

NORTHERN TERRITORY LIQUOR COMMISSION

Decision Notice

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/014

LICENCE NUMBER: 80101789

LICENSEE: Deemat Pty Ltd

PREMISES: Katherine Hotel
Corner of Giles Street and Katherine Terrace
KATHERINE NT 0850

LEGISLATION: Sections 67, 110, Part VII, Div. 2 and section 171 of the *Liquor Act*.

HEARD BEFORE: Ms Jodi Truman (Deputy Chairperson)
Mr Kenton Winsley (Health Member)
Ms Christine Hart (Community Member)

DATE OF HEARING: 10 May and 4 October 2018

DATE OF DECISION: 4 October 2018

Decision

1. Pursuant to the referral from the Director-General of Licensing NT (“the Director-General”) the Commission is satisfied that disciplinary action should be taken against the licensee in relation to contraventions as determined by the Delegate of the Director-General on 27 February 2018 of provisions of the *Liquor Act* (“the Act”); namely sections 67(3)(c) and 67(3)(m) of the Act
2. That given the contraventions occurred:
 - a. During the course of a period of conduct;
 - b. Were detected as a result of a single investigation; and
 - c. Were dealt with as a single complaint

the Commission has determined that only a single action should be imposed for all contraventions.

3. That given the remedial work undertaken by the licensee at the premises to reduce the noise emanating from the premises the Commission considers that disciplinary action in accordance with section 67(2)(b) of imposing an additional condition for the licence is appropriate.
4. The Commission therefore imposes an additional condition for the licence in the following terms with respect to Noise Control:

“All amplified music in the area known within the licence as the Garden Bar must operate using the sound ceiling from 1700 hours until cessation of trade in the Garden Bar each and every day.”

Reasons

Background

5. Deemat Pty Ltd is the Licensee for Liquor Licence 80101789 (the licence), trading as the Katherine Hotel (“the premises”), situated at the corner of Giles Street and Katherine Terrace, Katherine, NT 0850. The Nominees are Mr Robert Harney and Mrs Cassandra Harney (“Mr and Mrs Harney”).
6. The premises are situated on the same land title as the Katherine Motel (“the motel”) which is separately leased and operated by Mr Danny Johansen (“Mr Johansen”). Mr Johansen purchased the Motel in late 2011 and since that time has resided in the manager’s residence on the site of the Motel.
7. On 7 July 2016 Mr Johansen, submitted a complaint to the Director-General of Licensing NT (“the Director-General”) in relation to noise emanating from the Garden Bar of the Hotel. Preliminary inquiries were undertaken by Compliance Officers including attending at the premises and conducting noise level readings at the premises as well as the motel.
8. On 19 August 2016 a complaint was accepted by a delegate of the Director-General pursuant to section 67(3)(m)(i) of the *Liquor Act* (“the Act”) on the basis that the licensee had caused annoyance or disturbance to persons residing, working or conducting business in the neighbourhood of the premises. The conduct alleged was a breach of a condition of the licence and therefore a breach of section 110 of the Act. The licence provides that “*noise levels emanating from any part of the premise must be such as to not cause unreasonable disturbance to the businesses or ordinary comfort of lawful occupiers of neighbouring premises or any other person in the vicinity.*”
9. Notice was provided to the Licensee and it was invited to provide a response. Over a period of some months and assisted by Compliance Officers efforts were made by both Mr Johansen and the Licensee to mediate the issues arising. Unfortunately over a period of time the goodwill that existed between the parties in trying to resolve the noise issue deteriorated and communication broke down.

10. Eventually Mr Johansen lodged a further complaint to the Director-General on 3 August 2017. That complaint alleged that Mr Johansen had experienced "*unbearable loud music & bass until 4 am*" on 20 July 2017 and also alleged that on 21, 22, 28 and 29 July 2017 the music and other noise emanating from the premises was unbearable.
11. As a result a public hearing was conducted on 7 February 2018 in Katherine in accordance with the Act (as it then stood). Numerous witnesses were called to give evidence and material was tendered to the delegate of the Director-General ("the delegate") who conducted the hearing.
12. On 27 February 2018 the delegate provided notice of her decision, which found as follows:
 - 100 In all the circumstances, I am satisfied that the amplified low frequency music played in the venue at least on most Friday nights caused substantial annoyance and disturbance to Mr Johansen and most likely his family and guests staying at the Motel from time to time.
 - 101 I make no specific finding in relation to section 110 of the Act however, I am satisfied that on various and numerous occasions, the way in which the licensed premises has been used has caused annoyance or disturbance to Mr Johansen who resides, works and conducts a business in the neighbourhood of the premises contrary to section 67(3)(m)(i).
 - 102 I am also satisfied that the Licensee has contravened a condition of its licence in that noise levels emanating from the premises have been such on numerous occasion so as to cause unreasonable disturbance to the comfort of Mr Johansen, a lawful occupier of a neighbouring premise contrary to section 67(3)(c).
- 13 In accordance with the Act at that time, the delegate also indicated an intention to take disciplinary action against the Licensee by imposing a condition on the licence which restricted the playing of amplified music in the Garden Bar after a certain period of time on certain specified days.
- 14 The Act as it then stood required that the licensee be given notice of the intended disciplinary action and invited to provide a response. By letter dated 26 March 2018 the Licensee provided a response to the intended disciplinary action and advised that it intended to move its amplified music from the Garden Bar to an inside area in an attempt to mitigate noise. The licensee also submitted that the condition intended to be imposed ought not to be imposed for various reasons and further submitted that the intended condition would have the effect of turning the Garden Bar from an 'entertainment area' into an 'alcohol only area' contrary to liquor policy and guidelines.

15 However on 28 February 2018 (i.e. in the period between the delegate's decision and the taking of the intended disciplinary action) amendments to the Act came into effect together with the *Liquor Commission Act*. Section 171 of the Act provided for transitional arrangements relating to pending disciplinary action as follows:

171 Disciplinary action pending

- 1) *This section applies if, immediately before the commencement, the Director-General considered that disciplinary action should be taken against a licensee, but at the commencement no disciplinary action had been taken under section 69 as in force before the commencement.*
- 2) *The Director-General must refer the matter to the Commission for the Commission to decide, under the Act as in force after the commencement, whether to take disciplinary action.*

16 As a result, the Director-General was required to refer this matter to the Commission for it to decide whether to take disciplinary action and this was done by the Director-General on 13 April 2018.

Public Hearing

- 17 The referral was listed for public hearing before the Commission on 10 May 2018. Unfortunately the matter was unable to be completed on that date and was adjourned part heard. During the course of the hearing, the licensee indicated it wished to install a new sound system that it had previously referred to (and provided evidence about) at the public hearing before the delegate on 7 February 2018.
- 18 The Commission received evidence that the sound system involved the use of relatively new technology which included a sound ceiling ("the sound ceiling") which, the licensee hoped, would significantly reduce the noise emanating from the Garden Bar area. The Commission was advised that it was estimated that the sound ceiling would cost the licensee between \$60,000 and \$80,000. The Commission made clear to the licensee that the installation of the sound ceiling may not satisfy the Commission of the matters to be determined, however the licensee stated it understood this was a risk but wished to try and find a solution that would resolve the noise issues.
- 19 Given that the hearing could not be finalised and given that there was evidence before the Commission that the sound ceiling could potentially offer a reduction in noise (and therefore a solution to continuing issues between the licensee and the motel), the Commission determined to adjourn for a sufficient period to enable the licensee to install the sound ceiling.

- 20 The hearing was adjourned to 10 August 2018 however request was subsequently made on behalf of the licensee for a further adjournment and this was granted to 4 October 2018.
- 21 On 4 October 2018 the hearing recommenced. At that time the Commission received evidence the following evidence:
- a. The sound ceiling had been installed between 11 and 13 July 2018 with calibration being carried out on 13 July 2018. Calibration and testing was not finalised at that time however and continued testing occurred during the course of July 2018.
 - b. During the period 21 August to 13 September 2018 the “Pyrotec Wavebar Mass Loaded Vinyl Barrier – Sound Curtain” was installed in stages.
 - c. On 7 September 2018 a noise limiting wireless mixer was also installed at the premises.
 - d. An inspection of the operation of the sound ceiling was then carried out with the sound ceiling installer and compliance officers between 11.30pm and 12.30am on the evening of 14 September 2018.
 - e. On that same evening an inspection was also carried out with the sound ceiling installer, compliance officers and Mr Jack Line (as representative of the motel) of the closest bedroom of the adjoining manager’s residence and within unit 6 of the motel being the closest and most affected unit.
 - f. It was noted during that inspection that output from the sound ceiling was “not audible” in the adjoining manager’s residence and was “just” audible within unit 6 of the motel. The measured internal noise level was at or below the existing background noise level.
 - g. Following that inspection, the installer of the sound ceiling system “set and locked” the system to a level directly under the sound ceiling that is below the current recommendations of the Northern Territory Noise Management Framework Guidelines (“the Noise Guidelines”).
- 22 In addition to this evidence, the Commission was also advised that a further letter of complaint had been received by the Director-General from Mr Johansen alleging several new incidents of being unreasonably disturbed and/or annoyed by noise emanating from the premises. The dates alleged were 13, 14, 19, 20 and 21 July 2018. The Commission was advised that an investigation had been conducted by the Director-General and a determination made to refer the matter to the Commission for determination.

- 23 This Commission (as formed by the panel conducting the hearing in relation to this current complaint) wishes to make clear (and made clear during the course of the hearing) that whilst the new referral was relevant information for the Commission to consider in relation to the success (or otherwise) of the sound ceiling, the Commission was **not** determining that new referral. The new referral will no doubt be listed for determination at another date and time and the matters alleged within that new referral cannot be, and were not, determined by the Commission during the conduct of the hearing on 4 October 2018. It was however information that the Commission considered and sought further information upon during the course of the hearing.
- 24 In this regard, the Commission was also informed that it had been indicated by Mr Johansen that he intended to attend the hearing listed for 4 October 2018 (either in person or by way of a representative). Mr Johansen had in fact been informed of where and when the hearing would take place. Ms Ozolins (who appeared on behalf of the Director-General throughout these proceedings) also informed the Commission that she had been in communication with Mr Johansen about the matter and had in fact attempted to contact him on five (5) occasions to confirm his attendance and any information he wished to provide.
- 25 As a result of that indication, the Commission in fact stood the hearing down on 4 October 2018 to attempt to ascertain whether Mr Johansen was in fact in attendance or could be found. Those attempts continued until 10.20am on 4 October 2018, however contact could not be made with Mr Johansen and he was not seen in the foyer of the Local Court. As a result the hearing recommenced at that time.
- 26 In understanding these reasons, it is important that it be kept in mind that this is a hearing to determine wholly and solely the question of whether disciplinary action should be taken in relation to the contraventions that had been found by the delegate on 27 February 2018. It was agreed on behalf of both the Director-General and the licensee that the decision of delegate made on that date was to stand and the only question to be determined by the Commission was whether disciplinary action should be taken against the licensee.

Determination of whether to take disciplinary action

- 27 As earlier noted on 27 February 2018 the delegate determined the complaint as accepted by the Director-General on 19 August 2016 and 3 August 2017. The delegate determined that:
 - a. Amplified low frequency music played in the premises at least on most Friday nights had caused substantial annoyance and disturbance to Mr Johansen and most likely his family and guests staying at the Motel from time to time.

- b. She was satisfied that on various and numerous occasions, the way in which the licensed premises has been used had caused annoyance or disturbance to Mr Johansen who resides, works and conducts a business in the neighbourhood of the premises and that this was contrary to section 67(3)(m)(i) of the Act.
 - c. She was also satisfied that the Licensee has contravened a condition of its licence in that noise levels emanating from the premises had been such on numerous occasion as to cause unreasonable disturbance to the comfort of Mr Johansen, a lawful occupier of a neighbouring premise contrary to section 67(3)(c).
- 28 This determination still stands and has been accepted by the Commission as an appropriate determination based on all the information and material provided to the delegate. The Commission therefore upholds that determination.
- 29 Both the representatives for the Director-General and the licensee have agreed that the sole question for the Commission to determine is whether disciplinary action should be taken in relation to the grounds for disciplinary action.
- 30 The Commission has very carefully considered this matter and all of the material put before it; including the additional information in relation to complaint by Mr Johansen of noise from the premises during the month of July 2018. As indicated during the course of the hearing it is unfortunate that further disturbance has occurred. However the Commission also notes that such disturbance occurred at a time when the installation of the sound ceiling was taking place and **before** the sound ceiling system had been “set and locked” by the installer.
- 31 The Commission considers it extremely relevant that there is no evidence of any further disturbance since that time and in fact that there is evidence before the Commission that the sound ceiling has significantly reduced noise emanating from the premises and to a level below that recommended under the Noise Guidelines. Whilst the Commission does not consider decibel readings to be the deciding factor for noise complaints, they are a matter that have been considered and it is relevant that the readings that were taken following the sound ceiling being installed and locked appear to be significantly less than those readings recorded prior to the sound ceiling being installed and locked.
- 32 It was accepted on behalf of the Director-General that the evidence before the Commission was that the sound ceiling system **had** improved the noise levels.
- 33 The Commission also considers it relevant that the installation of that sound ceiling has been at considerable cost to the licensee. The cost of the sound ceiling to the licensee was significantly more than any monetary penalty that may have been imposed against the licensee with respect to the contraventions as found by the delegate. The Commission considers this shows the level of seriousness with which the licensee took this matter and the licensee's genuine desire to attempt to resolve the underlying issue of noise levels from the premises and to attempt to provide a solution into the future.

34 It is in all the circumstances that the Commission has determined that there exists ground for disciplinary action to be taken against the licensee based on the contraventions as found by the delegate and upheld by the Commission. The Commission considers the disciplinary action that should be taken against the licensee is the imposition of a further condition to its licence to provide for the use of the sound ceiling within the Garden Bar from 1700 hours each day of trade.

35 The Commission therefore determines that an additional condition be imposed to the licensee's licence in relation to Noise Control in the following terms:

"All amplified music in the area known within the licence as the Garden Bar must operate using the sound ceiling from 1700 hours until cessation of trade in the Garden Bar each and every day."

Notice of Rights:

- 36 Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to take disciplinary action against the licensee pursuant to section 69(3) of the Act is specified in the Schedule and is a reviewable decision.
- 37 Section 120ZC of the Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision must be lodged within 28 days of the date of this decision.
- 38 For the purpose of this decision, and in accordance with section 120ZB(1)(a) of the Act, the affected persons are the applicant and Mr Danny Johansen who lodged a complaint during the process that resulted in the decision being made.



JODI TRUMAN
Presiding Member
Deputy Chairperson

9 October 2018