

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Central Supermarket Lot 2782 Smith Street Darwin City NT 0800
Licensee:	Sunkay Pty Ltd
Nominee:	Mr Francisco Da Silva Lay
Licence Number:	80901929
Proceedings:	To Undertake a Hearing to Consider a Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> – Breaches of the <i>Liquor Act</i> and Conditions of the Licence, namely the Licensee – <ol style="list-style-type: none">1) supplied liquor on a licensed premises to a person who had not attained the age of eighteen years (Section 106C);2) failed to keep the Liquor Licence on or at the premises (Section 107);3) failed to produce the Liquor Licence on demand of a Licensing Inspector (Section 108);4) failed to comply with a Special Condition stating that Essences may only be sold in accordance with licence conditions. (Section 110);5) failed to appoint an acting Nominee and notify the Commission of the Nominee's extended absence from the licensed premises (Section 47)
Members:	Mr Philip Timney (Presiding Member) Mr Wally Grimshaw Mrs Jane Large
Attendees:	Inspector Mark Wood for the Director of Licensing Mr Miles Crawley of Cridlandsmb for the Licensee
Date of Hearing:	18 May 2011

Background

- 1) On 29 December 2010 the Licensing, Regulation and Alcohol Strategy Branch of the Department of Justice ("LR&AS") received information from Northern Territory Police alleging that on 17 December 2010 there had been sale and supply of liquor to a minor at Central Supermarket, Smith Street when Ms Sio Mi Cham, an employee of Central Supermarket, sold three packs of RTD style alcohol drinks to a female who was fifteen years of age.
- 2) When investigating this allegation Licensing Inspectors from LR&AS attended the premises and were advised by Ms Justine Lay, who was present in the store and appeared to be supervising the business activities, that Mr Francisco (Frank) Da Silva Lay, Nominee, was interstate and that Mr Nelson Lay was managing the store. The Inspectors noted that Mr Nelson Lay had not been appointed Acting Nominee as required by the *Liquor Act* ("the

Act”) .Ms Lay was unco-operative in assisting Inspectors with enquiries and requests. Ms Lay was unable to produce the Liquor Licence for the store. She refused to provide the Nominee’s interstate contact number saying that *“he had his phone turned off”* and after phoning Mr Nelson stated *“Nelson can’t help you. He is too busy to come here now”*. She stated she did not know where the “till tapes” were and did not know how to operate the CCTV system.

- 3) Later Ms Lay did ring Mr Nelson Lay and handed the phone to the Licensing Inspector who requested help from Mr Lay in locating some documents. Mr Lay’s response was:

“I very busy. I am a business man. I can’t help. I am too busy.”

- 4) On inspecting the premises the Inspectors found essence which contained more than 1.15% of ethyl alcohol by volume marketed in containers exceeding 50 ml of ethyl alcohol by volume was displayed on the supermarket shelves in contravention of a condition of the liquor licence
- 5) CCTV footage for 17 December 2010 was finally obtained from the premises on 30 December 2010 by a Licensing Inspector disconnecting the hard drive from the camera connections and removing the control box to the CCTV system. At this time Ms Lay handed over the till tapes for 17 December 2010, The CCTV and the till tapes showed that a minor had been sold liquor on that date. Copies were made and the CCTV and till tapes were returned to Ms Lay on the same day.
- 6) On 7 January 2011, following a report from the Licensing Inspectors, the Licensing Commission issued a Notice of Suspension of the Liquor Licence for seven (7) days from Friday 7 January 2011 to Friday 14 January 2011 or pending the appointment of a suitably qualified acting Nominee, whichever occurred sooner. Mr Nelson Lay applied for appointment as acting Nominee on 13 January 2011 and this was approved and the suspension lifted on 14 January 2011.
- 7) A complaint was lodged with the Licensing Commission on 1 February 2011 by the Director of Licensing alleging five (5) breaches of the Act or Conditions of the Liquor Licence by the Licensee of the Central Supermarket. The Commission determined that, in accordance with Section 49 of the Act, that the complaint was not of a frivolous, irrelevant or malicious nature and a hearing date of 18 May 2011 was set. The Licensee was advised of this date on 18 March 2011.

The Hearing

- 8) At the commencement of the Hearing Inspector Wood withdrew the complaint relating to failure to keep the liquor licence on the premises and submitted that no penalty be imposed for the complaints of failure to appoint an acting Nominee and failure to produce a licence on demand on the basis the Licensee had already suffered a 7 day suspension of licence for the failure to appoint a Nominee. Inspector Wood read the facts on the other complaints.
- 9) Inspector Wood tendered the Plan of the Licensed Area and the Hearing Brief and undertook to ensure that the name of the mother and minor involved in the complaint of sell liquor to a minor would be blocked out in all documents.
- 10) Mr Crawley admitted the breach of serving a minor but stated that there were elements of dispute with the other complaints, even though Inspector Wood was not asking for a penalty on some. He maintained that Mr Frank Da Silva Lay, although on holiday interstate, was in control of the business via electronic means and tendered a letter from the Director of Licensing to the Licensee dated 31 December 2003. In this correspondence the Director advised that:

“if the Licensee / Nominee is able to and continues to conduct his business via electronic communications during his physical absence from the premises (ie

phone, fax, e-mail etc), there is no requirement to notify the Commission of that absence and appoint a temporary replacement”

- 11) Mr Crawley queried the storage of essences in the premises as, according to the approved Plan tendered by Inspector Wood, the whole of the premises was licensed. Inspector Wood agreed to withdraw this complaint pending clarification as to the licensed area.
- 12) In submission on penalty Mr Crawley stated that the Licensee had held the licence since 1991. In 1997 a matter of serving an intoxicated person resulted in a fine in the Court of Summary Jurisdiction but no penalty imposed on the Licensee by the Licensing Commission. He noted that this was the Licensee’s first offence for serving a minor. He suggested that the penalty should be a suspension of licence for less than a week and with half of that penalty to be suspended. He asked the Commission to note that the licence had already been suspended for seven days in January 2011 pending the appointment of an acting Nominee, which according to the letter from the Director, was not necessary.
- 13) Inspector Wood, on penalty, submitted that ten days suspension with some of that penalty suspended would be consistent with previous Commission decisions. He drew the Commission’s attention to decisions in respect of Liquorland Casuarina (Decision 16 July 2008); Douglas Street Supermarket (Decision 11 November 2008); and Gray Supermarket (Decision 26 May 2010). He pointed out that the minor who was sold alcohol by Ms Cham was only fifteen years of age and there had been no attempt to check her ID, which would not only have shown her age, but also identified her as not being the owner of the credit card used to purchase the alcohol. He also stated that the attitude of the staff at the Central Supermarket when approached by Licensing Inspectors was the most obstructive he had come across in his experience as an Inspector.

Consideration of the Issues

- 14) The Commission accepts the withdrawal of the complaint of failure to keep licence on premises. Inspector Wood agreed to withdraw the complaint of failure to comply with a Special Condition of the licence stating that “Sale of Essences” may only be sold in accordance with licence conditions. The Commission accepts the withdrawal in this matter but it raises issues that may have ramifications for other Licensees and requires consideration.
- 15) The Condition that has been included in Liquor Licences reads:

“Sale of Essences - All products including essences which contain more than 1.15% ethyl alcohol by volume marketed in containers exceeding 50 ml may only be sold in accordance with licence conditions

Designated Area - 11 Liquor shall only be stored and displayed in the area designated and approved on the plan held by the Commission “
- 16) The plan held for the Central Supermarket shows the whole of the Supermarket as the licensed premises and within the licensed premises there are three major sections, namely, Loading and Unloading Area; Storage Area and Retail Sales Area. In the Storage Area of the plan, there are two small areas blacked out with one identified as “wines etc” and the other “Liquor cool room”.
- 17) Clearly all liquor products, including essences, are to be stored in the small blacked out areas but whether they can be displayed for sale in the Retail Sales Area of the licensed premises is unclear and, when challenged by Mr Crawley, the complaint was withdrawn. This issue could be rectified if, in the Licence Conditions, the storage and display was designated “A” and the plan marked accordingly.
- 18) Mr Crawley’s submission that it was not necessary to appoint an acting Nominee as the Nominee was in control of the operation of the business via electronic communications is contradicted by the Statutory Declaration of Licensing Inspector Cookson who has attested

that Ms Justine Lay, when she refused to provide him with the Nominee contact details in Cairns, and advised Inspector Cookson that "*he had his phone turned off*". Further Ms Lay stated that "*Nelson is looking after the store, he is Frank's son. He is a director of the company as well*" but she could not contact him as he was very busy. When Inspector Cookson did contact him by phone he confirmed this saying "*I can't help. I am too busy*".

- 19) Although Mr Nelson Lay later told Inspector Cookson that he went to the Central Supermarket every night after he had finished at the Dolce Espresso Bar in Smith Street Mall, it is the Commission's opinion that in December 2010 there was no Nominee or authorised person in control of the business and because of this situation there was no person who could produce the licence when requested by the Inspectors. Normally these breaches would incur some penalty. Inspector Wood is not seeking any penalty for either of these breaches and the Commission, taking into account the number of days in January 2011 that the licence was suspended, albeit the suspension was self-imposed whilst awaiting the application and approval of an acting Nominee, supports that proposal.
- 20) The remaining breach is by far the most serious and the Commission has previously warned Licensees that it would impose severe penalties for the serving of liquor to minors, particularly take away liquor that is likely to be consumed in an uncontrolled environment. However, each case is dealt with on its merits and the accompanying circumstances.
- 21) The Commission has taken into account its previous decisions in respect of the sale of alcohol to minors. The Liquorland case involved one occasion of selling alcohol to a minor and the Commission considered the imposition of a five day licence suspension but discounted this to two days due to the good record of the Licensee, its cooperation in the investigation and the active and positive steps taken by Liquorland, including participation and contributions made by Liquorland to Governments in support of a safer liquor industry.
- 22) In the Douglas Street supermarket there were penalties imposed relating to three sales of alcohol to minors. For the first breach the Commission found the appropriate penalty to be a licence suspension of four days, the second offence resulted in a six day suspension of licence and the third offence resulted in a twenty eight day suspension of licence. The actual penalty served was discounted to take into account the Licensee's unblemished record and previous initiatives in reducing the sales of certain types of alcohol. There had been full cooperation by the Licensee.
- 23) The Grey Supermarket case involved three separate occasions when liquor was sold to the same minor. The penalty considered by the Commission was a ten day licence suspension. However, given the good record of the Licensee, its cooperation in the investigation and the mitigating circumstance of the minor looking considerably older than her age, the Commission applied a discount and reduced the penalty to five days.
- 24) In the matter now before the Commission there is only one occasion of selling alcohol to a minor so a ten day suspension is not warranted. Although there had been a previous breach it was for a different offence and well over ten years ago so the Commission considers the breach on 17 December 2010 as a first offence of this nature.
- 25) The Commission is of the view that a suspension of the liquor licence for a period of five days is appropriate. However, in this instance the Commission is not persuaded to discount the penalty on the basis of any mitigating factors. In this case the minor did not look older than her actual age of fifteen years; no attempt was made to ascertain her identity or age and throughout the whole investigation the Licensee and its employees were not only non-cooperative but obstructive.
- 26) The Hearing Brief tendered at the Hearing showed the downloads from the cameras installed in the Central Supermarket. The pictures were clear and persons identifiable but the camera surveillance did not cover the whole premises. In particular, what appears to be an information board obstructs the sales area and the employee undertaking the sale. Whilst the Licensee has installed CCTV equipment at the premises on its own volition the

current licence for the Central Supermarket does not include a condition relating to camera surveillance.

- 27) The Commission notes that a condition of licence requiring the installation and maintenance of a CCTV system provides a useful and effective tool in respect of the management of licensed premises and the detection and proof of breaches. In this instance the person's in apparent control of the premises were unable to download the CCTV footage as requested by the Inspectors. The Inspectors were required to bring in their own technician to perform that task. Given the obstructionist behaviour of the employees of the Supermarket there is a strong possibility the footage of the minor purchasing the alcohol would have been lost had it not been for the proactive actions of the Inspectors. The Commission intends to impose such a condition pursuant to section 49(4)(a) of the Act. The Licensee is directed to submit a plan of the camera surveillance system in the Supermarket to the Director of Licensing and to upgrade that system, as directed by the Director, to meet the CCTV Guidelines applicable to other licensed premises.

Decision

- 28) The Commission, having taken into account all the circumstances surrounding the breaches by the Central Supermarket of the Act and its Liquor Licence conditions, and having considered the submissions made on behalf of the Licensee and the Director of Licensing, has determined:
- a) to impose a five day suspension of trading under its liquor licence by the Central Supermarket for the breach of selling liquor to a minor. This suspension to commence on the Monday following the date of this decision;
 - b) that there was no approved person in control of the Central Supermarket licensed premises on 17 December 2010. However, the Commission after taking into account the number of days in January 2011 that the licence was suspended has determined not to impose any penalty for the breaches of failure to appoint an Acting Nominee and failure to produce the Liquor Licence on the request of the Inspectors;
 - c) to accept the withdrawal of the breaches of failure to keep a copy of the Liquor Licence on the premises and failure to comply with a Special Condition of the Liquor Licence relating to 'Sale of Essences';
 - d) to request the Director of Licensing to examine all plans attached to Liquor Licences to ensure that the area for the storage and display of liquor are clearly designated;
 - e) that the Licensee of the Central Supermarket immediately supply a plan of the current camera surveillance installed in the Supermarket to the Director of Licensing and upgrade the camera surveillance to the satisfaction of the Director within thirty days of the date of this decision. The standard camera surveillance licence condition is to be included in the liquor licence for the Central Supermarket so as to make the Camera Surveillance Guidelines applicable to the licensed premises.

Philip Timney
Presiding Member

1 June 2011