

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: RAFFLES BAR

LICENSEE: STEVEN ANTHONY MERLINO

LICENCE NUMBER: 80816870

PROCEEDING: (Noise) complaint pursuant to s.48(2) of the *Liquor Act*

COMPLAINANT: Poinciana Holdings Pty Ltd

CORAM: Mr John Withnall (Chairman)
Mr Craig Spencer
Mr Paul Costigan

DATE OF HEARING: 30 September 2003

DATE OF DECISION: 24 September 2004

APPEARANCES: Mr G Cridland, for the Complainant
Mr P Walsh, for the Licensee

1. This noise complaint against Raffles Bar was the subject of a hearing by the Commission at the end of September 2003.
2. Thereafter the licensee of Raffles Bar ceased outdoor entertainment with the onset of the wet season, and the corporate Commission had indications both within and without the evidence at the hearing that the outside entertainment at Raffles during dry season 2004 would be of such a nature and sound level as to be consciously attuned to defusing the potential for any further complaint. The Commission therefore adopted a wait-and-see approach to ascertaining the nature and degree of determinative decision-making that the situation might require.
3. The complaining party is now indicating its need for a decision on the complaint at this time.

4. The liquor licence for Raffles Bar was hived off from the licence of the Carlton Hotel (as it then was). The stand-alone licence for the individual bar includes an open area, part of the main hotel concourse, but does not contain any condition pertaining to noise disturbance. Hence, even if the complainant's case were accepted at face value it cannot lead on this occasion to any finding of breach of licence condition or consequential penalty, and the Commission is limited to remedial action under s.49(4) of the Liquor Act, viz. varying licence conditions or issuing directions. Thereafter the licence will be vulnerable to any *recurrence* of the type of behaviour on the part of the licensee that precipitated the variation of licence condition or the issue of directions.
5. Both subjective and objective evidence as to sound levels emanating from Raffles Bar was given at the hearing. The evidence by way of guest comments and staff "noise pad" logs was both subjective and largely hearsay. More objective evidence was by way of sound level readings taken by an Occupational Health and Safety Adviser with the Department of Corporate and Information Services.
6. Ms Marie Fotiades gave evidence for the complainant Poinciana Holdings Pty Ltd, and Mr Steve Merlino gave evidence as the licensee of Raffles Bar.
7. Ms Fotiades in her written complaints had specified a series of dates and times as part of her more generalised over-all complaint. One of the specifics of the complaint included early Saturday morning on 14 June 2003, and her general allegation was inclusive of "the early hours of the morning on Saturdays and Sundays". In cross-examination at the hearing she conceded that this was incorrect, that in 2003 the objectionable sound levels on Friday nights ceased by midnight, and that the complaint was incorrect in that regard. The tendered noise pads bore this out.
8. Guest comment cards were dated 2002, since which time the Poinciana Inn had fitted door and window acoustic sealing and the licensee (after complaints from several neighbouring businesses) had downgraded the amplification system and allegedly dispersed the younger demographic by changing to acoustic style music. Ms Fotiades conceded a "soft muffling" of the music after the sealing work, but claimed that essentially she could not notice any real difference from 2002. Ms Tracey Inguy, the receptionist and one of the noise pad recordists, considered that as at the time of the hearing, the "last few Friday nights" had been the loudest it had ever been. She could clearly detect the "thumping" of the music that she was adamant emanated from the Raffles Bar.
9. Guest responses to what might be described as a sort of "push-poll" request from Ms Fotiades in 2003 were mainly concerned with objectionable street noise such as yelling, swearing and fighting. There are few references to loud music, which in any event do not correspond with noise pad logs for the same evenings.

10. Licensing Inspectors investigating the complaint reported that from the top floor of the Poinciana the sound of a solo guitar at Raffles could be heard along with people talking in the street, and traffic noise. Significantly, Ms Fotiades conceded the strength of traffic noise as something they “had to put up with”. Mr David Gibb, the OHS officer who took readings in room 201 at the Poinciana while a band was playing at Raffles Bar on the night of 19 September 2003, puts the traffic noise range at 60-70 dB, yet the highest peak of his readings over-all was under 75 dB.
11. The decibel scale is not a linear one, and a level of 75 dB has the capacity to be subjectively heard as being twice as loud as a level in the middle of the 60-70 dB range. However, almost the entirety of the relevant readings while the band was playing, taken “where possible without the influence of road noise”, was in the same range as the traffic noise or lower.
12. What then are the findings that can be meaningfully made on the evidence?
13. The problem for any adjudicating body in relation to an allegation of excessive noise is the high degree of subjectivity involved. Each individual has a different disturbance threshold, and the gross decibel level does not necessarily reflect the irritation level. Likewise, reducing gross decibels does not necessarily reduce the irritation. Bass vibration is often the major irritating element. Such vibration can be part of an overall sound level well below any reasonable ceiling level, and the irritant factor can often survive clear compliance with quite modest upper decibel limits. If one is not attuned to the nature of a particular noise, its mere audibility at all can prompt an irritated reaction.
14. We therefore constrain our findings to such as will have a bearing on the outcome of the complaint. We find that on the evidence the licensee has not been trading outside his licensed trading hours, but that despite various inconsistencies in the complainant’s evidence it is clear that the sound of amplified entertainment from the Raffles Bar from May through September 2003 from time to time caused annoyance to the management and some of the patrons of the Poinciana.
15. The major question of course must be whether such annoyance or disturbance was by normal community standards reasonably or unreasonably founded, given the nature of the precinct. In that regard we make the further finding that by far the vast majority of such annoyance that can be sheeted home to the particular licensee was in relation to his operations prior to midnight.
16. What then should be a reasonable outcome of such findings?
17. The Government would seem to still be struggling with the drafting of noise pollution regulations which would be fair and workable for a mixed-use zone. It obviously falls to the Commission in the meantime to bring its own legislated tools to bear on licensed premises, a task to be considered in the context of trying to

balance reasonable expectations in relation to residential use against the reasonable expectations of both operators and patronage of leisure and entertainment facilities in a mixed-use city precinct.

18. That approach produces no reason not to impose upon the licensee, and specific reason -- arising from the hearing -- to consider necessary, a "noise condition" for Raffles Bar similar to that of several other licensed premises in Mitchell Street. A condition will therefore be added to the licence of the Raffles Bar 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 enclosed residential premises. Without in any way limiting the generality of such restriction, the maximum noise emanating from the licensed premises as measured within any enclosed premises where a person resides, however temporarily, shall not exceed in any event:

65dB(A) from 11:00 – 23:00 hours;
and
60dB(A) from 23:00 -- 02:00 hours.

Notwithstanding the compliance by the licensee with this requirement, the licensee shall effect such further or other sound attenuation as the Commission in its discretion may notify the licensee in writing at any time as having become a reasonable requirement in the considered view of the Commission in circumstances then prevailing, provided always that the licensee shall be entitled to request a hearing in relation to any such requirement of the Commission.

19. Some notes on the Commission's thinking in relation to the foregoing condition may provide the respective parties with some measure of comfort and guidelines for the Commission's ongoing expectations in relation to the application of the new condition.
20. The actual dB(A) levels are taken from the *Environmental Protection Act* of South Australia and its appurtenant *Information Sheet on Environmental Noise* dated 22 July 2002 in respect of premises classified as 'predominantly commercial'. The levels are more generous than previous drafts of equivalent NT regulations

now withdrawn, and are in line with the levels the Commission believes will eventually be mandated by local noise pollution regulations when finalised. The requirement of the above condition is actually a little more generous to the licensee than similar conditions in some other Darwin CBD liquor licences in the restriction of its application to “enclosed” premises receiving the noise, ie. to locations inside residential buildings.

21. The Commission fully appreciates the unsatisfactory nature of setting specific dB levels without an accompanying codification providing for standards for calibration of measuring instruments, adjustments for impulsiveness and tonality, representative assessment periods and the like. We simply do not have the resources for such a project. Any future complaint to the Commission based on an excessive dB reading will therefore be dealt with, in terms of the exactitude of evidence required in a given case, by reference to a common-sense consideration of the balance of probabilities, vide *Briginshaw -v- Briginshaw*, 60 CLR 336.
22. The real strength of the new condition for both licensee and disaffected neighbour alike is the general proscription of unreasonable disturbance of ordinary residential comfort. The issue will of course always be that of reasonability of complaint, and in this regard the specific dB limits within the specified periods can be taken as a direct guideline to reasonability of noise levels. On the one hand the licensee is to realise that there are now specific limits, and on the other hand potential complainants are to realise that the licensee will not be expected by the Commission to operate inaudibly. However, the licensee needs to realise that the generality of the condition allows for complaints outside any consideration of maximum levels, such as unacceptable *content* of sound or unacceptable bass element in music even within the dB limits. Again we emphasise though, that it will always be a question of reasonability by normal community standards, and the time of night of the type of disturbance alleged will be a major consideration for the Commission in dealing with any future complaint. As indicated, we will be doing our best to balance the reasonable expectations of the licensee against the character and reasonable expectations of that element of the neighbourhood from which such complaint may arise.
23. This leaves the licensee in the position of having to make a judgment call as to the type of outdoor entertainment he puts on, its session times, and the level of amplification. He now has the protection of any new noise complaint not being upheld unless the aspect complained of should constitute a breach of the new condition. On the other hand, a breach of the condition will expose the licence to possible suspension or even, in a worst case, permanent cancellation.

24. The likelihood of a noise condition was flagged at the hearing, but inasmuch as the foregoing detail of the new condition was not canvassed with the parties at the hearing, the parties are to have "liberty to apply" within the next seven days. Upon application within that time (and by telephone would suffice), we are prepared to reconvene for the purpose of discussion on the application of the new condition, but not on the actual decision to impose it.

John Withnall
CHAIRMAN
24 September 2004