

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: **BORROLOOLA INN**

LICENSEE: O'BRIEN HOLDINGS (TOWNSVILLE) PTY LTD

NOMINEE: MS TERRY O'BRIEN

PROCEEDING: SEC. 48 COMPLAINTS

HEARD BEFORE: Mr John Withnall (Presiding member)
Ms Shirley McKerrow
Mr Brian Rees

DATE OF HEARING: 25 June 2002

DATE OF DECISION: Delivered 25 September 2002

APPEARANCES: Mr Peter Elliott, for the Licensee
Mr Peter Wilson, Counsel Assisting the Commission

Three complaints were originally set down for hearing on 25 June 2002:

- Ms Heather Hyde had lodged a formal complaint predominantly as to the audio levels of the sound of music emanating from the Borroloola Inn and the incidence of violence and drinking in the street outside the hotel;
- A similar complaint had been made by Ms Jennifer Milne, but adding broader concerns as to the impact of alcohol on the town generally;
- The Borroloola Community Government Council had written to complain of public drinking outside the hotel in Robinson Road and also alleging that it had heard that the management of the hotel was paying crowd controllers in cartons of cold beer which they were allowed to collect after closing time. The Council also had concerns with glass litter.

In these reasons we too shall refer to the Inn as the hotel.

Some time after making her complaint Ms Hyde left Borroloola, and by the time of the hearing had advised that she would be unable to attend the hearing to pursue her complaint, although she indicated that she wanted her letter to “still go before the Commissioner”. We can assure Ms Hyde that a formal complaint which is not withdrawn does not lapse or determine by reason only that the complainant does not attend the hearing which is set down in relation to that complaint. It remains on foot as a matter to be addressed by the licensee, although of course the comparative weight of an unsworn and untested allegation will suffer in the face of sworn denials by or on behalf of the licensee.

In July 2001 Ms Jennifer Milne moved into a residential caravan across the road from the hotel, and was shocked at the intrusion upon her lifestyle of the noise from the hotel. There is no doubt that she and her family were suffering genuine distress from the hotel’s amplified music levels at the time she lodged her complaint.

It is a given that the hotel has been a feature at its present location for very many years, and Ms Milne conceded that she had not exercised any “due diligence” in relation to the possible impact on her chosen site of the operation of the hotel across the road.

We have noted in previous decisions the common law rule relating to nuisance that it is no defence to a noise complaint to show that it was the complainant who had “come to the nuisance”, as the expression is, but the Commission is of the view that the common law in this area is not necessarily to be seen as being of determinative assistance to the Commission in discharging its purely statutory function of regulating liquor and licensed premises. Even so, as we pointed out in our decision of 29 June 2001 in relation to the *Top End Hotel*, there are statements in some of the Australian authorities on the common law as to nuisance which are not inconsistent with the direction of the Commission’s thinking in relation to noise complaints. For example, in *Munro v. Southern Dairies Ltd* in the Victorian Supreme Court (1955 VLR 332) the Court after stating the general common law rule went on to add that “the locality, however, is of importance such that it is material to consider the general nature of the locality and whether the discomfort or inconvenience of which somebody complains is so characteristic of the general neighbourhood that he ought not to be heard to complain of what other people are accustomed to habitually put up with”.

As we went on to say in the *Top End Hotel* decision, the Commission will balance noise complaints of nearby residents against the legitimate expectations of a licensee in a long established location.

In the present case though, the licensee has already embarked on a balancing exercise. As a direct result of the complaint, nominee Ms O’Brien stopped having discos altogether, to the alleged detriment of local youth sport which had been the beneficiary of some of the profits, and turned the jukebox around to face away from the residential area. She also removed the jukebox volume control from access by patrons.

Ms Milne conceded that the improvement in the situation since she had made her complaint had been considerable, and that obvious efforts had been made by the licensee. She had heard that Ms O’Brien refuses requests to turn the juke box up.

Ms Milne admitted that the noise “from the musical side of things” was no longer a problem.

As to her allegation of constant fighting, Ms Milne agreed with Sergeant Proctor that most of the disturbance of this nature is *outside* the hotel. Sgt Proctor gave evidence that these disturbances occurred mainly at closing time, when large groups tended to fight. Significantly in the Commission’s view, in Sgt Proctor’s experience these groups are affected by liquor but not intoxicated. In any event both the police officer and Ms Milne agree that it cannot be discerned on these occasions which of the participants have been patrons of the hotel.

Sgt Proctor, Ms Milne, Mr William South (the Borrooloola Community Government Council Clerk) and Ms O’Brien all agree that the fighting is fuelled by local tribal family factionalism, although Mr South is of the view that all the violence is nevertheless alcohol related. Certain perpetrators are known to the police and Ms O’Brien alike, and Sgt Proctor confirmed that such persons are banned from the hotel by Ms O’Brien as appropriate.

For her part Ms O’Brien tells us that she removes any intoxicated persons from the premises, and turns away intoxicated persons “all the time”, which in itself can cause problems in the vicinity of the gate. She closes the hotel as appropriate, and as requested by the police. She pointed out that the noteworthy “pre-rodeo” fight took place on a day on which she had actually closed in order to try and minimise such flare-ups, and that on the Saturday previous to the hearing she had been closed all day but “they fought all day anyway”.

She commends the current operation of the local night patrol.

Sgt Proctor testified that he thought that the licensee had made “genuine efforts” in the last twelve months in relation to the employment of security staff. In any event, we note that the security staff would have no legal standing in relation to street fighting.

On all the evidence, there is really nothing in relation to the street fighting that can be laid at the licensee’s door other than in a broader context of review of the impact of liquor generally on the Borrooloola community.

We note that Ms Milne does have such a broader view: she would like to see Borrooloola a dry town, and if she had her way would “tear the hotel down”. In her view the “whole cycle” of Borrooloola is addiction. She asks the Commission for action to rectify what she sees as the major problem of alcohol abuse in the town.

Ms Milne’s lone complaint is an ineffective platform for general reform. She will need to take her views to the local community and enlist a significant degree of community support for any broad-based restrictions on the availability of liquor. In all those Territory locations in which there are currently restrictions on the general availability of liquor, such restrictions have had their genesis in initiatives clearly perceivable by the Commission as representative of a significant cross-section of each local community.

The main complaint of the Borrooloola Community Government Council was that it had been told that the hotel pays its security personnel with cartons of beer which they take out into the community after closing time.

If this were true, the Licensee must expect to be severely dealt with by the Commission, given that in the course of a hearing in June 2000 the Commission expressly warned Ms O'Brien that such a practice was in breach of her licence conditions for the reasons there given. However, Mr South on behalf of the Council was unable to produce any evidence that this practice still occurred, and Ms O'Brien gave sworn evidence that it did not. She testified that everybody is paid in cash, and that if anybody uses the cash to purchase beer they have to pick it up before 7.00 PM. She says that she does not permit them to pay for the beer before that time and then pick it up after 7.00 PM, that she is well aware that this would be a breach of licence conditions.

The Council also complained about alcohol, and especially "last drinks", being consumed in cans and plastic cups outside the hotel grounds, with a resultant litter problem. Ms O'Brien testified that she supplies only water in plastic cups. Mr South testified that he had personally seen people walking across the road from the hotel drinking something other than water from plastic cups, but conceded that he had not seen such people actually exiting from the hotel. Ms O'Brien is unaware of liquor being taken off the premises; she feels that a reasonable job is done of policing "every inch" of her fenceline.

As to the rubbish problem, the evidence convinces us that the hotel management takes reasonable measures to mitigate the hotel's contribution to that situation.

It remains only to note that the Council asks what might be done about the sale of liquor in glass bottles. The vast majority of sales from the hotel comprise cartons of a well known locally-preferred brand of beer in cans. Ms O'Brien does not sell the product in glass. Admittedly the Council also includes the other Borroloola outlet in its query, but again we note the need for clear community support for the Commission to consider the implementation of any blanket restriction in this regard.

At the conclusion of the hearing both Counsel summed up by submitting that the Commission could not be satisfied as to any breach of the Act or of any licence condition having occurred, and we concur with that submission.

The inability to identify any specific breach, however, does not necessarily conclude the matter. The Commission is empowered under section 49(4)(a) of the Liquor Act to vary the conditions of a licence after a hearing, regardless of the outcome of the hearing. The question arises whether any of the complaints may have revealed or highlighted some aspect of the Licensee's operation which, although not in breach of the legislation or the licence, may nevertheless be of such an unsatisfactory nature as to persuade the Commission that the situation should be addressed by a variation to licence conditions.

In this regard the possible need for some sort of noise condition became an issue, argued against by Mr Elliott on the basis of "the nature of the beast" being such that the town needed to come to terms with having either a fairly noisy hotel or no hotel at all.

On reflection we have decided to impose a fairly standard noise condition which, on the evidence, should add no further burden to the licensee's current management of the noise issue. The new condition will be in the following terms:

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 any residential premises.

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 the 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.

John Withnall
(Presiding Member)
25 September 2002