

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE *LIQUOR ACT 2019*

REFERENCE: LC2022/019

LICENCE NUMBER: 81401269

LICENSEE: NT Water Ski Association

PREMISES: Darwin Ski Club
20 Conacher Street
FANNIE BAY NT 0820

LEGISLATION: Part 7 Divisions 3 and 4 of the *Liquor Act 2019*

HEARD BEFORE: Ms Jodi Truman (Deputy Chairperson)
Mr Bernard Dwyer (Health Member)
Ms Amy Corcoran (Community Member)

DATE OF HEARING: 17 June 2022

DATE OF DECISION: 21 June 2022

DECISION

1. For the reasons set out below, the Northern Territory Liquor Commission (the Commission) is satisfied that the NT Water Ski Association (the licensee) breached section 93 of the *Liquor Act 2019* (the Act), namely:
 - a. On 30 October 2021, the licensee allowed music to be played on the premises that caused undue and unreasonable noise whilst conducting an approved open day to host the “Electric Storm” event, namely that music from the event could be heard from within the residence of complainants who reside in the vicinity of the premises of Seale and Leichardt Street, Parap and East Point Road, Fannie Bay; and
 - b. Further on that same date, the premises were used in such a way which adversely affected residents and disrupted the amenity of the neighbourhood, namely that patrons’ behaviour and an absence of any traffic management affected the amenity of the neighbourhood.

2. The Commission has determined that:
 - a. Disciplinary action should be taken against the licensee;
 - b. A ground for disciplinary action exists; and
 - c. The disciplinary action is appropriate in relation to the ground.
3. The Commission has determined to vary the licensee's licence by:
 - a. deleting Club Condition (a)(iv) of the Special Conditions of the licence;
 - b. imposing an additional Special Condition on Club Condition (a) in the following terms:

“(iv) A club fundraising or promotional event open to the general public, provided that there shall not have been more than five such events at the licensed premises within the six month period immediately preceding any such event or promotion, and provided that the Licensee shall have given written notice of the proposed function or event to the office of the Director of Liquor Licensing at least fourteen (14) clear days before the holding of the function or event, and no person on behalf of the Director of Liquor Licensing shall have notified the Licensee that the holding of the proposed function or event is not consented to by the Director of Liquor Licensing. Should the proposed function or event be likely to have 1,500 or more patrons in attendance the written notice provided by the Licensee shall include a Traffic Management Plan.”
 - c. deleting the words “and undue noise abatement” from Club Condition (b) of the Special Conditions of the licence; and
 - d. imposing an additional Special Condition on the licence in the following terms:

“Noise Management

For all events and functions held at the premises, the licensee must ensure:

- (a) that any sound checking required for the event or function does not exceed two (2) hours and may not commence before 10:00am.
- (b) appropriate noise mitigatory measures are put in place.
- (c) that the speakers used for the purposes of the event or function are turned off at 11:30pm.
- (d) that after 11:30pm during any hours of trade any sound that is played at the premises shall not be at a level that impedes normal conversation.

- (e) that appropriate signage is put in place reminding patrons when departing the premises to do so in an orderly and respectful manner so as to not disturb the peace and quiet of the residential neighbourhood.
- (f) that the Director on her or his own initiative may review noise issues pertaining to the licensed premises, and notwithstanding compliance by the licensee with the foregoing, the licensee shall implement such sound attenuation and noise mitigation measures as the Director of Liquor Licensing in her or his discretion may notify to the licensee in writing at any time as having become in the Director's view a reasonable requirement in the circumstances then prevailing."

REASONS

Background

- 4. The licensee is the holder of Liquor Licence 81401269, trading as Darwin Ski Club (the premises) situated at 20 Conacher Street, Fannie Bay. The nominee is Ms Anais Herve.
- 5. The premises are iconic. They were established in 1964 and has a history of being a family orientated venue. It is in a beautiful location along the shore of Fannie Bay providing one of the ideal locations in Darwin for experiencing Darwin's incredible sunsets. It is the home of the Northern Territory Water Ski Association (the Association) and a hub for water sports in the Darwin region with the Association providing water skiing and wake boarding opportunities to individuals and groups across all ages and skill levels.
- 6. The premises have been licensed since 1964. The current licence includes take away, club and late-night authorities. Such authorities recognise that the premises is not "just" for families. The premises have certainly expanded their clientele in recent years and the premises has become a venue well known for holding music events and other festivals providing for a much wider and larger audience.

The Referral

- 7. On 16 December 2021, a complaint was formally accepted by a delegate of the Director of Liquor Licensing, Mr Merg Mikaelian (the Delegate) pursuant to section 161(2)(a) of the Act in relation to the alleged breach of section 93 of the Act by the licensee.
- 8. The substance of the complaint was particularised as follows:
 - a. On 30 October 2021, the licensee contravened section 93 of the Act by allowing music played on the premises to cause undue and unreasonable noise whilst conducting an approved open day to host the "Electric Storm" event, namely that music from the event could be heard from within the residence of the complainants who reside in the vicinity

of the premises of Seale and Leichardt Street, Parap and East Point Road, Fannie Bay; and

- b. Further on that same date, the premises were used in such a way which adversely affected residents and disrupted the amenity of the neighbourhood, namely that patron's behaviour and an absence of any traffic management affected the amenity of the neighbourhood.
9. There was reference within the complaint to an allegation that the licensee had also breached section 293 of the Act however on the day of the hearing that allegation was withdrawn on behalf of the Director.
10. Having accepted the complaint, an investigation took place. On 15 March 2022, an extension of time was sought from the Commission to complete the investigation pursuant to section 318 of the Act. That extension of time was granted. It is not understood by the Commission why it took so long to complete the investigation in light of the full admissions made by the licensee only days after the event and again in January 2022, however no complaint was made on behalf of the licensee that they were in any way disadvantaged by such delay and the Commission therefore determines to say nothing further about the delay.
11. Upon completion of the investigation the Delegate was empowered under section 163(1) of the Act to take several actions, including referring the complaint to the Commission.
12. On 6 April 2022, the Delegate referred the complaint to the Commission for disciplinary action to be taken against the licensee. Pursuant to section 166(2) of the Act, upon receipt of such a referral, the Commission must conduct a hearing and pursuant to section 166(1) decide whether to take disciplinary action against the licensee.

Public Hearing

13. Following receipt of the referral the Commission listed the matter for a hearing. A number of requests were made by the licensee to move the hearing date and the matter was eventually listed for 17 June 2022. It proceeded on that date. The Director appeared via his Delegate, Mr Bernard Kulda. The licensee appeared via his solicitor, Mr Jarrod Ryan, together with the President, Mr Paul Winter (Mr Winter), and Treasurer of the licensee, Mr Paul Gurr (Mr Gurr).
14. A number of the residents who wrote letters of complaint to the Director about these events also attended the hearing. The Commission thanks these residents for their attendance. It is important that the public feel free to attend such hearings and to see the work undertaken by the Commission and to know the evidence being presented. The Commission thanks the residents for the courtesy and respect they showed also to the process.
15. In advance of the hearing and to the credit of the licensee, the breach of section 93 of the Act and the following facts were admitted:

That on 30 October 2021, the licensee contravened section 93 by allowing music played on the licensed premises to cause undue and

unreasonable noise, whilst conducting an event pursuant to regulation 42(1) of the *Liquor Regulations*, namely the Electric Storm.

That music from the event could be heard from within the residence of the complainants who reside within the vicinity of the premises.

That the licensed premises was used in such a way which adversely affected lawful residents and disrupted the amenity of the neighbourhood, namely that, patron's behaviour and an absence of any traffic management affected the amenity of the neighbourhood.

16. The Commission notes that this was in accordance with admissions made by Mr Gurr in response to the complaint on 18 January 2022. Further that this was a continuation of the approach taken by the licensee's President, Mr Winter, at a meeting held with compliance staff of Licensing NT on 10 November 2021. Again, this is to the full credit of the licensee.
17. As a result of these fulsome admissions there was no necessity for there to be any evidence heard by the Commission. A copy of the brief was tendered and became exhibit 1. It was accepted on behalf of the licensee that a ground for disciplinary action exists, and the only question was what disciplinary action should be taken under section 165(2) of the Act. Submissions were made on behalf of the Director and the licensee on this question.
18. In understanding these reasons, it is important that it be kept in mind that the complaint referral that the Commission is dealing with and is satisfied occurred relates to the event occurring on 30 October 2021 and no other previous events. Other occasions and other allegations were referred to, however the Director referred only those matters set out in paragraph above and Mr Kulda stated that he could not substantiate the other allegations made surrounding the event on 30 October 2021.
19. Within exhibit 1, the Commission received a copy of twelve (12) letters from residents living within approximately 1.5kms of the premises. Within a number of those letters there was reference to events alleged on other occasions. Some of these references were specific, others were general. Again, the Commission is not dealing with any other events and has not taken those allegations into account in determining this matter. The only relevance of any prior events is with respect to any previous disciplinary action taken against the licensee which the Commission will refer to later in these reasons.

Disciplinary Action to be taken

20. As noted earlier a meeting was held between the licensee and Licensing NT on 10 November 2021. This meeting occurred as a result of the licensee giving notice to the Director seeking to hold another event scheduled for 27 November 2021. The Director was at the time already in receipt of a number of letters from residents relating to the event on 30 October 2021 and therefore the Director requested a meeting with the licensee to discuss compliance issues.
21. Following that meeting, on 11 November 2021, Mr Winter wrote to Mr Kulda acknowledging "(u)ndue noise" on 30 October 2021 and that "traffic management

was poor”. Other matters are referred to in that response, but they do not form part of the complaint and have not therefore been taken into account by the Commission in relation to the disciplinary action to be taken.

22. Within that response Mr Winter relevantly stated that the licensee “unreservedly commits to the following:
 - Within 30 mins of the meeting held on 10 Nov at your office the Ski Club have cancelled hosting the Raindance event on 27.11.21. There will be no further major events at the Club for 2021.
 - Also confirmed with LACT that we would no longer be hosting anymore Electric Storm events (even though we have held this event for 9 years).
 - In addition, no further uncontrolled high volume electronic music events (AKA uncontrolled duff duff music) will be held at the Club unless the volume & bass level can be controlled and ceased at a reasonable time, as we have proven already this year can be achieved with the Beats by the Pool DJ music event held on 16.10.21 and previous to that the Summit electronic music event held on 28.08.21, with no complaints received from the residents with agreed music volume and events cease times.”
23. It is clear that the licensee immediately began action towards addressing the complaints and took the matter very seriously long before it became a “formal” complaint. That response has continued since the event.
24. With respect to this issue of action taken, the Commission also notes the following relevant matters:
 - a. In 2021, the licensee held a total of nine (9) large scale events at the premises involving a mix of music and performance genres. It was submitted on behalf of the licensee, and not disputed on behalf of the Director, that with the exception of this event, the licensee had received no other formal complaints from residents for any of the 2021 events.
 - b. This provides evidence to the Commission that the licensee can, and has, managed and controlled noise to a reasonable level for other events.
 - c. Despite having in place a system whereby staff employed by the licensee were located in residential streets located within close proximity of the premises to record noise/decibel readings to ensure they fell within NT EPA Guidelines; those staff members were not approached during the event by any of the neighbours. It is note that it was stated by the licensee that those readings did fall within such guidelines.
 - d. The licensee did have in place a traffic management plan, but the subcontractor retained for that purpose was unable to obtain sufficient staff due to COVID on that date and pulled out of the contract on the evening. The Commission notes that this occurred through no fault of the licensee and does not accept the submission made by Mr Kulda submitted that the licensee “was to blame”. The Commission considers

this was an extraordinary event and that had the licensee determined it had no alternative but to cancel the event given the failure of the subcontractor to fulfil its obligations, this would have likely led to far worse behaviour from patrons than has been admitted by the licensee.

- e. In addition to the admissions made to the Director and the cancellation of another large event, the licensee also issued a letter of apology on 7 January 2021 by way of a letter drop to local residents for the noise that had occurred.
 - f. Positive feedback was received to that letter of apology.
 - g. The licensee has also received feedback from other residents that strongly support the activities occurring at the premises and noting that they did not find the noise excessively loud or unreasonable. This provides support that there are others in the same location that do not have the same experience of the noise of these events.
 - h. An “Outdoor Entertainment Events Operating Principles” document had been established and reviewed in January 2021 that set out the manner in which any and all events where attendance was above 2,000 would be conducted. These principles include relevantly matters relating to noise levels, timing of those levels and cessation of events.
 - i. Since the events of 30 October 2021, the licensee conducted an event in May 2022 which included a music concert from 1800 hours to 2300 hours and was undertaken in accordance with the Outdoor Entertainment Events Operating Principles. The licensee provided material to the Commission that supported that this event was successful in terms of its management and noise and did not result in any complaints.
 - j. The premises recently won the Best Live Music Venue 2022 by Hospitality NT.
25. The Commission is very sympathetic to the frustration and upset of the neighbours who lodged their letters of complaint to the Director concerning the events on 30 October 2021. One of the wonderful aspects of living in Darwin is the outdoor living and being able to enjoy the outdoors year around. Having that interfered with by noise levels in particular can be extremely distressing and, for some, debilitating depending on how long that noise continues for. The Commission understands the residents’ concerns.

26. There is also evidence before the Commission that some neighbours in the same location do not experience the noise levels from these premises in the same manner in which other residents do. This is always a relevant matter for the Commission when determining complaints such as this one. As the Commission has noted in earlier decisions, whenever the Commission is determining a matter such as this, it gives careful consideration to the elements of nuisance and in particular takes into account the following factors¹:
- “The nature and extent of the harm or interference;
 - The social or public interest value in the licensee’s activity;
 - Any hypersensitivity of the user or of the use of the complainants’ land;
 - The nature of established uses in and character of the locality; and
 - Whether all reasonable precautions were taken to minimise any interference.”
27. The Commission notes that in this matter the licensee has admitted that the noise was undue and unreasonable. It has taken immediate and significant action to address that circumstance. The Commission also considers that all reasonable precautions were taken to minimise that interference but that there were circumstances beyond their control relating to traffic management that exacerbated the disturbance caused to the neighbourhood.
28. The Commission accepts that since that time the licensee has successfully been able to undertake another large event and that this supports a finding that it is able to undertake such events and use the premises in such a manner in a way that does not cause unreasonable and undue noise. It is also this circumstance that the Commission has determined it is not appropriate to impose a condition relating to installation of a noise limiting device at this time.
29. The Commission did give consideration to including a condition that required noise levels to be under a certain level however it does not consider that this is a reasonable response in this matter at this time. That does not mean that it may not become so in future if issues continue to arise. The Commission also notes that readings were being taken in accordance with the NT EPA Guidelines and that these complaints arose. Therefore it appears inclusion of such a condition at this time will add little to addressing the issues that have arisen in this matter.
30. Consideration was also given to imposing conditions relating to the genre of music at the premises. When determining the objectives of any disciplinary action to be taken, the Commission repeats what was stated in the 18 January 2021 PINT Club decision² that the most important objective of any disciplinary action should not be to punish the licensee but (to paraphrase the court in *Ammon v Colonial Leisure Group Pty Ltd*)³ to establish a **balance** between the

¹ Northern Territory Liquor Commission, *Pint Club Incorporated (Pint Club) Decision Notice Disciplinary action pursuant to the Liquor Act 2019*: (18 January 2021) at paragraph 69

² *Ibid*, at paragraph 80

³ [2019] WASCA 158

licensee's right to use its land freely, and the right of the complainants to enjoy their land without interference.

31. This balancing exercise is a difficult one indeed, but it recognises that both the licensee and the complainants have rights with respect to the use of their land. In these circumstances the Commission considers that the inclusion of those conditions relating to noise as set out at the commencement of this decision will recognise the seriousness of this breach, send a message of deterrence to both this licensee and to other licensees and also balance the interests of both the licensee and the relevant complainants to enjoy their land.
32. In relation to the traffic management issues, the Commission considers that taking into account the unusual circumstances that led to that breach which were not contributed to by the licensee and also balancing the need to ensure that relevant management is in place for future events, that the inclusion of those conditions relating to traffic management as set out at the commencement of this decision will address the nature of the breach and at the same time go some way to avoid such circumstances arising in the future.
33. For all these reasons the Commission has determined that it is appropriate to take disciplinary action by varying the conditions of the licence as set out at the commencement of this Decision notice. The Commission hopes that in doing so this will enable the licensee and residents alike to continue their efforts to living more in harmony with one another and continuing to enjoy all the benefits of their location.

Notice of Rights

34. Section 31 read with section 166(7) of the Act provides that the decision set out in this decision notice is reviewable by the Northern Territory Civil and Administrative Tribunal ("NTCAT"). Section 94(3) of the *NTCAT Act 2014* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.
35. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for review of this decision are the Director, the licensee and the persons who made the submission, complaint or objection.



JODI TRUMAN
PRESIDING MEMBER
DEPUTY CHAIRPERSON

On behalf of Commissioners Truman, Dwyer and Corcoran
21 June 2022