

# NORTHERN TERRITORY LICENSING COMMISSION

## REASONS FOR DECISION

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<b>PREMISES:</b>	<b>CROSSWAYS HOTEL</b>
<b>LICENSEE:</b>	Liquid Management Pty Ltd
<b>LICENCE NUMBER:</b>	80100963
<b>PROCEEDING:</b>	Hearing on Penalty in Relation to Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> , for Permitting a Minor to Enter and Remain on Premises that are the Subject of a Declaration under Section 106 of the <i>Liquor Act</i> (Breach of Section 106B of the <i>Liquor Act</i> ).
<b>HEARD BEFORE:</b>	Ms Merran Short (Presiding Member) Ms Jane Large Mr John Brears
<b>DATE OF HEARING:</b>	13 May 2008
<b>APPEARANCES:</b>	Mr John Lawrence for the Licensee Mr Phil Timney for Director of Licensing

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### BACKGROUND

- 1) This was a penalty hearing following a complaint (“the Complaint”) pursuant to Section 48(2) of the *Liquor Act* (“the Act”) lodged by an Inspector of Licensing and Regulation (“Licensing”) against Liquid Management Pty Ltd (Liquor Licence No. 80100963) in respect of their licensed premises the Crossways Hotel (“Crossways”).
- 2) The Complaint is that Crossways committed a breach of Section 106B of the Act. Section 106B provides:

***“106B Licensee or employee not to permit minors to enter, &c., licensed premises***

*(1) A licensee of licensed premises, or any person employed by a licensee, shall not permit a person to enter or remain on the licensed premises or any part of the licensed premises the subject of a declaration served under*

*section 106 if that person has not attained the age of 18 years or, if that person is purportedly in the company of his parent, guardian or spouse, both that person and the parent, guardian or spouse, have not attained the age of 18 years. ”*

***“106 Commission may declare licensed premises prohibited areas for minors***

*(1) The Commission may, by notice in writing, declare licensed premises or parts of licensed premises to be an area or areas where a person who has not attained the age of 18 years –*

*(a) shall not enter or remain; or...*”

- 3) The particulars of the complaint are that on 17 February 2007 Crossways breached Section 106B of the Act by allowing a person who had not attained the age of eighteen (18) years to enter and remain in an area of Crossways, a licensed premises that was the subject of a declaration declared under Section 10 (1) of the Act (“the Declaration”). The Declaration for Crossways was issued on 1 June 2004. Section 106 (1).
- 4) The facts alleged in the Complaint are as follows:
  - On 17 February 2007, at around 04:00 hours, Northern Territory Police (“the Police”) observed a person known to them as a Minor (“the Minor”) exit The Base Lounge and Nightclub, an area of Crossway the subject of the Declaration (“the incident”);
  - On the date of the incident the minor whose birthday is 17 July 1989 had not attained the age of 18 years of age;
  - The Minor admitted to Police he had entered and remained within Crossways licensed premises on 17 February 2007;
  - The Base Lounge and Nightclub within Crossways is an area that is the subject of the Declaration.
- 5) On or about 16 November 2007, in accordance with Section 48(6) of the Act, Crossways was given the opportunity to provide a written reply to the notification of the Complaint.
- 6) On or about 10 December a response was received from Halfpennys Lawyers on behalf of Crossways providing, among other things, an explanation for the breach and a concession that the Minor was on the premises. However, Crossways did not admit to the breach itself.
- 7) The explanation given by the Licensee through their solicitor Mr Henschke (“Mr Henschke”) for the breach was that “...approximately 2 hours before closing time...” the Minor “...was seen by security just outside the front door of the Base Night Club (sic) to be the victim of a nasty assault. He was seen to be set upon by a group of young men who were punching and kicking...” the Minor. The security officers intervened to stop this and for the Minor’s

“...safety purposes they allowed him to enter the Club in order for them to negotiate his assailants away from the Premises.” Exhibit 5.

- 8) Mr Henschke goes on in his letter to concede that after that “...in the busy circumstances existing at this time with other patrons entering and leaving it was here that both officers negligently forgot that...” the Minor “...was on the said Premises.” It was admitted by Mr Henschke that in allowing the Minor onto the licensed premises, the Crowd Controllers gave no consideration to the Minor’s age.
- 9) Prior to the matter coming before the Licensing Commission Crossways had been prosecuted in the Courts. A criminal charge was laid against the Nominee of Crossways, Mr Steven Reed (“the Nominee”). The charge was heard in the Katherine Magistrates Court on 28 September 2007 before Mr Carey SM. Relying on, among other things, Section 124AA of the Act the “complaint was dismissed and the defendant was discharged.” Section 124AA provides inter alia:

**“124AA Regulatory offences**

*(1) An offence of contravening or failing to comply with section 75(1) or (1B), 93(b), 101L(1), 102, 103, 104(1), 105, 106B(1), 111, 113, 114, 118, 119(1) or (10), 121(1) or 123(1) is a regulatory offence.*

*(2) It is a defence to a prosecution for an offence referred to in subsection (1) if the defendant proves on the balance of probabilities that –*

*(a) any contravention or failure to comply constituting the offence occurred in an emergency and was necessary to preserve life or prevent injury or to protect property; ...”*

- 10) It is relevant to note that Section 124AA only raises a defence to the “prosecution for an offence” it is not intended to provide a defence before the Commission where the complaint is in relation to a breach of the Act and/or the licence condition and not prosecution for an ‘offence’. However, the fact that the Court determined to dismiss the charge against the ‘defendant’, in this case Mr Reed as Nominee of the Licensee, is a matter that the Commission may take into account in dealing with this matter.
- 11) In the view of the Commission and in light of the submissions made by both Counsel the issue that the Commission is concerned about is not so much the “entering” on to the premises but rather the “remaining” on the premises. In this case the Minor was being assaulted when “*one of the security officers from the Base (Crossways) told me to get inside the pub for my protection.*” In his statement the Minor went on to say –

*“I was told to sit in the chairs to the left of the entrance. I sat there for about ten minutes and then I got up. I started walking around. I cant (sic) really remember what I did in the club or how long I was in the Base for. I do remember having one game of pool. I probably would have drunk an alcoholic drink while I was in there.*

*I don't remember much more about the night. I cant (sic) remember leaving the nightclub and talking to the Police out the front."*

## **SUBMISSIONS**

- 12) It was the submission of Mr Lawrence that the facts of this matter demonstrated an emergency that was necessary to prevent injury to the Minor and in those circumstances the Crowd Controllers of Crossways had acted in the best interests of the Minor by protecting him from his alleged aggressors by removing him from the danger and placing him under their protection inside Crossways. This may well be so however the failure of the Crowd Controllers, described by Mr Henschke as negligent, to immediately either call the Police or at the very least to keep an eye on the Minor, so as to not allow the Minor to remain on the premises for approximately two (2) hours wandering through the premises consuming alcohol is inexcusable.
- 13) There was evidence before the Commission that during his time on the licensed premises the subject of the Declaration, the Minor by his own admission "probably would have drunk an alcoholic drink". A witness says that whilst playing pool with the Minor, the Minor "was drinking Jack Daniels" and later he saw him with a "rum can". There is no evidence as to how the Minor came to access and consume the alcohol on the premises however the fact that the Minor was allowed to remain on the premises exposed the Minor to potential danger from the consumption of alcohol. In total the Minor was on the licensed premises for about two (2) hours and by his own admission he does not remember leaving the nightclub nor talking to Police outside Crossways.
- 14) The law regarding the service of alcohol to minors is there to protect minors from harm and it is the very reason why access to licensed premises, particularly nightclubs, is the subject of Section 106B Declarations. It is for the protection of Minors who are deemed by the law not capable of dealing with such exposure. In any event, it is the view of the Commission that the failure of the Crossways Crowd Controllers to ensure the safety of the Minor by either calling the Police or keeping a close watch on him to ensure he did not enter the nightclub negates any commendable action they took in rescuing the Minor from potential injury due to an assault. With such rescue comes responsibility and to simply forget about the Minor's presence and allow him to remain on the premises is completely unacceptable. The only excuse given was that due to the busy time the Minor was "forgotten" about. This is simply not good enough and difficult to believe as, by the Minor's own admission, he was told to sit on the chairs to the left of the entrance which would have been next to the security guard on the door.
- 15) This is not the first time that Crossways has appeared before the Commission in recent history:

- a) On 23 January 2006 the Commission upheld a complaint against this Licensee for a breach of Section 102 of the Act - Liquor not to be sold to intoxicated person - relating to a breach that occurred on 2 August 2003, (the delay in the decision was due to the untimely death of the then Chairman of the Commission).
  - b) On 12 November 2007 the Commission handed down a decision relating to two (2) incidents dealt with as one 'offence' under Section 124AAA Additional Penalty provisions – the first breach was regarding the service of alcohol to an intoxicated person contrary to Section 102 of the Act and the second breach was regarding a breach of Section 106B Licensee or employee not to permit minors to enter or remain on licensed premises, the same breach as the subject of this hearing.
  - c) On 14 May 2008 this Commission found Crossways guilty of a breach of the *Gaming Machine Act* relating to an incident on 14 February 2008.
- 16) This Commission has said previously that Crossways operates within a very difficult environment and that is recognised by the Commission. However in electing to operate in such environment a higher level of vigilance is required to protect their patrons and the public in general. The Licensee and Nominee must be continually alert to ensure complete compliance with the Act and their Licence conditions. If it is the case that the Crowd Controllers were "too busy" to ensure the Minor's safety then other steps ought to have been taken. The doors to the nightclub could have been closed until such time as the matter was dealt with and the Police called.
- 17) This complaint against Crossways follows closely on the heels of other complaints and the Commission is of the view that whilst there is evidence that there are internal procedures in place; a greater onus is placed upon the Licensee and Nominee to ensure compliance with the Act and Licence Conditions. The Commission is exasperated with the Licensee's request for leniency when the level of complaints does not seem to be reducing. It is the view of the Commission that the potential danger to the Minor by being allowed access to alcohol placed the Minor in a potentially dangerous environment.
- 18) There must come a time when businesses such as Crossways consider their obligation to the community and whilst some allowance can be given a greater emphasis must be placed by the business on ensuring the safety of their patrons and compliance with the law and licence conditions. This is especially so regarding minors particularly in circumstances where it is recognised that the excessive drinking by minors is reaching heightened levels throughout Australia and steps to reduce the levels is the focus of Governments at both a Northern Territory and Federal level.
- 19) This Commission is not persuaded to extend leniency in circumstances where the licensed premises has the history of breaches that Crossways does. It is the view of this Commission that the history of the premises attaches to the

premises itself and the slate is not automatically wiped clean with a change in Licensee or Nominee.

20) The Commission must have regard to the objects of the Act and in so doing this Commission is entitled to take into account the environment within which the premises is located, the history of the premises itself and also consider any action taken by the current Licensees to overcome such obstacles to reduce or minimise the harm associated with the consumption of liquor. Protection and enhancement of the community is of paramount importance to the Commission. Regular breaches by licensed premises cannot be defended with the submission that the premises exist in difficult environments. This alone is not enough to overcome the principle obligations of licensees or nominees.

### **MATTERS TAKEN INTO CONSIDERATION**

- The number of prior complaints regarding Crossways;
- The lack of procedures in place to prevent a minor remaining on licensed premises;
- The initial prompt leading to the incident which was to rescue the Minor from injury; and
- That the staff were counselled following the incident and a procedure is now in place at Crossways to call Police in similar circumstances.

### **DECISION**

21) A former Chairman of the Licensing Commission previously advised the liquor industry that *“Licensees who served minors or drunks or who are found to be blatantly breaching their licence conditions must accept the consequences of their actions”*. The Commission considers the sale of alcohol to minors to be at the higher end of breaches and the Commission will treat such breaches seriously. Whilst there is no evidence that alcohol was sold to the Minor it is clear that he was allowed to remain on licensed premises the subject of the Declaration and whilst he was on the premises he had access to and consumed alcohol. It is therefore the view of the Commission that this is a serious breach and whilst we take into account the actions of the Crowd Controllers in ‘rescuing’ the Minor it cannot be overlooked that, by Mr Henschke’s own words, they “negligently” allowed the Minor to enter and remain on the premises thus exposing him to a dangerous environment. The Commission also takes into account the prior history of this Licensee and while giving credit to the Crowd Controllers for their initial action we are of the view that an appropriate penalty is between one (1) and five (5) days.

- 22) In light of the matters as set out above the Commission determines to suspend the licence of Crossways for a period of 5 days with 2 days suspended for a period of twelve (12) months.
- 23) In accordance with past Commission policy at least one of the days of served suspension should be the same day that the breach occurred, being a Saturday. Accordingly, the Commission determines that the days of suspension to be served are 31 July, 1 and 2 August 2008.
- 24) In addition, the following Notice is to be prominently posted on each of the public entrances to Crossways including the Bottle Shop and the Nightclub.

### **NOTICE OF SUSPENSION**

***“The Licensing Commission of the Northern Territory has suspended Licence Number 80100963 of Liquid Management Pty Ltd trading as Crossways, for a period of five (5) days, with three (3) days to be served from 31 July, 1 and 2 August 2008 inclusive for breach of Section 106B of the Liquor Act - Allowing a Minor to remain on the premises which have been declared an area prohibited to persons under the age of 18 years by the Licensing Commission Northern Territory pursuant to Section 106 of the Liquor Act.”***

Merran Short  
PRESIDING MEMBER

14 July 2008