

# NORTHERN TERRITORY LICENSING COMMISSION

## DECISION

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

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## BACKGROUND

- 1) On 14 September 2010, the Commission determined to conduct a Hearing in respect of four complaints lodged by the Director of Licensing pursuant to Section 48(2) of the *Liquor Act* (the Act), against Rediscover Pty Ltd, the Licensee of premises known as Discovery Nightclub and The Lost Arc (the premises).
- 2) The complaints allege the following breaches of licence conditions over a period of time from June to September 2010:
  - Approved guidelines for strip and lingerie shows
  - Fire precautions
  - Late trading premises in relation to adequate security
  - Late trading premises in relation to “lockout”
  - Sale for consumption on the premises
  - Fire precautions (further count)
  - Premises to be kept in good repair
  - Camera Surveillance requirement
  - ID scanning requirements
  - ID scanning requirements (further count)

- 3) By a decision dated 27 October 2010, the Commission also determined to conduct a Hearing in respect of a further complaint lodged by the Director of Licensing alleging a breach Section 106B of the Act by the Licensee. That complaint concerned an allegation that a minor was permitted to enter and remain on the licensed premises.
- 4) Following a number of adjournments of the Hearing in respect of the initial complaints, the Commission determined to hear all complaints relating to the Licensee in the one Hearing. Originally scheduled to commence on 18 October 2010, the Hearing was adjourned at the request of Counsel for the Licensee and rescheduled to commence on 25 January 2011. That date was also vacated with the consent of the parties and the Hearing ultimately commenced on 23 February 2011.

## **THE HEARING**

- 5) Prior to the commencement of the Hearing, Commission members met with Counsel for the Director and the Licensee to determine the manner in which evidence in respect of the minor would be dealt with during the course of the Hearing. The Chairman raised concerns that identification of the minor had the potential to cause significant harm to her given the significant media coverage of the complaints and sought Counsels' views in respect of conducting that part of the Hearing concerning the minor in private. After hearing from both parties in Chambers the Commission determined to formally raise the issue at the commencement of the Hearing.
- 6) Following the opening of the Hearing, Mr Anderson submitted that whether the Hearing in respect of the minor on the premises was closed to the public was a matter for the Commission. He noted that the prospect of the Hearing causing significant hardship to the minor could be resolved by not naming her during the course of proceedings. Mr Anderson advised that he had no intention of naming the minor in the evidence he would present or in his submissions.
- 7) Mr Lawrence stated that he was instructed to seek the closure of the Hearing to the public due to the materials gathered in the hearing brief that would be referred to in the course of the proceeding. He submitted that some of the material relating to the minor had the real potential to cause hardship to her. He stated that those risks would remain even if undertakings were given to not disclose her identity. Mr Lawrence submitted that Section 51(6) of the Act should be invoked and the Hearing should be closed to the public as a matter of caution to ensure the welfare of the minor was not put at risk.
- 8) The Commission determined, on balance, not to close the Hearing to the public on the basis that if the minor was not named during the course of the hearing the likelihood of any hardship arising would be removed. The Commission also noted the public interest in having complaints such as minors being on licensed premises aired in a public forum where the minor would not be called to give evidence. The Chairman did however seek undertakings from the parties and the members of the media present that the identity of the minor would not be revealed. Those undertakings were provided.

9) Mr Anderson then informed the Commission that the alleged breaches in respect of licence conditions concerning fire regulations, the CCTV equipment and one breach of the ID scanning requirement were admitted by the Licensee. The complaints in respect of the alleged breach of Approved Guidelines for Strip and Lingerie Shows (“the Guidelines”) and the minor on the premises were not admitted and would proceed by way of contested hearing. Mr Anderson advised that the parties had agreed to proceed with the complaint concerning the minor on the premises first. The remaining complaints were withdrawn on instructions from the Director. In essence, of the original eleven alleged breaches of the Act and Licence Conditions, four were admitted, two were contested and five were withdrawn on instructions from the Director.

Breach of Licence Conditions Complaints:

10) Mr Anderson advised that the complaints that remained before the Commission for consideration were:

- Alleged breaches (2) of Licence Condition 5 requiring the Licensee to comply with the requirements or instructions of an Authorised Member of the Northern Territory Fire and Rescue Service appointed under the *Fire and Emergency Act*. The complaint alleged that on 22/23 and 29/30 June 2010, Licensing Inspectors observed that the designated emergency exits for the premises did not provide a free path of egress as required by *NT Fire and Emergency Regulation 11(6)(b)*.
- An alleged breach of the Special Licence Condition in respect of Camera Surveillance Requirements. The Inspectors observed that crowd controllers engaged at the premises were using the side emergency exit to evict patrons from the premises and the camera installed at that exit did not meet the standards required for exit doors.
- Alleged breaches of Licence Condition 10 which requires that strip and lingerie shows shall only be conducted in accordance with the approved the Guidelines. The 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 Inspectors observed that a number of the patrons involved became partially nude during the competition by voluntarily removing their t-shirts. The complaint alleged that this conduct was in breach of the Strip and Lingerie Shows licence condition which, via the Guidelines, precludes audience participation in Adult Entertainment.
- Alleged breach of the ID Scanning Licence Condition which requires the scanning of patron identification as set out in a document titled “Requirements for ID Scanning Equipment“. In essence the ID Scanning Condition provides that the Licensee must scan and record the details of an approved form of identification for each patron entering the premises as well as taking and retaining a photograph of the patron.

11) The remaining complaints, as set out in paragraph 2 above, were withdrawn on instructions from the Director.

Minor on the Premises Complaint:

- 12) This complaint alleges that a minor, date of birth 11 January 1993, entered and remained on the licensed premises. At the date of the incident the minor was approximately 17 ½ years of age.
- 13) The factual allegations are that around 11.00 pm on the 6 July 2010, CCTV footage shows the minor approach a crowd controller engaged by the Licensee at the entry to the premises. The minor showed her identification to the crowd controller and then handed it to another employee manning the ID scanning system. The minor was then issued with a stamp by another employee following which she entered the premises.
- 14) At approximately midnight on 7 July 2010, the minor was observed by Police Officers urinating in the street on the opposite side of the road from the premises. She advised Police that she was seventeen years of age and was then issued an infringement notice for offensive behaviour in a public place. At approximately 2.10 am on 7 July 2010, the minor was observed by Police Officers on the stage in Discovery participating in the wet t-shirt competition. The minor was removed from the premises by Police and conveyed to her mother's address.
- 15) Mr Anderson, with the consent of Mr Lawrence, tendered the entire Hearing Brief in respect of this complaint into evidence. Mr Lawrence noted a caveat attached to his consent and submitted that some of the material in the brief is not relevant to the elements of the complaint itself and he was not consenting to the consideration of irrelevant materials.
- 16) Mr Anderson referred the Commission to a Certificate issued pursuant to Section 106 of the Act, prohibiting minors from entering or remaining on the premises. He noted that whilst it was an offence under Section 106B for a Licensee to allow a minor to enter premises for which a Certificate has been issued, Section 124AA(2)(c) provides a statutory defence where the Licensee is shown a form of ID representing that a person who is not eighteen years of age has actually attained that age and the Licensee has no reasonable grounds for doubting the validity of the identification.
- 17) Mr Anderson advised the Commission that it was acknowledged that the minor in question did show an employee of the Licensee a NT driver's licence representing that she was over eighteen years of age. The minor subsequently admitted that the driver's licence did not belong to her. As a result the question for the Commission is whether the employee had any reason to doubt the validity of the identification used by the minor to gain entry to the premises.
- 18) The Commission was referred to a Statutory Declaration of Police Sergeant Andrew Heath, one of the officers who had been involved in the issue of the infringement notice to the minor earlier in the evening in question and who later recognised the minor on the stage at Discovery as a competitor in the TOT competition. Sergeant Heath stated that, when the minor provided her details for the infringement notice, she did not produce any identification but disclosed that she was seventeen years of age. Some two hours later, at approximately 2.10 am Sergeant Heath observed the minor on the stage at

Discovery wearing a white tank top that had been watered down to make it see through. Sergeant Heath had the minor removed from the premises and, in response to his questioning, she stated that she had used a friend's driver's licence to gain entry to the premises. He recognised the driver's licence as belonging to the friend who was with the minor when the infringement notice was issued.

- 19) Mr Anderson then referred the Commission to the Statutory Declaration of Mr Errol Kadir who is the Crowd Controller engaged by the Licensee who checked the identification produced by the minor and permitted her to enter the premises. Mr Kadir stated in his declaration that he had viewed the CCTV footage showing him checking identification produced by the minor. He noted that she had a legitimate NT driver's licence that indicated she was over eighteen years of age. He thought she was the person shown in the photo on the licence so he assumed she was over eighteen years and allowed her to enter the premises.
- 20) Mr Kadir's statement included a summary of the procedures he employs in checking the identification of patrons. He stated that he checks the ID to make sure the hologram are correct, checks the date of birth to ensure that the person is over eighteen years of age and then checks to see that the photo on the ID matches the person producing it.
- 21) Mr Anderson then referred the Commission to a photograph of the minor and a scanned image of the driver's licence produced by the minor and a photograph of the minor captured by the ID scanning system prior to her entering the premises. Mr Anderson submitted that the photograph on the driver's licence did not bear any significant resemblance to the minor and that this should have been apparent to Mr Kadir.
- 22) Mr Anderson noted that the driver's licence produced by the minor was a provisional licence that expired on 24 July 2009 and that the minor had used the licence to gain entry to the premises almost twelve months after it had expired. He submitted that the fact that the licence had expired should have alerted Mr Kadir to check the minor and the driver's licence more carefully.
- 23) Following a viewing of the CCTV footage showing the minor entering the premises, Mr Anderson submitted that Mr Kadir's inspection of the driver's licence took no more than two seconds and that he only made a cursory examination of the minor and the licence.
- 24) Mr Lawrence submitted that the key question for the Commission's determination is whether Mr Kadir had any reason to doubt the validity of the driver's licence produced by the minor. He emphasised that the events that may have occurred prior to and after her entering the premises are irrelevant in terms of making out the elements of the complaint.
- 25) Mr Kadir was then called to give evidence on behalf of the Licensee. He stated that he was the Director of a private security firm that employed up to thirty staff and that he held a dual licence under the *Private Security Act*. He has been engaged in the security industry since 1997 and has not been the subject of any complaints or investigations during that period.

- 26) Mr Kadir stated that he was not contracted full time to Discovery and that he worked at other premises as well. He stated he had taken part in an interview with Inspectors in respect of the complaint and that he was happy to assist with their investigations. He stated that on a normal night at Discovery he would check hundreds of ID's. He confirmed that he had watched the CCTV footage of his involvement with the minor and stated that he thought the licence was hers and that she was nineteen years of age. He said that the minor displayed no characteristics or mannerisms alerting him that she may be under age and that she presented as a confident girl.
- 27) Mr Kadir acknowledged that he had received and read various fact sheets issued by Licensing Regulation & Alcohol Strategy (LR&AS) including those relating to minors on licensed premises and the false identification check list. He stated that his practice was that when he had any doubt about the age of a person he would refuse entry.
- 28) Mr Kadir noted that there had been a recent change in the advice from LR&AS in respect of expired identification documents. That had been brought to his attention by Licensing Inspectors and the guidelines had been amended regarding expired IDs since late last year. Mr Kadir stated that since the change to the guidelines he is more vigilant with expired identification documents. He emphasised that he had complied with the guidelines as they were on the night of the incident the subject of the Hearing.
- 29) Mr Kadir stated that the lighting near the scanning station was not ideal so he usually moved away from that area to a place under a spot light where the lighting was better. Mr Kadir stated that he thought the lighting under the spot light was sufficient for him to do his job properly.
- 30) Under cross examination from Mr Anderson, Mr Kadir restated the procedure used to check ID. He said an ID check normally takes him around 2 seconds and he considers that is enough time to do an adequate job. He stated further that he now checks the expiry date shown on IDs, however he would not have done that on the night in question. He added that the reasons for extra scrutiny at expired forms of ID are now apparent to him.
- 31) Mr Kadir was shown a copy of the driver's licence used by the minor and the photograph of the minor taken at the premises prior to her entry on 6 July 2010. He maintained that the photos have sufficient similarities for him to believe they were the same person.
- 32) The Commission noted that the photo obtained from the ID scanning system was of such poor quality that it provided very little assistance in making a comparison with the photo on the driver's licence. The Commission raised this issue with Mr Gray, a Principal with the Licensee company, and noted that the purpose of the ID scanning system was to allow for the identification of patrons on the premises and that the photo in this instance was less than helpful due to the poor quality. Mr Gray was unable to inform the Commission why the photo quality was so poor in this instance or whether it was a more systemic problem with the equipment installed at the premises.
- 33) That concluded the evidence in respect of the complaint regarding the minor on the premises.

Breach of Fire Regulations Condition:

- 34) Mr Anderson informed the Commission that on 22 / 23 June 2010 Licensing Inspectors observed that obstructions, being furniture, a partition and rubbish, were placed in the foyer area on the Mitchell Street side of the premises, a designated fire exit, preventing a free path of egress. The Inspectors noted that there were approximately 450 patrons on the premises at the time.
- 35) On 29 / 30 June 2010 Inspectors observed that egress via the side laneway, another designated fire exit, had been blocked by the placement of furniture, a bamboo screen and a pile of rubbish. At the time of the inspection some thirty patrons were in the fire exit area which was being utilised as a smoking area for patrons. Mr Anderson referred the Commission to photographs showing the obstructions and patrons in the fire exit areas.
- 36) In his response to these complaints Mr Gray, by letter dated 27 August 2010, advised that the furniture and partitions were placed in the fire exit areas to accommodate smokers. He also advised that steps had subsequently been taken to ensure there was no furniture in the foyer fire exit area. Mr Gray conceded that the rubbish in the fire exit areas was *“an absolute embarrassment to the company and we have taken steps to ensure this also will never reoccur”*.

Breach of Camera Surveillance Requirements:

- 37) A further complaint was lodged by Inspectors alleging a breach of the Camera Surveillance Requirements licence condition for the premises. The Inspectors observed that crowd controllers were using the side fire emergency exit from the premises to evict patrons and this exit did not meet the prescribed standards for camera surveillance at exit doors.
- 38) Mr Gray advised that the side exit was used as a last resort measure for the quick removal of problem patrons in the interests of patron safety. When the original camera surveillance plan was submitted there was no requirement to install a camera at this exit, presumably on the basis the fire exit was not intended as a general entry/exit point for patrons or security staff. Mr Gray informed the Commission that the intention was to continue to use the exit for the removal of patrons and he was in the process of having cameras to the required standard installed.

Breach of ID Scanning Requirements:

- 39) The licence for the premises includes the following condition:

*Unless authorised by the Director or an Inspector, the Licensee shall not permit a person to enter the premises unless the Equipment (the IDEYE Scanning system) has contemporaneously recorded the scanned image, the information and the photograph and stored them together in the register.*

- 40) Inspectors alleged that the Licensee breached the licence condition relating to the ID Scanning of patrons entering the premises having observed that at 10.15 pm on 11 September 2011 no security staff were present at the front entry to the premises. One staff member was handing out promotional pamphlets some five metres from the entry and a second employee left the scanning station to go to the hot dog stand some distance from the entry to the premises.
- 41) Whilst the scanning station was unmanned two males entered the premises without being required to produce ID for scanning and without having their photographs taken. At the time the Duty Manager informed the Inspectors that the 2 males were staff members. Further investigations by the Inspectors revealed the males were not staff members but patrons. The Commission was referred to photographs taken by Inspectors showing the unmanned scanning station.
- 42) This breach was admitted by the Licensee. Mr Gray advised that the staff member who had abandoned the scanning station had been sent home after the incident and would no longer be working on the front door.

Breach of Approved Guidelines for Strip and Lingerie Shows:

- 43) The liquor licence for the premises includes a condition requiring that strip and lingerie shows shall only be conducted in accordance with the approved Guidelines.
- 44) Relevant to the complaint concerning the conduct of TOT at the premises, the Guidelines define Adult Entertainment as being undertaken by a person (not a patron) who is partially nude, fully nude or wearing lingerie. The soliciting of performances by members of the audience in this type of entertainment is prohibited by the Guidelines. There is also a requirement that prominent signage be displayed when Adult Entertainment is taking place.
- 45) Mr Anderson referred the Commission to 3 statutory declarations sworn by Licensing Inspectors in respect of their observations of the conduct of TOT on 2 June 2010, 14 July 2010, 29 September 2010 and 26 January 2011.
- 46) Inspector Jodi Kirstenfeldt states that she attended Discovery in the early hours of 2 June 2010 for the purpose of conducting inspections and observed the conduct of the TOT competition on that night. She states that at approximately 1.30 am an announcement was made asking ladies wishing to partake in the wet t-shirt competition to present at the stage area. At approximately 2.30 am the MC for the competition announced that the "Tits Out" was about to commence and called seven named ladies from the crowd to present up to the stage. He then called for a further three volunteers from the audience. The MC then announced the cash prizes for the winners and that the winner would be selected by the loudest cheering from the audience. The contestants were then introduced one at a time.
- 47) Inspector Kirstenfeldt noted that none of the participants were wearing a bra and that several had altered their t-shirts by tying a knot or cutting it in half. The t-shirts of all the contestants were then saturated with water and they were invited to return to the front of the stage one at a time and the audience

was encouraged to select the winner by cheering. Three of the contestants were observed to remove their t-shirts and expose their breasts to the audience. Ms Kirstenfeldt states that this encouraged the audience to cheer louder. She states further that the MC then announced the winners, two of whom were the contestants who had removed their t-shirts. Inspector Kirstenfeldt states that it was apparent to her that the management and staff of the premises made no attempt to ensure the contestants kept their t-shirts on.

- 48) A Statutory Declaration sworn by Inspector Steven Holehouse attested to his observations in respect of the conduct of TOT on 2 June 2010 which were consistent with those of Inspector Kirstenfeldt. He also states that several contestants in the competition were wearing only their underwear during the competition, having removed their tops.
- 49) Inspector Holehouse states that he again attended TOT on 14 July 2010 as the winners were being announced. He observed that when the third placed contestant reached the front of the stage she removed her t-shirt exposing her breasts to the audience. The second placed contestant kept her t-shirt on and the winner removed her t-shirt.
- 50) During the course of an inspection of the premises on 29 September 2010, Inspector Kirstenfeldt again witnessed the TOT performance. She states that on this occasion five of the ten contestants exposed their breasts to the audience and two removed their t-shirts completely. She states that again this caused the audience to cheer louder and that two of the contestants who had removed their t-shirts were amongst the winners. Inspector Kirstenfeldt again noted that no staff of the premises appeared to attempt to ensure the contestants kept their tops on.
- 51) Inspector Graham Tribe swore a Statutory Declaration in respect of his observations of the TOT competition on 26 January 2011. His observations are consistent with those of Inspectors Kirstenfeldt and Holehouse. Inspector Tribe also states that when one of the contestants failed to expose her breasts to the audience the MC said "you know the rules for TOT, you have to get your tits out", or words to that effect. Inspector Tribe states that after the MC's announcement the first contestant exposed her breasts to the audience and all the other contestants in turn exposed their breasts by lifting up or opening their tops.
- 52) Mr Anderson submitted that statements of the Inspectors regarding their observation of the TOT competition on four separate occasions demonstrated that the manner in which the competition is conducted, and the fact that the contestants regularly expose their breasts, is commonplace and the usual practice and not a one off occurrence.
- 53) Mr Anderson informed the Commission that on 26 January 2011 contestants in the TOT were provided with free drinks which constitutes a breach of the Guideline prohibiting the offering of liquor as an enticement to a member of the public to perform in Adult Entertainment. Mr Lawrence acknowledged on behalf of the Licensee that contestants were in fact provided with free drinks that night. He submitted that the drinks could not have been an enticement to

perform as the contestants had already agreed to enter the competition when the drinks were provided.

- 54) Mr Anderson further informed the Commission that the area in which contestants changed into the t-shirts supplied by the Licensee and later redressed into their street clothes was covered by CCTV surveillance and that this was the subject of further investigations by Inspectors in respect of privacy and licence condition issues.
- 55) Mr Gray entered the witness box and stated that he had been involved in the hospitality industry since 2001 and that he had purchased the Discovery/Lost Arc premises in July 2003. He also has an interest in Kitty O'Sheas, the Cavenagh and the Victoria Hotel in the Darwin CBD as well as licensed premises in Adelaide where he resides. Mr Gray stated that a new Nominee had been engaged for the premises to replace Mr Craig McPharlan who was Nominee at the time of a number of the alleged breaches.
- 56) In respect of the breach of the licence condition relating to ID scanning requirements, Mr Gray said he had viewed the CCTV footage of the incident on 11 September 2011 and was satisfied that the breach had occurred. He stated that the employee who had vacated the scanning station had been demoted as a result of the incident. Mr Gray noted that the equipment purchase and installation costs incurred by the Licensee for the ID scanning system were in excess of \$40,000.
- 57) Mr Gray acknowledged the breaches of the fire regulation condition and stated that he had taken remedial action to ensure there were no recurrences, including the dismissal of then Nominee Ms Hilary Alcock. He also acknowledged that the CCTV surveillance camera for the emergency exit door was inadequate for a door used to remove patrons from the premises. Mr Gray stated that new cameras were in the process of being installed and these would be compliant with the requirements of the Director. He added that he considered it appropriate the fire emergency exit be used to remove troublesome patrons on occasions when the safety of patrons may be compromised by removing them via the body of the premises.
- 58) In respect of the alleged breach relating to the minor on the premises, Mr Gray stated that Mr Kadir had been employed as a crowd controller at the premises since he took over and is one of his longest serving Crowd Controllers. He regards Mr Kadir as one of his best security personnel and a person who is well regarded in the security industry. Mr Gray stated that he took no disciplinary action against Mr Kadir over the incident as Mr Kadir was obviously upset that a complaint being lodged as a result of his actions. Mr Gray stated that Mr Kadir had told him that he did not see that he could have done any more than he did prior to allowing the minor to enter the premises. Mr Gray noted that Mr Kadir had changed his practice in respect of expired ID as a result of recent advice from LR&AS.
- 59) Mr Gray informed the Commission that TOT had its inception some time around 2003 in the Lost Arc area of the premises as a beach party and tequila themed night. The aim was to attract patrons on Tuesday nights which were usually poor nights for trade. The event was previously largely driven by male military personnel and involved a tequila themed drinking song

during which the patrons lifted up their shirts. The event grew in popularity and at some stage females joined in. The wet t-shirt competition was introduced whilst the event was still being conducted in Lost Arc but eventually patron numbers grew to the point it was moved to the larger area in Discovery.

- 60) Mr Gray noted that complaints had previously been laid in respect of a breach of licence conditions relating to TOT by a former Licensee in 2005. The breaches were found to have occurred and a penalty of three days suspension of licence, suspended for twelve months, was imposed.
- 61) Mr Gray stated that his understanding was that the Guidelines applied only to formal striptease shows and not wet t-shirt competitions. He acknowledged that he had attended TOT on several occasions and he was aware that contestants exposed their breasts to the audience.
- 62) In respect of the conduct of TOT on 26 January 2011, Mr Gray noted this was the morning after a Directions Hearing in respect of the complaints now before the Commission. He stated that he had advised staff to run the TOT event on that night "strictly by the book" and in accordance with the rules. He agreed that contestants were provided with alcohol in a private bar on that night. Mr Gray stated that as far as he was aware contestants always changed in the band room and that the evidence presented at the Hearing was the first time he had heard that contestants undressed in a room with a bar and CCTV surveillance.
- 63) Mr Gray stated that he had contacted the MC in respect of Inspector Tribe's statement that he had encouraged the contestants to "get their tits out". The MC denied that he would have said that however Mr Gray noted that he had no reason to doubt Inspector Tribe's version.
- 64) Mr Gray agreed that cash prizes in the order of \$500 were given to successful contestants in the TOT competition and sometimes the prize pool was increased to \$1,000. Some of the contestants are regulars and some have been banned due to their regular success. Mr Gray stated Discovery opens its doors at 10.30 pm on Tuesday nights and that TOT commences between 1.45 am and 2.30 am on Wednesday mornings and runs for approximately thirty minutes. It follows immediately after professional strippers perform and partially strip as a warm up to TOT.
- 65) Mr Gray was referred to his letter dated 25 August 2010, folio 19, in response to this component of the complaint. He confirmed that he remained of the view that contestants in TOT are not required or requested by staff of the Licensee to remove their t-shirts during the competition and that contestants who did, did so at their own initiative. Mr Gray also confirmed that each contestant was required to sign a document titled Wet T-shirt Competition Guidelines ("the Participant Agreement"), including an agreement that they would not remove any item of clothing whilst on stage.
- 66) Mr Gray stated that he did not believe that TOT fell into the category of adult entertainment so as to make the Guidelines applicable. He stated that, in his view the Guidelines were intended to apply to professional striptease shows where the audience would be predominantly male. Mr Gray stated that TOT

was not that type of entertainment and that the audience usually included a strong female patronage. Mr Gray agreed that patronage of TOT had increased in recent weeks with the media coverage of the complaints. He added that over recent months patron numbers on Tuesday nights were near to and sometimes surpassing the numbers on Friday and Saturday nights.

- 67) In response to a question from the Commission, Mr Gray agreed that contestants who removed their tops were often awarded a prize despite signing the agreement that they would not do so. Mr Gray confirmed that patrons who breached the agreement were not removed from the premises or subject to any other sanction by management or staff of the premises.
- 68) Mr Gray was further questioned by the Commission in respect of the actual control he had over his staff given that he resides in Adelaide. The Commission noted that the conduct of TOT on 26 January 2011 appeared to have been in contradiction of his clear directions to staff.
- 69) In cross examination by Mr Anderson, Mr Gray confirmed that he was aware that TOT was routinely conducted in the manner described by the Inspectors and with some of the contestants exposing their breasts. He was referred to Discovery's Participant Agreement and the requirement that the contestants not remove any clothing. Mr Gary did not agree that the inclusion of that condition was an acknowledgement by the Licensee that if contestants did remove clothing during the contest the Licensee would be in breach of the Guidelines. Mr Gray did not agree that many contestants appeared on stage in only their underwear, having removed their tops. He stated that on the occasions he had attended TOT he had observed contestants in jeans and skirts with t-shirts.
- 70) In respect of the complaint relating to the minor on the premises, Mr Gray confirmed that he agreed with the evidence of Mr Kadir that he had done nothing wrong in checking the patrons ID and allowing her entry. He stated that he may have been concerned had it been a crowd controller other than Mr Kadir and that he thought two seconds was sufficient time to examine a person's ID, particularly where the crowd controller is assessing thousands of ID's per night.
- 71) In response to a question from the Commission, Mr Gray agreed that the quality of the photograph of the minor from the ID scanning system was very poor and inadequate for the purpose for which the system was designed. He could not explain why the clarity of the photo was so poor on this occasion or whether the problem was endemic or just a one-off malfunction.
- 72) Mr Gray conceded that he had been experiencing difficulties in recruiting and retaining competent management staff for the premises, including the Nominee, and as a result standards had slipped. Mr Gray agreed that there had been a significant turnover of Nominees recently and the Ms Alcock had been dismissed following some of the breaches that are now before the Commission. The subsequent appointment of Mr McPharlan has also not worked out. Mr Gray expressed his view that the new Nominee, Mr Andrew Chigwidden, will resolve many of the current management problems.

73) At this point the Hearing was adjourned, to be resumed on 28 January 2011. At the resumption of the Hearing Mr Lawrence informed the Commission that the scanning device used at the premises had been re-programmed to trigger an alert to staff when an identity document is detected as having expired. Mr Lawrence also advised that the MC for the TOT event on the nights to which the complaints refer had been dismissed by Mr Gray.

## **SUBMISSIONS ON BEHALF OF THE DIRECTOR IN RESPECT OF THE CONTESTED BREACHES OF LICENCE CONDITIONS**

### Minor on the premises complaint:

74) Mr Anderson noted that the Licensee, in denying the breach of the Act in respect of allowing a minor on to the premises, relied on the statutory defence contained in Section 124AA(2)(c) of the Act and that Mr Kadir had no reasonable grounds to doubt the validity of the ID presented to him by the minor. Mr Anderson submitted that the test to be applied was an objective test measured against the actions that would have been taken by a competent Crowd Controller in similar circumstances. Mr Anderson submitted that a subjective test approach where the Licensee would only need to show that a particular Crowd Controller had doubts would render the provisions in the Act relating to minors on licensed premise as almost unenforceable.

75) Mr Anderson submitted it was for the Commission to determine, given the evidence before it, whether Mr Kadir had any reasonable grounds for doubting the validity of the minor's ID. Mr Anderson submitted it should have been apparent from a cursory glance at the driver's licence that it had expired and that the person presenting it was not person shown in the photograph.

76) Mr Anderson also submitted that an expired driver's licence is not a licence that permits a person to drive a motor vehicle and as such is not valid for any purpose, including as a form of identification to gain entry to licensed premises. He stated that Mr Kadir now accepted that an expired driver's licence creates a doubt as to its validity and that he has amended his practices following the issue of amended guidelines by LR&AS. Mr Anderson submitted that even on the subjective test standard Mr Kadir should have taken extra steps when examining an expired driver's licence given his experience and expertise in the industry.

77) Mr Anderson stated it was a matter for the Commission to determine whether there were sufficient similarities between the photograph on the driver's licence and those of the minor to enable Mr Kadir to rely on the statutory defence. He submitted that the photos were dissimilar to the extent a proper examination of the photograph and the minor would have raised doubts as to whether they were the same person.

78) Mr Anderson also referred the Commission to the Statutory Declarations of Inspectors Jeff Paull and Christine O'Brien. Mr Anderson noted that these were the Inspectors who had interviewed the minor after the incident at Discovery and drew the Commission's attention to their observations that the minor bore very little resemblance to the photograph on the driver's licence.

Mr Anderson conceded that the Inspector's observations were made in the cold hard light of the day but submitted that Mr Kadir could not rely on the poor lighting for his failure to detect the false identification presented to him as he had stated in evidence that he thought the lighting was adequate and in fact moved to an area under a spot light where the light was best.

- 79) Mr Anderson noted Mr Kadir's evidence that he could adequately examine a person's ID in 2 seconds and the evidence of Mr Gray that Mr Kadir was one of the best crowd controller's in the industry. Mr Anderson submitted that, given that a minor had gained entry to the premises with another person's driver's licence, coupled with the disparity between the appearance of the minor and the photograph on the licence, the Commission should have grave concerns if this is the industry standard and reflected the practice of one of its "better" operators.

Breach of Approved Guidelines for Strip and Lingerie shows:

- 80) Mr Anderson submitted that Mr Gray's opinion that TOT did not constitute adult entertainment could not be maintained on a simple reading of the definition contained in the Guidelines. The Guideline provides, relevant to this complaint, that Adult Entertainment includes entertainment undertaken by a person who is partially nude or wearing lingerie. Mr Anderson noted that the Guidelines also prohibit audience members from participating in Adult Entertainment.
- 81) Mr Anderson submitted that the evidence presented to the Commission in respect of the manner in which the TOT competition is conducted satisfies both preconditions to the definition of Adult Entertainment as participants regularly became partially nude by removing their tops and exposing their breasts and, at least on some occasions, the contestants were dressed in their underwear. Mr Anderson submitted that the usual definition of "lingerie" included ladies underwear.
- 82) He noted that Mr Gray did not dispute that participants exposed their breasts during TOT and that this had always been a part of the event and that, at least on some occasions, contestants appeared in their underwear only. He submitted that the only conclusion to be drawn was that TOT includes partial nudity and is therefore within the definition of Adult Entertainment to which the Guidelines apply. Mr Anderson submitted that the Guidelines were breached in that the Licensee permitted audience participation in Adult Entertainment.
- 83) Mr Anderson submitted that the behaviour of some of the TOT participants would have been a breach of Section 105 of the *Criminal Code* relating to indecent exposure had it not taken place in an organised event. He added that Licensees were under an obligation under the Act to remove patrons who engaged in unlawful activity on licensed premises.
- 84) Mr Anderson noted that the behaviour of some participants was in breach of the agreement entered into with the Licensee that they would not remove any clothing during the competition and yet some of the participants who did remove their tops were awarded prizes. He submitted this demonstrated clearly that the Licensee had no intention of preventing participants from

removing their tops during the competition and, in fact, that behaviour was actively encouraged by staff of the Licensee during the competitions.

- 85) Mr Anderson noted that the complaints in respect of TOT were first referred to Mr Gray in the middle of 2010 and yet he had allowed TOT to continue to operate as it always had, with participants exposing their breasts. That had continued to be the case even after Mr Gray was advised the complaints would be referred to a Hearing before the Commission. He submitted further that whilst Mr Gray may have advised his staff to run the event according to the book, he took no other steps whatsoever to ensure that Guidelines or the Participant Agreement were upheld. Nor did he take any steps to ensure that contestants did not remove their clothing from the time the complaints were first referred to him in mid 2010. Mr Anderson submitted on that basis the breaches in respect of the Guidelines were committed by the Licensee knowingly and deliberately.

## **SUBMISSIONS IN RESPECT OF THE CONTESTED BREACHES OF LICENCE CONDITIONS ON BEHALF OF THE LICENSEE**

### Minor on the premises complaint:

- 86) Mr Lawrence submitted that the issue to be resolved by the Commission in respect of the allegation of the minor on the premises was narrow and limited to consideration of Mr Kadir's actions in examining the ID and allowing the minor to enter the premises. He stated that the extraneous material regarding the minor's actions before and after entering the premises were irrelevant to this complaint which is not related to the separate issues regarding the TOT complaint and it would be inappropriate to draw inferences from the fact that the minor actually tried to participate in the wet t-shirt competition. Mr Lawrence submitted that whilst those factors may be relevant in terms of determining penalty if the complaint is proven they were irrelevant in terms of proving that the elements of the complaint are established.
- 87) Mr Lawrence referred the Commission to Section 106B of the Act and confirmed it is not in dispute that the minor was in the licensed premises on the night in question and that the Licensee is relying on the defence set out in Section 124AA(2)(c). Mr Lawrence submitted that the test for reasonable grounds to doubt the validity of identification was a subjective test and in this instance the reasonable doubt had to be held by Mr Kadir, as the agent of the Licensee. He submitted that the core issues were what Mr Kadir had done in checking the age of the minor, whether his actions were reasonable and appropriate and, if so, whether his or the minor's actions had given Mr Kadir any reasonable grounds on which to doubt the validity of the ID presented to him.
- 88) Mr Lawrence noted that seventeen year olds were always trying to get into pubs and always will. Licensees are aware of this and employees who check for the age of patrons are aware they will be confronted with false or altered forms of ID. The Licensee in this instance does have measures in place to prevent minors entering the premises, including the engagement of crowd controllers and the ID scanning and photo systems. Mr Lawrence stated that the CCTV footage viewed by the Commission clearly shows Mr Kadir

examining the licence and it then being scanned before the minor entered the premises.

- 89) Mr Lawrence noted that Mr Kadir had voluntarily participated in an interview with Licensing Inspectors and, despite the fact he was not cautioned, he had responded candidly to the Inspector's questions. He had also sworn a Statutory Declaration, in which he had made statements entirely consistent with the evidence he had presented at the Hearing. Mr Lawrence submitted that Mr Kadir presented as a sincere, truthful and impressive witness and a person who is an experienced and able crowd controller with a conscientious and consistent approach to his duties.
- 90) Mr Lawrence acknowledged that the examination of the ID presented by the minor had been brief and that Mr Kadir had been momentarily distracted by another patron. He submitted however that the Commission was entitled to accept Mr Kadir's evidence that two seconds was sufficient time to examine an ID and that there was nothing remarkable about the way Mr Kadir checked the minor's ID in comparison to his actions with any other patrons.
- 91) Mr Lawrence noted the evidence of Mr Kadir that he moved from the entry area of the premise to a point where there was better lighting and that no evidence had been presented that there was a better place for him to carry out ID checks. He also noted that whilst much had been made about the fact the driver's licence was expired there was, at the time, nothing preventing an expired ID being used for entry to licensed premises and the guidelines in that regard have only recently been amended. Mr Lawrence submitted that Mr Kadir had followed the rules as they had applied at the time and that he had no reason to suspect the minor was presenting false ID.
- 92) Mr Lawrence submitted that little could be gleaned from a comparison of the photo on the driver's licence and the photos of the minor taken before she entered the premises. He emphasised Mr Kadir's evidence that the minor presented as a confident person and displayed none of the usual characteristics of a minor trying to sneak into the premises.
- 93) Mr Lawrence submitted that the Commission should find that this complaint is not made out on the basis Mr Kadir had no reasonable grounds for doubting the validity of the ID presented by the minor prior to her being permitted to enter the premises.

Breach of Approved Guidelines for Strip and Lingerie shows:

- 94) Mr Lawrence referred the Commission to the statutory declarations of the Licensing Inspectors in respect of the complaint concerning the conduct of TOT and particularly the statement of Inspector Tribe and his observations on 26 January 2011. He informed the Commission that Mr Gray was flabbergasted and furious when he found out that his staff had disobeyed his instructions regarding the conduct of TOT and the manner in which the competition was conducted on that night. Mr Lawrence noted also that Mr Gray was concerned about the unseemly recording of the competitors on CCTV surveillance whilst they were undressing and redressing, a situation of which he was not previously aware.

- 95) Mr Lawrence conceded that participants did become partially nude whilst engaged in the TOT competition however he submitted this in itself did not bring the event within the Guidelines. He submitted that the Guidelines were not precise in respect of partial nudity and wet t-shirt competitions and were intended to apply to performances involving professional strippers and entertainment of that nature.
- 96) Mr Lawrence acknowledged that professional strippers were regularly engaged at Discovery prior to the commencement of TOT event however this was a limited striptease in comparison to what would be the norm at traditional striptease performances and did not involve total nudity. Mr Lawrence submitted that this was part of the entertainment and hilarity of TOT and it should not be classified as adult entertainment. Mr Lawrence submitted that the type of entertainment the Guidelines were intended to control involved professional strippers who became completely naked and who used props as part of a show that was invariably performed to a room full of men.
- 97) Mr Lawrence submitted that clause (f) of the Guidelines, prohibiting audience participation, was aimed at keeping the male audience away from professional striptease performers. He noted that TOT had originated as an innovative military oriented event with males joining in a drinking song and that the event has long held a tequila theme. Whilst it has been a regular occurrence that participants in TOT expose their breasts that is not sufficient to invoke the Guidelines to control an event that is not of the type or character for which they were designed.
- 98) In response to a question from the Chairman, Mr Lawrence advised he had been instructed that for future TOT events participants who breached the agreement to not remove clothing during the competition would be disqualified.
- 99) In response to a further question as to where the line should be drawn in respect of what type of activity falls within the Guidelines, Mr Lawrence submitted that this was a difficult area to precisely define. He noted that the Darwin CBD has significant issues surrounding high levels of intoxication and violence. However, he added that TOT was in reality entertainment and a bit of a laugh and not an event that added to the anti-social issues.
- 100) In the alternative, Mr Lawrence submitted that there was a contract between the participants and the Licensee in the form of the Participant Agreement by which the contestants were offered the chance to win a prize by entering the competition. Mr Lawrence submitted on that basis, the participants were not members of the audience but more aptly described as contractors engaged by the Licensee.
- 101) Mr Lawrence submitted that the conduct of TOT by the Licensee requires a sensible and reasonable approach by management however it does not fall within the Guidelines and, as a result, the Commission should find that the complaint is not made out.

## CONSIDERATION OF THE ISSUES

### Minor on the premises complaint:

- 102) It is not in dispute between the parties that on 6 July 2010 a minor, being 17 ½ years of age at the time, entered the licensed premises using the driver's licence of another person to purport to Mr Kadir that she was nineteen years old.
- 103) Section 106B of the Act provides that a Licensee shall not allow a person who has not attained the age of eighteen years to enter licensed premises that are subject to a declaration served under Section 106. Such a notice has been served on the Licensee for the premises. Section 124AA(1) of the Act prescribes that a contravention of Section 105 is a regulatory offence.
- 104) In addition, Section 124AA(2)(c) includes the following defence in respect of an alleged breach of Section 106B:
- (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 :*
- (c) *where the offence relates to Section 106B, the defendant was shown an identification for the purposes of representing that the person who has not attained the age of 18 years had attained the age of 18 years, ... .. and the defendant had no reasonable grounds for doubting the validity of the identification.*
- 105) As was noted by Counsel for both parties, the Commission, having concluded that a minor was permitted to enter the premises, is tasked with determining whether the Licensee, through the agency of Mr Kadir, had reasonable grounds to doubt the validity of the driver's licence presented by the minor prior to her gaining entry.
- 106) The Commission notes the evidence in respect of the fact the licence was expired at the time it was presented to Mr Kadir and supports the amendments to the directions issued to crowd controllers in that regard. The Commission acknowledges that an expired form of ID should trigger concern on the part of Licensee and result in closer scrutiny of the ID and the person presenting it. However, the Commission accepts the submissions by Mr Lawrence that, at the time of the incident, LRAS material available to Crowd Controllers placed no particular emphasis on dealing with expired forms of ID, nor did those materials suggest that an expired driver's licence was an invalid form of identification.
- 107) The Commission agrees with the submission of Mr Anderson that the test to be applied in determining whether there are reasonable grounds for doubting the validity of an identification is an objective test and one based on determining whether a reasonable and properly trained Crowd Controller similarly circumstanced would have done anything different to the actions that Mr Kadir took on the night in question. The Commission agrees that the adoption of a subjective test requiring the determination of whether a specific crowd controller had reason to suspect would set the evidentiary bar so low for the statutory defence as to render the offence provisions virtually unenforceable.

- 108) The Commission is highly persuaded in reaching its determination by the evidence presented by Mr Kadir. The Commission agrees with Mr Lawrence's submissions that Mr Kadir presented as a thoughtful and credible witness who was making his best endeavours to provide an honest account of his dealings with the minor. The Commission notes that the statements made by Mr Kadir in interview with Licensing Inspectors was entirely consistent with the evidence presented in person some four months later and was confirmed by the CCTV footage. The Commission also accepts the minor showed no obvious signs of nervousness or any other indication she was under age during the brief screening.
- 109) The Commission heard evidence that Mr Kadir is a very experienced crowd controller who is well regarded in the industry. He is also the principal of a private security firm with up to thirty employees. Both Mr Kadir and his firm have unblemished records over a period spanning some fifteen years. Mr Gray considers Mr Kadir to be one of his best security providers.
- 110) Mr Kadir told the Commission that, except for the new requirements for expired ID's, he would not, even with the benefit of hindsight, have done anything differently on the night the minor was permitted to enter the premises. He checked the photo against the person in front of him, checked the date of birth, checked for any imperfections on the licence and concluded the person before him was the owner of the driver's licence. Mr Kadir confirmed that he was still of the view that two seconds was sufficient time to check an ID for an experienced and competent Crowd Controller.
- 111) The Commission considers that evidence to be most persuasive. The test within the Section 124AA(2)(c) defence is to be proven on the balance of probabilities. The determination of the balance of probabilities is to be reached in accordance with the principles set out in the High Court Authority of *Briginshaw v Briginshaw* and requires the adjudicator to take account of the consequences of a finding of guilt in determining where the balance lies.
- 112) A breach of the Act in respect of allowing a minor on licensed premises is likely to result in a suspension of licence, a significant penalty and one that reflects the seriousness of that type of offence. In this instance the Commission is not able to determine, on the balance of probabilities, that Mr Kadir could have done anything further on the night to verify the validity of the ID presented by the minor. The Commission is not persuaded that the Director has satisfied the evidentiary burden to the necessary level so as to convince the Commission that Mr Kadir had reason to doubt the validity of the identification presented to him by the minor.

113) As a result the Commission finds that this complaint is not made out.

Breach of Approved Guidelines for Strip and Lingerie Shows:

- 114) For the purpose of removing any doubt, the relevant 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. In this instance the Commission is tasked with determining whether the manner in which the TOT wet t-shirt competition was conducted when the Inspectors were in

attendance was such that the event falls within the Guidelines applicable to Adult Entertainment.

- 115) The Liquor Licence held by the Licensee of Discovery includes the following condition relating to the Approved Guidelines for Strip and Lingerie Shows:

*Strip and Lingerie shows shall only be conducted in accordance with the approved guidelines.*

- 116) The Commission accepts Mr Anderson's submission that the determination of what constitutes Adult Entertainment at licensed premises is governed by the Guidelines which include the following definition:

*"For the purpose of these guidelines, adult entertainment is the performance of any other entertainment at a venue where the adult entertainment condition is contained within its liquor licence. This entertainment would be undertaken by a person who is partially nude or wearing lingerie."*

- 117) The Commission has no doubt, on the basis of the unchallenged evidence presented during the Hearing, that participants in the TOT event regularly remove their tops and become partially nude. In the Commission's view such activity brings TOT within the ambit of Adult Entertainment so as to bring the Guidelines into effect and make them applicable to the event.

- 118) The Commission is not persuaded by Mr Lawrence's argument that the Guidelines are intended to apply only to premises that conduct professional striptease shows for a predominantly male audience in an often sleazy environment and not to premises like Discovery where there is a mixed crowd and it's all just a bit of fun. In the Commission's view, whether a particular type of entertainment falls within the definition of Adult Entertainment requires an assessment based on the content of the entertainment itself and not the amenity of the premises or an assessment based on the gender makeup of the audience.

- 119) The Commission is satisfied that the conduct of TOT whereby contestants expose their breasts falls within the definition, for licensing purposes, of Adult Entertainment so that the Guidelines apply. Those Guidelines prohibit the participation of members of the audience in Adult Entertainment. The Commission is also minded of the context in which TOT is preceded by professional strippers who partially strip as a warm up to TOT.

- 120) The Commission gives little credence to the submissions on behalf of the Licensee that the participants are contractors pursuant to the Participant Agreement. It was conceded by Mr Gray in his evidence that participants who breached the signed agreement with the Licensee by removing their tops were not sanctioned in any manner and were often rewarded with prizes as those who revealed their breasts often drew the most support from the audience. He advised that future TOT events participants who breach the Participant Agreement and remove their tops will be disqualified from the competition.

121) For the above reasons the Commission finds that the Licensee has breached the licence condition relating to Adult Entertainment in the manner in which it permitted the conduct of the TOT event on the nights referred to in the affidavits of the Inspectors tendered during the Hearing.

## **DECISION**

122) The Commission notes that the breaches of the licence conditions relating to fire regulation, the ID Scanning licence condition and the Camera Surveillance licence condition have been admitted by the Licensee and formally finds that those complaints have been made out.

123) The Commission is not satisfied, for the reasons set out above, that the complaint alleging that the Licensee allowed a minor to enter the premises has been proved to the necessary standard. The Commission finds that, in the circumstances, the Licensee is entitled to rely on the defence set out in Section 124AA(2)(c) of the Act and for that reason that complaint is dismissed.

124) The Commission is satisfied that the complaint in respect of the breach of the Adult Entertainment licence condition has been made out and finds that the Licensee breached that condition of licence.

## **SUBMISSION ON PENALTY**

125) Towards the conclusion of the hearing Mr Anderson, with the consent of Mr Lawrence, presented submissions on penalty on behalf of the Director in respect of the complaints that were admitted and the contested complaints, should they be found by the Commission to be made out. Mr Lawrence asked that his submissions on penalty be deferred until the Commission has reached its decision in respect of the contested breaches.

126) The Commission, having found the breach in respect of the Strip and Lingerie Shows licence condition to be proven, will resume the Hearing for the purpose of hearing Mr Lawrence's submissions on penalty. Naturally Mr Anderson's submissions on penalty as already delivered will be taken into account when the Commission deliberates on penalty. The time and date of the resumption of the Hearing will be advised to the parties through the Executive Officer.

Richard O'Sullivan  
CHAIRMAN

30 March 2011