

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	BOGARTS RESTAURANT
LICENSEE:	Therapy Projects Pty Ltd
LICENCE NUMBER:	80817675
NOMINEE:	Lars Otto Holm
PROCEEDINGS:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> Alleging Breaches of the Act and Licence Conditions for Bogarts Restaurant (Bogarts).
HEARD BEFORE:	Mr John Brears (Presiding Member) Ms Kerry Williams Mr Wally Grimshaw
DATE OF HEARING:	17 February 2010
APPEARANCES:	Mr Grant Rau, Complainant Mrs Kelly Rau Mr Lars Holm, Nominee Ms Jodi Kirstenfeldt, Licensing Inspector Mr Geoff Annear – Director of Therapy Projects Pty Ltd

BACKGROUND

- 1) Between 30 June 2009 and 6 August 2009, three (3) complaints against Bogarts were received by the Director of the Licensing, relate to Sections 102, 104, and 110 of the *Liquor Act* (the Act). Specifically the complaints allege the following;
 - a) Breach of Section 110 of *the Act* – Fail to comply with licence conditions – Concept condition.
 - b) Breach of Section 110 – Fail to comply with licence conditions – Noise condition.

- c) Breach of Section 110 – Fail to comply with licence conditions – Sale for consumption only on the premises.
 - d) Breach of Section 104 – Persons on Licensed Premises after hours.
 - e) Breach of Section 102 – Liquor not to be sold to intoxicate persons.
- 2) The complaints were from:
- a) Mr Robert House –Apartment Owner and Body Corporate Chairperson of the adjacent Alkira Apartments Complex.
 - b) Ms Yvonne Cronin – Apartment and Management Rights Owner of the adjacent Alkira Apartments Complex.
 - c) Mr Grant Rau – Owner and resident of a house at 54 Gregory Street, Parap.
- 3) The complaints related to excessive noise from loud music, air conditioning unit, bottle disposal and noisy and intoxicated patrons leaving the restaurant in early hours of the morning.
- 4) The complainants were advised by letters (dated 8 July 2009 and 19 August 2009) from Jodi Kinstenfeldt, Licensing Inspector, that their complaints would be investigated.
- 5) The Licensee and Nominee were advised by letter from the Director of Licensing (31 August 2009) of the nature of the complaints and how they breach Sections 102,104 and 110 of the Act, and invited to comment in writing on the substance of the complaint.
- 6) A written response was received from the Nominee, Mr Lars Holm dated 11 September 2009.
- 7) The current liquor licence granted to Therapy Projects Pty Ltd on 3 January 2008, was an “On Licence”, which allows the sale of alcohol to patrons not having a meal. The trading hours approved were 11.30 am to 02.00 am (the following day) seven (7) days a week. Special conditions in the licence were:

Concept

The concept of the premises will be that of an upmarket restaurant providing high quality dining, bar facilities and entertainment. The entertainment will generally consist of live piano bar and recorded music, with a DJ operating during special functions.

Noise Control

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

- 8) In relation to the complaints lodged regarding Section 104 of the Act, "Persons on Licensed Premises after hours" and "Sale for consumption only on the premises", Inspectors Kulda and Te Whato, on 20 August 2009 visited Bogarts and inspected the till tapes for Thursday 13 and Saturday 15 August 2009. They reported that they found no evidence that trading had continued beyond the licensing hours, which is 02.00 hours for those days. The Inspectors also checked other dates at random and found no evidence that sales had taken place after 02.00 hours on those days.
- 9) On Friday 28 August 2009 at 01.40 Inspectors Kulda and Paull visited Bogarts and noted low volume pre-recorded music playing and minimal patron noise. They observed the Nominee approach and request a male, displaying signs of intoxication to vacate the premises. The male did so without incident. Later at 02.40 they approached the Nominee Lars Holm and asked him why patrons were on the premises consuming last drinks forty (40) minutes after closing. Mr Holm replied that his patrons were waiting for pre-arranged taxis and he would rather have the patrons wait indoors rather than out the front making undue noise. The Inspectors observed a number of taxi drivers enter the premises and collect patrons. The last patron left at 02.50. They reported that the Nominee and Licensee have admitted that in the past patrons have been allowed to remain on the premises past closing time until a taxi has arrived to collect them.
- 10) The Inspectors reported that the Nominee and Licensee have also admitted that there may have been some occasions when a patron had gone outside to answer a mobile phone call, carrying a drink. Prominent signs had been erected advising patrons not to take bottles or glasses past the sliding front doors.
- 11) On Saturday 12 September 2009, Inspectors Holehouse and McCorkell visited Bogarts at 23.00. From the outside they noted that no noise was emanating from the premises. Inside the premises approximately twenty (20) patrons were seated. No breaches were detected.
- 12) On Saturday 12 September 2009 at 10.45, Inspectors Kirstenfeldt, Kulda and Te Whata attended Bogarts as part of a joint operation with the Police and Northern Territory Fire Department. A full compliance check was carried out. A total of thirty-five (35) patrons were present. Pre recorded background music was playing at a reasonable level. The mood was relaxed and all patrons well behaved with no signs of intoxication.

- 13) On 12 August 2009 Inspector Kirstenfeldt submitted a request to the Nominee for a copy of security camera footage. The Nominee advised that he was not aware how to download the footage and that he had to contact his service provider to assist.
- 14) On 7 January 2010 Inspector Kirstenfeldt received an email from Robert House advising that he wished to withdraw his previous complaints against Bogarts.
- 15) On 22 January 2010, Inspector Kirstenfeldt received an email from John and Yvonne Cronin advising that they no longer wished to proceed with their previous complaint against Bogarts.
- 16) On 22 January 2010 Inspector Kirstenfeldt received an email from Grant Rau detailing:
 - a) A verbal altercation at the front of Bogarts involving at least one (1) intoxicated man, at 02.00 hours on the 22 January 2010.
 - b) The practice since Bogarts re-opened after Christmas, for patrons to linger around the front of the premises smoking, recording in particular on Saturday evening 16 January 2010 at midnight, twenty (20) to thirty (30) people standing on the road and sitting on the front exterior deck, smoking, speaking in loud voices, laughing and yelling, at noise levels very noticeable in his home across the road.
 - c) Requesting advice about Bogarts' current liquor licence and when and how it was granted.
- 17) On 25 November 2009, Inspector Kinstenfeldt requested advice about actual and acceptable noise levels around Bogarts and the Alkira Apartments, particularly emanating from the air condition units, from Nigel Green a Senior Environmental Scientist with the NT Department of Natural Resources, and requesting that he take noise readings to assist the Licensing Commission in its decision.
- 18) The response from Nigel Green on 2 February 2010 was that the noise level measured, "would only amount to a marginal accedence, of what would in other jurisdictions, with noise legislation, be determined as unacceptable, and its impact "could be met by some level of mitigation".

The Hearing

- 19) At the commencement of the Hearing, Inspector Kinstfeldt, on behalf of the Director of Licensing, advised that they would rely upon the information provided in the written "Hearing Brief" document. They would make no oral presentation, nor call any witnesses.

- 20) Mr Grant Rau as the only complainant still remaining and present was invited to put his case to the members of the Commission. He explained that he and his wife Kelly had purchased their house in January 2007. At this time the restaurant known as Bogarts had been closed for some years. Later in 2007 renovations started to the old Casablanca Motel which became Alkira Apartments Complex. He advised that they were not aware Bogarts' was to re-open, nor that a new licence was granted in January 2008, otherwise they would have objected to the application.
- 21) Mr Rau stated that large groups of noisy and often intoxicated patrons of Bogarts were coming and going at times up to 03.00 hours. This was occurring particularly on Thursday, Friday and Saturday nights.
- 22) Mr Rau further stated that he had seen patrons of Bogarts drinking both on the footpath and timber deck at the front of the Restaurant. This had increased this year, with the new anti smoking laws, that came into effect, and patrons were now smoking and socialising during the afternoon and evening at the front of the premises. He claimed that by 02.00 hours some of them were intoxicated and were laughing, shouting and yahooping loudly.
- 23) Mr Rau confirmed that he made another complaint to the Licensing Commission on Friday 22 January 2010 after being woken from his sleep in an air-conditioned bedroom. He and his neighbour, Mr Mark Hoult of 47 Gregory Street, both witnessed a patron of Bogarts shouting and abusing others in what was obviously a drunken state. Unfortunately Mr Hoult was unable attend the hearing due to work commitments.
- 24) Mr Rau further stated that Bogarts was being promoted as a live music venue with placards at the front of the premises advertising live music. He said many people were arriving after midnight to what is in effect a late night bar with live entertainment. This is contrary to the concept of the premises in the special conditions of the license which state "will be that of an upmarket restaurant providing high quality dining, bar facilities, and entertainment. The entertainment will generally consist of live piano bar and recorded music with a DJ operating during special functions".
- 25) In summary Mr Rau said that Parap is a residential suburb, and while he can complain to the Police about a noise disturbance after midnight, he could not understand why the Licensing Commission had granted this venue, which was within 50 metres of a residential area, a licence to 02.00 hours, seven (7) days a week and on occasions allows this to be extended further.
- 26) The Commission noted that most restaurants had liquor licences that allowed trading till 2.00 am in the morning.

- 27) Mr Rau said that he did not have an issue with the premises being used as a restaurant with a bar for dining patrons but he would like to see the hours restricted to 11.00 pm and no trading on Sundays.
- 28) Mr Rau presented a written statement of his points, together with a signed statement from his neighbour, Mr Mark Hoult of 47 Gregory Street, to the members of the Commission. Mr Hoult 's statement echoed the points raised by Mr Rau.
- 29) Mr Lars Holm, Nominee was then asked to address members of the Commission. He explained that he had made a detailed response to the alleged breaches in his written response dated 11 September 2009, but now wished to further elaborate on certain issues some five (5) months later. He advised that Bogarts had been a licensed premise since 1967, seven (7) days a week open to 02.00 hours. He explained that early last year they did have some problems with noise from live music, but had since changed the type of instruments played and this had successfully reduced the noise level.
- 30) Mr Holm explained that the main focus of Bogarts was not to operate as a live music venue and night club, as had been claimed by the objectors, but as a restaurant with appropriate music as defined in the licence special conditions.
- 31) Mr Holm stated that the biggest problem they had were patrons outside the premises. They had put up signs advising that:
- No alcohol should be taken outside, and
- Requesting patrons leave in a quiet and peaceful manner and respect their neighbours.
- 32) They had also put security staff at the front entrance, late in the evening to monitor patrons, when smoking outside and when leaving the premises.
- 33) Mr Holm also stated that, after a recent fight outside Bogarts they had banned the two (2) patrons involved. Mr Holm provided photographs and copies of letters to substantiate what he had said above.
- 34) Mr Holm handed up copies of letters from a number of other local residents who support what Mr Holm is trying to provide at Bogarts and that they are not having experiences with late night noise problems. He stated that they had not been solicited but arrived after people had heard that the Licensing Commission was hearing complaints against Bogarts. The Commission considers that in relation to these letters, Mr Holm is no less entitled than the complainant to seek support from nearby neighbours and patrons.
- 35) Mr Holm advised the members of the Commission that the style of food music and entertainment that he was providing was very popular, with most weekends being fully booked with seventy (70) to eighty (80) diners.

- 36) Mr Geoff Annear, a Director of Therapy Projects Pty Ltd, asked to address the members of the Commission. He explained that they had made an application to the NT Government to allow the front deck area to be used as a smoking area, to enable them to comply with the new regulations. They had not yet received a response.
- 37) Mr Annear also advised that having had previous business dealings with Mr Rau's father, he had taken the complaints personally and had phoned Mr Rau, in October, and given him his mobile phone number, to ring if he was disturbed again in the future. He had received no calls from Mr Rau since then, advising of noise problems.
- 38) Mr Annear explained that during a recent conversation with Mr Rau, when he was trying to persuade him to withdraw his complaint, Mr Rau had suggested that the hearing "may go badly" for Mr Annear and he would be prepared to sell his house to Mr Annear for \$1.5 M.
- 39) Mrs Kelly Rau then asked to address the members of the Commission. She advised because of the noise problems she and her husband, Grant had seriously considered selling their house, and knowing that Mr Geoff Annear was a long established Darwin Building Developer, offering the house for sale to him to develop.
- 40) The Commission decided to disregard the suggested purchase of the house in its considerations of the complaint.
- 41) Mr Grant Rau said in summary that his complaint still stands. He considers that the letters of support have been solicited by Bogarts and stated that one of the neighbours who wrote a letter of support is in fact deaf.
- 42) Mr Lars Holm said in summary that Bogarts is normally closed on a Sunday night and on other nights they occasionally close early at 11.30 pm

CONSIDERATION OF THE COMPLAINTS AND THE COMMISSION DECISIONS

- 43) The Act states:

110. Licensee to comply with conditions

A licensee shall not contravene, or fail to comply with, a condition of his licence.

- 44) Considering each of the complaints in turn:

(a) Concept and (b) Noise Control

The special conditions in the Liquor Licence are:

Concept

The concept of the premises will be that of an upmarket restaurant providing high quality dining, bar facilities and entertainment. The entertainment will generally consist of live piano bar and recorded music, with a DJ operating during special functions.

Noise Control

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

- 45) The Commission accepts that since Bogarts re-opened in mid January 2008 the Nominee has made changes to the type of music, specifically with the intention of ensuring that local residents are not suffering “unreasonable disturbance”. Noise level checks by the Inspectors since the complaints were received have recorded no breaches of the licence. The Commission therefore dismisses this complaint.

(c) Sale for consumption only on the premises

A condition of the Liquor Licence is:

Sale for Consumption on the Premises

Subject to the conditions specified below this licence authorises the sale of liquor for consumption on or at the licensed premises.

- 46) The liquor licence granted is only “Sale for consumption on the premises”, it does not allow for the sale of Take Away. Complaints about people consuming alcohol outside the licensed area have been investigated by the Inspectors and they found no evidence to confirm this has been the case. The Nominee explained that this may have happened occasionally in the past, when patrons trying to answer a mobile phone, walking outside with a drink in their hand. The Nominee has installed large signs, reminding patrons of the licensing regulations and not to take drinks outside. The Commission therefore dismissed this complaint.

(d) Persons on licensed Premises after hours

Section 104 of the Liquor Act states:

Persons on licensed premises after hours

- (1) Subject to this section, a person shall not enter, or remain on or at, licensed premises in respect of which a licence is in force for the sale of liquor for*

consumption on or at those premises unless those premises are open for the sale of liquor in accordance with the conditions of the licence.

(2) A person does not commit an offence against subsection (1) by remaining on or at licensed premises for a period not exceeding 30 minutes after those premises cease to be open for the sale of liquor.

47) The Liquor Licence defines the trading hours as being from 11.30 am to 02.00 (the following day), seven (7) days a week.

48) During an inspection on 28 August 2009, the Inspectors observed patrons consuming drinks forty (40) minutes after closing time. The Nominee explained that he allowed patrons to wait indoors until their taxis arrived rather than stand outside and possibly make noise that would disturb local residents. The Commission understands what the Nominee is trying to achieve but on the evidence given by the Inspectors must consider that the complaint is upheld and a breach of Section 104 has occurred.

(e) Liquor not to be sold to intoxicated persons

Section 102 of the Liquor Act states:

Liquor not to be sold to intoxicated person

A licensee or a person employed by a licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant).

49) The complaints that intoxicated patrons from Bogarts congregate in front of the venue, have been investigated by the Inspectors, but no evidence to substantiate the complaints has been found. Indeed during one inspection the Nominee was observed requesting a male patron displaying signs of intoxication to depart the premises. Judging whether or not a person is intoxicated is not easy and bar staff are now required to have "Responsible service of Alcohol" (RSA) training, which includes recognising the signs that would indicate that a person is intoxicated. The Commission therefore dismisses this complaint.

CONCLUSIONS AND PENALTIES

50) Whilst the Commission has only found one of the five charges to be proven, it considers it is appropriate to identify some areas of concern that the Licensee and Nominee should give consideration as to how arrangements can be improved.

- 51) Firstly the area at the front, designated for smokers and used by patrons entering and exiting the premises. The liquor license special condition for noise control clearly places the responsibility with the licensee not “to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any premises”. Whilst the Inspectors did not observe any breaches in the licence conditions clearly in the past the three original objectors experienced what they thought were, “unreasonable disturbances” which caused them to lodge their complaints. The Commission is pleased that the Nominee has placed a member of security staff at the front entrance to monitor and control patrons both smoking and leaving. It is hoped that this will avoid further “unreasonable disturbances”.
- 52) Secondly the Commission would consider it prudent for the Nominee to ensure that he knew how to operate the security camera system, and that copies of recorded footage could be easily downloaded and examined. The Commission notes that the number of establishments selling alcohol, that have installed a security camera system at their own choice, as part of their overall management plan, is increasing every year, no doubt due to the benefits that the camera system brings. At this time the Commission is not imposing a requirement for CCTV to be installed.
- 53) Thirdly the Nominee is reminded that the licence conditions require that the sale of alcohol ceases at 02.00 hours and patrons vacate the premises by 02.30 hours. The limited availability of taxis in the early hours of the morning is well known in Darwin. The Commission would expect a prudent Nominee to encourage patrons requiring taxis to book early to avoid delays or consider organising some form of shuttle bus for patrons who live locally.
- 54) The Commission has decided in regard to the proven breach “Persons on licensed premises after hours” not impose any penalty, instead it expects the Licensee and Nominee to take their appearance at this Hearing as a warning to heed the conditions of their licence in particular the control of noise and its affect on adjoining Residents.

John Brears
PRESIDING MEMBER

11 March 2010