Northern Territory Licensing Commission

Reasons for Decision

Premises:	Victoria Hotel
Licensee:	Reviction Pty Ltd
Licence Number:	8030989
Temporary Nominee:	Mr Gregory McDonald
Proceeding:	Complaint Pursuant to Section 48 of the *Liquor Act*
Heard Before:	Mr Philip Timney (Presiding Member) Mrs Kerri Williams Mr Wally Grimshaw
Date of Hearing:	15 June 2010
Date of Decision:	12 July 2010
Appearances:	Mr Gregory McDonald and Mr Mark Gray for the Licensee Mr Mark Wood on behalf of the Director of Licensing

Background

1) By report dated 6 April 2010 the Director of Licensing referred a complaint against the Licensee of the Victoria Hotel, Reviction Pty Ltd, to the Licensing Commission. The complaint alleged that the Licensee had committed four breaches of Section 110 of the *Liquor Act* ("the Act") by failing to comply with conditions of its liquor licence. Those conditions of licence are:

   - **Appearance**: The Courtyard Alfresco Dining Area shall always have the appearance of a restaurant. Patrons are permitted to stand on the proviso that table seating for at least eighty percent (80%) of the permitted patron capacity for the area must be available at all times.

   - **Courtyard concept**: The Licensee shall operate the Courtyard area of the licensed premises at all times consistently with the concept as presented to the Commission, or as otherwise subsequently approved in writing by the Commission.

     It is part of the concept of this licence that:

     i. the Courtyard shall be used principally and primarily for al fresco dining and shall not be operated as if it were a beer garden or as an extension of the ground floor bar;

     ii. The area may be used from time to time for special events such as the Hooker's Ball, Halloween and a New Years Eve party provided that the Licensee applies within the specified time to the Director of Licensing for a Temporary Variation of the Liquor Licence.

     iii. Should the usage of the Courtyard area be considered by the Commission, a Licensing Inspector or Police Officers to be inconsistent with such concept, the Commission may of its own motion convene a hearing into the operation of the premises and, at the conclusion of the Hearing, may suspend, cancel or vary the

licence if the Licensee in the opinion of the Commission shall have failed to show sufficient cause to the contrary.

- **Health requirements**: The Licensee shall comply with the requirements of the Chief Health Officer appointed under the *Public Health Act* and his delegates with respect to the requirements of that Act, the *Food Act* and any other Territory legislation.

- **Noise disturbance**: The Licensee shall not permit or suffer the emanation of noise from the Licensed Premises including the Courtyard of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises.

2) The complaints arose following a routine inspection of the licensed premises by Licensing Inspectors McCorkell, Pech and Burdett at approximately midnight on the night of 13 March 2010. A fancy dress night function was being held at the premises on that evening.

3) The complaint alleges that, when the Inspectors entered the Darwin City Mall from the Knuckey Street end music could be clearly heard, on closer inspection it was ascertained the source of the music was the Victoria Hotel. On entering the premises the Inspectors allege they observed that the usage of the Courtyard was inconsistent with the concept of an alfresco restaurant in that no meals or snacks were apparent on the tables. Nor were cutlery, plates or serviettes observed. None of the patrons in the courtyard area were consuming any food. The Inspectors observed that the courtyard had the appearance of a chill out zone for the downstairs bar, a usage specifically prohibited by the licence condition.

4) The Inspectors also allege they observed a number of patrons smoking and drinking in the courtyard and moving freely between the courtyard and the downstairs bar in breach of the requirements of the *Tobacco Control Act* and a specific direction issued by Mr Warwick Kneebone of Tobacco Policy, Enforcement and Education that smoking was prohibited in the Courtyard.

5) The Inspectors also observed that the doors to the upstairs veranda facing the Mall were open and that patrons were using the veranda as a smoking area. Whilst there is no written condition included in the licence stipulating that the veranda doors are to remain closed after 10.00 pm, that condition was agreed to by the Licensee during the hearing of a prior noise complaint against the Victoria Hotel. Refer to the decision of the Licensing Commission dated 14 March 2008.

The Hearing

7) Mr Wood formally presented the précis of the complaints. Mr Gray informed the Commission that the Licensee denied the breaches of licence conditions had occurred and that he intended to defend the complaints.

8) The Commission then viewed some of the CCTV footage of the Victoria Hotel Courtyard area at the time of the alleged offences. Mr Wood submitted that the footage clearly showed patrons entering the courtyard from the downstairs bar area, and in a number of cases, re-entering the downstairs bar.

9) Mr Wood also submitted that a number of patrons could be observed to be smoking in the Courtyard area. Mr Gray denied that all of the instances cited clearly showed the patrons smoking, however he did concede that in several instances patrons could clearly be observed smoking. A number of the patrons smoking were spoken to by security, however none were removed from the Courtyard area and several continued to smoke after the security personnel left.

10) Mr Wood submitted that the presentation of the Courtyard at the time of the alleged breaches was not in accordance with the Appearance or Courtyard Concept licence conditions. He referred the Commission specifically to the requirement to have seating

available for at least 80% of the permitted patron capacity for the area. The Commission was informed that that the maximum patrons permitted in the Courtyard area was 120, with the result seating for 85 patrons was required. Mr Wood noted that the CCTV footage showed seven tables in the courtyard with only 24 to 26 seats available.

11) Mr McDonald submitted that the Courtyard had been utilised as an alfresco dining area earlier in the evening. He informed the Commission that the area was regularly used to provide meals to backpackers and that food was available either from a bain-marie inside the downstairs bar or via food platters. He submitted that finger food was available to patrons in the courtyard throughout the evening.

12) Mr McDonald advised that "No Smoking" signs were displayed in the courtyard area and noted that on the night in question crowd controllers had actually spoken to patrons who were smoking. He conceded that the non-smoking requirement was difficult to police, short of having security placed permanently in that area.

13) Mr Gray conceded that management of the Courtyard area had been problematic since its opening, more so since the stricter provisions of the *Tobacco Control Act* were introduced. He added that the alfresco dining in the Courtyard was not heavily patronised and that ceasing to open that area at night had been considered.

14) In respect of the noise complaint, Mr Wood referred the Commission to the decision of 14 March 2008 in respect of an earlier noise complaint against the Licensee of the Victoria Hotel. Of particular relevance is the following extract:

> "Therefore, in this instance, the Commission accepts, as the best outcome for the complaint made under the *Liquor Act*, the agreement reached between both parties for a specific noise policy to be included in the Victoria Hotel's Employees Practices and Procedures as follows:
>
> ***"Noise Policy***
>
> *The Vic Hotel lies within a developing residential community and to ensure that we have a minimal impact on our community, we need to be aware that noise does travel and can be a disturbance on others. To ensure that we keep this to a minimum the following need to be considered and adhered to.*
>
> *a Front balcony doors to verandah, overlooking the Mall, are to remain closed and not to be opened unless in an emergency under the direction of a Duty Manager;"*
>
> *b (not applicable)*
>
> *c After 22:00 hours and subject to occupational health and safety (including fire safety) legislation:*
>
> *c.1 All windows to be closed;*
>
> *c.2 Best endeavors to ensure front door is closed when not being used by patrons entering or leaving.*

15) Mr McDonald conceded frankly that he was not aware of that condition or of the prior decision of the Licensing Commission that lead to the agreement regarding keeping the veranda doors closed. Both he and Mr Gray submitted that the Victoria Hotel was experiencing significant difficulty in complying with the new non-smoking laws and that the upstairs veranda was the only option for smokers using the upstairs area, other than to exit the premises completely to smoke in the Mall.

Consideration of the Issues

16) **Appearance – Courtyard concept**: The Commissioners unanimously formed the opinion, having viewed the CCTV footage, that the courtyard area did not have the appearance of a restaurant at around midnight on 13 March 2010. None of the normal indicators of a restaurant were observed on the CCTV footage, nor were any of the patrons using the area observed to be dining.

17) The number of tables and chairs available in the courtyard was not in accordance with the licence condition requiring that seating be provided for 80% of the permitted patron numbers.

18) The written response to the complaint, co-signed by Mr Gray and Mr McDonald raises some serious concerns for the Commission in respect of the effort on the part of the Licensee to conform with the existing licence conditions. In response to the complaint the licensee made the following comment:

> "*We are confused by point 7 of your correspondence, as it does not appear in our licence that the courtyard has to have the appearance of a restaurant as you outline, rather it is stated that it is to be used as an alfresco dining are. That is how it was and will continue to be used*".

19) As set out in paragraph 1 above, the relevant condition states:

> ***Appearance:*** *The Courtyard Alfresco Dining Area shall always have the appearance of a restaurant. Patrons are permitted to stand on the proviso that table seating for at least eighty percent (80%) of the permitted patron capacity for the area must be available at all times.* (emphasis added).

20) It is difficult to see how the confusion referred to in the letter arises given the specific and clear terms of the licence condition. At best the response from the licensee and nominee displays a deplorable lack of knowledge of the licence conditions, at its worst the response points to managers who intend to run the premises in the manner they see fit, oblivious or regardless of the applicable licence conditions.

21) The Commission agrees with the statements of the Inspectors that the Courtyard had the appearance of, and was being used as, an extension of the downstairs bar area. That use of the courtyard is specifically and clearly prohibited by the licence condition. The Commission finds that, at the relevant time, the Licensee was in breach of its licence conditions in respect of the appearance and concept of the Courtyard Alfresco Dining Area.

22) **Health Requirements**: In respect of the Health Requirements condition as it relates to the *Tobacco Control Act*, the Commission is satisfied that several patrons were smoking in the courtyard area at the relevant time in breach of that Act. In considering that situation the Commission notes that the Licensee was specifically advised by Mr Kneebone on 17 February 2010 that smoking in the Courtyard was prohibited, less than one month prior to the alleged breach. The Commission notes that whilst security personnel did speak to several of the smokers no attempt was made to have them extinguish their cigarettes nor to remove those patrons from the Courtyard area.

23) Licensees are under an obligation to ensure that their premises are operated in accordance with relevant legislative requirements, including those relating to the prohibition on smoking in prescribed areas. The Commission notes the submission on the part of Mr Gray and Mr McDonald that preventing patrons from smoking in the Courtyard is problematic.

24) Mr Gray submitted persons walking through the Courtyard area who were not patrons of the hotel often smoked as they passed through. The Commission acknowledges that submission and agrees there is nothing the Licensee can do to prevent smoking in the Courtyard by persons who are not patrons of the hotel.

25) However the incidents of patrons smoking referred to in the complaint occurred around midnight when the only people in the Courtyard were patrons of the hotel. The current law prohibits smoking in enclosed areas and it is a matter for the licensee how that requirement is implemented and enforced. If the Courtyard area is unable to be properly managed the only option may be to close the courtyard area completely to patrons in the evening.

26) **Noise Disturbance**: The complaint by the Inspectors that they could hear music from the Victoria Hotel from the Knuckey Street end of the Mall is more properly described as an alleged breach of licence condition rather than a noise complaint. The Victoria Hotel Licence, as it currently stands, contains the usual noise attenuation condition as follows:

> *Noise Disturbance: The Licensee shall not permit or suffer the emanation of noise from the Licensed Premises including the Courtyard of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises*.
>
> *Late Trading Premises: (6) The Licensee shall take all measures necessary to ensure that noise from the premises does not cause undue disturbance or discomfort to residents of the neighbourhood.* (emphasis added).

The License is otherwise silent on conditions relating to the control of noise emanating from the premises.

27) A complaint of a breach of either of those conditions can only be sustained on the basis of evidence that the comfort of a lawful occupier of premises has been unreasonably or unduly disturbed by noise emanations from the hotel. No such evidence has been presented in this case by the Inspectors. The substance of the complaint is that the doors to the upstairs balcony were open after 10.00 pm and that this was contributing to music being able to be heard at the far end of the Mall.

28) Whilst there is no condition on the licence requiring the upstairs veranda doors to be closed so as to minimise noise that requirement was intended to be imposed on the Licensee following the hearing of a previous noise complaint against the Victoria Hotel. The decision in respect of that noise complaint was published on 14 March 2008. That decision also noted that, in interpreting the noise conditions on the licence, only a resident of premises in the neighbourhood could lodge a complaint. The Commission, as constituted at the time, was clearly correct on that point.

a. In the published decision of 14 March 2008 the Commission made a number of observations in respect of the resolution of the complaint, as set out in paragraph 14 above.

29) It is perfectly clear on a literal reading of that part of the decision that the Commission intended that the conditions as agreed between the parties to the complaint, including the agreement to close the upstairs veranda doors, would be included in the Victoria Hotel's Employees Practices and Procedures document and that they would be enforced by the Licensee.

30) Mr McDonald stated at the hearing that he was not aware of the requirement for the upstairs veranda doors to be closed. There is no reference to the requirement to close those doors in the written response from the Licensee to the current complaint. The response states:

> *"The primary reason for this door to be open at this time was to allow easy access to the smoking area as it was being very heavily used. It is normally closed."*

31) There are only two plausible reasons why Mr McDonald, and perhaps Mr Gray, was unaware of the requirement that the veranda doors remain closed. Either they have not read and/or put into practice the Victoria Hotel's Employees Practices and Procedures or, alternatively, the conditions effectively imposed by the Commission in its decision of 14 March 2008 were never incorporated into that document by the former Licensee.

32) Neither reason is satisfactory in terms of compliance with conditions specified by the Commission, albeit the conditions were not formally included in the Licence. The Commission is entitled to expect that Licensees will comply with undertakings given in the course of a hearing, more so where those undertakings persuade the Commission to not impose a penalty on the basis of the apparent co-operation of the licensee in adopting self-imposed conditions. The Commission's expectations in that regard were certainly not being met on the night of 13 March 2010.

33) Despite that previous agreement, the current Licensee is obviously not complying with the requirement to close the veranda doors. The stated reason is that the doors need to be opened to accommodate smokers. If that is the case then the appropriate course would have been for the licensee to have made some form of application to have the requirement to close the doors removed or amended. During the hearing Mr Gray informed the Commission that he thought such an application had been submitted or was close to being submitted. The Commission was advised, subsequent to the hearing, that no such application has been lodged with the Director prior to the hearing. At the time of publishing this decision the Commission is unaware of any application having been lodged.

Decision

34) On the basis of the considerations outlined above the Commission makes the following decisions in respect of each of the alleged breaches of licence.

35) Appearance – Courtyard concept: The Commission finds that the Licensee breached the Appearance and Courtyard Concept conditions of licence on 13 March 2010. As a result of that breach the Commission has determined to vary the Licence condition by reducing the trading hours for the opening of the Courtyard Alfresco Dining Area to 10.00 pm seven days per week. That decision is taken pursuant to Section 49(4)(a) of the Act.

36) In making this decision the Commission is mindful of the comments of Mr Gray that the courtyard area is difficult to manage, especially during evening and night time trade. Regardless of those difficulties, the Courtyard area is licensed for the purpose of alfresco dining and not as an extension of the downstairs bar area. If the licensee is unable to properly manage the courtyard area, including compliance with the appearance and concept conditions, it may be necessary to further restrict the opening times for that area. The Commission also notes that the licence only requires the service of meals until 9.00 pm each evening. It appears incongruous that the service of meals could cease at 9.00 pm and yet the restaurant could remain open until 2.00 am the following day.

37) For the purpose of certainty, at 10.00 pm each evening access to the Courtyard area is to be closed off to all patrons except for the purpose of access and egress to the hotel. Also, the serving of finger food, whether from platters or from a bain-marie does not constitute the operation of a restaurant and, in the Commission's view, does not comply with the licence condition requiring the Courtyard to be used for alfresco dining.

38) Health Requirements: The Commission is satisfied that the Licensee has breached the condition of licence requiring compliance with the provisions of the *Tobacco Control Act*. Whilst the Commission acknowledges the difficulties in this area since the introduction of the revised legislation the means of enforcing compliance with that Act is a matter for each Licensee. Licensees are required to have a system in place to ensure that patrons do not breach the *Tobacco Control Act*. The Commission notes from its viewing of the CCTV footage on the night of complaint that whatever system the Licensee has in place at present, if any, it is not effective and is in need of review.

39) This complaint includes the aggravating factor that the Licensee was informed by an officer of the Department of Health and Families just one month before the breach that the Courtyard area was a no smoking zone.

40) In this instance the Commission has determined to issue a formal caution to the Licensee. The Licensee is warned that future breaches of the requirement to adequately enforce

compliance with the *Tobacco Control Act* may result in a more severe penalty, including the closure of licensed areas that the Licensee is unable to properly monitor and control.

41) Noise Complaint: The Commission expresses its concern that the agreement of the former Licensee to keep the veranda doors closed is not being implemented by the current Licensee. Those concerns are exacerbated by the fact that the agreement was reached in the context of resolving a complaint being heard before the Commission at the time.

42) The former Licensee agreed to the closure of the doors leading to the veranda as a means of addressing complaints regarding noise, predominately music, emanating from the hotel to the annoyance of neighbours. It would appear that neither Mr Gray nor Mr McDonald was aware of the requirement to keep the veranda doors closed, presumably as no condition in those terms was included in the licence following the hearing. The Commission did not insist that the requirement to keep the doors closed was incorporated as a condition of Licence. Instead the Commission relied on the assurances of the former licensee that similar conditions would be included in the Victoria Hotel's Employees Practices and Procedures document and that the conditions would be enforced via that means.

43) The Commission has no knowledge of whether the Victoria Hotel's Employees Practices and Procedures manual was ever updated to include the agreed noise conditions. The current Licensee did not produce a copy of the document during the course of this hearing, nor has the Commission received a copy via any other avenue.

44) As noted above, during the hearing Mr Gray informed the Commission that an application to vary conditions of licence concerning the use of the veranda for a smoking area was either with the Director or imminent. The Commission has been advised that, as at the date of this decision, no such application has been lodged with the Director. That situation brings into doubt the veracity of the advice provide to the Commission by Mr Gray that an application was either lodged already or imminent. The Commission is not prepared to accept further non-binding assurances that the situation with access to and noise emanations from the balcony will be dealt with internally by the licensee.

45) The Commission has determined to impose a condition on the licence of the Victoria Hotel that reflects the agreement made by the former Licensee in resolving the 2008 noise complaint. The following condition is to be applied under the heading Noise:

> *Front balcony doors to the verandah, overlooking the Mall, are to remain closed after 10.00 pm on each evening when the hotel is open for business and not to be opened unless in an emergency under the direction of a Duty Manager*.

46) The additional conditions that were agreed to by the former Licensee, as set out in paragraph 14 above, will not be included as conditions of the licence. It is a matter for the Licensee to decide whether or not those measures need to be implemented in order to comply with the requirement to prevent noise emanations creating disturbance for residential neighbours of the Victoria Hotel.

47) The reduction in the operating hours for the Courtyard Alfresco Dining Area and the additional noise condition are to take effect from the date the licensee receives notification of this decision. A further copy of licence, incorporating the new conditions will be provided to the Licensee in due course.

Philip Timney
Presiding Member
Legal Member

12 July 2010