

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2020/056 and LC2021/002

LICENCE NUMBER: FLL1063

LICENSEE: Dom's Bar & Lounge Pty Ltd

PREMISES: Dom's Bar & Lounge
Shop 7 & Partial Arcade Area
60 Aralia Street
NIGHTCLIFF NT 0810

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

HEARD BEFORE: Mr Richard Coates (Chairperson)
Mr Bernard Dwyer (Health Member)
Ms Christine Hart (Community Member)

DATES OF HEARING: 11 & 12 February 2021

DATE OF DECISION: 2 March 2021

Decision

1. For the reasons set out below, the Commission heard and upheld a number of complaints against Dom's Bar & Lounge Pty Ltd ("the licensee") and is satisfied:
 - a. On Saturday 8 August 2020 from 20:00 to 01:00 hours (the following day), undue and unreasonable noise was emanating from the premise in the form of loud DJ music, the use of a PA system and a large number of patrons on the footpath that were yelling and shouting which adversely affected the amenity of the neighbourhood;
 - b. On Saturday 22 August 2020 from 20:00 to 01:30 hours (the following day) undue and unreasonable noise was emanating from the premises in the form of continuous thumping loud bass beat music and boisterous patrons on the footpath which adversely affected the amenity of the neighbourhood;
 - c. On Saturday 22 August 2020 from 20:00 to 01:00 hours (the following day) patrons were consuming liquor off the licensed premises, namely the footpath in contravention of the conditions of licence;
 - d. On 12 September 2020 between 20:30 and 23:30 hours undue and unreasonable noise was emanating from the premises which adversely affected the amenity of the neighbourhood;

- e. On Sunday 8 November 2020 between 18:00 and 21:35 hours, undue and unreasonable noise was emanating from the premises in the form of boisterous patrons on the footpath, the use of a PA system and loud drumming noise which adversely impacted on the amenity of the neighbourhood
2. The Commission is satisfied that disciplinary action should be taken against the licensee by varying the conditions of the licensee's licence. The licence will be varied by deleting the current Special Condition (a) and replacing it with
 - a) NOISE CONTROL
 - (i) There shall be no live music, DJ performance or any other entertainment in the arcade area. The only music that is permitted in the arcade shall be through the installed speakers and be in the nature of background music which is not so loud as to impede normal conversation or encourage patrons to dance. These speakers must be turned off no later than 22:00 hours.
 - (ii) Live entertainment, pre-recorded music and DJ performances are permitted within the internal bar area provided it is consistent with the concept of the premises as a small intimate bar and is not of such a volume to cause nuisance to nearby residents.
 - (iii) All live entertainment and DJ performances in the internal bar area must cease no later than 23:30. The only music that is permitted after that time is pre-recorded background music which is not so loud as to impede normal conversation or encourage persons to dance.
 - (iv) Noise levels emanating from any part of the premises (including but not limited to noise from entertainment) must be such as to not cause unreasonable disturbance to the businesses or ordinary comfort of the neighbouring premises and residences.
 - (v) The Director of Liquor Licensing ("the Director") on his or her 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 in his or her 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
 - (vi) The Licensee is required to have in place appropriate signage 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.

STATEMENT OF REASONS

Background

3. Dom's Bar & Lounge Pty Ltd is the Licensee for Liquor Licence FLL1063, trading as Dom's Bar & Lounge situated at shop 7 and Partial Arcade, 60 Aralia Street, Nightcliff, NT 0810. On 11 September 2019, the NT Liquor Commission (the Commission) granted the applicant an 'onlicence' liquor licence pursuant to the Liquor Act 1978. On

10 August 2020, the liquor licence was converted to a 'small bar/late night authority' pursuant to the Liquor Act 2019 (the Act). The Nominee is Mr Dominic Wundke.

4. A number of local residents were objectors to the grant of this licence and gave evidence at the Commission hearing on 21 August 2019 detailing their concerns that noise from this venue would adversely impact on their quiet enjoyment of their homes. They included Paul and Susan Walsh, Peter Van den Herik, John Bell, Kirrily Chambers who were complainants in these matters.
5. The initial application had included a proposed "smoking" area on the Cunjevoi Street footpath in front of Shop 7 with tables and chairs. That area was subsequently removed from the application which allayed to some extent the concerns of some of the objectors.
6. Another issue of significant concern to the objectors was the proposed use of part of the arcade of this old shopping complex to accommodate patrons and also provide live entertainment. There are banks of open louvres between the roof and walls of the arcade and only a grille gate at the Cunjevoi Street entrance which makes it difficult to contain sound within the arcade. That is why the Commission limited the hours of operation of the arcade until 22:00 on weeknights and 22:30 hours on weekends. A further condition was imposed that "live music in the arcade area must be of an acoustic nature with only the vocalist amplified and must cease by 22:00 hours".
7. On the evidence before the Commission there seems to be general consensus that this bar operated without any significant disturbance to neighbours from its opening in November 2019 until June 2020. The catalyst for the onset of disharmony between the licensee and the residents was a Decision by the Director (acting pursuant to a delegation from the Commission) to extend the hours of trade in the arcade to match the hours of the inside premises and to also extend the licensed footprint onto the footpath to comply with COVID distancing guidelines.
8. On 14 June Mr Paul Walsh sent an email to his local member, the Attorney General Natasha Fyles complaining of a noisy late night event that was held at these premises the previous night. As a result of that complaint Licensing Officers met with the licensee who admitted that he had hosted a large special event at the premises and a DJ was playing "house music" until 1:00am. He didn't believe he was in breach of this license condition because it was not a "live performance".
9. On 5 July 2020, Mr Walsh again complained to Licensing NT in relation to noisy events at the premises on 1 July and 4 July 2020 where patrons were engaged in rowdy behaviour on the footpath.
10. On 12 August, following further complaints by neighbouring residents of noise disturbances in respect of events held at the premises on 1 July, 4 July and 8 August the Director revoked the permission to use the footpath as part of licensed premises. The Darwin City Council had determined the day before not to allow the licensee to continue using the footpath area.
11. There were further complaints of excessive noise disturbance in respect of events held on 22 August and 12 September. On 17 September the Director revoked his approval for extended trading hours within the arcade area.

THE COMPLAINTS

12. On 4 September 2020, a complaint in respect to the 8 and 22 August 2020 was accepted by the Delegate of the Director and the Licensee was formally advised and given the opportunity to provide a response.

The particulars of the complaint are:

1. On Saturday, 8 August 2020 from 20:00 to 01:00 hours (the following day), undue and unreasonable noise was emanating from the premises in the form of loud DJ music, the use of a PA system and a large number of patrons crammed on the footpath (licensed) yelling and screaming before noisily leaving area about 01:00 hours.
 2. On Saturday, 22 August 2020 from 20:00 to 01:30 hours (the following day), undue and unreasonable noise was emanating from the premises in the form of continuous thumping loud bass beat music, boisterous patrons calling out to each other positioned on the footpath (unlicensed) which was further escalated at closing with the use of car horns. (01:40 hours).
 3. On Saturday, 22 August 2020 from 20:00 to 01:00 hours (the following day), patrons were consuming liquor off the licensed premises namely on the footpath (front of shop 7).
13. On 2 October 2020, Mr Andrew Giles of HWL Ebsworth Lawyers, submitted a response on behalf of the Licensee to the complaint dated 4 September 2020 and states:
 1. In respect to the alleged breach of section 93 of the Act, the Licensee does not dispute the fact there was noise emanating from the premises however, disputes the fact that the noise can be classified as undue and unreasonable such as to affect the amenity of the neighbourhood.

In support of Mr Giles statement that the noise cannot be classified as undue and unreasonable, he submits the complaints are not supported by any objective evidence and takes the form of subjective opinions (noise is too loud for their liking) whereby the Licensee takes a different view.
 2. In respect to the alleged breach of section 293 of the Act, the Licensee does not dispute that liquor was consumed off the licensed premises however, denies that this was the result of any intentional conduct of the Licensee.

Mr Giles states, this is supported by the Licensees reasonable efforts (signage, tables, inform and request patrons to return to licensed area) to attempt to prevent the removal of liquor from the licensed area whereby, patrons decided to ignore the initiatives put in place by the Licensee.
 14. Having reviewed all the evidence which included video and audio recordings, on 11 November 2020 the Director determined pursuant to section 163(1)(f) of the Act to refer the complaints to the Commission for disciplinary action.
 15. After another event at the premises on 8 November 2020 a further complaint was lodged and accepted by the Delegate of the Director on 23 November 2020. The particular of the complaints were;

1. On Sunday, 8 November 2020 between 18:00 to 21:30 hours, undue and unreasonable noise was emanating from the premises in the form of boisterous patrons (positioned on the unlicensed footpath), the use of a PA system and loud thumping drumming noise (between approx. 21:25 and 21:35 hours).
 2. On Sunday, 8 November 2020 at 17:02 hours, a patron was consuming liquor in the form of a can of beer (Goat Lager) off the licensed premises namely the footpath (front of shop 7).
 3. On 11 November 2020, the licensee posted an advertisement (via Facebook) promoting the possession and consumption of liquor off the licensed premises namely the footpath.
16. Mr Wundke submitted a response to the complaint. He said that on 8 November the premises hosted a “Dom’s 1st Birthday Party” and whilst some patrons were congregating on the footpath he disputed the assertion that there was excessive noise. He did not dispute that liquor was consumed off the premises however denied that this was the result of any intentional conduct on his part.
17. Having reviewed all the evidence in accordance with section 163(1)(f) the Director determined on 11 January 2021 to refer these further complaints to the Commission for disciplinary action.

THE HEARING

18. At the time of the referral of the first complaints (11 November 2020) the Commission was also advised that it was likely that a further complaint file would be referred and that the licensee had also lodged an application for a material alteration to extend the premises and vary the conditions of licence. Mr Wundke was informed that the Commission would be unlikely to deal with his application prior to hearing the complaints. Having had regard to the availability of an appropriate public hearing venue, the availability of the parties, complaint witnesses and the requirements of section (60) (in relation to the licensee’s application) the Commission determined to set down the complaint hearings for 11 February and the Application to follow on 12 February 2021.
19. At the hearing of the complaints Mr Bernard Kulda appeared on behalf of the Director and Mr Wundke appeared to represent the licensee. Prior to the hearing commencing the Commission indicated that where relevant it would receive the evidence given by those complaint witnesses who were also objectors as evidence in support of their objections in the licensee’s subsequent hearing on the application for a material alteration.
20. At the commencement of the hearing Mr Kulda announced that although the Director’s referral of 11 November 2020 only listed the 3 complaints (referred to in paragraph 12 of this Decision Notice) that the evidence will support a further complaint namely
- “That on 12 September 2020 between 20:30 and 23:30 hours undue and unreasonable noise was emanating from the premises and patrons were consuming liquor on the footpath, which was not part of licensed premises”.

21. That further complaint had already been foreshadowed in the material included in the brief so the Commission permitted it to be formally read to the licensee and included it within these proceedings.

THE EVIDENCE

22. Mr Jeffrey Paull a Senior Compliance Officer with Licensing NT had sworn a Statutory Declaration which was included in the Director's referral brief and also gave evidence. He had been dealing with the licensee as a result of noise complaints since 22 June 2020. On 22 August 2020 he and Compliance Officer Neall conducted a covert observation of the premises between 22:00 and 00:35 the following day. Mr Paull played video and audio recordings that were taken from the vicinity of the Walsh family residence. The video showed a significant number of patrons congregating on the footpath and the noise from people talking, shouting and laughing was significant. Loud music was emanating from the premises and this appeared to increase in intensity after midnight.
23. Mr Paull testified that from his own observations he was of the opinion that the noise emanating from the premises was clearly able to be heard at the Walsh residence and was unreasonable.
24. Mr Paull also obtained security footage from the licensee's CCTV system in respect of the night of 22 August 2020. An examination of that footage revealed that a male patron was drinking beer on the unlicensed footpath for 17 minutes before being directed back into the premises by staff, a female was drinking spirits on the unlicensed footpath for 14 minutes before returning of her own accord to the premises and a female patron was consuming champagne on the unlicensed footpath for 6 minutes before being challenged by a staff member.
25. Mr Paul Walsh gave evidence and tendered a number of photographs, videos and audio recordings of his observations of the licensed premises between 8 August 2020 and 8 November 2020. Mr Walsh and his wife Susan had lodged formal complaints with Licensing NT of noise disturbance from these premises in respect of 8 and 22 August 2020 and 8 November 2020. He said that his residence at 35 Cunjevoi Crescent Nightcliff was, by direct line of sight, 37 metres away from Dom's Bar. Prior to the extension of trading hours in the arcade and onto the footpath, subsequent to The Director's "COVID emergency Approval" on 27 May 2020, there had been little in the way of noise disturbance emanating from the premises. However since June the licensee had begun holding "noisy club type events" with amplified music playing in the arcade which were causing significant disturbance to him and other residents. The Commission viewed the video recordings and listened to the audio recordings in respect of events which had occurred at the premises on 8 and 22 August and 8 November 2020. Despite the limitations inherent in the use of recording devices by non-professionals to capture sound levels, having regard to the numbers of people on the footpath and the noise emanating from them as well as the music sounds from within the premises, the Commission finds that these recordings provided a reasonably accurate record of the noise disturbance experienced by the Walsh family on each of those occasions.
26. Mr Wundke cross examined Mr Walsh over the fact that he had not called the police in respect of any of his noise complaints, but tellingly in our view, having just heard the video recordings, he did not suggest that the noise levels experienced by the Walsh's were acceptable. He did however get a limited concession from Walsh that here had

been some improvement in recent time. Mr Walsh also explained that the reason he did not complain to Police was that this type of issue would not be regarded as a priority for them and he knew that he would be better served directing his complaint to Licensing NT.

27. Peter Van den Herik gave evidence about the events of 22 and 23 August. He and his wife live at 14 Cunjevoi Crescent which is approximately 200 metres from the venue. He complained of hearing loud electrified bass beat music emanating from the arcade until 1:00am on 23 August which was followed by boisterous patrons leaving the premises and sounding car horns. He had been an objector in relation to the original licence application. In his view the way the bar was operating on this night was not in accordance with what had been approved by the Liquor Commission. When questioned by Mr Wundke about improvements with the level of disturbance in recent months, Mr Van den Herik said that Dom had lost his trust and he was not convinced he would do the right thing in the future.
28. John Bell was also a complainant in relation to 22 August. He is the non-resident owner of the licensed restaurant and units at 58 Aralia Street Nightcliff. He had visited his properties on this evening and said he was “quite discouraged to hear (such) a level of noise so late into evening”. He had received complaints from his tenants about the noise, some of whom had commenced wearing noise cancelling headphones to reduce the impact of noise disturbance within their units. He attended inside his enclosed restaurant and could hear thumping bass music coming through the wall.
29. Kirrily Chambers lives at 18 Pandanus Street Nightcliff. She had lodged a complaint with Licensing NT over noise that was generated from the licensed premises on Saturday 12 September 2020. She said that the noise of patrons talking, shouting and laughing together with the underlying bass beat of music prevented her from sleeping. She had also been disturbed by other events including undue noise on 22 August and had tried to get the EPA to intervene and record sound levels which they refused to do because of demarcation issues with Licensing. In cross examination, Ms Chambers fairly conceded that apart from a noisy event on March 21 that the premises had little impact on her enjoyment of her residence until the original limited hours of operation for the arcade were extended.
30. Mr Wundke gave evidence before the Commission and also tendered two video clips (exhibit 6). He said that the noise emanating from the arcade area was not in breach of his licence condition because there was no restriction on the use of a DJ and the drumming on 8 November was not amplified. He pointed out signs on A4 sheets that warned patrons not to take alcohol onto the footpath and also asked them to be quiet when departing the premises. He conceded that the Walsh family would be impacted by noise from patrons on the footpath because their residence is in direct sight of it. He accepts that the footpath is a problem for noise and that is why he is no longer pursuing an application to include it within the licenced footprint. He said that the term “undue and unreasonable noise” involved a subjective assessment of what is excessive. He said that he accepted some events had worked and others had not. He was committed to improving his relationship with his neighbours. He believes he will have a sustainable business model if he is able to extend his premises to shop 6. There will be sufficient customers attending the bar for a pre-dinner or post dinner cocktail to make the enterprise profitable and he would be prepared to limit all live entertainment to the internal bar area. He said that he now realises that he does not need to host large “party events” to make money.

31. In relation to the complaints of breaching the licence conditions through patrons consuming liquor on the footpath he was adamant that this was something which neither he nor his staff encouraged. Prior to 12 August smokers were entitled to drink on the footpath in the smoking area, after that time the footpath was used generally by smokers and chairs and tables were still provided, but liquor was not permitted. On some occasions a staff member was posted at the entrance of the arcade to prevent patrons taking drinks off the premises.
32. In relation to the Complaint that the licensee had posted on advertisement on Facebook promoting the consumption of liquor off the premises at the event held on 8 November 2020, Mr Wundke said that this event was the celebration of his Bar's 1st birthday. He was busy watching the smoking ceremony and was not aware nor did he concede that patrons were consuming liquor in his presence on the footpath. When he posted the photograph of the event he certainly had no intention of promoting the idea that patrons were permitted to consume liquor in an unlicensed area.

CONSIDERATION OF THE ISSUES

33. With regard to the noise complaints, the applicable law was considered in the recent PINTS Club case¹. The Commission respectfully agrees with and adopts the following passages from that decision as an appropriate statement of the law that should be applied to our consideration of these complaints.

"It may be observed that on its face the Act appears to impose two differing standards of conduct on licensees regarding the emission of noise. Section 93 fixes a standard of "undue and unreasonable noise" that "affects the amenity of the neighbourhood", whereas section 160(1)(m)(iii) fixes a standard of causing "annoyance or disturbance" to certain persons "in the vicinity of the premises". The Commission considers that the legislature did not intend to require licensees to conform to two substantially different standards in relation to a single type of conduct. Rather, the Commission considers that the terms of sections 93 and 160(1)(m)(ii) refer, in essence, to a single standard. In the view of the Commission, although these two provisions use different language, in relation to noise levels they have the same meaning²."

"The Commission accepts the submission made by the Director that the relevant standard is derived from the common law tort of nuisance. The Commission was not referred to and has not identified any decisions of the superior courts of the Northern Territory concerning the tort of nuisance caused by noise. However, the Court of Appeal of Western Australia recently considered the elements of nuisance in dealing with a noise complaint by a resident of an apartment building adjacent to licensed premises in a suburb of Perth. The Commission considers that the following authoritative statements of the court in that case provide useful guidance to the Commission in determining noise complaints under the Act:³⁴"

"To constitute a nuisance, the interference with the plaintiff's use or enjoyment

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

² Commission's 2021 decision of PINT Club, [21].

³ *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [119] to [121] (citations omitted).

⁴ Commission's 2021 decision of PINT Club, [22].

must be both substantial and unreasonable...

“The test of unreasonableness is objective. The reasonableness enquiry involves a balancing exercise between the defendant's right to use his or her land freely, and the right of the plaintiff to enjoy his or her land without interference. The reasonableness requirement thus reflects the need for give and take between neighbours living within a community...”

“Among the factors relevant to whether interference is unreasonable are the nature and extent of the harm or interference, the social or public interest value in the defendant's activity, any hypersensitivity of the user or of the use of the plaintiff's land, the nature of established uses in and character of the locality, whether all reasonable precautions were taken to minimise any interference, and the type of damage suffered...”

“The complainant has the burden of proving that the allegations it makes in support of a complaint are true, on the balance of probabilities. As stated at paragraph 92 of the Commission’s 2020 decision, “the Commission considers that it should apply the ‘Briginshaw test’...the Commission must be satisfied that the allegation is made out to the reasonable satisfaction of the Commission. ‘In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences’.⁵⁶”

34. While it is understandable, that in an attempt to keep the hospitality industry afloat during the COVID Pandemic, Government made sweeping changes to licence conditions, it is unfortunate that the “one size fits all” approach has had such adverse consequences for the residents of this community and ultimately this licensee. The conditions that the Commission had originally imposed on this licence were clearly aimed at achieving a balance between the right of the licensee to operate an intimate cocktail bar in a small business precinct, which was located in the midst of a long established residential community and the rights of residents to preserve the amenity of their neighbourhood.
35. On a number of occasions during the hearing the Commission asked Mr Wundke why he had not considered rejecting the offer of late night trading in the arcade and footpath. No doubt with the benefit of hindsight he now realises that such a decision would have been in his long term best interests. The Commission does have some sympathy for the licensee. This is Mr Wundke’s first business which would have been at real risk of failing less than 6 months after its inception with the advent of the COVID lockdown. In his desperation to save the business he has used these emergency licence conditions to operate a business model that was never envisaged by the Commission and in doing so has diminished his standing, amongst his neighbours.
36. Turning to the first complaint of noise disturbance on Saturday night 8 August and the Sunday morning, the Commission finds on the evidence that the use of a PA and DJ music in the arcade together with the large number of patrons gathered on the footpath behaving in a boisterous manner, caused undue and unreasonable noise disturbance to nearby residents including the Walsh family. Although the Walsh’s were the only

⁵ *Briginshaw v Briginshaw* (1930) 60 CLR 336 per Dixon J.

⁶ Commission’s 2021 decision of PINT Club, [23].

residents to complain, the Commission is satisfied from the video footage that others would have been significantly impacted by the disturbance.

37. The Commission is satisfied that disciplinary action is appropriate in relation to this complaint, and that the disciplinary action it has determined to take is appropriate.
38. In relation to the complaint of noise disturbance on the night of Saturday 22 August and Sunday morning, the Commission finds that the use of DJ music in the arcade for a “dance party” held at the premises together with the congregation of a large number of patrons on the footpath created undue and unreasonable noise disturbance to a number of residents within the vicinity of the premises, including the Walsh family, Ms Chambers, the Van den Herik family and the tenants of the units at 58 Aralia Street. The Commission has relied on the evidence of the video recordings admitted into evidence the testimony of Senior Compliance Officer Paull and the evidence of Paul Walsh, John Bell, Peter Van den Herik and Kirrily Chambers together with the other statements included within the Director’s referral brief, to be reasonably satisfied that the interference with those persons’ use and enjoyment was substantial and unreasonable.
39. The Commission is satisfied that disciplinary action is appropriate in relation to this complaint and that the disciplinary action it has determined to take is appropriate in the circumstances.
40. The Commission further finds the complaint that was formally laid at the hearing, in relation to an event promoted as “Spanish Fiesta and after Dance Party” held on the premises on Saturday 12 September and Sunday morning is made out. The Commission relies on the evidence of Paul Walsh, compliance officer Neall and Kirrily Chambers to find that the noise emanating from the premises which included amplified dance music and rowdy patrons was unreasonable and unduly interfered with the complainants use and enjoyment of their property.
41. The Commission is satisfied that disciplinary action is appropriate in relation to this complaint and that the disciplinary action it has determined to take is appropriate in the circumstances.
42. On Sunday 8 November 2020 the licensee held an event to celebrate the 1st birthday of the bar which was held between 3:00pm and 10:30pm. Mr Paul Walsh complained that the noise from the many patrons gathered on the foot path, together with the use of a PA system in the arcade and a continuing loud drumming performance caused undue and unreasonable noise which adversely impacted on his enjoyment of his residence. Although this was not a late night disturbance, the Commission is satisfied, that in a situation where the vulnerability of the Walsh residence to noise disturbance had been raised on numerous occasions by Walsh as well as Licensing Officers, it was unreasonable in all the circumstances for the licensee to allow that level of noise disturbance to emanate from its premises. If this had been a one off “special occasion” then the Walsh family may have been prepared to “grin and bear it”, the Commission may also have been prepared to afford the licensee some leniency. However in the situation that existed, where complaint proceedings had already commenced, holding the event in this manner was provocative and a serious lapse of judgement on the part of the licensee.

43. The Commission is satisfied that disciplinary action is appropriate in relation to this complaint and that the disciplinary action it has determined to take is appropriate in the circumstances.

PATRONS CONSUMING LIQUOR OFF THE PREMISES

44. Paul Walsh has alleged that patrons of these premises were consuming liquor on the footpath on 22 August 2020, 12 September 2020 and 8 November 2020 subsequent to that area being removed from the licensed footprint. That allegation is corroborated by Compliance Officer Paull's examination of the licensee's CCTV footage for 22 and 23 August which clearly show that 3 people purchased liquor from the bar and were illegally consuming it on the foot path for periods ranging from 6 minutes to 17 minutes before there was intervention, if any, by bar staff. The licensee had been put on notice by Licensing Officers at a meeting on 14 August that he would have to take particular care to ensure that there was no drinking on the footpath because permission to use that area had been revoked by the Darwin Council and by the Director.
45. Section 293(1) of the Act provides:

293. Contravening licence conditions

- (1) A licensee commits an offence if:
- (a) the licensee intentionally engages in conduct; and
 - (b) the conduct results in a contravention of a condition of the licensee's licence or authority and the licensee is reckless in relation to that result; and
 - (c) the contravention does not constitute another offence against this Act.

Maximum penalty: 200 penalty units.

- (2) Strict liability applies to subsection (1)(c).
- (3) To avoid doubt, references in subsection (1)(b) to licence and conduct include an interstate retailer's licence and conduct outside the Territory.

46. The licensee does not dispute that the patrons identified on the CCTV footage were consuming liquor off the premises in contravention of a condition of the licence but said that he was not aware this was occurring and did not intend it to occur. However a person is reckless in relation to a result if:
- a) the person is aware of a substantial risk that the result will happen, and
 - b) having regard to the circumstances known to the person, it is unjustifiable to take the risk

47. In the circumstances that were occurring on 22 August, the Commission finds that having been warned by Licensing Officers and from his own past experience Mr Wundke was aware that there was a substantial risk that patrons would continue to drink on the footpath as they had been permitted to do previously. He should have been more diligent in his efforts to avoid this occurring even if this required posting a

security guard at the arcade entrance. Intermittent checks by roving bar staff was not a sufficient precaution in the circumstances that existed. The Commission finds to a reasonable degree of satisfaction that this complaint is made out.

48. The Commission is satisfied that disciplinary action is appropriate in relation to this complaint and that the disciplinary action it has determined to take is appropriate in the circumstances.
49. In relation to the allegation that liquor was being consumed off the premises on 12 September we note that is not supported by the observations of the licensing officers who attended the vicinity of the premises on that night nor is it supported by video evidence from Mr Walsh or the in house CCTV. The Commission is not satisfied to the extent required that this complaint is made out.
50. Mr Walsh has produced photographic evidence of a female person drinking what appears to be a can of Goat Beer on the footpath at 17:02 hours on 8 November 2020. While the Commission is prepared to infer that the Goat Beer would have been supplied by this licensee, as the evidence only comprises a still photograph there is no certainty as to how long she may have been consuming the liquor contrary to the conditions of licence. It is also relevant in our view that there were not a large number of people outside at the time so we are not satisfied that the Licensee has failed to take reasonable precautions to prevent the conduct. Accordingly we do not find that complaint is substantiated.
51. The further complaint relating to 8 November alleges that the licensee was promoting the consumption of liquor off the premises through a Facebook post-dated 11 November 2020. The Commission is not satisfied to the extent required that the persons alleged to be consuming liquor on the footpath were consuming liquor nor that the licensee was aware of any risk that by posting this photograph he would be promoting the consumption of liquor off licensed premises. Accordingly that complaint is also dismissed.

DISCIPLINARY ACTION


52. The Commission accepts the Director's submission that the most important objective of any disciplinary action in this matter should be aimed at ensuring that the disharmony that has been occasioned by the licensee's recent use of its premises cease through the variation of licence conditions aimed at achieving a balance between the licensee's right to use the premises as was intended by the grant of the licence and the right of the residents to enjoy their suburban homes without unreasonable disturbance.
53. The Commission has determined that it is appropriate to take disciplinary action by varying the conditions of licence as set out at the commencement of this Decision Notice. The Commission has also had regard to the evidence in support of these complaint proceedings in determining not to approve the licensee's application to extend the hours and scope of operation of the arcade area. Details of the circumstances surrounding that application are dealt with in the Commission's Decision Notice concerning Application reference LC2021/005.

Notice of Rights:

- 54. Section 31(1) read with section 166(7) of the Act provide 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* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

- 55. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are; the Director, the Licensee and the persons who made the submission, complaint or objection.

Richard Coates



CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
2 March 2021

On behalf of Commissioners Coates, Dwyer and Hart