

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	DARWIN RAILWAY SPORTS & SOCIAL CLUB
LICENSEE:	Darwin Railway Sports & Social Club Inc
LICENCE NUMBER:	81401142
NOMINEE:	Kane Stewart
PROCEEDING:	Complaints Pursuant to Section 48(2) of the <i>Liquor Act</i> – Noise Complaints and Alleged Breaches of Sections 107, 108 and 110
HEARD BEFORE:	Mr Richard O’Sullivan (Chairman) Ms Cynthia-Lee Bravos Mr Walter Grimshaw
DATE OF HEARING:	9 March 2011
DATE OF DECISION:	4 April 2011
APPEARANCES:	Mr Alan Woodcock, Counsel for the Licensee Inspector Mark Wood for the Director of Licensing

BACKGROUND

- 1) By report dated 10 January 2011, the then Acting Director of Licensing recommended that the Northern Territory Licensing Commission (“the Commission”) conduct a Hearing in respect of noise complaints lodged pursuant to Section 48(2) of the *Liquor Act* (“the Act”) and alleged breaches of Sections 107, 108 and 110 of the Act by the Licensee of the Darwin Railway Sports & Social Club Inc (“the Licensee”).
- 2) Prior to the Hearing, the Commission was advised by way of the ‘Pre Hearing Brief’ that on 18 April 2009, the Darwin Railway Sports & Social Club Inc located at Sommerville Gardens Road, Parap (“the club”) had suffered serious fire damage to the premises. At this time, consideration was given to suspending the club’s liquor licence on public safety grounds as the club did not have a current Certificate of Occupancy. However rather than suspending the licence, it was agreed that the club would need to apply for temporary variations to its licence before it could trade from a temporary bar

on any particular day. This arrangement was intended to allow the club to maintain a revenue stream to fund its rebuild.

- 3) The club continued to operate by way of temporary variations to its liquor licence until 27 August 2010 at which time, permission was granted by the Director of Licensing for the club to resume normal trading as per its liquor licence following the receipt of a Certificate of Occupancy for the building.

HEARING

- 4) On 9 March 2011, the Commission conducted a Hearing into noise and other complaints at the Commission's Hearing Room in Darwin. Licensing Inspector Mark Wood appeared on behalf of the Director of Licensing and Mr Alan Woodcock under instruction from Hall Payne Lawyers appeared on behalf of the Licensee.
- 5) The Commission was advised that Mr Wood would be calling three witnesses being Licensing Inspector Travis Te Whata, Ms Kim Hedley and Ms Sarah Harris and that Mr Woodcock would be calling five witnesses being Mr Kane Stewart, Ms Wendy Giles, Mr William John Williams, Ms Nelli Rooke and Mr Rowan Howard.
- 6) In order to gain an appreciation of the location and design of the premises, the Hearing was adjourned for Commission members to attend the premises for a viewing.
- 7) Upon resumption of the Hearing, Mr Wood laid five complaints before the Commission as summarised below:

Complaint 1

Pursuant to Section 48(2) of the Act, noise emanating from the premises between April 2009 and 10 November 2010 unreasonably disrupted the informants' (being Ms Hedley and Ms Harris) quiet enjoyment of their private residences.

Complaint 2

On 28 October 2010 the Licensee failed to produce the liquor licence upon demand of an inspector, namely Inspector Peter Cookson, contrary to Sections 108 and 110 of the Act.

Complaint 3

On 28 October 2010 the Licensee failed to ensure that the licence was kept on the premises, contrary to Section 107(1) of the Act.

Complaint 4

Between 16 July 2010 and 27 October 2010 the Licensee failed to comply with condition 15 of the Licence in that the Licensee shall keep and maintain a visitors' book, contrary to Section 110 of the Act.

Complaint 5

Between 18 July 2010 and 22 October 2010 the Licensee failed to comply with condition 16 of the Licence in that the on any one day, a member shall not sign in more than six visitors, contrary to Section 110 of the Act.

- 8) Mr Wood advised the Commission that he sought to withdraw the complaint pertaining to the Licensee contravening condition 10 of the Licence regarding effective supervision and control of the Club's Manager between 16 July 2010 and 27 October 2010 as it arose from the same set of facts as Complaints 4 and 5.
- 9) Mr Woodcock advised the Commission that the Licensee admitted to Complaints 2, 3, 4 and 5. However, in respect of Complaint 1, Mr Woodcock challenged the basis on which this charge was laid in that the Act does not contain a provision specifically relating to noise.
- 10) In this regard, Mr Wood referred the Commission to Section 48(2) of the Act which states:

A person may make a complaint regarding any matter arising out of the conduct of the business at a licensed premises or the conduct of a licensee in relation to the business of a licensee...

- 11) Mr Wood called Licensing Inspector Te Whata who gave evidence that he had been a licensing inspector since late September 2008 and that he had some preliminary involvement in the matter before the Commission since late 2009. In March 2010 he took over the file in relation to the noise complaints lodged by Ms Hedley and Ms Harris with respect to the premises subject of this Hearing.
- 12) Inspector Te Whata gave evidence that he had a number of discussions with the Licensee regarding the issue of noise emanating from the premises. Inspector Te Whata stated that the Licensee was aware that noise complaints had been received and it appeared to Inspector Te Whata that during those meetings the Licensee wished to work towards resolving the issues without going to a formal Hearing. A number of noise reduction strategies were discussed such as the installation of sound curtains and the replacement of the window louvers with full glass panels, however no timeframes were ever agreed to.
- 13) Inspector Te Whata further stated that on 16 October 2010 about 11.00pm, he and Inspector McCorkell attended the premises with a noise reader. Inspector Te Whata gave evidence that in his opinion the noise when the band was playing was "not very nice at all" however, in between songs it was okay. He further stated that the doors leading to the beer garden were opened regularly and when the doors were open, the noise was very loud. Inspector Te Whata then left the premises and returned about 1.00am the following morning and he could hear the emptying of glass into bins which, in his opinion was noisy. He also observed people leaving the premises loudly and could hear people swearing and taxis and cars beeping horns in the car park area.

- 14) Upon cross examination, Inspector Te Whata advised the Commission that the noise reader used on the night that he and Inspector McCorkell visited the premises was not calibrated. Inspector Te Whata further stated that the noise was not constant and was not loud when the doors were closed although he later stated that even when the doors were closed, the noise disturbed him as it kept going up and down and because of the bass.
- 15) Mr Wood called Ms Kim Hedley who gave evidence that she was the owner of a property adjacent to the premises and that she had resided there for nine years. Ms Hedley stated that she had not had any major issues with noise from the premises until after the fire at the premises about eighteen months ago.
- 16) Ms Hedley gave evidence that she resided in a top floor apartment that has great breezes, however, she is often forced to shut her windows and doors and to put the air conditioner on in order to be able to concentrate, watch television, speak on the telephone or to sleep when there is noise emanating from the premises. Ms Hedley advised the Commission that she had taken to staying at friends' places rather than coming home due to the noise.
- 17) Ms Hedley gave evidence that there were numerous functions held at the premises that caused excessive noise with these functions including live bands on Friday, Saturday and Sunday nights and the Wednesday swing night involving an 18 piece band. Ms Hedley stated that the doors to the beer garden do not remain closed and that she has to shut her doors and windows in order to be able to hear the television or to speak with people on the telephone.
- 18) Ms Hedley also stated that the noise is excessive when activities are held in the beer garden such as when the PA system is used during Tuesday quiz nights and during fundraiser events. Ms Hedley further gave evidence that even when there are only six (6) people in the beer garden, the noise is amplified and she can hear every word they say. Ms Hedley also gave evidence that that the noise emanating from the beer garden was not as intrusive when folk music is played with acoustic instruments only.
- 19) Ms Hedley gave evidence that she had complained directly to the Licensee on a number of occasions and these complaints usually ended up in an apology being given by the Licensee but the behaviours causing the noise would still continue.
- 20) During Ms Hedley's evidence, a number of video recordings taken by Ms Hedley were shown to the Commission. These recordings were in relation to music being played on 18 September 2010 and 29 September 2010 and were taken by Ms Hedley from her balcony area.
- 21) In cross examination, Ms Hedley gave evidence that in addition to the noise emanating from the premises, noise in the area also emanated from the highway, itinerants, the building of a block of flats next door and cars racing up and down the road and that in the last eighteen months she had noticed an increase in noise from all avenues. Ms Hedley gave evidence that she accepts the fact that there will be noise emanating from the premises but is complaining because it is frequent.

- 22) Upon further questioning by Mr Wood, Ms Hedley stated that she wants the Licensee to change the louvers to solid glass panels and to install the sound-proofing curtains as promised by the Licensee.
- 23) Mr Wood called Ms Sarah Elizabeth Harris who gave evidence that she was the owner of a property adjacent to the premises and that she had purchased the property in February 2009.
- 24) Ms Harris gave evidence that she was affected by the noise emanating from the premises and as a result has to shut her own doors, turn on the air conditioning and wear ear plugs in order to be able to sleep.
- 25) Ms Harris stated that the excessive noise emanates from various events held at the premises including live bands, music practice and people congregating in the court yard area. When events are held inside, the doors of the premise are not closed and as a result the noise is not contained within the premises. Ms Harris also gave evidence that when large events are held, there is also noise created by car engines starting, doors slamming and horns honking at the conclusion of the event. Ms Harris also gave evidence that on one particular evening, the Licence Nominee swore into the microphone along the lines of *“there’s laws against drinking, laws against swearing, now there’s even laws about singing and it’s time for us to stand up and say fuck you”* Ms Harris stated that she found this language offensive.
- 26) During Ms Harris’ evidence, a number of video recordings taken by Ms Harris were also shown to the Commission. These recordings were in relation to music being played at the premises on a number of evenings and were taken by Ms Harris from her balcony area. Ms Harris stated that she tries to be away when large events are held at the premises.
- 27) Ms Harris gave evidence that she had met with the Licensee in relation to her noise complaints but that a year later; her concerns were still not addressed. Ms Harris gave evidence that she believes that there would be a noticeable reduction in noise emanating from the premises if the sound was enclosed.
- 28) In cross-examination, Ms Harris conceded that the area she lives in is a noisy area and in addition to the noise emanating from the premises, there is noise coming from the large housing community population, itinerants walking past and on occasion from cars roaring through the area.
- 29) Mr Woodcock called a number of witnesses to give evidence, these being Ms Giles, Ms Nelli Rooke, Mr William John Williams and Mr Rowan Hayward, each of who are residents of the area with their respective properties being located adjacent to the premises.
- 30) Ms Giles gave evidence that she had lived at her property since 9 November 2010 and that she did not have any issues with noise emanating from the premises. Ms Giles stated that when she is out on her balcony, she can hear the music but does not find it intrusive and although she hears the cars leaving she also does not find this intrusive. Ms Giles gave evidence

that in her view more noise emanates from the itinerants and other residents than it does from the premises.

- 31) Ms Rooke gave evidence that she had lived at her property for three years and that she does not hear any noise emanating from the premises. Ms Rooke stated that the neighbours make more noise than the premises does. Ms Rooke gave evidence that she frequents the premises in the mid afternoon to early evening and that it is a quiet and cool place to be.
- 32) Mr Williams gave evidence that he had lived at his property for four to five years and that before the fire at the premises, there was a lot more noise coming out. Mr Williams stated that in 2008 he had to ask for the noise to be lessened but that now there was significantly less noise than there was at that time. Mr Williams gave evidence that there is more noise coming from the Casino than there was from the premises and that he finds the premises relaxing and a nice neighbourhood place to go.
- 33) Upon cross-examination, Mr Williams gave evidence that he had in fact signed a petition dated 26 March 2009 in which he and a number of other residents had requested that the Licensee modify the excessive noise coming from the premises. Mr Williams gave evidence that he had forgotten that he had signed the petition but that his opinion had changed since then as the noise had been significantly reduced by the installation of air conditioning, solid panes of glass instead of louvers and that the doors are kept closed.
- 34) Mr Hayward gave evidence that his property is situated at the rear of the premises and that he doesn't hear much noise. Mr Hayward stated that on a quiet and still night that he may faintly hear music if he is outside. Mr Hayward stated that it is a noisy area to live in due to the fights in the blocks around him and that he doesn't find the noise from the premises disturbing or annoying.
- 35) Mr Woodcock then called Mr Stewart who gave evidence that he was the nominee listed on the license and that he had been the chairman of the club for over two years. Mr Stewart gave evidence that the purpose of the club when it was built in 1973 was as a workers' community club. In 1976, the members of the club purchased it for the neighbourhood and it had been used as a community club since that time.
- 36) Mr Stewart gave evidence that prior to him becoming the chairman of a new club committee, the viability of the club was in question as it was only being utilised by two to three people per day. Mr Stewart gave evidence that the committee's aim is to make the premise viable. Mr Stewart stated that the premise is a sociable and ambient place to drink and is a meeting place for people in the area. Mr Stewart gave evidence that there is no gambling at the premises and only one television and it is a place where people can enjoy social networking.
- 37) Mr Stewart gave evidence that the premise has a diverse entertainment list ranging from swing, jazz and folk music to belly dancing. He stated that the entertainment included rock bands, Brazilian and African music and that it was broadly multi-cultural in design.

- 38) Mr Stewart gave evidence that no profit was made in the previous financial year but since September 2009 when the premise was in full operation again after the rebuild from the fire, business had increased and membership had gone from 200 members to 1200 members.
- 39) Mr Stewart gave evidence that he was conscious that the premises were “*smack bang in suburbia*” but that when the premises were being rebuilt after the fire, that attempts were made to limit the impact of the noise by moving the stage area to the opposite end of the club, installation of air conditioning so as to enable the doors and windows to remain closed and the replacement of the louver windows with solid glass panes. There is also signage requesting that patrons leave the premises quietly.
- 40) Mr Stewart gave evidence that he was not surprised that there were noise issues prior to the completion of the rebuilding of the premises as functions had to be held outside and he made admission to using inappropriate language on the one occasion complained about.
- 41) Mr Stewart gave evidence that the installation of the solid glass panels was a gradual one that is occurring as club finances allow as it is an expensive process. He accepts that there may be a sound surge created when the doors open and that automatic doors had been considered but that they were again an expensive option. Mr Stewart gave evidence that he doesn't want people to be upset by the activities at the premises and that he is happy to consult and work with people to address their concerns.
- 42) Mr Woodcock handed up eleven written submissions of which four were from the witnesses already called at the hearing. The remaining seven submissions ranged from members supporting the club to ‘thank you’ letters from organisations who have held functions at the club. Of particular note to the Commission is the submission from:
- Bill (surname not provided), Associate Professor and Head of School, Creative Arts and Humanities at the Charles Darwin University who supports the continuation of the presentation of live and original music at the premises. Bill states that *he “understand[s] the sensitivity that music volumes and audiences can present”* and that the Creative Arts and Humanities School would be willing to discuss options into researching such things as silent rehearsal solutions and silent venue technology.
- 43) In his closing submission, Mr Wood submitted that the evidence from Ms Henley and Ms Harris was naturally subjective as to the impact of the noise upon them. Mr Wood further submitted that the evidence of the Licensee's witnesses came from witnesses who did not reside on the same side of the premises as the complainants and that the sides they resided on were ones where the louver panels had already been replaced by solid glass panels.
- 44) Mr Wood referred the Commission to two previous decisions of the Commission in relation to noise complaints against the Katherine Hotel. Mr Wood submitted that the earlier Commission decision dated 15 December 2008, in which noise conditions were imposed on the license was not dissimilar to the matter before it now.

- 45) Mr Wood also referred the Commission, amongst others to a decision of the Supreme Court of Victoria in the matter of *Oldham v Lawson (No 1)* [1976] VR 654, that sets out applicable principles in determining the degree of nuisance that must exist to found a complaint in public nuisance and interference with enjoyment of premises.
- 46) Mr Woodcock in closing submissions, submitted that the Commission would be led into error if it were to follow the decision made by the Commission in relation to the Katherine Hotel as in that matter there existed conditions on the licence. Mr Woodcock submitted that one cannot breach someone on a breach that does not exist. Mr Woodcock also submitted that nuisance is an issue in common law and therefore the Commission did not have jurisdiction in this matter.
- 47) Mr Woodcock further submitted that all persons involved in this matter were acting in good faith however, the two complainants had given highly subjective accounts. Mr Woodcock submitted that the noise emanating from the premises must be measured against ordinary community standards and which his witnesses residing in the neighbourhood had not found excessive.

CONSIDERATION OF THE ISSUES

- 48) The Commission first considered the challenges put forth by Mr Woodcock in relation to the jurisdiction of the Commission to hear a complaint regarding noise emanating from the premises given that nuisance is a common law tort and that the Act does not contain a provision specifically relating to noise.
- 49) The Commission further considered the submission of Mr Wood that Section 48(2) of the Act allows for the Commission to consider complaints concerning any matters arising out of the conduct of the business at a licensed premise.
- 50) In this respect, the Commission concurs with Mr Woods' submission. In addition, the Commission also notes that pursuant to Section 49(2)(c) of the Act, the Commission may elect to conduct a hearing in relation to a complaint. The Commission therefore finds that it does have the jurisdiction to conduct a hearing in relation to the complaint and this written decision is the outcome of that hearing.
- 51) The Commission notes that there is conflicting evidence before it in relation to the amount of noise emanating from the premises. In this respect, the Commission notes that both Ms Hedley and Ms Harris reside on the side of the premises where the club's beer garden is located whilst the Licensee's witnesses either reside on the opposite side of the premises where only a small outdoor area is located or at the rear of the premises. Many of the club's activities in the past and current beer garden use by patrons would likely have a greater noise impact on Ms Hedley and Ms Harris than residents on the other side or to the rear of the Club.

- 52) The Commission has no reason to doubt that both Ms Hedley and Ms Harris are genuinely aggrieved by the level of noise that they say emanates from the premises at various times of the day and night.
- 53) The Commission also acknowledges that the evidence before it from the Licensee's witnesses has been presented in good faith and in particular the Commission takes note of the honesty demonstrated by the evidence given by Mr Stewart in that he accepts that prior to the completion of the rebuild of the premises after the fire that there were noise issues associated with the provision of entertainment in the outside beer garden area.
- 54) The Commission further notes that on Mr Stewart's own admission and as sighted by the Commission during its viewing of the premises, sound reduction measures through the replacement of all the louvers with solid glass panels is yet to be completed. The Commission notes that on the evidence before it, whilst measures are in place to ensure that the doors leading to the outside beer garden area remain close, this does not always occur.
- 55) The Commission notes that there has been a significant growth in membership of the club in the past year and that this is primarily related to the new direction taken by the club's committee to provide a financially viable venue that caters to a diverse range of entertainment and patronage. In this respect the Commission takes note that amongst others, an object of the Act is to "*facilitate a diversity of licensed premises and associated services for the benefit of the community*" and for this, the Commission acknowledges the efforts of the Licensee in this respect to date.
- 56) The Commission further notes that the Darwin Railway Sports & Social Club Inc operates under Liquor Licence number 81401142 which contains no provision relating to amplified music or other noise as is the case for other venues offering similar entertainment.
- 57) The Commission notes that the Licensee has admitted to Complaints 2, 3, 4 and 5 and therefore the consideration of these issues by the Commission is limited to penalty only and in this regard notes that the Licensee has undertaken rectification measures to address non-compliance.

SUBMISSIONS ON PENALTY

- 58) Mr Wood submitted that should the Commission find the Complaint 1 related to excessive noise proven, it was not the desire of the Director of Licensing to close the premises or discourage the provision of entertainment at the premises, however that there needs to be effective controls on the Licensee to ensure that noise issues are prevented. In this respect, Mr Wood submitted that a noise condition should be placed on the licence.
- 59) Mr Woodcock submitted that the non-provision of the licence to Licensing Inspectors and not having the licence on the premises, was caused by the fire and has now been rectified. In relation to the complaints associated with the visitors' book, strict adherence had not been maintained due to the traffic in

and out of the premises by tradesmen. Mr Woodcock submitted that a warning of some sort in this regard would be sufficient penalty.

- 60) With respect to the noise complaint, Mr Woodcock submitted that should the complaint be proven, the Commission should adjourn sentencing for six (6) months whilst the louvers are replaced and to give the Licensee an opportunity to improve measures to address noise mitigation and to report back to the Commission four weeks before the expiration of the six month adjournment.

DECISION

- 61) In all the circumstances, the Commission is convinced on the balance of probabilities that unacceptable noise had emanated from the premises and that this noise had in the past disrupted the quiet enjoyment of the complainants' private residences as well as potentially those of other nearby residents.

- 62) The Commission has determined that, from the date of publication of this decision, Liquor Licence number 81401142 held in respect of the Darwin Railway Sports & Social Club Incorporated shall be subject to the following Special Condition:

Noise Control: *Noise levels emanating from any part of the premises must be such as to not cause unreasonable disturbance to the businesses or ordinary comfort of lawful occupiers of neighbouring premises or to any other persons in the vicinity.*

- 63) The Commission notes that the Licensee is currently in the process of replacing the window louvers in the premises with solid glass panels and has determined that this work must be treated as a priority in order to minimise the noise emanating from the premises. The Commission expects that these works will be completed within six (6) months from the date of this decision.

- 64) The Commission also notes the written offer by Charles Darwin University's Head of the School of Creative Arts to explore options available to minimise the noise associated with the provision of live music at the premises such as the usage of 'silent venue technology'. The Commission recommends that the Licensee accepts this offer and works towards finding further initiatives that may reduce noise emanating from the premises.

- 65) Further, the Commission notes Mr Stewart's willingness to work with surrounding neighbours to address their concerns regarding noise levels and in this respect encourages the complainants and the Licensee to again open up lines of communication so that concerns regarding noise can be addressed in real time.

- 66) The Commission requests that the Director of Licensing forward a report to the Commission advising whether the noise issue has been resolved to the satisfaction of the parties by the end of September 2011. In the event that the issues are not resolved and/or complaints alleging a breach of the newly imposed noise condition continue to be received, the Commission will

convene a Hearing to determine what measures it will need to take to ensure that the Licensee complies with the noise condition now contained in its licence.

- 67) In respect of Complaints 2, 3, 4 and 5, the Commission notes the Licensee has admitted to these breaches. The Commission has determined that a written warning that the Licensee must comply with the conditions of the licence is to be issued to the Licensee by the Director of Licensing and maintained on the licence file.

Richard O'Sullivan
CHAIRMAN

4 April 2011