

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

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| PREMISES: | BORROLOOLA INN |
| LICENSEE: | O'Brien Holdings (Townsville) Pty Ltd |
| LICENCE NUMBER: | 80103282 |
| NOMINEE: | Ms Terry O'Brien |
| PROCEEDING: | Complaint pursuant to section 48 of the <i>Liquor Act</i> |
| COMPLAINANT: | Ms Jennifer Milne |
| HEARD BEFORE: | Ms Jill Huck (Presiding) Mr Alan Clough Mr Craig Spencer |
| DATE OF HEARING: | 3 September 2003 |
| APPEARANCES: | Mr Kelvin Curry for the Licensee |

Background

1. This hearing arose from a complaint by Jennifer Milne against the Borroloola Inn (the Inn) lodged under section 48 of the *Liquor Act* (the Act) in June 2003. Ms Milne stated that the Inn was not complying with its noise condition, in that loud music was being regularly played at the Inn, and that this noise was adversely affecting the people living at her residence. She complained specifically about the noise from fortnightly discos and about the noise from a live band on 26 June 2003.
2. The Commission had heard a similar noise complaint from Ms Milne in June 2002 and had inserted a noise condition in the Borroloola Inn licence as a result of that complaint. The noise condition reads as follows:

The licensee shall not permit or suffer the emanation of noise from the licensed premises of such a nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises.

3. In the statement of reasons explaining the decision to insert the noise condition, the Presiding Member, John Withnall, had written:

Such condition obviously does not provide any codification of the situation, but in its introduction of the notion of reasonability should provide at least a workable touchstone for licensee and community alike. On the one hand the licensee knows that she does not have carte blanche in matters of sound levels of entertainment or revelry, and on the other hand the community cannot reasonably expect a long established hotel of this nature to operate in silence. Any future noise complaint will see the Commission balancing the reasonable expectations of the licensee against the character and reasonable expectations of the neighbourhood from which such complaint may arise.

4. In this current case the Commission heard evidence from Ms Milne that the noise from the Inn from discos, the live band and drunks was very distressing for herself and her parents. Ms Milne and her parents lived directly opposite the Inn and Ms Milne advised that their property was the closest residential property to the Inn. She complained of muffled sounds, loud sounds and chronic sounds from the Inn. She said that when discos were held at the Inn, she and her parents had difficulty hearing their television and stereo. She said that when the live band played at the Inn, the noise was so bad that it was impossible for her parents and herself to talk outside and the windows and the ground at her residence vibrated. She said that the vibrations from the noise made her feel like she was being 'microwaved' from the inside out.
5. Ms Milne said that she had variously rung the Inn, the Licensing Commission and the Police to complain about noise from the Inn. She said that after she made her original complaint to the Commission, the noise problems had improved for a while (about 6 months). The noise problems had also improved since she made her current complaint to the Commission, with no discos having been held at the Inn since she lodged the complaint. Ms Milne said that, if the situation stayed the way it was currently, she would be happy.
6. Ms Milne did not produce any witnesses to support her claims of excess noise. She said that she had not asked her parents to give evidence because they were in their 70s and had been through enough stress from the music. Both parents have hearing problems and use hearing aids, making it harder for them to participate in conversations if there is background noise.
7. Ms Milne said that she had not approached anyone else to give evidence because most people were drinkers and would not want to go against the Inn; she thought that they would be too afraid of being banned from the Inn if they gave adverse evidence. She said "Grog around here is more precious than gold". Ms Milne advised that she was not afraid of complaining about the Inn as she did not go there; she drinks, but does not feel safe or comfortable drinking at the Inn. She said that she had been abused by some members of the community for complaining about the Inn. She wanted to make it clear that her complaint was not about the

existence of the Inn, nor the Inn's opening hours; her complaint was purely about the noise from the Inn.

8. The Commission called the Borroloola Police to give evidence about the noise issues. Sergeant Don Garner advised the Commission that Ms Milne had made numerous noise complaints about the Inn to the Police (8 in the previous 12 months). He said that the complaints had been investigated but no further action had been warranted as the noise levels were not considered undue or unreasonable. Sergeant Garner advised the Commission that Ms Milne was the only person who had made noise complaints about the Inn in recent times.
9. Sergeant Garner said that there were only a few occasions when the noise was louder than normal: the two nights on which the live band was playing; and another night when there had been a boxing tent in the grounds of the Inn. In the first situation a constable had listened to the noise levels from the road outside Ms Milne's property and concluded that the music was not excessively loud for that time of night. Police also interviewed some of the neighbours the following day. All those interviewed stated that they were not unduly affected by the noise and it did not worry them. When the boxing tent was operating, Police concluded that, although the public address system was fairly loud, the noise was not at a level where it warranted Police action, especially since people were having fun and the show was due to finish within the hour.
10. Sergeant Garner commented that Ms Milne should have foreseen that there would be some noise associated with the Inn when she moved to her current residence two years previously. Ms Milne conceded that she had not considered the potential noise problems when she decided to purchase the property. Sergeant Garner said that, as long as the noise was not unreasonable, there was little Police could now do about Ms Milne's concerns.
11. The nominee, Ms Terry O'Brien, and her son, Mr Clete Ryan, also gave evidence. Ms O'Brien said that she did not believe the music from the discos had been unreasonably loud and said that she had been able to talk at normal volume to Ms Milne at her residence during one of the discos. Despite this, Ms O'Brien had taken several additional measures to reduce the impact of the noise on Ms Milne's residence including: turning the juke boxes around so that they faced away from Ms Milne's residence; keeping the volume as low as possible; keeping the volume control behind the counter; and discontinuing the fund raising discos. Ms O'Brien said that the Inn had a policy of keeping the juke box volume levels just above the noise of the patrons, and therefore adjusted the volume according to the size of crowd. Ms O'Brien said that she now gets lots of complaints (20 to 30 per month) from patrons that the music is not loud enough.
12. Ms O'Brien pointed out that the Inn had not benefited financially from the discos held at the Inn. All the money had gone to benefit kids in the community.

13. Ms O'Brien said that she was away from Borroloola when the live band had played at the Inn and could not, therefore, comment on this. Her son, Mr Clete Ryan, gave evidence that he had employed the band for two nights. It was the first live band to play at the Inn for two years. He received a phone call on the first night from a licensing inspector (who had been rung by Ms Milne) and spoke to the band about the volume. He did not consider that it was too loud and the speakers were pointing towards town and away from Ms Milne's residence. He commented that there was little for people to do in Borroloola after hours; they relied on the Pub for entertainment and reacted very positively when entertainment was provided. He said that people behaved better and slowed down their drinking when a band was playing or a disco was held. This was evidenced by the fact that the Inn's takings go down on nights where entertainment is provided.
14. Mr Damien Vincent advised that he was the person responsible for the discos and gave evidence about the purpose, organisation and conduct of the discos. He confirmed that all the money raised went towards supporting youth soccer activities in Borroloola and supporting the team to go away to compete. Mr Vincent confirmed that efforts had been made to keep the noise from the discos down by positioning the speakers so that they faced away from the immediate residential area. He confirmed that the discos had been stopped because of the noise complaint.
15. In response to Mr Vincent's evidence, Ms Milne advised the Commission that she did not want to be seen as undermining the fund raising activities associated with the discos. She understood the desirability of raising money to support sporting activities for local youth and said that she would like the discos to continue if the noise problems could be reduced.
16. The Inn produced two of Ms Milne's neighbours as witnesses. They were Ms Karen Maher and Mr Peter John Simpson. Ms Maher said that she and her husband lived about 100 metres from the Inn (3 houses up from Ms Milne) and that they had lived there for 2 years. Essentially her evidence was that the noise from the Inn did not disturb them. She said that when they were outside they could hear the music from the Inn in the background but could still talk normally. She said that they could not hear the noise from the Inn at all when they were inside the house.
17. Mr Simpson, advised the Commission that he lived next door to Ms Milne and her parents and that his place was close to the road and to the Inn. His residence consisted of a demountable with a verandah area at the side. He said that he largely lived in the verandah area and from there he could hear some noise from the Inn, including the discos, the live band and various other sounds of merry making. He said that the noise did not disturb or distress him or interfere with his normal activities, such as watching television. He said that on the first night of the live band he had sat outside and listened to the band for about 1 ½ hours; on the second night he had gone to bed at about 8.30/9.00pm and slept.

18. After hearing the evidence, the Commission and the parties to the complaint viewed the premises and also visited Ms Milne's residence across the road from the Inn. Ms Milne's residence consisted of a caravan, a converted container and an outside verandah/kitchen/dining area. During the viewing of the licensed premises the parties discussed various possible noise amelioration strategies and Ms Milne suggested having a trial of discos over the next few months to see if her concerns could be resolved.
19. Counsel for the Inn argued that, regardless of any agreed trial of noise reduction strategies, the Commission should dismiss the complaint as having no substance.
20. At the conclusion of the proceedings the parties agreed to conduct a trial of four discos over the next few months to see if they could come up with some ways of further reducing the noise problems, with both parties agreeing to provide feedback to the Commission through a licensing inspector. Ultimately, the proposed trial was delayed because Ms Milne was unexpectedly away from Borroloola for a substantial period of time. Ms Milne wrote to the Commission in July 2004 to say that there had been some, but not sufficient, improvements in the noise problems associated with the Inn. Due to a clerical oversight, the Commission did not receive this letter until January 2005. At some stage in the interim Ms Milne had left Borroloola to move permanently to Katherine. The Commission wrote to her in January 2005 at an address in Katherine but has received no reply. It is now time to bring this matter to a conclusion.

Discussion of the evidence:

21. At the end of the day, the Commission had to decide whether the levels, types and frequency of noise complained of constituted an "*unreasonable disturbance to the ordinary comfort of the lawful occupiers of any residential premises*" and was, therefore, a breach of the Inn's licence conditions. In the process of making this assessment, the Commission had to weigh up the available evidence; evidence which, in this case, includes some very different subjective reactions to the noise from the Inn. On the one hand, we had Ms Milne's genuine distress about the noise and her evidence that the noise was very disruptive to her household. On the other hand, we had the evidence of the Police, the other neighbours, the Nominee, her son and Mr Vincent that the noise complained of was neither unreasonable nor disturbing. To add to the mix, we had no objective measurements of the noise levels complained of.
22. Counsel for the Inn argued that, in making its decision, the Commission should also take into account that Ms Milne had moved to her residence long after the Inn was established and she should have anticipated there being a certain amount of noise associated with the Inn. This factor was mentioned in John Withnall's written decision on the earlier noise complaint in which he also wrote that "*the community cannot reasonably*

expect a long established hotel of this nature to operate in silence". Counsel also argued that the Commission should take into account the frequency of the offending noise (once per fortnight until 10.30pm for the discos; and twice in two years for the live band), the reason for the noise (the discos were held to raise funds for the youth soccer team) and the fact that the licensee had taken steps to try to reduce the level of disturbance to Ms Milne. He pointed out that the licence condition does not say "no disturbance at all"; it refers only to "unreasonable disturbance". He said that it was for the Commission to decide what was a reasonable or unreasonable level of disturbance in the particular circumstances.

23. Mr Curry referred the Commission to its decision in *Top End Hotel* (2001), in which the issue of noise problems in a mixed use zone was discussed, particularly in the situation where the entertainment facilities predated the residential facilities. We note that this issue is also dealt with in the *Beachfront Hotel* (2003).

The decision

24. The *Liquor Act* allows the Commission a wide discretion with regards to the outcome of a hearing into a complaint. Options include varying licence conditions, issuing directions to a licensee and the suspension or cancellation of a licence.
25. After considering all the evidence in this case and the applicable case law, the Commission came to the conclusion that, although Ms Milne had been disturbed by the noise from the Inn on a number of occasions, there was insufficient evidence to conclude that the noise had been of such a nature or at such levels as to cause *unreasonable disturbance* to local residents. The Commission therefore decided that there had not been a breach of the noise condition of the licence. Further the Commission decided that there was no basis for making any other adverse finding against the Inn or imposing a penalty of any sort. The Commission therefore decided to take no further action on this complaint.

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J Huck
Presiding Member
24 June 2005