

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Ducks Nuts Bar & Grill
Licensee:	DNPW Pty Ltd (In Administration)
Licence Number:	80304395
Nominee:	Mr Colin Bird
Proceedings:	Pursuant to Section 48(2) of the <i>Liquor Act</i> Breach of Section 106B-Allow Minors to Enter and Remain on Licensed Premises (2 x Counts) Breach of Section 106C-Supply of Liquor to Minors (2 x Counts)
Heard Before:	Mr Richard O'Sullivan (Chairman) Mr Phil Timney Mr John Brears
Date of Hearing:	21 August 2008
Appearances:	Mr Ben O'Loughlin for the Licensee Mr Alan Woodcock for the Director of Licensing

Background to the Complaint

- 1) A complaint has been lodged by a Licensing Inspector in accordance with Section 48(2) of the *Liquor Act* ("the Act") against Ducks Nuts Bar and Grill located at 76 Mitchell Street Darwin NT ("the Licensed Premises"), the holder of Licence number 80304395. The Licensee is DNPW Pty Ltd.
- 2) The complaint alleges breaches of Sections 106B (2 counts) and 106C (2 counts) of the Act on the part of the Licensee on 2 December 2007.
- 3) Section 106B of the Act provides:

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.*

Section 106B of the Act provides:

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) Declarations pursuant to Section 106(1)(a) of the Act and Section 106(1)(b) of the Act were issued in respect of the Licensed Premises on 12 May 2006 (refer folios 76 and 77 of the Hearing Brief respectively).
- 5) Counsel for the Director of Licensing, Mr Alan Woodcock, tendered a summary of facts agreed to by both parties, setting out the background to the complaint (Exhibit 1) as follows:

On 2 December 2007, an event known as 'The Hookers Ball' was held at the Discovery Nightclub. This is an annual event, and attendees usually dress up in costume aligned to the theme.

At approximately 9.00pm, two sisters, aged 16 and 17 years at the time, had dressed in lingerie and attempted to gain entry to Discovery Nightclub. They were stopped at the entrance to Discovery Nightclub and asked to supply identification confirming their age. They were unable to do so, and were refused entry. These events were previously unknown to the Licensee. They then left discovery and attended at Ducks Nuts Bar & Grill, which is a licensed premise situated across the road at 76 Mitchell Street, Darwin.

A relative of the two minors observed them enter Ducks Nuts Bar & Grill in their lingerie and contacted their mother. The two sisters were not asked for identification when they entered. Once inside Ducks Nuts Bar & Grill, they spoke with a person, who identified himself as a staff member N, and who asked the girls whether they would like to participate in a game of 'scoring' the fancy dress of passers by. N was off duty at the time and normally works in the café. This involved being seated at a table near the street, next to N, and holding up score-cards whenever anybody walked past dressed in 'Hooker' clothing. N offered to buy alcoholic drinks for their participation.

Video footage of the area confirms that they were seated at the table at 9.16pm. At 9.19pm, drinks were delivered to the girls by a drinks waiter dressed in theme wear. The girls later confirmed to their mother that these drinks were alcohol. At 9.36pm, a further round of drinks was delivered to the table by the waiter.

The mother of the girls, in company of her sister, attended in Mitchell Street at approximately 9.50pm and took up a position where she could observe the veranda area of Ducks Nuts Bar & Grill. She observed her daughter seated at a table and surrounded by four people. She also observed that one of her daughters was drinking from a tall glass, and that the other had a drink in front of her on the table. She observed one of her daughters hold up a card with a number on it.

She then observed one of her daughters get up from the table and head inside into the bar area. She observed her daughter at the bar receiving two greenish drinks. She did not see her daughter pay for the drinks. She then approached her daughter and was able to see that her daughter was intoxicated. She described her as being unsteady on her feet, her voice was slurred and her eyes were not focused.

The daughter continued out to the table, with her mother following. The other daughter then became aware of her mother's presence, and also moved from the table towards the group. After a short discussion, they all left the premises and moved to a position away from Ducks Nuts Bar & Grill. At this point, the mother has assessed both daughter as being 'quite intoxicated'. She then drove them all home.

A conversation with her daughters the next morning confirmed the events of 2 December 2007, and she drafted a letter of complaint to the Director of Licensing

about the circumstances. She also made reference to 'sexually themed' events in licensed premises in Darwin, and the need to protect minors.

*She has provided a Statutory Declaration regarding this matter. It is noted at this point that the Ducks Nuts Bar & Grill is situated at 76 Mitchell Street, Darwin, and has been issued with Liquor Licence 80304395, The Licensee on this licence is DNPW Pty Ltd (**the Licensee**).*

The Licensee has held the licence since 28 April 2005 and has not been charged with any breaches of the Liquor Act during that time.

On 19 May 2008 letters were sent to the Licensee, the current Nominee and two employees of BRI Partners (formerly Sims partners), who are the Administrators appointed to the Licensee, from the Director of Licensing setting out the above complaints and inviting them to respond. On 16 June 2008 a response was received from Clayton Utz solicitors on behalf of the Licensee.

- 6) Counsel for the Licensee, Mr Ben O'Loughlin, informed the Commission that his client agreed with the summary of facts as presented and admitted the breaches of the Act as alleged in the notice of complaint.
- 7) The Commission viewed the CCTV footage of the evening which confirmed the majority of the matters set out in the agreed summary of facts. In addition the Commission noted from the CCTV footage that the minors were present on the licensed premises from approximately 9.15 pm until shortly after 10:00pm. The Commission also noted from the CCTV footage that the minors were in the company of an off-duty employee of the Licensee for the majority of the time they remained on the Licensed Premises. In addition at least two (2) other employees, including the then Nominee, either served or had the opportunity to observe the minors.
- 8) A Statutory Declaration by the mother of the minors, dated 7 May 2008, was included in the Hearing Brief (refer folios 55 to 56). At paragraph 9 the mother states that she was informed by her daughters on the morning after the incident that they were not requested to present any identification when they entered the Licensed Premises. The CCTV footage supports that allegation and the Commission notes that the Licensee did not dispute that allegation.
- 9) The Commission formally found that the alleged complaints were made out and invited Counsel to present submissions on penalty.

Submissions of Mr Woodcock

- 10) Mr Woodcock informed the Commission that the dates of birth of the minors were 11 March 1990 and 22 May 1991 respectively. At the date of the incident, the minors were aged seventeen (17) years and eight (8) months and sixteen (16) years and six (6) months respectively.
- 11) Mr Woodcock tendered a number of previous decisions of the Commission relating to the supply and sale of alcohol to minors by way of guidance in respect of the appropriate penalty in the circumstances of this complaint. Mr Woodcock drew the Commission's attention particularly to paragraph 12 of the Commission's Reasons for Decision in the matter of the Tiwi Supermarket (delivered 23 July 2007) and the requirement for the imposition of real sanctions for breaches of the Act as a deterrent to other Licensees and the fact that the public perception that a lack of real penalty is not in the public interest, particularly where the offence involves the sale of alcohol to minors.
- 12) Mr Woodcock further submitted that there were aggravating factors in respect of these particular offences that militated against the Commission imposing a suspended penalty. Namely:

- the seriousness of the offending given the ages of the minors;
 - the fact that no attempts were made by any of the staff of the Licensee to check the age of the minors;
 - that the minors were in the company of a staff member and were observed by at least two (2) other staff members, including the then Nominee; and
 - of particular significance, the minors were provided with free alcohol on at least two (2), and possibly three (3) occasions, in return for participating in a game of “scoring” the fancy dress of passers by.
- 13) Mr Woodcock submitted that, given the seriousness of the offending and the age of the minors the appropriate penalty was a suspension of the licence for a period of five (5) days. Mr Woodcock further submitted that that penalty should be discounted to two (2) days actual suspension of licence given the Licensee’s previously unblemished record, the admission of the offence by the Licensee at the earliest opportunity and the pro-active steps taken by the Licensee since the incident on 2 December 2008.

Submissions of Mr O’Loughlin

- 14) Mr O’Loughlin confirmed to the Commission that whilst the initial response from the Licensee, contained in the letter from Clayton Utz dated 11 June 2008 (refer folios 57 to 59 of the Hearing Brief), was not of itself a clear admission of the offences alleged, the Licensee did not dispute the facts alleged nor that the offences as alleged had been committed.
- 15) Mr O’Loughlin referred the Commission to the recent decision involving the Victoria Hotel (delivered 24 July 2008) in support of a submission that the appropriate penalty should be a formal caution on the basis of the Licensee’s previously unblemished record since obtaining the licence in October 2004.
- 16) Mr O’Loughlin informed the Commission that the Licensee is presently facing serious financial difficulties and is in fact under administration with the Administrators having responsibility for the day to day conduct of the business under the licence. Mr O’Loughlin advised that the Licensee currently has creditors in excess of \$2 million, including some \$300,000 owing to local business and tradespeople, with the balance owing to financial institutions in respect of director loans, inclusive of the cost of renovations to the licensed premises.
- 17) Mr O’Loughlin submitted that the imposition of a penalty of suspension of licence and the resultant loss of trade would further exacerbate the Licensee’s precarious financial position whilst not imposing any real or meaningful penalty on the Directors of DNPW, given the circumstances of the company being in administration. Mr O’Loughlin further submitted that those who would suffer from an actual suspension of licence would be local traders and suppliers and casual staff, who would not be rostered on for any day of suspension, and the creditors.
- 18) The Commission’s attention was also drawn to the fact that the Nominee, who was on duty at the time of the incident, was no longer employed by the Licensee. Another staff member who was in company with the minors was also off duty at the time.
- 19) Mr O’Loughlin submitted (Exhibits 5, 6 and 7) the Ducks Nuts Staff Induction Manual, the in-house Responsible Service of Alcohol Policy and a copy of an in-house advertisement relating to the responsible service of alcohol as evidence of the Licensee’s responsible attitude in respect of the detection and prevention of the sale of alcohol to minors.
- 20) Mr O’Loughlin referred the Commission to Section 124AAA of the Act and the additional penalty prescribed in that section for a first offence. He submitted that whilst this was a complaint brought pursuant to Section 48 of the Act, which provides the Commission with

an open range in terms of penalty, were the Commission minded to impose a penalty of suspension it should have regard to the penalty prescribed by Section 124AAA. Mr O'Loughlin also submitted that a penalty resulting in a loss of trade would be a greater financial burden on the Licensee than would likely have been imposed by the Court had the matter been prosecuted in the Local Court.

- 21) Following an outline of the mitigating circumstances in relation to the admitted breaches of the Act (early plea, unblemished record and parties not involved in the breach being punished by any penalty), Mr O'Loughlin submitted that a reprimand would be the appropriate penalty.

Matters Taken into Consideration

- 22) In relation to Mr O'Loughlin drawing an analogy with the Victoria Hotel decision in suggesting an appropriate penalty, the Commission did not accept that submission on the basis of its view of the seriousness of offences involving the supply of alcohol to minors and the comparatively short period during which the Licensee has held the licence. The Commission determined that a reprimand or formal caution was not the appropriate penalty in respect of the breaches under consideration.
- 23) Mr O'Loughlin had submitted that with the Licensee under administration a severe penalty would be inappropriate due to its impact on trade creditors, with loss of trading revenue impacting on sale price of the business. The Commission, whilst noting the financial circumstances in which the Licensee found itself, did not accept that the fact of being under administration placed the Licensee in a markedly different position to any other Licensee. A penalty of suspension in any circumstances would result in a financial impost on the Licensee and the possibility of loss of wages for staff as a result of a restriction of trade. The Commission notes that the staff are in reality the face of the Licensee and charged with the actual responsibility for ensuring the responsible sale of alcohol.
- 24) With reference to the relevance of Section 124AAA of the Act on its deliberations, the Commission did not accept Mr O'Loughlin's submission on the basis that the forum for the prosecution of a complaint under the Act is a decision for the Director of Licensing and not the Commission. The Section 48 complaint process provides the Commission with wide ranging powers in respect of penalty, including a penalty of cancellation of licence. Depending on the seriousness of the complaint, the Commission does not accept that it should have regard to the additional penalties prescribed by the legislature in Section 124AAA when considering the penalty for a complaint brought before it pursuant to Section 48 of the Act.
- 25) The Commission received differing submissions in respect of the issue of the level of intoxication of the minors on the night in question. Mr Woodcock submitted that the Commission should accept the evidence of the mother that the minors "were quite intoxicated" and "unstable on their feet" on leaving the Licensed Premises (refer paragraph 8 at folio 4 of the Hearing Brief). Mr O'Loughlin on the other hand submitted that the CCTV footage showing the minors entering and leaving the premises indicated no signs of intoxication. The Commission notes however that, other than Mr O'Loughlin's referral to the CCTV footage, the Licensee presented no evidence to refute the mother's allegation that the minors were intoxicated.
- 26) The Commission makes no finding in that regard on the basis the Licensee was not charged with an offence under Section 102 of the Act with the result the Licensee was not required to discharge the onus of proving that the minors were not intoxicated. In addition the Commission considered the CCTV footage, which while not conclusive, did not show manifest or outward physical indications of intoxication while the minors were subject to camera surveillance, lending some credence to Mr O'Loughlin's argument.
- 27) In reaching its decision on penalty the Commission took the following matters into consideration:

- The age of the minors concerned;
- The complete failure by any of the staff of the Licensee to ask for identification despite the fact the minors were viewed and/or provided with free drinks by a number of employees, including the then Nominee, over a period of almost an hour;
- The involvement of the then Nominee in the breaches is a compounding factor to the severity of the breach as the Nominee, by virtue of the position, is entrusted with a heightened onus and duty of care in respect of the proper and lawful conduct of the licensed premises.
- The fact that an employee of the Licensee encouraged the minors to remain on the licensed premises and to participate in a game whilst being supplied free alcohol;
- The potential dangers posed to the minors in being supplied with free alcohol whilst dressed in lingerie and in the company of a number of older males;
- The fact that the offences occurred in the Mitchell Street precinct and the heightened potential danger for the minors being harmed on leaving the premises;
- The Commission's view on underage drinking and the requirement for a penalty that adequately acts as a deterrent both for the Licensee in question and for others engaged in the industry; and
- Recent decisions of the Commission in respect of the penalties imposed for the service of alcohol to minors.

28) The Commission also took note of the following mitigating circumstances in determining the appropriate penalty:

- The early admission of the offence, both in the letter from the Licensee's solicitors dated 11 June 2008 (folio 57 to 59 of the hearing brief) and during the course of the hearing;
- The Licensee's unblemished record for the period for the three (3) years since the grant of the licence;
- The fact that the Licensee is currently under Administration; Shareholders principally owed maximum money under Administration; and
- The steps taken by the Licensee in respect of the responsible service of alcohol, including the documents tendered as Exhibits on behalf of the Licensee.

Decision of the Commission

29) The Commission determined to impose a two (2) day suspension for the breach of Section 106B of the *Liquor Act* for allowing two (2) minors to enter and remain on the licensed premises and the breaches of Section 106C for the supply of liquor to two (2) minors. The dates of the suspensions to be served are to be determined by the Director following the publication of these written Reasons for Decision.

Richard O'Sullivan
Chairman

26 August 2008