

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Hearing:</b>	<b>Mr Vanny Mann</b>
<b>Heard before:</b>	Ms Merran Short (Presiding member) Ms Kerri Williams Mr John Brears
<b>Date of Hearing:</b>	12 December 2007
<b>Date of Decision:</b>	30 January 2008
<b>Appearances:</b>	Mr Philip Timney for the Director of Licensing Mr Ronald Hope for Mr Vanny Mann

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### Background

- 1) This was a preliminary hearing in respect of time limit as prescribed under Section 53B of the *Private Security Act* (“the Act”). A complaint was lodged with Licensing and Regulation (“Licensing”) on 28 March 2007 in relation to an incident that occurred on 1 February 2007 at the Top End Hotel (“the Complaint”).
- 2) The Complaint related to an incident at the Top End Hotel where two (2) females (“the Complainants”) were allegedly assaulted by Mr Mann and another off duty male crowd controller. The Complainants allege being physically and verbally assaulted by the two males.
- 3) The Complainants in this matter did not know of their right to complain to Licensing until informed by their solicitor in late March 2007. A formal written ‘complaint’ was received by Licensing on 28 March 2007.
- 4) The only identifying factor the Complainants could give to Licensing at the time was the badge number of the Crowd Controller.
- 5) Investigation undertaken by Licensing with the Top End Hotel revealed that Mr Vanny Mann was on duty that evening and was wearing badge number 69. A copy of the incident register and surveillance footage was collected from the hotel.
- 6) It would be convenient to set out the relevant chronology in respect of this matter.

### Relevant Chronology

01 February 2007	Alleged Assault at the Top End Hotel by Crowd Controller wearing badge 69.
28 March 2007	A ‘complaint’ was lodged in writing only identified the Crowd Controller as wearing badge 69 not Mr Mann personally.
29 March 2007	Licensing Inspector telephoned Police to see if any complaint had been made to them regarding the incident.
05 April 2007	Licensing Inspector makes enquiries with Top End Hotel and identified Mr Mann as wearing badge 69.
06 April 2007	Good Friday

09 April 2007 Easter Monday

10 April 2007 Notification letter delivered to Mr Mann's sister and accepted by both parties has having been received on that date by Mr Mann.

- 7) It was agreed between the parties that the 'complaint' was received on 28 March 2007. It was also agreed that pursuant to Section 28(1) of the Interpretation Act that time began to run from 29 March 2007.

#### *Section 28*

- (1) *Where in an Act a period of time dating from a given day, act or event is prescribed, allowed or limited for any purpose, the time shall be reckoned exclusive of such day or of the day of such act or event.*

## **Submissions**

- 8) Mr Hope submitted two arguments, firstly that Licensing had forty-eight (48) hours from 29 March 2007 to serve Mr Mann with notification of the 'complaint' in order to comply with Section 53B of the Act. This is despite the fact that Mr Mann was not as yet identified in the 'complaint'.
- 9) And secondly, Mr Hope argued that the wording of Section 53B, in particular the use of the word "must", makes that section a mandatory provision and in those circumstances a failure by Licensing to notify Mr Mann within forty-eight (48) hours of receiving of the 'complaint' on 28 March 2007 amounted to non-compliance of the Act and therefore the Licensing Commission ("the Commission") had no jurisdiction to proceed with the 'complaint'.
- 10) In response to Mr Hope's first submission Mr Timney argued that the forty eight (48) hours did not and could not begin to run until such time as Mr Mann had been identified. This did not occur until Thursday 5 April 2007.
- 11) The Commission agrees with Mr Timney that time did not begin to run until such time as Mr Mann had been identified. In the Commission's view a 'complaint' as cannot be a formal complaint until such time as all "...the grounds on which the complaint is made and the facts relied on by the person (making the complaint) to constitute the grounds..." of the complaint, including the identification of the alleged offender, are set out; see Section 53A of the Act. In this case Mr Mann was not identified until the Inspector made enquiries with the Top End Hotel on Thursday 5 April 2007. The Easter break was from Friday 6 April 2007 until Monday 9 April 2007. Notification of the Complaint was provided to Mr Mann on 10 April 2007 within forty-eight (48) hours of receiving the Complaint as required under Section 53B of the Act.
- 12) In these circumstances it is not necessary for the Commission to deal with Mr Hope's second submission that Section 53B of the Act is a mandatory provision however it may be of assistance if the Commission gives some guidance in respect of Section 53B of the Act.
- 13) Mr Hope argued that Section 53B is a mandatory provision and failure to strictly comply with the time limits as set out therein went to jurisdiction and the 'failure' by Licensing to strictly comply with the section, which Mr Hope argued could have been easily achieved, meant that the Commission had no jurisdiction to hear this matter and any decision would be ultra vires of the Act.
- 14) In support of this submission Mr Hope relied on the wording of Section 53B and the Second Reading Speech regarding amendments to the Act including Section 53B.
- 15) Mr Hope argued that a simple telephone call to; or attendance at the Top End Hotel to view the incident register ("the register") required pursuant to Section 54 of the Act, would have allowed the Licensing Inspector ("the Inspector") to identify and serve Mr Mann within the forty-eight (48) hour period, from 29 March, as required by the Act. The register should

contain (a) “the name and residential address of the crowd controller;” as well as (c) “...the number assigned to the crowd controller by his or her employer...” see Regulation 8 (a) and (c) of the *Private Security (Crowd Controllers) Regulations*.

- 16) Mr Timney, on the other hand, argued that it was entirely proper for the Inspector to telephone the Northern Territory Police (“the Police”) to determine whether a report had been made to them or whether Police were proceeding with an assault charge. The Inspector did make enquiries with the Top End Hotel on the 5 April 2007. Mr Timney further argued that in a perfect world the Inspector could drop everything to concentrate on identifying badge 69 however in reality, the competing interests of other work and given the Inspector’s workload, 4-5 working days to identify badge number 69 did not amount to any significant delay and further Mr Mann did not suffer any detriment as a result. It was conceded by Mr Hope that Mr Mann did not suffer any detriment as a result of the ‘delay’.
- 17) In addition, Mr Timney submitted that Section 53B of the Act was directory not mandatory and he referred the Commission to the High Court decision of *Project Blue Skies Inc. v. Australian Broadcasting Authority* 194 CLR 355. Mr Timney argued that Section 53B of the Act, including the notification requirement within forty-eight (48) hours is directory not mandatory because there were no repercussions if the forty-eight (48) hours were not complied with.
- 18) The High Court in *Project Blue Skies Inc. the Broadcasting Authority*, stated at page 373 that:

*Paragraph 36*

*“If the power exercised by a repository (in this case licensing) is within the ambit of the power reposed, there can be no unlawfulness on the part of the repository in exercising it. Either there is power available for exercise in the manner in which the repository has exercised it and the exercise is lawful or there is no power available for exercise in the manner in which the repository has purported to exercise it and the purported exercise is invalid” (emphasis added).*

*Paragraph 38*

*“A third kind of provision must be distinguished from provisions which restrict the ambit of the power which prescribe the conditions on its availability for exercise. A provision may require the repository or some other person to do or to refrain from doing something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance does not invalidate a purported exercise of the power (27): the provision does not condition the existence of the power (28). Such a provision has often been called directory, in contradistinction to mandatory, because it simply directs the doing of a particular act (sometimes within a prescribed period) without invalidating an exercise of power when the act is not done within the prescribed period. The description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance can be determined; rather, the consequences must be determined before a provision can be described as either mandatory or directory.”*

- 19) In Mr Timney’s submission the Commission must consider the consequences of finding that Section 53B had not been complied with before deciding whether it was mandatory or directory. As Mr Timney correctly pointed out the consequences of the Commission finding that Section 53B of the Act is mandatory not directory would be that the Complainants in this matter would not have their ‘day in court.’ They would not have justice, through no fault of their own. They have, as Mr Timney submitted, done all they can do. Mr Timney also stated that it was not as if there had been any intentional, unreasonable or contumelious delay in this matter, it was a matter of some four (4) days before Mr Mann was identified as wearing badge 69.

- 20) Arguably, if the Commission were to find that Section 53B of the Act is mandatory not directory the consequences may be that an alleged offender of a serious offence may walk free and not face their accusers due to a technicality. In the Commissions view this cannot have been what the legislature intended.
- 21) The Commission was persuaded by Mr Timney's argument and agrees that Section 53B of the Act is directory not mandatory and in those circumstances failure by Licensing to comply with the forty-eight (48) hours as prescribed does not mean that the Commission has no jurisdiction to hear the matter but rather the Commission must give consideration to all the consequences that flow if Licensing do not notify the security provider of the complaint within forty-eight (48) hours and consider whether there has been any intentional, unreasonable or contumelious delay.

## Decision

- 22) For the reason stated above the Commission finds:
- a) a 'complaint' is not a complaint for the purposes of Section 53B of the Act until such time as "...the grounds on which the complaint is made and the facts relied on by the person (the complainant) to constitute the grounds..." are set out (see Section 53A of the Act), including that the identity of the alleged offender is known to Licensing and Regulation;
  - b) that the time limit set out in Section 53B of the Act is directory not mandatory; and
  - c) if the time limit as prescribed is not complied with, the Commission ought to have regard to the consequences of finding that the notification was not provided to the security provider within the time prescribed in Section 54 of the Act.
- 23) Having found in favour of the Director of Licensing the Commission directs that the hearing against Mr Mann should proceed.

Merran Short  
Presiding Member

30 January 2008