

Northern Territory Licensing Commission

Reasons for Decision

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| Premises: | Discovery |
| Licensee: | Rediscover Pty Ltd |
| Licence Number: | 80316240 |
| Complaints: | Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> -Sections 106B and 106C of the <i>Liquor Act</i> |
| Heard Before: | Mr Richard O'Sullivan (Chairman) Mr John Brears Mr Wally Grimshaw |
| Date of Hearing: | 9 September 2008 |
| Appearances: | Ms Sue Porter for Licensee Mr Nikolai Christrup for Director of Licensing |
| Witnesses: | Student A Student B Mr Joseva Vovoli, House Parent, St Johns College Mr John Lawrence, Security Officer for Discovery Mr Somsak Falkers, Cashier for Discovery Ms Hilary Alcock, Nominee for Discovery Mr Mark Gray, Director Rediscover Pty Ltd |

Background

- 1) A complaint has been lodged on behalf of the Director of Licensing pursuant to Section 48(2) of the *Liquor Act* ("the Act") alleging breaches of Sections 106B and 106c of the Act by the Licensee Rediscover Pty Ltd.
- 2) The complaint alleges two (2) counts of breaches of Section 106B

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.

- 3) It also alleges one (1) count of a breach of Section 106C

106C Supply of liquor to minors

A person who has attained the age of 18 years shall not sell or supply liquor on licensed premises to another person who has not attained the age of 18 years except where the first-mentioned person is the licensee of the licensed premises, or a person employed by the licensee, and –

(a) the liquor is sold or supplied on licensed premises or any part of licensed premises that is the subject of a declaration for the purposes of section 106(1)(b);

- (b) *the person to whom the liquor is sold or supplied is in the company of his parent, guardian or spouse (who has attained the age of 18 years); and*
 - (c) *the liquor is sold in conjunction with or ancillary to a meal supplied on the licensed premises.*
- 4) The allegation is these breaches occurred between the late hours of 17 November 2007 and the early hours of 18 November 2007 at the Discovery Nightclub licensed premises.
 - 5) There has been a time delay in this matter coming to Hearing in part as a result of one of the minors (Student A) being overseas for a time after the alleged breach and also the absence overseas over the Christmas holiday period of Mr Joseva Vovoli, a House Parent at St Johns College who in a Statutory Declaration has evidenced the presence of minors (Students A and B) on the premises of Discovery Nightclub.
 - 6) Camera surveillance has not been able to be provided as requested by Licensing Inspector Christine O'Brien for various reasons, largely the fault of Discovery Nightclub. The absence of this footage has also not assisted in the timely and expeditious investigation and subsequent consideration of the alleged breaches.

Hearing

- 7) Mr Chrstrup appearing for the Director submitted that breaches of Sections 106B and 106C had clearly taken place based on Statutory Declarations submitted and evidence to be provided by Students A, B and House parent, Mr Vovoli.
- 8) The Statutory Declaration of Student A who was seventeen (17) years seven (7) months of age at the time of the breach presents that he entered Discovery Nightclub around 12.30am on the night of 17 November 2007 and that he remained on the premises and consumed a quantity of alcohol over a two (2) hour period. His Declaration states that there was security at the door at the time he entered the premises but that he was not challenged or asked for ID.
- 9) The Statutory Declaration of Student B who was seventeen (17) years five (5) months of age at the time of the breach is that he entered Discovery Nightclub at approximately 2.00am on the morning of 18 November 2007. While in the nightclub he purchased a Bundaberg Rum and Cola stubby. His Declaration presents that "*there was no one on the door*" at the time of entry and when served alcohol at the bar the female attendant did not seek identification or proof of age.
- 10) The Rediscover Pty Ltd licence for the Discovery and Lost Arc venues does not allow for minors to be on the premises.
- 11) Ms Porter on behalf of Rediscover Pty Ltd, trading as Discovery Nightclub and Lost Arc Nightclub, advised that her client did not contest that Students A and B were on the premises at around the times indicated. She alluded to there being issues as to how the students gained entry.

Student A

- 12) Student A gave evidence that he was under eighteen (18) years of age at the time he entered and consumed alcohol at Discovery Nightclub. His Statutory Declaration of 18 February 2008 was sworn in as evidence. His evidence was that he left St Johns College on the evening of 17 November 2007 and went to Discovery in the company of other West Papuan friends who were over eighteen (18) years of age.
- 13) He advised that security was outside the entrance to the premises and that money was paid by his companions to "*the girl*" to get in. He thought \$10.00 had been paid for his admission. He was not challenged at the time of entry nor was he asked to produce ID. There was a queue of people lining up to gain entry at the time of his admission.

- 14) Friends bought him a number of drinks he described as Smirnoff Double Blacks. His evidence referred to the House Parent (Mr Vovoli) seeing him on the premises at around 2.30am and that he spoke to Mr Vovoli for a time, after which he left the premises.

Student B

- 15) Student B testified that he entered the Discovery Nightclub at around 2.00am on the morning of 18 November 2007 and in his Statutory Declaration and under cross examination he consistently recalled not paying any entry fee to get in. His evidence referred to there being a lady at the door but he went on walking through the entrance area and at no time did anyone speak to him or ask for ID. During cross examination he admitted to having seen security at the Discovery nightclub entrance when he initially approached the area, but that there was no security present when he entered the premises.
- 16) Student B stated that he was on the premises for around fifteen (15) to twenty (20) minutes when he went to a bar and purchased a stubby of Bundaberg Rum and Coke. He did recall that security was present at the time of his departure from the Nightclub.

Mr Joseva Vovoli

- 17) Mr Vovoli affirmed his Statutory Declaration of 8 February 2008 and his evidence is that on the morning of 18 November 2007 he went to the Lost Arc and then into Discovery Nightclub. His evidence was that he did not pay to enter the nightclub but admitted that friends may have paid for his admission.
- 18) Whilst in Discovery Nightclub he saw Student A who appeared to be surprised to see him. Nevertheless Student A then approached him and they talked for around ten (10) to fifteen (15) minutes during which he recalls telling him he should leave the premises.
- 19) Mr Vovoli's Statutory Declaration also states: *"he was with a group of about eight kids who are all day students and all under eighteen years old. Because they are day students I don't know their names. The kids did not leave the premises because I was there."*
- 20) *I talked to the kids upstairs for about half an hour. They told me they just walked through the front door of Discovery nobody checked their ID".*
- 21) On walking downstairs to exit the premises Mr Vovoli also noticed Student B.

Mr John Lawrence

- 22) Mr John Lawrence advised that he was an experienced licensed Crowd Controller and Security Provider. Mr Lawrence was on duty during the time of the alleged breaches. On being provided with photographs of Students A and B he advised that he did not recognise either or recall them being on the premises.
- 23) In relation to Discovery policy he advised that while there were no written guidelines in relation to underage admittance, the policy was if a patron looked under twenty-five (25) years of age to seek some sort of formal ID. He further advised that the ID must be a driver's licence or some other legal form of identification which included a photograph.
- 24) Exhibit 8 was tendered to the Hearing, it being the employee's incident register. This Exhibit shows that one hundred and eleven (111) persons were refused entry on the night of 17 November 2007 and morning of 18 November 2007; thirty-eight (38) for being intoxicated, twenty-five (25) for no adequate ID; and forty-eight (48) for not meeting dress standards. This document was tendered to illustrate a detailed and rigorous level of screening of patrons and a maintenance of good records of such activities and incident reports by Discovery Nightclub.

- 25) Camera footage of the entrance to Discovery and Lost Arc for 20 and 21 November 2007 was viewed during the Hearing which showed people entering the Lost Arc and Discovery, with security present at all times. Mr Lawrence indicated that systems operating at Lost Arc and Discovery, as illustrated in the footage shown, would ensure that security was always present.
- 26) Mr Ken Davidson, a Licensing Inspector interpreted the footage as showing people could enter the licensed premise without having direct facial contact with security and that security could be distracted by surrounding events.

Mr Somsak Falkers

- 27) Mr Falkers advised that he was generally employed as a cashier at the door of Discovery and that he had been working in the capacity for around four (4) years. He advised that on the night of 17 November 2007 entry to Discovery was \$20.00 per person and that there was always someone at the till.
- 28) His evidence was that if an underage person had managed to pass security the cashier at the till would seek confirmation of age if that person appeared under age or marginally over eighteen (18) years of age.

Ms Hilary Alcock

- 29) Ms Hilary Alcock outlined the policy of Discovery on ID, which for any patron not clearly of age, would involve production of driver's licence, passport or an eighteen plus (18+) card. Ms Alcock advised that despite this policy there is still a problem with under age people entering licensed premises. She stated that persons with a borrowed or otherwise obtained Birth Certificate, could with this Certificate, obtain a driver's licence or other photo ID which would then provide their photograph on the ID card, but not in their right name.
- 30) Evidence was tabled of a minor who had obtained fake ID by this means.

Mr Mark Gray

- 31) Mr Gray advised that as a Director of the company owning and operating Discovery and Lost Arc he had been concerned with the troubles experienced with camera equipment, maintenance of footage and other system failures. He advised he wanted to be aware of any CCTV footage issue and requests from Licensing Inspectors for footage of any incidents and that management was aware of this request.
- 32) He stated he was not aware that the Licensing Inspector had sought footage on 28 November 2007. He advised that the Nominee at the time was no longer in the employ of the company, partly as a result of not notifying the Directors of the footage request and making it available to the Licensing Inspectors.
- 33) He correctly stated that CCTV footage at the time of the alleged breach, if available and provided, would have made the matter of how the minors entered the premises definitive one way or the other.
- 34) He further advised that Directors were considering installing an ITEC system of ID similar to that operating in Geelong nightclub premises. Considerable success in reducing the use of fake ID's and of minors obtaining nightclub entry has been reported in Geelong due to the ITEC system being installed.

Reasons for Decision

- 35) Hearing Commissioners formed the view that Students A and B, although nervous, were reliable witnesses and their outline of events was, on the whole, consistent throughout cross examination. Considerable evidence is placed on the veracity of their statements and

recall. Mr Vovoli's statement and evidence are based on an honest recount of his time at Discovery Nightclub and corroborates that of Students A and B.

- 36) Mr Chrstrup drew the Commission's attention to the evidence of Students A and B on how they entered the premises, that is through the front door. The Commission formed the view that Student B did enter the premises at a time when security was not present, but that he had waited outside the venue and opportunistically entered when security was absent or distracted.
- 37) No specific evidence of fake ID or the vetting of the students by security had been presented by defence Counsel during the Hearing. What was presented was the general approach and systems that operate to minimise the risk of minors entering and staying on the premises. The Incident Record for the time in question, tendered as evidence, added weight to the argument that it would be difficult to enter the premises without being screened by security staff and cashier staff. Commendable as these systems may appear, they evidently did not prevent the entering of minors in this instance.
- 38) Mr Chrstrup stated that while evidence had been presented showing that on normal nights there were multiple security guards at the entrances, on the evidence of the students there had been failure on the night and morning of the alleged breaches.
- 39) He advised the Commission that in addition to there being no substantive evidence to challenge the students' versions of how they entered the premises, there had been no evidence provided at Hearing that liquor was not sold or supplied to Student B.
- 40) Ms Porter on behalf of Rediscover Pty Ltd suggested or inferred that both students were asked for and provided fake ID. She maintained that there was ample evidence provided to the Commission that the systems and procedures in place would prevent minors from just walking through the entrance doorways to Discovery as claimed.
- 41) She added that the problem of fake identification is a whole licensing issue and should be of concern to the Licensing Commission, the Office of Licensing Regulation and Alcohol Strategy, Licensees and other Government agencies.
- 42) Ms Porter maintained that while there were issues for the Licensee not providing or keeping footage on the night of the alleged breaches, there are seizure powers under Section 19 of the Act which would enable the Inspector to take possession of the CCTV footage tapes at the commencement of an investigation. The Commission concurs and considers it may be prudent in future for Licensing Inspectors to take possession of or seize tapes at the commencement of investigations.
- 43) The Commission considers that there have been clear breaches of the Act in that minors did enter and remain on licensed premises contravening Section 106A of the Act. On the evidence of Student B it is clear that a minor has been sold or supplied liquor on licensed premises, in breach of Section 106C of the Act.
- 44) The suggestion that the students must have been in possession of fake ID is discounted by the Commission on the basis that it was not put or put clearly to the witnesses. This is corroborated to a degree in the Commission's view by the Statutory Declaration of Mr Vovoli whose evidence attests to the presence of Students A and B, but goes on to mention that there with other St Johns students on the premises, all likely underage on the night of 17 November 2007 and morning of 18 November 2007. Whilst this was not a major consideration raised during the Hearing it nonetheless does lean weight to the ability of underage persons to enter the premises during the time in question.
- 45) It is the Commission's contention that it would have been up to Counsel for Rediscover Pty Ltd to prove or provide strong evidence of possession of fake ID as a defence for the Licensee. Having alleged or inferred the students were in possession of fake ID as a potential defence against the breaches, to apply Section 124AA(2)(c) of the Act as a defence, it is incumbent to provide proof in support of this contention.

- 46) To rely on evidence of the consistent provision of adequate security and monitoring against underage admission operating at Discovery and Lost Arc Nightclubs does not satisfy the Commission as proof in support of this defence (that Students A and B must have used fake ID to gain admission). Proof required would be to either to the level of “balance of probability” or more likely “beyond reasonable doubt”. Therefore the Commission does not give significant credence to this argument.
- 47) The question of whether the Director of Licensing would prosecute the minors for breaches of the Act was raised prior to and during Hearing. It is salient to note the Director of Licensing stance conveyed in correspondence of 7 May 2008 to Mr Mark Gray, a Director of Rediscover Pty Ltd, in answer to his query on the matter.

“I confirm that there is currently no intention to prosecute the minors for a breach of the Liquor Act. The fact that minors are able to access licensed premises, apparently with little difficulty, is of greater cause for concern than the fact the minors would try to do so. In addition, and as I am sure you would appreciate, the prospect of criminal prosecution would undoubtedly deter any future witness from co-operating with the licensing inspectors in the future.

The onus to ensure under aged persons do not enter licensed premises rests with the licensee who is in the best position to put measures in place to ensure all patrons are of legal age.”

- 48) The Commission concurs that the onus of preventing minors to enter and consume alcohol at a licensed premises rests with the Licensee. Preventative systems and risk management to avoid this happening is a key responsibility and challenge to all Licensees, particularly those operating late night or nightclub venues, which are apparently alluring and even seductive to minors.
- 49) The presence of minors and the consumption of liquor on licensed premises by minors are considered serious breaches of the Act by the Commission. This is more so given recent events and community concerns, shared by the Commission, relating to violence and alcohol related incidents in and around Darwin nightclubs and late night venues.

Decision

- 50) The Commission finds the complaint of two (2) counts of breach of Section 106B of the Act proven and the one (1) count of breach of Section 106C of the Act also proven.
- 51) Submissions on penalty will now be sought and whether these submissions will be in written form or through oral presentation will be determined in conjunction with the parties involved.

Richard O'Sullivan
Chairman

3 October 2008