally, including:
 - (i) Primarily those requiring facilities for transport.
 - (ii) Secondly those providing such facilities.
 - (b) Needs of the district/s in relation to carriage of goods.

(Section 123(1))

- (c) Financial ability of applicant to carry on service.
- (d) Likelihood that applicant will carry on service satisfactorily.

(Section 123(2))

- (ii) If, after considering those factors, LA is satisfied:
 - (a) That proposed service is desirable in the public interest; and
 - (b) It would not operate adversely to public interest where rail exemption is involved;then he shall grant the application unless he decides:
 - (a) That the grant would injure materially the economic stability of transport services of any kind in respect of the proposed routes or localities; or
 - (b) Would prejudice the maintenance of reasonable standards of living and working conditions in the transport industry.
- (iii) In considering those matters regard is to be had to evidence and representations received from Railways, local authorities or other public bodies, operators of other transport services and, in certain cases, petitions.
- (iv) In some cases involving exemption the LA is to have regard also to the direction in which it is necessary to carry goods at one or both ends of the railway journey to permit of their carriage by rail. (Section 124)

Section 179

- 1. LA is directed to have regard to:
 - (a) Provision of modern transport facilities best suited to meet needs of national production, living standards and national defence.

(b) The fair and impartial regulation of all forms of public transport adequate for the needs of New Zealand and of national and Commonwealth defence and for those purposes:

- (i) To recognise inherent advantages of each form of transport.
- (ii) Promote safe, adequate, economic and efficient service and the fostering of sound economic conditions.
- (iii) Encourage reasonable transport charges without unjust discrimination, preference, advantage, unfair or destructive practices.
- (iv) Promote good working conditions for workers.

2. Section 179 cannot of itself be foundation of grant and is to be harmonised with Section 123 by treating the matters it refers to as going to the issue of public interest.

(Car Haulways v McCarthy Cooke J. 8/8/73 CA [1974] 2 NZLR 331.

6. "Desirable in Public Interest"

- (a) Infinite number of factors go to make up public interest.
- (b) Result must be "balance of benefit in favour of public".
- (c) Generally necessary to demonstrate some unsatisfied demand or circumstances which justify additional rights. If existing services completely adequate it may be difficult to suggest that additional services are required in public interest.
- (d) Many factors relevant to Section 123(1) and (2) among them:
 - (i) Nature of existing services.
 - (ii) Kind of service they provide and any deficiencies.
 - (iii) Nature and extent of demand for applicant's service and how it was obtained.
 - (iv) Comparative cost and convenience.
 - (v) Plant and facilities available and to be provided.
 - (vi) Whether monopoly or effective competition exists.
 - (vii) Nature of goods to be carried - size, weight, fragility, cost, timing etc.
- (e) Emphasis in Section 123(1) primarily customer, secondarily existing operators. Seems clear, but watered down by Haslam J in Car Haulways at p. 335.
- (f) Existing operators (including NZR) have their positions initially considered under Section 123(1) and later under (3)(b).

- (g) Proof of demand:
 - (i) Direct customer evidence.
 - (ii) Letters in support.
 - (iii) Surveys or questionnaires.
 - (iv) Hearsay evidence generally.
- (h) Nature of evidence:
 - (i) Contracts or commitments for work.
 - (ii) Potential custom.
 - (iii) Work already done:
 - 1. Existing licences.
 - 2. Temporary licences.
 - 3. Illegal cartage.

7. Financial Ability

- (a) Financial ability of applicant not economic viability of business that is in issue.
- (b) Financial backing may be sufficient.
- (c) With large organisations little problem - production of balance sheet generally sufficient.
- (d) Small organisations or individuals normally require:
 - (i) Statement of assets and liabilities.
 - (ii) Budget setting out projected financial results of business:
 - 1. Importance of evidence to establish budgeted income.
 - 2. Realistic assessments for costs including repairs, depreciation, insurance, relief drivers, contingencies etc.
 - 3. Effect on any existing business of applicant - marginal costing.
 - 4. Total outgoings relevant for individuals.
- (e) Often need for written contract to establish continuity of work (particularly for owner/drivers).
- (f) Confidentiality of accounts - must be made available to objectors but usually on terms.

8. Suitability of Applicant

Relevant factors are:

- (a) General character and experience of applicant.
- (b) Adequacy, age and state of repair of plant.
- (c) Previous activities including:
 - (i) Conviction for offences.

- (ii) Carriage without licence.
- (iii) Breaches of other provisions such as driving hours, vehicle weights.
- (iv) Under-cutting or unfair practices.

9. Exemption from Rail Restriction

- (a) Purpose of legislation not to provide for equitable sharing between road and rail but to afford Rail a conditional monopoly.
- (b) Applicant bears onus of showing that in public interest Rail exemption should be granted.
- (c) Additional inconvenience and often additional cost inherent in road/rail/road journeys. Sometimes said that neither factor justifies exemption, but really question of degree and disparity.
- (d) Generally when Rail services suitable and available, exemption will be declined.
- (e) Relevant factors in seeking exemption:
 - (i) Nature of goods - size, weight, value, fragility etc.
 - (ii) Packaging - practicability and cost.
 - (iii) Experience with Rail cartage:
 - A. Damage and its proof.
 - B. Delay.
 - (iv) Rail trials generally.
 - (v) Inconvenience.
 - (vi) Cost.
 - (vii) Loading and unloading facilities.
 - (viii) Loss of public revenue.
 - (ix) National benefits - e.g. exports, savings in overseas funds.
- (f) Nature and extent of exemption need not apply to all carriage authorised by licence.

10. Economic Effect on Other Transport Operators

- (a) Not limited purely to road transport operators.
- (b) The threat to economic stability must be established by objectors.
- (c) Necessity to call accounting evidence.

TRANSFER OF LICENCES - Section 138

- (a) Licence may be transferred in whole or in part.
- (b) LA has discretion to grant or refuse.

- (c) Must refuse unless satisfied as to:
 - (i) Financial ability of applicant.
 - (ii) Likelihood that he will carry on service satisfactorily.
- (d) LA may impose conditions on transfer but only as to terms of transfer not as to terms of licence.
- (e) Transfer of "bare licences" generally refused; but
- (f) Mere fact that business has ceased to trade not necessarily ground for refusal.
- (g) Goodwill on transfer is relevant to exercise of Authority's discretion.

AMENDMENT OF LICENCES - Section 139

- (a) LA has discretion to amend by altering or revoking any terms and conditions that are, in his opinion, "necessary in the public interest".
- (b) Includes power to add terms.
- (c) Contrast in wording between Section 123 ("desirable") and Section 139 ("necessary") of no practical significance.
- (d) Proper for LA to apply criteria under Section 123 to application which seeks to amend rights and can treat it, effectively, as an application for a new licence.
- (e) Application for additional VAs in existing terms:
 - (i) Generally licensee entitled to sufficient VAs to meet an expanding business; but
 - (ii) Not necessarily to exemption in respect of those additional VAs; nor
 - (iii) To additional capacity if:
 - A. Obtained by unfair competition or practices.
 - B. (Rarely) Capacity and efficiency of other operators adequate.
- (f) Public hearing usually required but Section 140 can be used for non-controversial amendment or transfer.

APPEALS

- (a) Appeal lies against any "decision" of LA.
- (b) As to persons entitled to appeal see Section 166(2).
- (c) Time for appeal is 21 days after date of decision - Section 166(1).

- (d) LAA must act as judicial authority and observe principles of natural justice.
- (e) LAA has discretion to hear an appeal lodged within one month after expiry of appeal period.
- (f) Appeal form prescribed by Reg.9 and is forwarded to Secretary for Transport.
- (g) LAA has power to hear additional evidence but usually reluctant to do so and appeal normally argued on basis of transcript of proceedings before LA.
- (h) LAA not bound to have oral hearing of appeal, but if he does not do so, must receive written representations.
- (i) LAA has power to confirm, modify or reverse the decision and also to refer back to LA under Section 173.
- (j) Pending appeal or reference back licensee entitled to carry on service to which the appeal relates in accordance with terms of licence or terms of LA's decision.
- (k) LAA has power to award costs on appeal - rarely exercised.
- (l) LAA also has power to state a case for the opinion of the Court of Appeal on any question arising in the proceedings.

REVIEW OF APPEAL AUTHORITY'S DECISION

- (a) No appeal lies to the High Court from decision of Appeal Authority.
- (b) Strong privative clause in Section 164 limits attack by way of Judicial Review to lack of jurisdiction.
- (c) Principles of Anisminic apply but still open to argument how far Lord Denning's view in Pearlman v Harrow School will prevail or whether some intermediate principle will emerge which will hold, as a want of jurisdiction, errors which effectively change the statutory criteria applying to applicants or objectors.

USE OF APPEAL DECISIONS

- (a) Strong tendency to give too much weight to appeal decisions.
- (b) Most depend on own facts and of limited value.
- (c) Tendency for some to lay down "principles" which have effect of altering statutory requirements.
- (d) No binding effect and of limited value as precedents.

- (e) Proper approach indicated in Merchandise Transport v British Transport Commission and approved in Bay of Islands Timber v McCarthy.

INTRODUCTION

3. For history see Review by J.F. Northey published as Appendix to Butterworths R.T.L.A. Vol. 1.
- 4(a) Definition of "Goods Service" Section 2
- (c) Section 110.
As to "availability of route" see
M.O.T. v Vibrapac (Southland) Limited [1973] NZLR 500 C.A.
Subsections(2)-(2B)
M.O.T. v United Carriers Limited [1973] 1 NZLR 230 but note criticism by Somers J in
Freightways Road (Otago) Ltd v M.O.T. Unrep. 23/10/79 M.12/79 (Dunedin)
and see Putaruru Deliveries (1958) Ltd v M.O.T. Unrep. 3/10/79, M.49/79, New Plymouth, Barker J.
- (d) Section 111
Cave v Schroeder [1957] NZLR 718
Wilson v Habgood [1958] NZLR 1173
but query effect of changed wording in 1962 Act
Transport Department v P. Anderson Trailways [1965] NZLR 312
F.R. Andrews v M.O.T. Unrep. 18/2/74, M.50/73, Invercargill, Quilliam J.
Koolen v Thames Freightways Unrep. 16/9/74, M.769/74, Cooke J.
- Section 112
Attorney-General v Gore Carrying Co 10 M.C.D. 139
- (f) Regulation 24
Freightways Road (Otago) Ltd v M.O.T. (Supra)
Willetts Freight & Transport Waimate v Transport Department Unrep. 11/12/53, Timaru, McGregor J

GOODS SERVICE APPLICATIONS

- 1.(a)
(i)A. Ross v Walker [1921] NZLR 965
Gill v Laird [1940] NZLR 540
M.O.T. v Keith Hay Ltd [1974] 1 NZLR 103
- B. Transport Department v Roadair (HB) Ltd [1969] NZLR 861
Transport Department v Chilcotts Transport Ltd [1970] NZLR 637 A.D. 2272

- 2.(c) Roadair & Chilcott cases (supra)
- 4.(c)
(v)B. No restriction on successive applications
Buses Ltd v Laurenson [1951] NZLR 209 A.D. 1475, 2159
- 4.(d)
(iv) A.D. 1488
1706
2489
A.S.L.A.A. 69
- 6.(a)
to (e) Government Railways Board v Hodsons Pioneer Motors Services Ltd
referred to in Chalmers & Dixon (3rd) p. 129
Car Haulaways v McCarthy & Anor Unrep. Auckland 8/8/73, Cooke J
Attorney-General v Car Haulaways & Anor [1974] 2 NZLR 331 C.A.
A.D. 2017
2186
2274
2580
- 6.(g) Section 117(3)
A.D. 2744
- 6.(h)
(iii) 2. A.D. 2755, 2793
3. A.D. 2734
- 7.(a) Newman Bros v Allum [1934] NZLR 694 A.D. 2394, 2420
(d) A.D. 2768
(f) A.D. 1367, 1637
- 8.(c) A.D. 581, 1230, 1377, 2351, 2099, 2744, 1009, 1044
- 9.(a)
to (d) A.D. 1418, 1504, 1536, 1623, 1716, 1795, 2580, 2651, 2788
- (e)
(iv) Bay of Islands Timber Co Ltd v McCarthy Unrep. Barker J, 4/4/77,
Auckland, A.1569/75
Car Haulaways v McCarthy (Supra)

10. NZRVPA v Luxford [1967] NZLR 453
A.D. 1530, 1648, 1978, 2084, 2092, 2153

TRANSFER OF LICENCES

A.D. 1285, 1676, 2611, 1686, 1830, 2184, 2388

AMENDMENT OF LICENCES

A.D. 2044, 2064, 2777
A.D. 149, 1470, 1568, 1698, 2160, 2303, 2532

APPEALS

A.D. 1647, 1866, 2513, 2239, 2259
Bay of Islands Timber Co v McCarthy (Supra) and
C.A. [1979] 2 NZLR 511

REVIEW OF APPEAL AUTHORITY'S DECISION

Anisminic v Foreign Compensation Commission [1969] 2 AC 147
Pearlman v Harrow School [1969] 1 All ER 365
Car Haulways and Bay of Islands Timber Co cases (supra)

USE OF APPEAL DECISIONS

Merchandise Transport Ltd v British Transport Commission
[1962] 2 QB 173
Bay of Islands Timber v McCarthy (supra)