

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO *LIQUOR ACT 2019*

REFERENCE: LC2020/042

LICENCE NUMBER: 81401481

LICENSEE: PINT Club Incorporated

PREMISES: PINT Club
Abala Road
MARRARA NT 0812

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

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Ms Elizabeth Stephenson (Health Member)
Ms Sandra Cannon (Community Member)

DATES OF HEARING: 27 October 2020, 1 December 2020, 8 January 2021

DATE OF DECISION: 18 January 2021

DECISION

1. On 27 October 2020, 1 December 2020 and 8 January 2021, the Northern Territory Liquor Commission ("the Commission") heard a complaint against the PINT Club Incorporated ("the licensee"). The Commission has decided to take disciplinary action against the licensee by varying the conditions of the licensee's licence.
2. The Commission has determined to vary the licensee's licence by omitting the Special Condition headed "Noise Management" and substituting the following Special Condition.

1 Introduction and Interpretation

- 1.1 The object of this special condition is to ensure that the licensee does not cause or permit its employees or patrons to cause undue or unreasonable noise on or in the licensed premises that affects the amenity of the neighbourhood.
- 1.2 This condition is to be read consistently with and subject to the Club Condition.

- 1.3 As at the date of commencement, the licensee intends to construct a new west-facing live performance stage (“the sound shell”) in the rear yard area of the licensed premises in order to replace the existing east-facing open stage. Construction is intended to be in accordance with the BESTEC report dated 3 October 2019.
- 1.4 The technical acoustic terms referred to in this Special Condition (including dB(A) and L_{Aeq}) have the meanings ascribed by “Guidance Document Number Two” in the Northern Territory Noise Management Framework Guideline (Northern Territory Environment Protection Authority, September 2018).
- 1.5 For the purpose of this Condition, “event or function” means an occasion when acoustic entertainment is presented using amplified sound emitted by a loudspeaker located in the outdoor area of the premises, other than background accompaniment to other activities on the premises whether by live music played by no more than two performers, or similar background recorded music, and irrespective of whether attendance at the premises is limited to club members and their guests, is by personal invitation or purchased ticket, or is open to the general public.

2 Arrangements for noise management

- 2.1 The licensee must install a noise limiting device to prevent noise being emitted in excess of 85 dB(A) L_{Aeq} measured at front of house (4 metres from the stage), even if the volume is turned up by the sound system operator.
- 2.2 The licensee shall only cause or permit music to be played at events or functions with the noise limiting device engaged.
- 2.3 The licensee must not cause or permit any events or functions to take place at the licensed premises unless and until the Commission or its delegate has provided the licensee with written confirmation that it is satisfied that the noise limiting device has been properly installed, engaged and locked.
- 2.4 Following receipt of this confirmation, and subject to the Club condition, the licensee will be permitted to conduct a maximum of eighteen events or functions each calendar year, with each event or function being no more than five (5) hours duration, and ceasing no later than 23:00 hours on Fridays and Saturdays, and otherwise no later than 22:00 hours.
- 2.5 If the Commission or its delegate has provided the licensee with written confirmation that it is satisfied that the sound-shell has been constructed in accordance with the BESTEC Report, sound levels at events or functions conducted using the sound-shell shall be permitted to exceed 85 dB(A) L_{Aeq} but not to exceed 95 dB(A) L_{Aeq} measured at front of house (4 metres from the stage).
- 2.6 Sound checking for events or functions must not exceed 1 hour and may not commence until midday.

- 2.7 The licensee must arrange for the professional measurement of sound levels and the operation of the noise limiting device at least quarterly to ensure compliance with the above conditions.
- 2.8 All measurement must be carried out using an integrating sound level meter and shall be of at least 15 cumulative minutes of music audible at the measurement point, excluding any periods when music is not being played.
- 2.9 Records of measurement of sound levels must be kept by the licensee and produced to a Licensing Inspector upon request.

3 Patron numbers

- 3.1 Within one month of completion of the sound-shell, the licensee must arrange for an inspection by NTFRS of the premises and provide to the Director a report by NTFRS regarding compliance with fire safety requirements, including the maximum number of patrons permitted in both the interior and exterior areas of the premises. Total number of patrons on site is not to exceed such number as is approved by NTFRS at any one time.

4 Advertising and notice of events

- 4.1 Notification of all events and functions (other than functions or events described in Club condition (a)(i) and (a)(iii)) including the time of the event and sound checks must be given at least five days in advance on the licensee's website or Facebook page.

5 Noise Complaint management

- 5.1 The licensee shall publish on its website or Facebook page an email address to which noise complaints can be addressed, and which will be monitored daily by the licensee.
- 5.2 All noise complaints received by the licensee must be printed out and kept in a register and produced to a Licensing Inspector upon request.
- 5.3 In addition, any noise complaints directed to the licensee received by telephone or in person must be documented at the time of receipt and placed in the said register.
- 5.4 The nominee must table new complaints at each meeting of the management committee of the Licensee and meeting minutes must be produced to a Licensing Inspector upon request.

6 Delegation

For the purpose of the Special Condition, the Commission delegates to any Member of the Commission Panel that fixed this Condition the authority to provide written confirmation to the licensee that sections 2.3 and 2.5 of this condition have been satisfied.

STATEMENT OF REASONS

BACKGROUND

3. The background to this complaint is set out at paragraphs 7 to 28 of the decision notice delivered by the Commission on 17 March 2020 (“the Commission’s 2020 decision”) in relation to similar complaints against the same licensee originating from a similar group of local residents of Sunningdale Court and nearby streets (“the complainants”).
4. Throughout the period the subject of the complaints to be determined in the instant proceedings, the licence included a Special Condition (“the old noise management condition”) that relevantly required the licensee to:
 - Not to play live music at the premises that emit noise in excess of a maximum level of 65 dB at Sunningdale Court;
 - Maintain a noise complaints register;
 - Train staff in relation to the use of the register and the contemporaneous recording of noise complaints; and
 - Record sound levels at two hourly intervals, both at the Club and Sunningdale Court, during the times that bands are playing.
5. On 19 November 2019 the Commission completed the hearing of evidence in relation to the complaints the subject of the Commission’s 2020 decision.
6. On 26 November 2019, in anticipation of the Commission’s then pending decision, the licensee gave a written undertaking to the Commission stating in part:

That the sound level from music events under the First Sunday Blues program will not exceed 80 L_{Aeq} (15 minutes) measured at 4m in front of the edge of the Club’s stage.
7. After the complaints the subject of the Commission’s 2020 decision had been referred to the Commission, but before the Commission’s 2020 decision had been issued, the licensee presented several further events between 25 August 2019 and 2 February 2020 that attracted further noise and associated complaints from the complainants. Those complaints were accepted by the Director and referred to the Commission on 25 August 2020.
8. In the Commission’s 2020 decision, it upheld several noise and other complaints against the licensee and imposed disciplinary action. Of particular relevance to the complaints the subject of these proceedings, the Commission varied the conditions of the licensee’s licence by imposing, among other conditions, a Special Condition headed “Noise Management” (“the new noise management condition”), which replaced the old noise management condition.
9. In brief, the new noise management condition required the licensee to install a noise limiting device to restrict sound levels to 85 dB (A) L_{Aeq} measured four metres from the licensee’s stage. Until the noise limiting device was installed, the licensee was required to limit noise emissions to 80 dB (A) L_{Aeq} measured four metres from the licensee’s

stage. The licensee had informed the Commission that it planned to erect a soundshell at the premises. The Commission fixed a limit of 95 dB (A) L_{Aeq} measured four metres from the licensee's stage once the soundshell was in operation. Notably, the stage currently used by the licensee faces towards the residential area where the complainants live. If and when constructed, the soundshell will face in the opposite direction.

THE COMPLAINTS

10. On 5 February 2020, two of the complainants, Mr Lawson and Ms Oblonk, wrote to the Director complaining about noise from the premises on 6 October 2019 (First Sunday Blues), 19 October 2019 (Darwin Blues Rock Festival), 3 November 2019 (First Sunday Blues), 1 December 2019 (First Sunday Blues), 26 January 2020 (Australia Day Special Event) and 2 February 2020 (First Sunday Blues). In his letter, Mr Lawson also complained about offensive language emanating from the premises on 26 January 2020, and the failure of the licensee to measure sound levels at Sunningdale Court on various occasions.¹
11. On 7 February 2020 Senior Compliance Officer Franchi submitted a complaint to the Director on two grounds pursuant to section 160(1) of the *Liquor Act 2019* ("the Act"): (a) "the licensee contravened a condition of the licence or authority"; and (m)(ii) "the licensed premises were used in a way that caused annoyance or disturbance to persons residing, working or conducting a business in the vicinity of the premises". On 17 February 2020 the Director, having considered the complaint, accepted it.²
12. The following day, 18 February 2020, Officer Franchi notified the licensee of the complaint and invited a response within 14 days. On 27 February 2020 the licensee provided a written response. A lengthy correspondence then ensued between Officer Franchi and the licensee, the focus of which was to establish whether the licensee had complied with the condition requiring it to take noise readings in Sunningdale Court, and if not, why. This process continued until 22 June 2020, when the licensee provided responses to a series of twelve questions that had been put to it by Officer Franchi.³
13. On 25 August 2020 the Director referred the complaints to the Commission. The Director did not allege in his referral that the licensee had caused annoyance or disturbance, or that the licensee had breached section 93 of the Act by causing undue or unreasonable noise. In his referral the Director alleged only that the licensee had breached its licence conditions, firstly, by failing to record sound levels at Sunningdale Court on 17 occasions, and secondly, by failing to record complaints received by telephone in the Noise Complaints Register on two occasions.
14. The Commission determined to convene a panel comprising Members Goldflam, Stephenson and Cannon, who had made the Commission's 2020 decision and were familiar with the background to the complaint. The first available hearing date convenient to the panel and the parties was 27 October 2020.

¹ Exhibit Two (Hearing brief), 32 to 35.

² Exhibit Two (Hearing brief), 46 to 49.

³ Exhibit Two (Hearing brief), 76 to 170.

15. At the hearing, the Director elected not to proceed with the complaints relating to failing to record sound levels at Sunningdale Court on five occasions, arising from the events on 26 January 2020 and 2 February 2020.

THE HEARING

16. The hearing of the instant complaints commenced as a public hearing on 27 October 2020 and continued on 1 December 2020 and 8 January 2021. Mr Kulda appeared on behalf of the Director on 27 October 2020. Mr Wood appeared on behalf of the Director thereafter. Mr Murphy appeared on behalf of the licensee. Mr Lawson, one of the complainant residents, appeared on behalf of the complainants. Three other members of the complainant group (Ms Lawson, Ms Oblonk and Mr Berry) also attended the hearing. (A fifth neighbouring resident, Mr Campbell, witnessed a statutory declaration by Ms Oblonk that was tendered in the hearing.⁴ The Commission infers that members of at least three and probably at least four households in the neighbourhood can be counted as supporters of the complaint.) The Commission thanks the parties and witnesses for their attendance and assistance.

THE LAW

17. Section 160(1) of the Act is an exhaustive list of the grounds on which a complaint to the Commission may be made. In this matter, the Commission considers that three of those grounds provide a potential pathway to upholding one or more of the complaints.
18. Firstly, there is the ground set out at section 160(1)(a), that “the licensee contravened a condition of the licence”.
19. Secondly, there is the ground set out at section 160(1)(b), that “the licensee or the licensee’s employee contravened another provision of this Act or the regulations”. The first provision of the Act that may have been breached is section 293, which provides that it is an offence for a licensee to intentionally engage in conduct that results in a contravention of a condition of the licence and the licensee is reckless in relation to that result. The second provision of the Act that may have been breached is section 93, which provides that “a licensee must not cause or permit its employees or patrons to cause undue and unreasonable noise on or in the licensed premises that affects the amenity of the neighbourhood.”
20. Thirdly, there is the ground set out at 160(1)(m)(ii), that “the licensed premises were used in a way that caused... annoyance or disturbance to persons residing, working or conducting a business in the vicinity of the premises”.
21. 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 meaning.

⁴ Exhibit Two (Referral Brief), 111 to 112.

22. 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:⁵

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

23. 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'.⁶"

THE ADMITTED BREACHES

24. The licensee indicated that it did not intend to contest the grounds of complaint maintained by the Director at the hearing. Accordingly, at the hearing the facts relied on by the Director in support of the complaint were recited. They identified 14 breaches of section 293 of the Act. Those facts can be summarised as follows:

Between Sunday 25 August 2019 and Sunday 3 November 2019, on 12 occasions, the licensee failed to record sound levels at two hourly intervals at Sunningdale Court Marrara during the times that live bands were playing, as required by the Special Condition in the PINT Club's liquor licence.

⁵ *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [119] to [121] (citations omitted).

⁶ *Briginshaw v Briginshaw* (1930) 60 CLR 336 per Dixon J.

On Sunday 26 January 2020 at 15:10 hours and 17:00 hours, on two occasions, the failed to record complaints received via telephone in the PINT Club's Noise Complaints Register, as required by the Special Condition in the PINT Club's liquor licence.

25. The licensee admitted the truth and accuracy of these recited facts, and the Commission finds them to be proved.

THE SCOPE OF THE HEARING

26. Section 166(4) of the Act provides that "the Commission may hear a matter not referred to it but which arises from a matter that was referred to it."
27. In the course of the hearing, the Commission considered whether to hear a matter not referred to it in relation to three issues.
28. Firstly, the complainants contended that some further complaints they had made to the Director should also be considered ("the further complaints"). As explained below, the Commission refused to accept those complaints, and the Commission declined to consider these matters.
29. Secondly, the complainants contended that the Commission should consider whether the complaints that had been referred to the Commission were made out on the ground that the licensee had contravened section 93 of the Act and/or the "annoyance and disturbance" ground in section 160(1)(m)(ii) ("the noise ground"). Although the Director did not accept that this ground was made out by the complaints, the Commission determined to hear and consider the noise ground. Having done so, for reasons set out below, the Commission is satisfied that this ground is made out, and that it is appropriate to take disciplinary action.
30. Thirdly, during the hearing Mr Wood submitted on behalf of the Director that a further ground of complaint was made out, namely that on 26 January 2020 the licensee permitted strong language to be broadcast from the premises in a way that caused annoyance or disturbance to persons residing in the vicinity of the premises ("the strong language ground"). The Commission determined to hear the strong language ground, and finds that the alleged strong language was broadcast, but is not satisfied that it is appropriate to take disciplinary action in relation to this ground.

CONSIDERATION

The further complaints

31. When the hearing commenced the Commission was informed that since the Commission's first decision of 17 March 2020, the complainants had made further complaints to the Director against the licensee arising from six events conducted by the licensee in August and September 2020. The Commission indicated that it preferred to hear and determine any and all outstanding complaints in a single hearing, rather than in a piecemeal fashion. The hearing was accordingly adjourned, and the Commission requested the Director to urgently progress the complaints, and, if they were to be referred to the Commission, that any such referral be made before 1 December 2020, the date to which the Commission adjourned the hearing.

32. When the hearing resumed on 1 December 2020, Mr Wood informed the Commission that the Director had decided to refuse to accept all of the further complaints, although he had not yet delivered decision notices explaining his reasons. By operation of section 161(4) of the Act, those decisions by the Director are not reviewable.
33. The licensee submitted that the further complaints did not and could not arise out of the complaints that had been referred to the Commission, because they all arose from events that took place several months after the incidents the subject of the referred complaints. Whether or not that submission is well founded, the Commission considers that it would be inappropriate to exercise its discretion to enlarge the scope of the hearing to include the further complaints, because to do so would be to frustrate the clear statutory purpose of section 161(4) of the Act, which expressly provides that a decision by the Director to refuse to accept a complaint is not reviewable by the Commission.

The noise ground

34. In the matters referred to the Commission, the complainants alleged as their principal ground of complaint that the noise emitted by the licensee was excessive.
35. As mentioned above, the Director decided not to refer these complaints to it on the noise ground, and not to proceed with the referral he had made to the Commission of the part of the complaint arising from the licensee's conduct on 2 February 2020. Nevertheless, the Commission considers that it is entitled to consider the noise ground in relation to all the complaints referred to it by the Director, whether on the basis that Officer Franchi's complaint as submitted (and indeed as accepted by the Director) included the noise ground, or as a matter arising from a matter referred to the Commission under section 116(4).
36. In the Commission's 2020 decision, it upheld a series of noise complaints that were similar in substance to the complaints now before the Commission.⁷ The complainants attended the instant hearing with documentary and oral evidence to support the noise ground. The Commission considered that it would have been unfair to the complainants to decline to hear and determine their complaints on the noise ground, and accordingly the Commission, in the exercise of its discretion, proceeded to do so.
37. Mr Lawson, his daughter Ms Erin Lawson and Ms Oblonk each gave similar evidence to the Commission about noise from the licensee's premises. They said that on the occasions complained of, the noise of the music being performed at the premises was so intrusive that it was only possible to conduct a conversation by shutting the doors and windows and turning on the air conditioner. They deposed that when they rang to complain they would be hung up on or fobbed off. It was, as Ms Lawson put it, "infuriating to say the least".
38. The Commission finds that the complainant witnesses honestly believed that the noise emitted from the licensee's premises on various occasions was so undue and unreasonable as to affect the amenity of the neighbourhood, and that it caused them annoyance and disturbance.

⁷ Commission's 2020 decision, [94]. The 2020 decision was made under the *Liquor Act 1978*, the relevant terms of which are identical to their counterpart in the Act.

39. Furthermore, the Commission finds that “the nature and extent of the harm or interference”⁸ to the complainants was substantial. As the Commission has previously found:

Mr Lawson has been severely vexed both by the annoyance and disturbance to which he and his neighbours have been subjected, and by the failure over an extended period of the regulatory authorities to which he has complained, to act effectively to fix the problems he has encountered.⁹

40. However, for the same reasons given at paragraphs 64 to 68 and paragraphs 92 to 95 of the Commission’s 2020 decision, the Commission is not satisfied on the basis of these findings that the old noise management condition was contravened.

41. The technical evidence of the measured level of noise caused by the licensee is mixed and, in the view of the Commission, inconclusive.

42. On the one hand, Mr Lawson took readings with his own sound meter on 2 February 2020 at intervals of about fifteen minutes between about 1730 hours and 1830 hours. He recorded dB(A) levels over this period between 68.8 dB(A) and 76.6 dB(A). The Commission has previously found that the difference between the noise level at the premises and the noise level at the residents’ rear boundary is approximately 37 decibels.¹⁰ The levels recorded by Mr Lawson therefore correspond to levels at the premises of between 106 dB(A) and 113 dB(A). The Commission accepts that music played at 105 dB(A) at the premises would sound about twice as loud as the music played at 95 dB(A) during the experiment the Commission conducted on 18 November 2019.¹¹ In its 2020 decision, the Commission found that the music it listened to in that experiment was so loud as to cause annoyance and disturbance.¹²

43. Mr Lawson did not use an integrated sound meter (the cost of which is prohibitive to a private individual), and his readings were taken using the MAX (maximum hold) and FAST settings, which, according to the Sound Level Meter User Manual adduced as evidence by Mr Lawson, are suitable for catching sound peaks. As the manual states, “to measure average sound, use the slow setting”. The Commission has previously found that “meaningful measurements of intrusiveness of noise can only be obtained by recording over a substantial period”,¹³ and accordingly the new noise management condition includes a requirement that noise measurement to be undertaken for at least 15 cumulative minutes of music audible at the measurement point, using an integrating sound level meter and the L_{Aeq} descriptor, which measures average sound levels rather than sound peaks.

⁸ *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [121].

⁹ Commission’s 2020 decision, [20].

¹⁰ Commission’s 2020 decision, [143].

¹¹ Unchallenged expert evidence to this effect was adduced at the hearing that resulted in the Commission’s 2020 decision. See also *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [102].

¹² Commission’s 2020 decision, [83], [96].

¹³ Commission’s 2020 decision, [66].

44. The Commission does not criticise Mr Lawson for not using settings on his sound meter that would have enabled him to more closely approximate L_{Aeq} measurements over a fifteen minute period: the readings he took were all made before 17 March 2020, when the Commission delivered its 2020 decision explaining for the first time the approach to measurement it had determined to follow. However, in the circumstances the Commission is unable to make a finding based on Mr Lawson's measurements that the noise at his residence was undue and unreasonable.
45. On the same date, 2 February 2020, Mr Brooks, the licensee's regular Sunday duty manager, measured sound levels on the premises at 15:45 hours, 17:11 hours and 19:07 hours using a similar sound meter to Mr Lawson's, recording readings of between 68 dB(A) and 74 dB(A). It will be recalled that as at that date the undertaking by the licensee not to exceed 80 dB L_{Aeq} was in force. Mr Brooks conceded that he had not undergone any significant training in how to use the sound meter, and was unable to identify which settings were in use when he took his measurements, which he said were conducted over periods of about ten seconds. The Commission is unable to determine from Mr Brooks' measurements whether or not the noise emitted at the licensed premises complied with the licensee's undertaking.
46. Clearly, there is a gross disparity between the measurements taken at similar times by Mr Lawson and Mr Brooks of the same music using similar equipment. The Commission is unable to be reasonably satisfied as to which if either of these two sets of measurements is the more accurate.
47. However, the Commission considers that sound measurements taken on another occasion the subject of complaint are more reliable. The Commission engaged EcOz to monitor noise emissions by the licensee to determine whether it was complying with its undertaking of 26 November 2019. On 1 December 2019, Mr Jack Dymalla, an environmental consultant employed by EcOz Environmental Consulting, attended the premises while that month's First Sunday Blues event was in progress.
48. The next day Mr Dymalla provided counsel then assisting the Commission with the following brief report:
- I used the noise meter on loan from the NTEPA, which was a Bruel and Kjaer, Type 2250 Hand-held Analyser. As per your instructions this was set up four metres from the front edge of the stage during the performance. The readings were taken from 1526 to 1545 and stored on a new SD card.¹⁴
- Observations of the noise levels during the performance indicated minor exceedance's of the 80db limit, but with the breaks between songs the 15 minute average may fall below 80db.
49. In his evidence to the Commission, Mr Howard, the licensee's manager and nominee, stated that on 1 December 2019 he attended the premises, instructed (as he always did) the sound system operator to ensure compliance with the applicable sound limits, and talked to Mr Dymalla as he was setting up his measuring equipment. The Commission finds that on 1 December 2019, at least between 15:26 hours and 15:45 hours, noise emissions from the premises were compliant with the licensee's undertaking of 26 November 2019 not to exceed 80 dB(A) L_{Aeq} . Although the

¹⁴ The Commission has been unable to locate the SD card.

complainants' evidence was that they were disturbed and annoyed by excessive noise on that day, the Commission is not satisfied that the noise ground has been proven for that day. In making this finding, the Commission has had regard to the experiment it conducted at the premises on 18 November 2019, when noise levels near the front of the stage at the premises were set at 95dB(A) L_{Aeq} .¹⁵

50. The licensee submits that if the Commission is not satisfied that the noise ground can be made out on the only occasion on which reliable independent noise measurements are available (1 December 2019), the Commission cannot be reasonably satisfied that the noise ground is made out on any of the other occasions the subject of complaint.
51. There is considerable force in this submission, but the Commission also received evidence about three other matters that lend weight to the complainants' contentions. Firstly, there is evidence of the events of Australia Day 2019. Secondly, there is evidence of recent events involving the First Sunday Blues Club. Thirdly, there is evidence of the events the subject of complaint that took place before the licensee entered into its undertaking of 26 November 2019.

Australia Day 2019

52. On 26 January 2019 the licensee presented an Australia Day concert. At the end of the concert a mother and daughter act came on to the stage and sang an anti-fracking protest song, to the tune of Advance Australia Fair. The Lawson family were in the family room of their home at the time, and gave evidence that they clearly heard the performers sing the word "fuck". The licensee adduced evidence by way of a statutory declaration from the PINT Club assistant manager Ms Amy Smith, who was on the premises at the time, and who stated "I can confirm that I did not hear the lady or the 14 year old girl swearing." Similarly, the licensee adduced a statutory declaration from Mr Ramon Dixon, the PINT Club president. Mr Dixon stated:

I was present throughout the entirety of that song being sung. It was clear to me that the song was about fracking. Whilst it is possible that persons may have assumed that the word "*fracking*" and its derivatives were another word entirely. Having been there in person and listening to the song as it was being sung, I am certain that any such assumption is mistaken, and I confirm that I did not hear the lady or the 14 year old girl swearing throughout the course of that song.

53. Mr Howard also deposed a statutory declaration about this incident. Although he was not present, he viewed the song by accessing a weblink on the Don't Frack the Territory Facebook page.

...which contains the video footage of the performance during the 21.01.2020 [sic: 26.01.19] event and the lyrics to the song that was sung by what appears to be a mother and daughter act. When you read the lyrics along with the video footage from the song it is obvious that they did not swear during that performance.

54. The Commission has also viewed this video footage, which was tendered as evidence. The Commission finds that, notwithstanding the adamant assertions to the contrary of the licensee's witnesses, the performers sang the word "fuck" or a derivative of it, three times. The Commission has no doubt about this, and finds that the licensee's witnesses

¹⁵ Commission's 2020 decision, [33].

were all mistaken on this issue. The Lawsons, who were sitting inside their home 240 metres away, were not. Ms Erin Lawson said in her evidence that they sang “they’ve fucked this great country”. Actually, the words sung were “They fuck up our country”. The Commission also finds that the volume of this vocal performance, which was supported by barely audible piano accompaniment, was substantially lower than the volume of the songs played by the blues rock band that had preceded it.

55. The Commission will return to a discussion of this incident later in these reasons, but for present purposes, it is noteworthy in two respects. Firstly, it graphically demonstrates how clearly and potently the noise from the premises intruded into the complainants’ home. Secondly, it goes to the credibility of the witnesses.

Supervision of the First Sunday Blues Club

56. Evidence regarding recent events involving the First Sunday Blues club was adduced through Ms Smith, Mr Howard and Mr Brooks, each of whom made a statutory declaration and then gave oral evidence at the hearing. The Commission finds that Mr Howard attended only one First Sunday Blues Club event, on 1 December 2019, when My Dymalla took his sound measurements. Mr Howard’s evidence was that he was often present on Sunday afternoons in 2019 and 2020 when the bands were setting up, that he would remind the staff not to exceed the applicable noise limits, and that he would go home before the event commenced.
57. Ms Smith, who was rostered off on Sundays, only attended two First Sunday Blues Club sessions, on Australia Day 2019, and on 6 December 2020. On 26 January 2019, she admonished the First Sunday Blues organiser for permitting a protest song to be played on Australia Day, which she considered to be inappropriate. Although she states that she did not consider the noise at this event to be excessive, according to two Licensing NT officers who made statements that were tendered in evidence, Ms Smith told them that evening that she had received a complaint about the noise that afternoon, in response to which she had caused the volume to be turned down.
58. On 6 December 2020, Ms Smith was on the premises when the First Sunday Blues Club session commenced. An hour later, she states, “I could hear the music start to get loud”. She picked up the Club’s sound level meter, observed a reading of 90 dB(A), showed it to the sound mixer, Mr Lash Lisson, and told him to turn the music down. Mr Lisson did not do so, so Ms Smith told the musicians to lower their volume. Mr Lisson, judging by the abusive and offensive rant he subsequently posted on Facebook,¹⁶ was infuriated by this challenge to his authority. In response to this incident, Mr Howard immediately terminated the standing arrangement for the First Sunday Blues Club to use the licensee’s premises for its monthly sessions.
59. The licensee’s supervision of First Sunday Blues Club events was generally assigned to Mr Brooks. Among his duties was the task of taking sound meter readings every two hours and recording them in a register. In his oral evidence, Mr Brooks said that if he thought the noise was going up, he would go and test it, but that this never happened. The Commission considers that this evidence was unconvincing, and that Mr Brooks was an unimpressive witness.

¹⁶ Exhibit Nine, Annexure DH 4.

60. The event of 6 December 2020 occurred about a year after the events the subject of the instant complaints. Nevertheless, the Commission considers it to be significant, because it is indicative of the attitude, behaviour and character of Mr Lisson, who, along with a colleague, had operated the sound system for First Sunday Blues Club events over the period of the events the subject of the complaints. The Commission considers that the arrangements put in place for the supervision of the First Sunday Blues events were inadequate. The general manager elected to be present during the events only on the single occasion when independent noise monitoring was being undertaken. The only two times the licensee caused the volume of the First Sunday Blues Club music to be lowered were the only two times the assistant manager was present. The Commission's strong impression is that in marked contrast to Mr Brooks, Ms Smith was willing to confront the man who controlled the volume, did so when the occasion arose, and was vilified for doing her job.
61. The Commission finds that for the First Sunday Blues Club events the subject of complaint, after Mr Howard left the premises, there was no effective supervision of the event organisers by the licensee. On 6 December 2020, Mr Lisson ignored or defied the licensee's instructions he had been given to keep the noise down. The Commission infers that it is likely he also did so on other occasions, without being able to identify exactly which such occasions.
62. If this were the only basis for a finding adverse to the licensee, applying the Briginshaw test, the Commission would not be reasonably satisfied that the noise emitted was undue and unreasonable.
63. However, the Commission does find from the above analysis that the licensee failed to take "all reasonable precautions... to minimise any interference"¹⁷ to the quiet enjoyment of their homes by the complaints.

The incidents of 6 October 2019, 19 October 2019 and 3 November 2019

64. The complainants allege that the noise emitted from the premises on three occasions prior to the licensee's undertaking of 26 November 2019 was excessive. The Commission has previously upheld noise complaints arising from 29 events conducted by the licensee between 5 May 2018 and 1 September 2019.¹⁸ No evidence was adduced by the licensee to the effect that there were any changes made to the management of noise emissions by the licensee between 1 September 2019, the date of the last of the noise complaints upheld in the Commission's 2020 decision, and 26 November 2019, when the licensee entered into its undertaking.
65. This militates in favour of a finding that, similarly, the noise complaints arising from the events of 6 October 2019, 19 October 2019 and 3 November 2019 should be upheld.

¹⁷ *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [121].

¹⁸ Commission's 2020 decision, fn. 8, [96].

FINDINGS

The noise ground

66. Mr Ammon's claim in nuisance¹⁹ was dismissed, as was his subsequent appeal. In the view of the Commission, a significant distinction between the circumstances of Mr Ammon and the complainants is that Mr Ammon moved into a newly built apartment adjacent to a long-established hotel located on a busy highway, whereas by contrast, in 2017 the PINT Club transformed its business model to become a popular entertainment venue adjacent to a long-established quiet suburban neighbourhood.²⁰
67. A further distinction is that it appears that Mr Ammon was alone amongst the residents of his apartment complex to press noise complaints against the nearby hotel, implying that he had a pre-existing hypersensitivity to noise. By contrast, as noted above, the Commission considers that the concerns of the complainants in this case were shared by members of several nearby households, which suggests that hypersensitivity may not be an issue in this case. The licensee contends that Mr Lawson is hypersensitive, and it appears from the evidence in both these proceedings and proceedings arising from previous similar disputes between the parties that there is a similar view within Licensing NT. The Commission accepts that there is a real possibility that the complainants are now hypersensitive to noise, but that if that is the case, it is likely the result of having been continuously exposed to unwelcome noise by the licensee since 2017.
68. The Commission considers that "the social or public interest value in the defendant's activity"²¹ in Mr Ammon's case is comparable to that of the licensee in this case. Both are licensed premises offering live entertainment.
69. The Commission has given careful consideration to the elements of nuisance as identified in *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, and in particular has taken into account the following factors:
- 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.
70. Having considered the cumulative effect of the evidence before it, the Commission is reasonably satisfied that the interference with the complainants' use and enjoyment of their property in the period the subject of the complaints was substantial and unreasonable.

¹⁹ See paragraph 22 above.

²⁰ Commission's 2020 decision, [111].

²¹ *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [121].

71. Accordingly, the noise ground of the complaints is upheld: the Commission is satisfied that the licensed premises were used in a way that caused annoyance and disturbance to persons residing in the vicinity of the premises, by emitting excessive noise. In addition, the Commission upholds the complaints on the ground that the licensee or its employees contravened a provision of the Act, namely section 93, which prohibits a licensee from causing or permitting its employees or patrons to cause undue or unreasonable noise on or in licensed premises that affects the amenity of the neighbourhood.
72. The Commission is satisfied that disciplinary action is appropriate in relation to the noise ground, and that the disciplinary action it has determined to take is appropriate.

The strong language ground

73. The Commission has found that the Lawsons heard strong language emitted from the premises on 26 January 2020. The Commission finds that the Lawsons were affronted by this strong language. It is unnecessary to decide whether the three swear words that were uttered on that occasion in the context of a parody of the national anthem as part of a political protest constitute “annoyance or disturbance” for the purpose of section 160(1)(m)(ii) of the Act. It is also unnecessary to decide whether the utterance of the three swear words resulted from the use of the licensed premises, in the context of what appears to have been an unforeseen, unforeseeable and unavoidable intervention by the mother and daughter act into the afternoon’s events. Even if the Commission were to find that this ground of complaint were made out, the Commission would not be satisfied that it would be appropriate to take disciplinary action against the licensee. Section 166(6) of the Act provides that if the Commission decides not to take disciplinary action, it must dismiss the matter. This matter is dismissed.

The admitted breaches

74. The licensee admits failing to record sound measurements at Sunningdale Court, contrary to a condition of its licence, on 12 occasions. The licensee submitted in mitigation of this conduct that its staff had been harassed, intimidated and threatened by the complainants when attempting to take sound measurements at Sunningdale Court, and that in these circumstances staff were entitled to refuse, as they did, to undertake this task.²² In the Commission’s 2020 decision, the Commission accepted that relations between the complainants and the licensee had deteriorated to the point that it would be counter-productive to require the licensee to continue to take measurements in Sunningdale Court. For that reason, the new noise management condition includes no such provision.
75. Whether or not and if so, to what extent, staff had been harassed, intimidated or threatened by any of the complainants, a matter that the Commission considers it is unnecessary to determine, the Commission acknowledges that the licensee was placed in a difficult position when confronted with apparently competing demands to comply with its licence conditions and its work health and safety obligations to staff. In the overall context of this dispute, the Commission considers it would be inappropriate to take additional disciplinary action in relation to this ground, and dismisses the matter.

²² Commission’s 2020 decision, 168.

76. The licensee also admits failing to record two telephone complaints made by Ms Oblonk on 26 January 2019. In mitigation, the licensee submitted that this was an oversight by Ms Smith on a day when she was particularly busy dealing with other matters, and that when she spoke to Licensing NT compliance officers that evening, Ms Smith had volunteered that she had received a telephone complaint that day, in response to which she had turned down the volume.²³
77. The Commission accepts that this breach of the licence condition is minor. In the overall context of this dispute, the Commission considers it would be inappropriate to take additional disciplinary action in relation to this ground, and dismisses the matter.

DISCIPLINARY ACTION

78. The Commission was at pains in its 2020 decision to fix a noise management condition that would end this long-standing, costly and distressing dispute between the complainants and the licensee. Regrettably, that objective has not yet been realised. A key component of the new noise management condition was the requirement that the licensee install a noise limiting device. The condition was calibrated to provide an incentive to the licensee: the permitted noise level would be moderately increased once the limiting device was installed.
79. At the outset of the hearing the Commission was informed that, firstly, the licensee has not yet complied with this condition by installing a noise limiting device, and secondly, that the complainants have continued to lodge noise complaints with the Director. The dispute has not been settled.
80. The Commission accepts the Director's submission that usually the primary principles engaged when determining what disciplinary action to impose are proportionality, deterrence and parity. In this unusual case, however, the Commission considers 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* [2019] WASCA 158, to establish a balance between the licensee's right to use its land freely, and the right of the complainants to enjoy their land without interference.²⁴
81. To that end, the Commission has determined to take disciplinary action by further varying the conditions of the licence.
82. The licensee is to be commended for taking strong action following the events of 6 December 2020. However, that action was, in the view of the Commission, too little, and too late. Although the Commission is satisfied that the complainants will not be disturbed again by the First Sunday Blues Club for the foreseeable future, no evidence was adduced that provides the Commission with reassurance that the licensee has taken steps to effectively manage noise levels from other performers.
83. The Commission notes that during the 2020 dry season, the licensee engaged Stereobate, a Darwin blues rock trio, to perform on Sunday afternoons on four occasions.²⁵ Stereobate describe themselves as follows: "If you Love Loud Guitars,

²³ Exhibit Two (Referral Brief), 55 to 57.

²⁴ At [119].

²⁵ Exhibit 9B.

Meaty Bass, Huge Drums, Fat Riffs & Epic Solos come down and Rock with us”.²⁶ Their performances are geared to generate a significant amount of noise.

84. The incentive previously offered to the licensee to install the noise limiting device was ineffective. Accordingly, the Commission has now decided that a more drastic step is required to prevent the disturbance and annoyance from continuing. The licensee will not be permitted to stage amplified musical entertainment until it has installed the noise limiting device. This disciplinary action is akin to the injunctive relief commonly granted to plaintiffs who are successful in bringing an action of nuisance.
85. The Commission has also determined to vary the definition of “event” in the noise management condition. Among the recent complaints that the Director refused to accept was one alleging that the licensee had conducted more than the permitted number of “events”. The effect of the Director’s decision was that several recent “Stereobate Sunday Sesh” sessions were not counted as “events”. Performances like this should be counted as events for the purpose of the noise management condition, and from now on they will be.
86. As the licensee has recently disassociated itself from the First Sunday Blues Club, the Commission has deleted references to that particular event from the licence conditions.
87. The Commission has also varied the noise management condition in other respects. For example, the requirement to notify neighbours of impending music events by letterbox drop is deleted. The Commission considers that this requirement has not proven to be effective, and it is replaced with a condition requiring notification by way of the licensee’s website or Facebook page.
88. In deciding to take this disciplinary action, the Commission has considered the submission of the licensee that to install the noise limiting device will cost the licensee in the order of \$100,000. The Commission notes that the licensee does not currently have its own sound system, and that to install a noise limiting device it will either have to purchase its own sound system or come to an arrangement with the business from which it usually leases a sound system to present musical events.
89. Because the disciplinary action it has determined to impose is likely to impose a substantial financial burden on the licensee, the Commission declines to follow the recommendation of the Director that disciplinary action be imposed by way of a suspension of the licence or the imposition of a monetary penalty.
90. The Commission delegates to any one of members Goldflam, Stephenson and Cannon the authority to issue the approvals referred to at conditions 2.3 and 2.5 set out at the commencement of this notice.

NOTICE OF RIGHTS

91. 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.

²⁶ www.facebook.com/rockbandstereobate, posted 4 July 2020.

92. In accordance with s 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director, the licensee, Mr Lawson and Ms Oblonk.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

19 January 2021

On behalf of Commissioners Goldflam, Stephenson and Cannon