

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	Discovery
LICENSEE:	Rediscover Pty Ltd
LICENCE NUMBER:	80316240
NOMINEE:	Mr Andrew Case
PROCEEDING:	Complaint pursuant to section 48(2) of the <i>Liquor Act</i> – Breaches of the “Camera Surveillance Requirement” Liquor Licence Special Condition
COMPLAINANT:	Director of Licensing
HEARD BEFORE:	Ms Merran Short (Presiding) Mr John Brears Ms Jane Large
DATE OF HEARING:	19 October 2007
APPEARANCES:	Mr Lex Silvester and Mr Des Crowe for the Licensee Mr Phillip Timney for the Director of Licensing

Background

- 1) Prior to the Licensing Commission (“the Commission”) proceeding to a hearing in respect of four (4) complaints (“the complaints”) brought against Rediscover Pty Ltd in breach of Section 10 of the *Liquor Act* (“the Act”), Mr Silvester on behalf of Rediscover Pty Ltd (“the Licensee”) sought to be heard in respect of a preliminary issue as to the validity of the complaints as charged and set out in a letter from the Director of Licensing (“the Director”) to the Licensee dated 19 July 2007, (the preliminary hearing”).
- 2) In summary, the complaints allege several breaches of the Special Condition of the Licensee’s licence (“the Licence”) regarding Camera Surveillance Requirements. At the conclusion of the preliminary hearing the Commission made a preliminary ruling confirmed in this written decision. The matter proceeded to hearing on the complaints (“the hearing proper”). Mr Silvester was excused from the hearing proper and Mr Crowe appeared for the Licensee.

3) In the preliminary hearing Mr Silvester submitted that the complaints as charged by the Director against the Licensee were invalid because there had been -

a) 'Variation' ultra vires of the *Liquor Act*

- A variation to the licence conditions of the Licensee which had not been made by the Commission but rather purportedly made by the Director ultra vires of Section 33(1) of the Act which provides inter alia that "...the Commission may, from time to time by notice in writing, vary the conditions of the licence held by a Licensee",, and
- A change to the "requirements" referred to in the Special Conditions of the Licence amounted to a variation of the Licence; and

b) No valid variation

- There was no evidence that the original Special Condition regarding Camera Surveillance Requirements was properly incorporated into the Licence conditions of Rediscover Pty Ltd.

Paragraph (b) – No valid variation

4) Dealing firstly with the issue raised in (b) above, Mr Timney on behalf of the Director provided to the Commission a copy of a letter ("letter A") dated 28 November 2003 signed by the then Chairman of the Commission, Mr Peter Allen. Letter A is addressed to Mr Craig McPharlin, the former Nominee of the Licensee, providing notice of the Commission's intention to issue a Section 33(1) notice to vary the conditions of the licence held by the Licensee, in this case Discovery Pty Ltd as it was then, Rediscovery Pty Ltd as it is now.

5) Letter A is Attachment "A" to the decision.

6) Letter A was followed up with a further letter from the Commission, dated 9 January 2004 from the Acting Chairperson Ms Jill Huck to Rediscover Pty Ltd ("letter B"). Letter B advised that the Commission had decided to add the following condition to the Licensee's liquor licence.

SPECIAL CONDITIONS

Camera Surveillance Requirement

The Licensee shall comply with such requirements for and in relation to camera surveillance as the Commission shall at any time notify to the Licensee in writing as being thereafter applicable to the licensed premises.

7) Letter B is Attachment "B" to this decision.

8) Notice was provided in letter B of the Licensee's right to a hearing regarding the variation of the licence upon notice within 28 days as per, Section 33 (2) of the Act.

- 9) Mr Silvester submitted that letter B may not amount to a valid variation because letter B was not followed up within twenty-eight (28) days with a further letter clarifying that in the absence of any request for a hearing the licence was now varied within the terms as now set out.
- 10) Mr Timney argued this was “nonsense” and with respect, we agree. We see no reason why notification of the change and its activation in the absence of a request for a hearing cannot take place in the same letter.
- 11) The Commission is of the view that letter B was a valid variation to the Licensee’s licence and validly inserted the Special Condition regarding the Camera Surveillance Requirement “the Special Condition”.

(a) ‘Variation’ ultra vires of the *Liquor Act*

- 12) Turning then to paragraph (a) above, the substance of Mr Silvester’s submission is that the Revised Camera Surveillance Requirements amounted to a variation of the Special Condition of the Licence and as such could only be varied by the Commission in accordance with Section 33(1) of the Act.
- 13) It would be helpful to provide some background to the Revised Camera Surveillance Requirements issued by the Commission effective from 13 September 2006.
- 14) The original Camera Surveillance Requirements were issued by the Commission in January 2004 after extensive consultations with the Police and the Australian Hotels Association (“AHA”).
- 15) Two (2) years later the Commission decided after receiving comments from the Police and Licensing Inspectors, that the quality of the camera surveillance records were not of a sufficiently high standard to enable easy identification of faces and actions to be made.
- 16) A working group was formed with representatives from the Police, AHA, Licensing Inspectors, Sky City Casino, camera surveillance experts, and the Commission to review the original camera surveillance requirements. After six (6) months a revised set of camera surveillance requirements was proposed and adopted by the Commission and noted in the Commission Minutes of Meeting as set out below.

CAMERA SURVEILLANCE REQUIREMENTS

Acting Senior Inspector: Graham Tribe

Commission Decision 13 September 2006

Commission determined to:

Approve the revised standard for camera surveillance, titled “Northern Territory Licensing Commission Camera Surveillance Requirements and guidelines”;

Approve the timeframe for Licensees to achieve approval of a camera surveillance plan and compliance with the revised standard; and

Note the example plan and the draft letters to be sent to Licensees and suppliers respectively.

Commission thanked their fellow Member John Brears for his effort put into the Camera Surveillance Requirements.

- 17) The Revised Camera Surveillance Requirements were approved by the Commission on 13 September 2006. A letter dated 20 September 2006 ("letter C") advised the Licensee and indeed all affected Licensees in the Northern Territory of the new Revised Camera Surveillance Requirements, how they came about and what they involved.
- 18) Letter C is Attachment "C" to this decision.
- 19) In summary, letter C advised Licensees that to comply with the new Revised Camera Surveillance Requirements the Licensee's would need to:
- i) prepare a camera surveillance plan and submit it to the Director for approval. Such plan to include a detailed schematic showing the layout of the premises as well as the coverage provided by the plan ("the plan");
 - ii) upgrade their camera surveillance systems if necessary; and
 - iii) do so within the timeframe for compliance; such timeframes would vary but in general for those premises that had not had a major upgrade of their surveillance systems a period ranging from between three (3) to six (6) months.
- For those premises that had undergone a major upgrade, and what amounts to a major upgrade is set out in letter C, more time would be given, the length of time to be determined by consultation between the Director and the Licensee.
- 20) Evidence was given by Inspector Tribe at the hearing proper that Discovery nightclub had not undergone a major upgrade within the preceding twelve (12) months of the release of the Revised Camera Surveillance Requirements. At the time of adjournment of the hearing proper, that evidence was unchallenged by the Licensee.
- 21) In this instance it was the Director who wrote to the Licensee on 20 September 2006, letter C, advising of the revised standards for Camera Surveillance Requirements. Mr Silvester contends that the new Camera Surveillance Requirements amount to a variation of the Licence because they substantially and materially alter the Special Condition of the licence in that the Revised Camera Surveillance Requirements impose three (3) new 'requirements' upon the Licensee. Firstly, submitting an approved plan, secondly undertaking an upgrade and thirdly doing so within a time limit that may or may not be definitive.
- 22) In Mr Silvester's submission an alteration to the "requirements" referred to in the Special Condition amounts to a variation of the Licence which in this case was done ultra vires of the Act because it was the Director who purported to 'vary' the Licence not the Commission as required under the Act. If Mr Silvester is correct it follows that neither the Director, nor the Commission for that matter, can enforce the Revised Camera Surveillance Requirements and more importantly the complaints as laid against the Licensee are invalid.
- 23) In support of his argument Mr Silvester further submitted that the Commission could not delegate the legislative power to make an administrative decision and referred the Commission to the decision of Southwood J, in *Grunt Labour*

Services Pty Ltd v Work Health Authority [2006] NTSC 6 in support of that proposition, in particular paragraphs 53 to 59. It is clear that “When a discretionary power is conferred by statute upon any public authority, the power can only be exercised by the authority upon whom it was conferred”. See *Racecourse Co-Operative Sugar Association Ltd v Attorney General (QLD)* (1979) 142 CLR 460 at 481.

- 24) I agree with Mr Silvester in this regard and if letter C amounts to a variation of the licence then Mr Silvester would be correct.
- 25) The question then is whether the updating of the Camera Surveillance Requirements amounts to a variation of the Special Condition in the Licence.
- 26) Mr Timney argues it does not. In Mr Timney’s submission there has not been a variation to the Special Condition but rather a change to the “requirements” imposed by the Commission in regards to Camera Surveillance of licensed premises, in this case, Discovery nightclub.
- 27) With respect the Commission agrees with Mr Timney. The Special Condition in the Licence is as follows:

SPECIAL CONDITIONS

Camera Surveillance Requirement	The Licensee shall comply with <u>such requirements</u> for and in relation to camera surveillance <u>as the Commission shall at any time notify to the Licensee in writing</u> as being thereafter applicable to the licensed premises. (emphasis added)
--	---

- 28) When interpreting words or phrases it is well settled law that words are to have their plain and ordinary meanings. In *Short v FW Hercus* (1993) 46 IR it was held that accepting the plain meaning of words should be done whenever possible “and to have regard to the context”. Further, it is best not to “depart from the plain meaning used”... see *Bennett v Minister for Public Works* (1908) 7 CLR 372.
- 29) The Commission is of the view that on a plain reading of the Special Condition set out above the Commission is entitled to impose any ‘such requirements’ in relation to the camera surveillance of licensed premises that the Commission considers necessary. Whether those “requirements”-
- call for the submitting of a plan;
 - an upgrade in equipment; or
 - the undertaking of works within a nominated time limit.
- 30) It is the role of the Commission to regulate the sale, provision, promotion and consumption of liquor so as to minimise the harm associated with the consumption of liquor, in a way that takes into account the safety of the public. If that requires an upgrade to camera surveillance equipment to assist the Commission or the Police, then provided the Licensee is notified in writing it amounts to such a requirement within the Special Condition and is not a variation to the licence.

- 31) On an ordinary reading of the Special Condition this includes the introduction of new standards in the form of the Revised Camera Surveillance Requirements as issued on 13 September 2006 and notified to the Licensee on behalf of the Commission on 20 September 2006 by the Director.
- 32) For absolute clarification it was the Commission who embarked upon the revision of the Camera Surveillance Requirements and asked the Director to advise all affected licensees of the final Camera Surveillance Requirements on its behalf. It is not an uncommon practice of the Commission to have the Director distribute information on its behalf in the manner that was adopted in this instance. However the revision of the Camera Surveillance Requirements and original notification to the Licensee was undertaken by the Commission.
- 33) As such it follows that the notification of changes to the requirements as advised in letter C did not amount to a variation of the Licence and the complaints as laid against the Licensee are valid.

Merran Short
PRESIDING MEMBER

6 November 2007