

NORTHERN TERRITORY LICENSING COMMISSION

DECISION ON PENALTY

PREMISES:	DISCOVERY
LICENSEE:	Rediscover Pty Ltd
LICENCE NUMBER:	80316240
COMPLAINTS:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> – Breach of Licence Conditions
HEARD BEFORE:	Mr Richard O’Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Jane Large
DATE OF HEARING:	23 & 28 February 2011
APPEARANCES:	Mr John Lawrence, SC Counsel for the Licensee Mr Tom Anderson, Counsel for the Director of Licensing

BACKGROUND

- 1) On 23 and 28 February 2011 the Commission conducted a Hearing in respect of a number of alleged breaches of the *Liquor Act* (“the Act”) by the Licensee of the premises known as Discovery Nightclub. During the course of the Hearing the Licensee admitted the following breaches of the Act:
 - Two breaches of Licence Condition 5 relating to Fire Precautions;
 - A breach of the Special Licence Condition in respect of Camera Surveillance Requirements; and
 - A breach of the ID Scanning Licence Condition which requires the scanning of patron identification.
- 2) In addition, the Commission found that the Licensee had breached Licence Condition 10, relating to the Approved Guidelines for Strip and Lingerie Shows. That complaint concerned a wet t-shirt competition conducted at the premises in the early hours of Wednesday 2 June 2010 and Wednesday 14 July 2010 involving participation of female patrons in what is known as

TOT. The Commission also found that a further complaint regarding an allegation that a minor was permitted to enter the premises was not proven.

- 3) Prior to the conclusion of the Hearing, Mr Anderson presented submissions on penalty on behalf of the Director of Licensing. The Commission consented to Mr Lawrence's request that the Licensee's submissions on penalty be deferred until the Commission had reached its decision in respect of the contested breaches relating to the Approved Guidelines for Strip and Lingerie Shows and the minor on the premises.
- 4) The Commission published its formal reasons for decision in respect of the breaches on 30 March 2011. Prior to the Commission receiving the Licensees submissions on penalty the Director of Licensing was advised that the Receivers and Managers, KordaMentha, had been appointed to manage the affairs of the Licensee Company.
- 5) By letter dated 21 April 2011, Mr Stephen Duncan and Mr Nicholas Gyss of KordaMentha advised the Director of Licensing that they did not wish to make any further submissions on penalty. KordaMentha also advised they would accept a penalty of two days suspension of licence.

SUBMISSIONS ON PENALTY ON BEHALF OF THE DIRECTOR

- 6) During the Hearing, Mr Anderson submitted that the breaches of the Fire Precaution condition of Licence were at the serious end of the scale of offending. He noted that the main emergency exits from the premises were blocked with tables, chairs, and bamboo screens, all put in place by staff of the Licensee to accommodate smokers. In addition Mr Anderson noted that the main emergency exit from the side of the premises was further cluttered by a pile of garbage bags, effectively preventing patrons from escaping from the premises via that exit.
- 7) Mr Anderson noted that the principal of the Licensee Company, Mr Mark Gray, was not aware of what was happening with the emergency exits until notified of the complaint by the Director and his response was to terminate the employment of the Nominee. Mr Anderson noted that this was a reaction after the event to an issue that Mr Gray should have been aware of earlier. He submitted that it was the Licensee's responsibility to ensure that appropriately trained and competent staff were employed, more so taking account of the fact Mr Gray resides in Adelaide.
- 8) Mr Anderson submitted that a breach of such a serious nature, and one that potentially put the lives of patrons at risk, should attract a penalty of actual suspension of the licence.
- 9) Mr Anderson noted that the Licensee's response to the breach of the ID Scanning licence condition was to demote the responsible staff member and remove him from front door duties. He submitted that this was another instance of Mr Gray reacting after the event and a further indication that there

was inadequate control over the staff of the premises by the principal of the Licensee company.

- 10) In respect of complaints regarding the conduct of the TOT wet t-shirt competition and the breach of the Licence Condition relating to the Approved Guidelines for Strip and Lingerie Shows, Mr Anderson referred the Commission to a previous breach concerning TOT set out in a decision dated 17 July 2006. He acknowledged that the previous breach occurred prior to the current Licensee taking over the premises but noted that the penalty applied was a three day suspension of licence, fully suspended for a period of twelve months.
- 11) Mr Anderson submitted that the penalty imposed for the 2006 breach was an indication of the seriousness with which the Commission treated a breach of this nature and that a period of actual suspension should be imposed in this instance.
- 12) In the alternative, Mr Anderson submitted that if the Commission was not minded to suspend the licence for this breach it should exercise its power under Section 49(4) of the Act and amend the licence conditions so as to prohibit the conduct of any adult entertainment at the Discovery premises. He also submitted that it would be appropriate for the Commission to review the Approved Guidelines for Strip and Lingerie Shows as applicable to professional striptease shows and what is allowed in relation to audience participation in wet t-shirt competitions and the like.
- 13) In response to questions from the Commission as to what changes were required to the Guidelines, Mr Anderson noted that patron participation in adult entertainment was not fully covered and a statement in respect of the boundaries for such forms of entertainment would be useful to Licensees. He cited as an example a clear statement in the guidelines that audience participants were prohibited from removing their clothing or appearing partially nude.
- 14) Mr Anderson noted that despite the agreement entered into between the Licensee and TOT participants, that they would not remove their clothing, those who breached the agreement were often rewarded with a prize. He submitted that the Licensee should be directed by the Commission to properly enforce the agreement it currently enters with participants in the TOT competition and that those who breach the agreement should be eliminated from the competition and ejected from the premises entirely.

CONSIDERATION OF THE ISSUES

Breaches of the Licence Condition relating to Fire Precautions

- 15) In respect of the breach of the Fire Precaution condition of licence, the Commission reiterates the view expressed in recent decisions that it considers offending of this type to be at the serious end of the scale of

offending. In this instance the blocking of the major emergency exits from the premises posed a risk of the highest order, namely that if the need for patrons to quickly depart from premises due to an emergency arose, such as in the case of a fire, loss of life or serious injury was a real possibility.

- 16) The photographs of the emergency exits tendered during the Hearing present compelling evidence that, in the case of an emergency, patrons attempting to exit via the main emergency exit would have real difficulty in reaching safety. The fact that Mr Gray, the principal of the Licensee, was unaware of the fire exits being used as smoking areas demonstrates to the Commission a clear lack of control over the operation of the premises with potentially disastrous consequences.
- 17) The Commission notes the response to this complaint by Mr Gray that it was an embarrassment to his company. The Commission agrees with that sentiment. The fact that the senior managers of the premises allowed the main fire emergency exit to be used as the rubbish dump for the premises is, in the Commission's view, as incomprehensible as it is reckless in respect of patron safety.
- 18) The Commission accepts the submission of Mr Anderson that a breach of this nature warrants the imposition of an actual suspension of the liquor licence.

Breach of the ID Scanning Licence Condition

- 19) The admitted breach of the ID scanning licence condition occurred as no staff at all were present at the scanning station when patrons entered the premises whilst Inspectors were conducting inspections on 11 September 2011. The responsible employee had left his post to buy a hot dog and it is apparent that no procedure was in place to ensure his duties were covered by another employee during his absence.
- 20) Mr Gray's evidence was that the employee was demoted and removed from responsibility for front door duties. The Commission views this as another reactionary response after the event on the part of the Licensee and a further indication that the management practices for the premises are sadly lacking.
- 21) The Commission makes the following additional observations in respect of this breach of ID Scanning requirements. The licence condition relating to the installation and use of the scanning device was a result of the Commission determining on 30 October 2008 that such a requirement would be a condition of licence, following an earlier breach of Section 106B by the Licensee in allowing minors to enter the premises and consume alcohol. The reasons for the installation of such equipment are obvious, and include the aim of preventing minors from entering the premises.
- 22) In the context of the complaint considered during this Hearing of a minor on the premises, the Commission would have been greatly assisted by a clear photograph of the minor on the night she entered Discovery. The Commission would have been far better placed to assess the similarities

between the photo on the driver's licence and the photo from the scanning system were it not of such poor quality as to render the minor almost unrecognisable.

- 23) This assessment, aided by a reasonable quality ID scanned image of the minor, could have led the Commission to conclude there was a distinct difference in the minor's appearance compared to the photo on the driver's licence leading to the conclusion that security should have prevented the minor from gaining entry to the licensed premises. The complaint of the minor on the premises may very well have been upheld if the ID scanning system was operating properly.
- 24) The Commission finds it somewhat incongruous that the Licensee's apparent lack of routine checking and maintenance on the ID scanning equipment has resulted in the Commission being presented with less than satisfactory evidence. Mr Gray's evidence in this regard was again completely unsatisfactory – he was not aware that the photographic side of the ID system was not operating properly and could provide no explanation as to why the photo of the minor in this instance was of such poor quality.
- 25) Given the importance of the ID Scanning system in the detection of minors attempting to enter the premises the Commission is of the view that this breach also warrants an actual suspension of licence.
- 26) In addition, the Commission directs that the Licensee immediately develop and implement a Management Plan dealing with the maintenance and verification of the scanning equipment, to the satisfaction of the Director, so as to ensure it is properly operational at all times. The Commission intends to rely on this finding in respect of the failure of the Licensee to properly maintain the ID system in the event of any further issues arising in respect of the proper operation and effectiveness of the ID scanning and photographic systems at the premises.

Breach of the Camera Surveillance Requirements - Special Licence Condition

- 27) The Commission notes the submission of Mr Anderson that the breach of the camera surveillance licence condition is the least serious of the complaints currently before the Commission. However, the Commission notes the evidence presented at Hearing, that when the Camera Surveillance Plan for the premises was devised the emergency exit the subject of the complaint was not intended for normal patron access. During the Hearing Mr Gray acknowledged that the exit was currently used to allow patrons access to a de facto smoking area and for the removal of troublesome patrons by crowd controllers. Both those activities bring that exit within the ambit of areas that need to be covered by surveillance cameras.
- 28) The Commission also notes the evidence of Mr Gray that an additional camera was to be installed covering the emergency exit door. It is expected that the Receiver / Managers will ensure that Mr Gray's undertaking has been

put into effect and that the additional camera is actually installed and operational.

Breach of the Approved Guidelines for Strip and Lingerie Shows Licence Condition

- 29) The complaint regarding the conduct of the TOT competition and the breach of the Approved Guidelines for Strip and Lingerie Shows has generated significant media and general public attention since these complaints were laid. The Commission repeats the statement made when the decision relating to the breach itself was published. Namely, the licence condition attached to the Discovery/Lost Arc premises does not prohibit the conduct of wet t-shirt competitions per se and such events in themselves do not constitute a breach of the Act or licence conditions.
- 30) The fact that participants in the TOT competition are patrons who regularly appear partially nude by removing their tops is the activity that brings this entertainment within the Guidelines. The Guidelines clearly provide that performances where the participants appear nude or partially nude fall within the definition of Adult Entertainment and are therefore covered by the Approved Guidelines for Strip and Lingerie Shows. Those Guidelines also prohibit the engagement of patrons in adult entertainment.
- 31) The Commission views the submissions on the part of the Licensee that the TOT competition is not Adult Entertainment but a bit of harmless fun with a fair degree of skepticism.
- 32) During the course of the Hearing Mr Gray on behalf of the Licensee acknowledged that he was aware of the previous breach concerning TOT referred to in the Commission's decision published in 2006. As a consequence the Commission is entitled to assume Mr Gray is also aware of the Commission's criticism at the time in respect of the manner in which TOT was conducted. At the time the Commission, whose composition included a different panel of members than those currently constituting the Hearing Panel of Commissioners, made the following statements:

The substance of those breaches relates to the unacceptable behaviour of some staff and patrons at the "Tequila on Tuesday Beach Party" (also known as "Tits Out Tuesday") events staged at Lost Arc. The behaviour allowed and encouraged on premises was clearly in breach of the Stripshow Guidelines and the Code of Practice for Responsible Promotion of Alcohol. It included lewd behaviour by staff and patrons - with patrons actively encouraged with free drink offers to partially disrobe. These antics took place within partial viewing of passers-by on the street. At the hearing, the content of the brief was admitted into evidence and its contents form the basis of our decision making.

The episodes as outlined in the brief can only be described as unsavoury and sleazy and the sort of behaviour that this Commission wants to actively discourage.

33) Despite the clear words in that decision, it would appear that the current Licensee decided to conduct the TOT competition as it always has, including the encouragement by staff for participants to remove their tops. The Commission notes that even after the current complaints became public knowledge through media reporting, and despite the apparent instructions from Mr Gray to conduct the event "according to the book", staff of the Licensee continued to encourage contestants to remove their tops, as evidenced by the MC on 26 January 2011 exhorting patron competitors to "Get your tits out". The Commission can only view this as another example of Mr Gray having little or no effective control over the day to day activities of his staff or the operation of the premises.

MANAGEMENT OF THE PREMISES

34) The Commission has, in recent years, been required to conduct Hearings in respect of a significant number of complaints against the Licensee of Discovery / Lost Arc. In addition, a significant number of complaints, in comparison to other licensed premises in the Darwin CBD, have recently been referred to the Commission in respect of alleged breaches over the past six months. The Commission views the disproportionate number of complaints against this particular Licensee as being endemic of a lack of management control and supervision of the premises and the staff.

35) The reactionary response by the Licensee to complaints, namely the sacking or removal of the staff responsible for the breaches, is not in the Commission's view an appropriate response nor does it provide any significant comfort in terms of the prevention of future breaches or the effective management of the premises.

36) As noted above, the Commission is aware that the Licensee Company has recently been placed in the hands of Receivers and Managers KordaMentha. In their capacity as Licensee the Receivers and Managers are responsible for the lawful operation of the premises. Given the poor track record of this Licensee the Commission is not inclined to allow the premises to continue to operate as it has over recent years in lurching from complaint to complaint without any indication of any on-going or sustainable remedial action.

37) The Commission intends to direct that the Receivers and Managers prepare and implement a comprehensive management plan for the premises with the intent of putting documented systems and procedures in place to ensure, as far as possible, that all aspects of the business associated with the liquor licence are conducted in accordance with the Act and the Licence conditions.

DECISION

- 38) In respect of the breach of the Fire Precaution Licence condition the Commission has determined to impose a two day suspension of the licence of the Discovery /Lost Arc premises. The suspension dates will include a Tuesday night, being the day of the offences occurred. The suspension is to take place on Tuesday 31 May 2011 (including the following Wednesday morning) and Wednesday 1 June 2010 (including the following Thursday morning).
- 39) The Commission formally warns the Licensee, including the current Receiver Managers, that any future breach of the Fire Precaution condition of licence that potentially places the safety of patrons at in jeopardy will result in a significant suspension of the liquor licence.
- 40) In respect of the breach of the ID Scanning licence condition, the Commission has determined to impose a one day suspension of licence with that penalty to be served on Thursday 2 June 2011 (including the following Friday morning).
- 41) In addition, the Commission directs the Licensee, pursuant to Section 65 of the Act, to prepare a management plan in respect of the maintenance and operational verification of the ID scanning equipment so as to ensure that the system is operating effectively at all times that the premises are open for business. That management plan is to be prepared to the satisfaction of the Director and to be submitted for consideration by the Commission within one month of the date of this decision.
- 42) The Commission has determined to impose no additional penalty in respect of the breach of the Camera surveillance Licence Condition. The Commission does however express its concern that the Licensee would significantly vary the use to which the main emergency exit was put without itself taking account of the possible requirement for additional CCTV surveillance. It is glaringly obvious to the Commission that the use of that exit by crowd controllers to remove patrons, coupled with the congregation of smokers in the emergency exit area, dictates that camera surveillance is an essential consideration.
- 43) The Commission further directs that the Director retain a copy of this decision on the file of the Licensee for reference in the event of any future breach by the Licensee of its obligations in respect of the Camera Surveillance licence condition.
- 44) In respect of the breach of the Approved Guidelines for Strip and Lingerie Shows in the conduct of the TOT competition, the Commission considered the imposition of a suspension of licence, noting the 2006 breach concerning the conduct of TOT. However, following careful consideration, the Commission considers the issuing of a direction in respect of the future conduct of TOT events to be a more appropriate measure in the circumstances of this particular type of breach. The Licensee should be in no

doubt however that any future breach of the Commission's direction in respect of the conduct of TOT may result in a suspension of the licence or, alternatively, a blanket ban on the conduct of TOT events.

- 45) Having concluded that the TOT event in itself is not unlawful, the Commission is not minded, at least at this stage, to order a permanent ban of the event. The Commission does however expect the future conduct of the TOT event to be in accordance with the Guidelines and that the Licensee will take positive steps to ensure that contestants remain fully clothed during the competition. The Commission also expects the Licensee to ensure that in the future TOT events contestants comply with the agreement entered into with the Licensee and that participants who remove their tops in breach of the agreement will be removed from the competition and ejected from the premises entirely. The Commission directs that the Licensee take proactive steps to ensure that TOT participants remain fully clothed during the competition, including enforcement of the agreement entered into with contestants.
- 46) In conclusion, the Commission directs, again pursuant to Section 60 of the Act, that the current Licensee prepare a fully documented Management Plan for the premises identifying procedures and practices to be put in place to ensure future compliance with the Act and Licence conditions. That management plan is to be prepared to the satisfaction of the Director and is to be presented to the Commission within three months of the date of this decision.

Richard O'Sullivan
CHAIRMAN

13 May 2011