

# NORTHERN TERRITORY LIQUOR COMMISSION

## DECISION NOTICE

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<b>MATTER:</b>	<b>DISCIPLINARY ACTION PURSUANT TO THE <i>LIQUOR ACT 2019</i></b>
<b>REFERENCE:</b>	<b>LC2021/032</b>
<b>LICENCE NUMBER:</b>	80818038
<b>LICENSEE:</b>	<b>Crocosaurus Cove Pty Ltd</b>
<b>PREMISES:</b>	<b>The Tap on Mitchell</b> 56 Mitchell Street DARWIN CITY NT 0800
<b>LEGISLATION:</b>	Part 7, Divisions 3 and 4 of the <i>Liquor Act 2019</i>
<b>HEARD BEFORE:</b>	Mr Richard Coates (Chairperson) Professor Phillip Carson (Health Member) Ms Amy Corcoran (Community Member)
<b>DATE OF HEARING:</b>	28 October 2021 and 11 March 2022
<b>DATE OF DECISION:</b>	3 May 2022

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### **Decision**

1. For the reasons set out below, Northern Territory Liquor Commission (the Commission) upholds the complaint against Crocosaurus Cove Pty Ltd trading as The Tap on Mitchell (the Licensee) and is satisfied that the Licensee has breached licence conditions, namely:
  - (a) on 20 October 2020, it was in breach of the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, furniture had been moved from an area in front of the performer to facilitate its use as a dance floor.
  - (b) on 26 November 2020, between 10:00pm and 10:30pm, it breached the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, the music was being amplified independently of the in-house sound system and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor.
  - (c) on 12 December 2020, between 7:00pm and 10:00pm, it breached the licence concept as the premises had the appearance of a rowdy pub beer garden rather

than an alfresco café. Furthermore, the music was being amplified independently of the in-house sound system and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor;

- (d) on 8 May 2021 at 1:20am, it breached the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, the music was being amplified independently of the in-house sound system and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor.

2. The Commission is satisfied disciplinary action should be taken against the Licensee by varying the conditions of the Licensee's licence.

- (a) The licence will be varied by including within the current Entertainment condition. "Live entertainment" will only be permitted:

Sunday to Wednesday, 10:00 to 23:00 hours

Thursday to Saturday as well as a day preceding a public holiday in the Northern Territory, 10:00 to 24:00 hours

- (b) The current noise condition will be deleted and replaced with the following:

- 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.
- The Director of Liquor Licensing on her or his own initiative may review noise issues pertaining to the licensed premises, and notwithstanding compliance by the licensee with the foregoing, the licensee shall implement such sound attenuation and noise mitigation measures as the Director of Liquor Licensing in her or his discretion may notify to the licensee in writing at any time as having become in the Director of Liquor Licensing's view a reasonable requirement in the circumstances then prevailing.

- (c) The two conditions entitled – "Persons may remain on Premises" and "After Hours Snacks to be made available" are both deleted as they are no longer relevant.

## **Reasons**

### **Background**

### **History of the Licence**

3. In 2004, the former NT Licensing Commission (the Licensing Commission) dealt with an application by Value Inn Pty Ltd (the Applicant) to obtain a liquor licence for premises then known as Melaleuca on Mitchell. The Licensing Commission was advised that Melaleuca on Mitchell would be a new 452 bed 3 storey, 5 star backpacker

hotel which was seeking to cater for a rapidly emerging market of better-heeled Australian and International backpackers.

4. The Applicant was seeking a licence to sell liquor in two distinct areas of the premises:

- A Leisure Deck area on the first floor of the building which would only be open to in-house guests and;
- A Street Frontage Alfresco area, adjacent to the accommodation complex which would be open to the public and would be an outdoor style café/bar built around an existing Beauty Leaf tree.

5. In its Reasons for Decision dated 14 August 2005, the Licensing Commission noted:

*“It was argued that the Street Frontage Alfresco area would actually add to the amenity of the Mitchell Street area, with its outdoor style facilities designed to encourage relaxed conversation. The premises would make a feature of the large existing Beauty Leaf tree and, in the process, ensure the survival of the tree. The landscaping of the premises with rock and water features would also add to the area’s attractiveness. There would be none of the characteristics of venues, which tend to have problematic patrons in that there would be no loud music, no crowds, no dancing or nightclub style entertainment.*

*Evidence was presented that there had been a change in the backpacker market in recent times, with backpackers now being better educated, more mature and with higher expectations of backpacker style accommodation. Whereas historically backpacker accommodation had been mostly provided in old houses and other converted buildings, there was now a trend towards purpose built backpacker accommodation of a much better standard. Melaleuca on Mitchell was built specifically to fill this gap in the Darwin market. The developers hoped to revitalise, what was then, the flagging Darwin backpacker industry and to assist Darwin in regaining its status as a gateway for backpackers arriving in, and departing from, Australia. A licensed café bar on the premises was an essential component in achieving five star backpacker accommodation accreditation for the premises.*

*Examples were given of other five star backpacker hotels in Australia including the Palace in Brisbane, YHA and Nomads in Sydney, Hotel Bak Pac in Melbourne and Gilligan’s in Cairns. A promotional video about Gilligan’s in Cairns was shown during the hearing. Counsel for the applicant explained that there would be some key differences between Melaleuca on Mitchell and Gilligan’s. Gilligan’s was far more ambitious in scale, with Melaleuca on Mitchell being a smaller establishment, with no nightclub, no lighting effects, and only a modest sound system (speakers at the perimeter of the licensed areas pointing inwards to minimise escaping noise)”.*

6. There had been a significant number of objections lodged against the application and the most contentious aspect of the proposed development was the Street Frontage Alfresco area. Concerns were raised that this could become another tavern style venue in a precinct where there were already more than enough of these and noise would be a major issue.

7. During the course of the hearing before the Licensing Commission the objectors were largely persuaded that this development would have a positive impact on the Darwin tourist industry and that with strict controls on the licence concept and the conditions under which entertainment could be provided, the risk of noise disturbance could be satisfactory managed.
  
8. The Licensing Commission granted the Applicant a licence over the whole of the premises and imposed special conditions in relation to the Street Frontage Alfresco area namely:
  - The Licence concept required that *“the area shall have the appearance of an alfresco dining area or café set in an open air uncovered (other than for shade) tropical garden with rock and water features”*.
  - Entertainment

*“Entertainment by way of recorded music and live music (not amplified independently of the in-house sound system) of not more than solo artists or does may be played in the Street Frontage Alfresco and shall be limited to easy listening music and shall not include bands, nightclub or disco style music or karaoke. There shall be no designated dance floor on the premises. Drums kits and drum machines may not be used”*.
  - Noise

*“The Licensee shall not permit or suffer the emanation of noise from the licensed premises of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any premises.*

*Notwithstanding compliance by the Licensee with this requirement, the Licensee shall effect such further or other sound attenuation as the Commission in its discretion may notify the Licensee in writing at any time as having become a reasonable requirement in the considered view of the Commission in circumstances then prevailing, provided always that the Licensee shall be entitled to request a hearing in relation to any such requirement of the Commission.*
  
9. Those conditions together with a subsequent further restriction against promoting or advertising the Alfresco Dining Area as a bar have continued to apply to these premises, which were later excised from the Melaleuca on Mitchell backpacker hostel complex and became known as “The Tap on Mitchell” (The Tap) now operated by a different licensee, namely Crocosaurus Cove Pty Ltd.

## **The Complaint**

10. On 20 September 2020, Mr Pengju Sun, a resident of a unit in the complex at 79 Mitchell Street, Darwin complained to Licensing Officers in relation to the volume of music emanating from The Tap late at night. Mr Sun complained “his mental and physical health have been greatly influenced for a long time” and that “he can’t get enough sleep every day”. He also said that he had tried to talk to The Tap management

but they were unwilling to reduce the music volume and claimed they have “a legal licence to run their business this way.”

11. Mr Sun continued to provide information to Licensing Officers about what he claimed was excessive noise emanating from these premises between 28 September 2020 and 4 February 2021. On 20 October 2020, he attended the premises at about 00:30 hours and took video footage of people dancing in front of a performer and complained via text message to a Licensing Officer.
12. Following the intervention of Senior Compliance Officer Holehouse (SCO Holehouse) the Licensee agreed to implement a noise mitigation plan, which was completed on 27 October 2020.
13. However, Mr Sun continued to complain of noise disturbance on occasions from The Tap but also from other nearby licensed premises namely Shennanigans, Six Tanks and Youth Shack.
14. Mr Sun became frustrated with what he perceived as a delay in resolving his concerns over the noise disturbance he was experiencing and registered complaints with the Chief Executive Officer of the Department of Industry, Tourism and Trade as well as the Office of the Ombudsman NT.
15. On 26 November 2020 between 22:00 hours and 22:30 hours SCO Holehouse attended The Tap premises in a social capacity. He observed a solo singer guitarist performing what he regarded as “Pub Rock/Country Rock” songs rather than “easy listening music”. The music was played at a level which made conversation difficult and he believed that the performer was using a speaker and amplifier other than the in-house system in contravention of the licence condition. He also observed that there was an area directly in front of the performer, which had been cleared of tables and chairs where 12 to 15 patrons were dancing and singing to the musician’s songs.
16. On 12 December 2020, after receiving a complaint from Mr Sun, SCO Holehouse attended The Tap and recorded footage of a singer playing an amplified acoustic guitar performing in front of 20 to 30 patrons who were dancing and singing loudly along with the performer. In the opinion of SCO Holehouse, the music was being played through an amplifier and speakers additional to the in-house system.
17. On 28 January 2021, a complaint pursuant to section 160 of the Act was accepted by a Delegate of the Director and forwarded to the Licensee.
18. The substance of the complaint was particularised as follows:

(a) Component 1

- On 20 September 2020, a complaint was received from a local resident alleging the licensee allowed undue and unreasonable noise to emanate from the Tap in the form of live musician/s playing music at a level that subsequently affected the amenity of the neighbourhood.

- The complainant feels the offending noise is most nights of the week and does not cease until approximately 1:30 am and this has been occurring for approximately five (5) months. The complainant states he has attempted to resolve this with staff, however, the noise issues are ongoing and yet to be resolved.

(b) Component 2

- The Tap operates in contravention of its liquor licence conditions in that musician's employed by the Tap play a playlist of songs that have a large content of what may be described as "Pub Rock" as opposed to "Easy Listening music" as per the licence conditions.
- The Licensee allows staff on any occasion live entertainment is provided to relocate tables and chairs, which are normally located in front of the musician's stage creating a designated dance floor for patrons. Compliance Officers observed this on 12 December 2020 at 11:30pm.

19. The Licensee responded to the complaint through its lawyer, Ryan and Durey Solicitors, by letter dated 12 March 2021. In relation to Component 1 of the Complaint it was asserted on behalf of the Licensee that following the complaint a new sound system was installed on 27 October 2020 at a cost of nearly \$10,000 whereby the sound was distributed evenly throughout the premises via a number of smaller house speakers which allowed management to control the noise level rather than the performers. The Licensee disputed many of Mr Sun's specific complaints and relied on the fact that it had been operating from the premises for 15 years without any prior complaint of noise disturbance. It also relied on an email from Mr Sun dated 3 March 2021 wherein he said, "I am feeling good at night recently and the noise can hardly be heard".

20. In relation to Component 2 of the Complaint, it was submitted that the music played by The Tap's performers could be categorised as easy listening. It argued:

*"The licence condition does not prohibit "pub rock" songs being played; in fact there is no reference to pub rock in the licence condition at all. The licence merely refers to "bands, nightclub or disco style music". As such, well known "pub rock" songs, that are arranged in a slower tempo can be characterised as easy listening style".*

The Licensee also disputed that it was in breach of the "dance floor" condition. It argued that moving table and chairs in front of the performer was done for the safety of patrons and staff rather than to facilitate or encourage dancing.

## THE EXTENSION OF TIME

21. On 4 June 2021, Principal Compliance Officer Meguerditch Mikaelian wrote to the Commission seeking an extension of the time to complete this investigation pursuant to section 318 of the Act because section 158 of the Act requires that an investigation under section 161 must be conducted within 90 days after the complaint had been accepted or by any longer period allowed by the Commission.

22. Although the Commission determined on 5 August 2021 to extend the period within which to complete the investigation until 13 August 2021, on the information now before it there appears little justification for the delay in referring the matter on to the Commission subsequent to the Director receiving the Licensee's response to the complaint on 12 March 2021. There could be no complaint that the Licensee has been disadvantaged by the delay in this matter being referred to the Commission. However, it would appear that Mr Sun has been aggrieved by the seemingly inexplicable delay in bringing this matter to a resolution. He has vacated the unit he was renting near these licensed premises, refused to co-operate any further with Licensing Officers in these proceedings and failed to attend this hearing. Instead, he has redirected his focus to complain about what he apparently perceives as a failure of this process to address his concerns in a fair and timely manner.

## **THE HEARING**

23. On 25 August 2021, the Director referred this matter to the Commission pursuant to section 163(1)(f) of the Act for disciplinary action.
24. On 24 September 2021, Commission Support staff contacted the Licensee's solicitor by email enquiring whether 14 October 2021 would be a suitable date as far as the Licensee and its lawyers were concerned, for the Commission to conduct the hearing in respect of this complaint. In the absence of any response, the Commission wrote to the parties on 27 September 2021 advising that the matter had been set down for hearing on 14 October 2021.
25. Subsequently the solicitors for the Licensee sought and were granted an adjournment of the hearing until 28 October 2021. On that date, Mr Kulda appeared to represent the Director and Mr Ryan, solicitor, appeared for the Licensee. Also present on behalf of the Licensee were Mr Chris Foy, the current nominee Ms Kylie Arthur and former nominee Ms Anita Clerk all of whom gave evidence before the Commission. SCO Holehouse gave evidence in support of the complaint. The Commission acknowledges the co-operation and assistance provided by all those present at the hearing.

## **ASSESSMENT OF THE MATTER**

26. At the commencement of the hearing, the Director's referral brief was tendered as exhibit 1 in the proceedings.
27. The complaint originally before the Commission was particularised in a document headed "summary of Facts" at page 4 of exhibit 1. It was divided into two components and alleged:

- *Component 1 – Breach of section 93 of the Act.*

*The complainant feels the offending noise is most nights of the week and does not cease until approximately 1:30 am and this has been occurring for approximately five (5) months. The complainant states he has attempted to resolve this with staff however, the noise issues are ongoing and yet to be resolved.*

*Following the nominee being advised on 23 September 2020 of the initial complaint (20 September 2020), it further alleged on 20 October 2020 and 25*

*October 2020 the licensee did cause or permit undue and unreasonable noise on or in the licensed premises that affected the amenity of the neighborhood.*

*In addition to this, a subsequent letter dated 22 June 2021 was forwarded to the licensee advising of additional dates of alleged breaches of section 93 of the Act. These dates are as follows: 28 September 2020, 1 October 2020, 27 October 2020, 12 December 2020, 21 January 2021 and 24 January 2021.*

- *Component 2 – Breach of section 293 of the Act:*

*The Tap operates in contravention of its liquor licence conditions in that musician's employed by the Tap play a playlist of songs that have a large content of what may be described as "Pub Rock" as opposed to "Easy Listening music" as per the licence conditions.*

*The Licensee allows staff on any occasion live entertainment is provided to relocate tables and chairs, which are normally located in front of the musician's stage creating a designated dance floor for patrons. Compliance officers observed this on 12 December 2020 at 11:30 pm.*

*The Licensee provided a response on 12 March 2021 and on 9 August 2021, advised they had no further comment to add to the additional letter dated 22 June 2021".*

28. At the commencement of the hearing, Mr Kulda alluded to further complaints having arisen from the operation of these premises. Mr Ryan interrupted with an objection, so it was not clear whether Mr Kulda was referring to fresh matters or attempting to justify the inclusion of the additional material in the Director's referral brief. So, to avoid any prejudice to the Licensee the parties were advised that the Commission would be confining its inquiry to only those matters that were encompassed within the material in the Director's referral brief, including the audio visual footage which we had already watched.
29. Mr Ryan initially argued that the Licensee should only be required to deal with the allegations contained in the original complaint of 28 January 2021. However the Commission reminded him of the broad discretion provided the Commission by section 165 and more particularly section 166(4) of the Act which specifically empowers the Commission to "hear a matter not referred to it but which arises from a matter referred to it".
30. At the conclusion of the evidence at the hearing on 28 October, Mr Ryan sought and was granted an opportunity to file written submissions on behalf of the Licensee, which were filed on 15 November 2021.
31. In those submissions, Mr Ryan reiterated his argument that the Commission's inquiry was limited to the allegations contained in the original complaint. Accordingly, the Commission wrote to the Licensee's legal representative in the following terms on 23 November 2021.

*"Dear Mr Ryan*

*RE: DISCIPLINARY MATTER - THE TAP ON MITCHELL*



*I refer to your email and submissions of 15 November 2021.*

*As you are aware, section 166 (4) of the Liquor Act 2019 allows the Commission to hear a matter that might not have been formally referred to it if it arises from the matter that was referred.*

*Although I did indicate to Mr Kulda at the commencement of this hearing that he should not adduce evidence in respect of matters that had never been raised previously with the Licensee, it should have been clear to you from the evidence adduced and questions asked, that the Commission would be considering all the allegations contained in the referral brief of the Director of Liquor Licensing (the Director), Exhibit 1, even if they were not specifically particularised in the original complaint or what might be regarded as the complaint as amended by the Director's letter of 22 June 2021. However, the overly "legalistic" tone of your submissions raises the possibility that you might be wrongly assuming that the Commission will confine its deliberations to only those matters alleged in the original complaint.*

*In order that you might be under no misapprehension as to the matters upon which the Commission could potentially decide breaches warranting disciplinary action have been made out, we have decided, in an abundance of caution, that I should particularise those matters and give the Licensee the opportunity to request that the hearing be reconvened so that you can re- cross examine witnesses, adduce further evidence or make further submissions.*

#### **PARTICULARS**

*In relation to Component 1 of the Complaint alleging a breach of section 93 of the Act:*

*There is some evidence of excessive noise disturbance constituting a breach of section 93:-*

*(a) On 20 October 2020, between midnight and 1:00 am, the evidence of the email from Mr Sun to Senior Compliance Officer Holehouse of 20 October 2020, combined with the video footage taken of the premises by Mr Sun that morning could possibly support a finding of excessive noise disturbance (page 110, Exhibit 1 and Attachment T) [as alleged in original complaint];*

*(b) On 12 December 2020, between 9:00 pm and 10:00 pm, in response to a complaint of noise by Mr Sun, Senior Compliance Officer Holehouse attends the premises and takes two video recordings of the premises from the adjacent footpath and from across the road which could be possibly construed as supporting Mr Sun's complaint of excessive noise, (Attachment 3, also see para 45 of Senior Compliance Officer Holehouse's Statutory Declaration at page 11, Exhibit 1) [this breach was alleged in letter of 22 June 2021].*

*On the evidence as it currently stands, in the absence of Mr Sun, you would be safe to assume that we accept that there is not sufficient evidence to support any adverse finding in respect of the other allegations of a breach of section 93. However while the Commission has no concluded view on the two matters referred to above we would be assisted by any further submissions you wish to make in respect of those particular incidents.*

*In relation to Component 2 of the Complaint alleging a breach of section 293 of the Act:*

*There is some evidence of breaches of conditions of the licence, namely:-*

*(c) On 20 October 2020, the Licensee breached licence conditions: it was in breach of the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, the music was being amplified independently of the in-house sound system, it could not be categorised as easy listening music and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor (Attachment T and page 110, Exhibit 1), [alleged in original complaint];*

*(d) On 26 November 2020, between 10:00 pm and 10:30 pm, the Licensee breached the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, the music was being amplified independently of the in-house sound system, it could not be categorised as easy listening music and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor (paragraphs 39 to 44, pages 10 – 11, Exhibit [not alleged in original complaint or letter of 22 June 2021];*

*(e) On 12 December 2020, between 7:00 pm and 10:00 pm, the Licensee breached the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, the music was being amplified independently of the in-house sound system, it could not be categorised as easy listening music and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor (paragraph 45, page 11, Exhibit 1 and video footage Attachment3), [in original complaint];*

*(f) On 8 May 2021 at 1:20 am, the Licensee breached the licence concept as the premises had the appearance of a rowdy pub beer garden rather than an alfresco café. Furthermore, the music was being amplified independently of the in house sound system, it could not be categorised as easy listening music and furniture had been moved from an area in front of the performer to facilitate its use as a dance floor (paragraph 56, page 12, Exhibit 1 and video footage Attachment 12 B) [not alleged in original complaint or letter of 26 June 2021]*

*I refer to the suggested amendment of licence conditions outlined in part 5 of your submissions which have been agreed to by Licensing NT. Whereas the Commission will necessarily carefully consider that submission, you cannot assume that it will be accepted because it is supported by the Director. The Commission is bound to have regard to all relevant considerations in determining what if any disciplinary action should be taken if it determines that any breaches are made out.*

*Once again, I should stress that the Commission does not have a concluded view as to whether these particular breaches are made out.*

*Could you please advise within the next 7 days as to whether you would like the Commission to reconvene the hearing or make further submissions. If further evidence is necessary, that may not be able to happen until next year.”*

32. On 30 November 2021, Mr Ryan requested that the hearing be reconvened so that further cross-examination could occur and further evidence adduced. Due to Covid

restrictions, the matter was unable to be relisted until 11 March 2022 when Mr Ryan once again appeared for the Licensee and Mr Kulda appeared for the Director.

33. Although the further hearing presented an opportunity for the Director to attempt to secure the attendance of Mr Sun, Mr Kulda advised that he was continuing to decline to have any involvement in these proceedings. Mr Holehouse was further cross-examined and Mr Foy and Ms Kyle Arthur gave further evidence.

## **Assessment of the Matter**

### **Component 1 – Noise complaint**

34. As Mr Sun did not make himself available to give evidence at the hearing, the Commission had already indicated to the Licensee's legal representative that it would not be finding proved allegations of undue noise on 20 September 2020, 28 September 2020, 1 October 2020, 27 October 2020, 12 December 2020, 21 January 2021 and 24 January 2021. However as indicated in the particulars provided to the Licensee by the Commission on 23 November 2021 there was some not insignificant evidence in support of the complaint of undue and unreasonable noise for 20 October 2020 and 12 December 2020.
35. On 20 October 2020 at 12:48 am, Senior Compliance Officer (SCO) Holehouse received a text message from Mr Sun complaining of loud music being played at the tap after 12:00. He said that he had recorded a video of the premises. To his considerable credit, SCO Holehouse left his home in the early morning and arrived at the premises at 1:15 am by which time the live entertainer was packing up his equipment and there was no excessive noise.
36. Later that day Mr Sun provided SCO Holehouse with video footage, which showed a musician playing an amplified guitar along with six patrons dancing in an area in front of the musician. Although the video footage was not time and date stamped the Commission can infer on the basis of the text message that he went there between midnight and 00:48 hours on 20 October 2020. That is also supported by Holehouse's conversation with the duty manager Nick who confirmed that a man of Asian appearance had attended the Tap earlier that night and recorded the live musician on his phone as well as requesting that the music be turned down.<sup>1</sup>
37. Although Mr Sun's video footage<sup>2</sup> depicts a relatively small number of people behaving in a rowdy manner and the premises operating in breach of its licence concept, it is not clear that the noise emanating from the premises at that time amounted to "undue and unreasonable noise". The noise may well have been greater at the time Mr Sun determined to leave his residence to register a complaint with the Licensee however without his testimony at the hearing we cannot be satisfied that is the case.
38. Accordingly, the alleged breach of section 93 of the Act on 20 October 2020 is not made out.

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<sup>1</sup> (Holehouse Stat Dec Paragraph 28 exhibit 1 Page 9)

<sup>2</sup> (Attachment T)

39. In relation to the remaining allegation of a breach of section 93 of the Act, Mr Holehouse attended the premises on 12 December 2020 between 21:00 hours and 22:00 hours following an off duty phone call from Mr Sun. He recorded video footage of a singer playing a guitar in front of approximately 20 – 30 patrons who were dancing and singing along with the entertainer. He told the Commission that both the singer and his instrument were amplified independently of the house sound system. It is safe to infer that Mr Sun found the noise disturbing and that it came from the Tap because Holehouse attended the premises very shortly after receiving Sun’s complaint to find a significant level of noise emanating from the premises. The video footage taken by Holehouse (Attachment 3 to Exhibit 1) has been played on numerous occasions before the Commission during the proceedings. It clearly shows that the assurances provided by the former Licensee when the licence was granted in 2005 have long been forgotten and that these premises were being conducted like a rowdy beer garden right on Mitchell Street frontage.
40. Although it appeared to the Commission from the video recording that significant noise was emanating from the premises. Mr Holehouse did not express a view in either his statutory declaration or evidence as to whether he believed it was undue and unreasonable. We must also have regard to the fact that these events were occurring between 09:00 and 10:00 pm when neighbouring residents and business operators might be expected to tolerate a level of noise disturbance that would not be acceptable after midnight. In all the circumstances the Commission is not satisfied, to the degree required that the alleged breach of section 93 of the Act on 12 December 2020 is made out.

## **Component 2**

41. Although the Commission will not be taking disciplinary action against the Licensee for breaching section 93 of the Act, it has little doubt that unacceptable levels of noise were emanating from these open air premises during the period within which Mr Sun lodged his complaints including on 20 October 2020. The Licensee in its response to Mr Sun’s complaint questioned the “validity and accuracy” of his allegations and portrayed him as unusually sensitive given there had been no other formal complaints where the venue had been operating in the same manner for at least 5 years. However, it had become patently clear from the observations of SCO Holehouse on 26 November 2020 and the subsequent video recordings that there was a problem with the noise emanating from this venue, which had not been cured by the installation of a new sound system on 27 October 2020.
42. The Licensee did not formally admit the breach of Component 2 of the Complaint. In a spirited defence of her employer, the current nominee, Ms Kylie Arthur, argued that the premises still had a tropical garden with rock and water features in line with the licence concept, the live music was only provided by a solo artist or duo and that there was still no designated dance floor. However, that ignores the circumstances under which the licence came into existence which make it clear that the reason for the detailed licence concept and restrictions on entertainment were to ensure that the venue did not become a noisy, late night open-air nightclub.
43. Mr Foy, representative of the Licensee, who has been involved with the operation of this licence from the start realistically conceded that the nature of the business had changed over the past 15 years. He spoke of the pressure that existed to retain market

share, as against the competing venues in Mitchell Street, since the departure of the many workers who had come to Darwin during the INPEX construction project.

44. While the Commission is not unsympathetic to the challenges that have confronted the hospitality industry over recent years it still needs to ensure that licensees abide by the conditions of their licences particularly those conditions, which were willingly accepted by the developers of venues such as this, as reasonably necessary to preserve the amenity of the neighbourhood. What might be regarded as good business for one sector of the hospitality industry can have detrimental consequences for other tourism and hospitality businesses. The Commission would be surprised if some of the guests of the neighbouring hotels and hostels as well as the open air restaurants had not been adversely impacted by the operation of these premises having viewed the video evidence particularly that in relation to the events of 12 December 2020 and 7 – 8 May 2021, the licensee should take little comfort from the fact that Mr Sun was the only formal Complainant.
45. It might also be useful for the Mitchell Street licensees to reflect on whether the increasing noise from competing venues in this area, as detailed by Mr Sun, is actually driving custom away from this traditional night club strip to the smaller bars which have sprung up elsewhere in the CBD and appear to be thriving.

## Findings

### **Breach of Concept:**

46. Mr Ryan on behalf of the Licensee submitted,

*“That the key word in the concept condition is appearance that is the premises must have the appearance of an alfresco dining area and café. It does not require the premises to operate like a café, but rather to look like a dining area being set up with chairs and tables”.<sup>3</sup>*

47. The Commission cannot agree that the concept condition has no part to play in the way these premises are allowed to operate. As referred to previously in this decision, when regard is had to the circumstances under which this licence came into existence it is clear that the concept together with the restrictive entertainment conditions and prohibition on a designated dance floor were imposed to prevent these premises from operating as an open air nightclub or as the Commission has particularised it “as a rowdy pub beer garden”. What possible purpose is achieved by requiring these premises to have the appearance of an “alfresco café” if that has no effect on moderating the style of its operations? It is of concern to the Commission that the Licensee has taken this approach to these proceedings as it has left us with little faith that it will operate in accordance with the spirit of those conditions in the future.
48. On the evidence of the three sets of video recordings and the observations of Mr Holehouse, the Commission is satisfied that the licensee was in breach of the concept condition on the four occasions particularised in the Commissions letter of 23 November 2021.

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<sup>3</sup> Ryan further submission – Page 9

## Dance Floor

49. In relation to the allegations that the Licensee had moved or allowed furniture to be moved by patrons to facilitate the use of an area in front of the performer as a dance floor, Mr Ryan submitted:

*“In relation to the designated dance floor, the Licensee reiterates that it has not created a designated dance floor. Designated is defined as “to say officially that a place or thing has a particular character or purpose. The Licensee disputes that it has in any way created a floor space with the particular purpose for dancing.*

*The Licensee reiterates that as a result of there being some, albeit limited space in front of the musician, some patrons do stand and sometimes dance in that area. However, the area is not designated or promoted as a dance floor and it is certainly not the intention of the Licensee to create a dance floor. It is an unmarked concrete floor with no designated lighting or mirror ball, which would suggest a “designated dance floor”.<sup>4</sup>*

50. Although Mr Ryan acknowledged that one table was sometimes moved during live entertainment for staff access purposes it is clear from Mr Holehouse’s observation on 26 November 2020 and the three sets of video footage that not insignificant areas have been cleared to facilitate the use of those spaces for dancing. If the sole reason for removing the furniture were to enable safe access through this area then we would have expected that some effort would have been made to clear the dancers away from this area. The fact that there is no “mirror ball” or special lighting does not prevent the area from becoming the “designated dance floor” on a particular night. Furthermore, it can be observed from the video footage that the area set aside for dancers was different on some nights. Once again, the Licensee’s attitude to these alleged breaches is disappointing. What is the point of imposing a condition that there be no designated dance floor if it is not aimed at discouraging patrons from dancing?
51. The Commission is satisfied that on the four occasions particularised, that the Licensee breached the condition of licence “that there be no designated dance floor on the premises”.

## Easy Listening Music

52. Mr Ryan argued that “easy listening music” was “music that is not up-tempo dance music with hypnotic rhythm repetitive lyrics and electronically produced sounds”. He also relied on the Commission’s decision in the Six Tanks Brewing Co. matter<sup>5</sup> which detailed the difficulties associated with categorising music in such broad generalised terms. Whether the music that was played on these four occasions can be properly described as “easy listening” is not really capable of any reliable objective analysis. It is clear to the Commission, however, that the type of music that was played and its level of amplification were such as to encourage dancing and give the premises the appearance of a rowdy pub beer garden, in contravention of the concept condition. Accordingly, the Commission does not consider it necessary or fruitful to embark upon

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<sup>4</sup> Ryan – Further submissions – Page 5

<sup>5</sup> LC2021/019

the tortuous process of also determining whether the music played could fall within the definition of easy listening.

## **Music not to be amplified independently of In-house System**

53. The Commission agrees with the submission of the Licensee that there is insufficient evidence to ascertain whether the performer on 20 October 2020 was using any amplification other than the in-house system. The Commission is satisfied on the evidence of Mr Holehouse at the resumed hearing that the performer on 26 November 2020 was using an additional amplifier and speaker. The licensee has conceded, as was also clear from the evidence that it had also breached this condition on 12 December 2020 and 08 May 2021. It is of concern to the Commission that the three breaches of this condition occurred subsequent to the Licensee advising Licensing Officers that it had installed a new sound system and implemented procedures aimed at ensuring that any music was only played through the in-house system.

## **The Disciplinary Action**

54. Having upheld the complaint in relation to the aforementioned breaches of section 293, the Commission has determined it is appropriate that disciplinary action be taken and that should take the form of varying the conditions of licence to better ensure that the operation of these premises does not adversely impact on the amenity of this neighbourhood.
55. The Commission accepts that through Ms Arthur the Licensee has taken proactive steps to liaise with other business owners in the area to receive feedback on any concerns over the operation of the premises. It would also seem that the sound system is now being operated in a manner whereby the musicians are only able to turn the sound down, as a password is required in order to raise the sound level. The Licensee has also made it clear to performers who want to work at the venue that they must not use fold back or any other type of additional speaker.
56. The Licensee has also of its own volition limited the hours that live music is played until 11:00 pm on Sunday to Wednesday and 1:00 am (the following day) Thursday to Saturday. It has as well ceased moving tables and chairs when a musician is performing.
57. In his further submissions Mr Ryan suggested that the fact that this licence had evolved from an "On Licence" to "Tavern" and now Public Bar Authority with Late Night Authority showed the business had changed significantly over the 17 years despite the "concept" having remained largely unchanged. However, it is relevant to acknowledge that although this licence has in the past been part of a backpackers accommodation complex, adjoined the 'Opium Nightclub' and is now associated with the Crocosaurus tourist theme park, the concept and relevant conditions for these completely "open air" premises on Mitchell Street require it to have the appearance of an Alfresco dining area or café. Indeed, there is also a condition on the licence that the Tap on Mitchell not be advertised or promoted as a bar. Furthermore, there is also a condition of licence, which states: "Any proposed transferee of the licence may be required by the Director as a prerequisite of its consent to transfer to sign a written acknowledgement

of the proposed transferee's awareness of the conditions of the licence and in particular the "Licence Concept Conditions".

58. The Commission does not accept that the Licensee could have had any reasonable expectation that it was entitled to operate this licence in the manner that occurred on these four occasions the subject of the proven complaints. If it wanted to operate a late night music venue, it could have done so within the walls of the Opium Nightclub rather than leasing those premises to another operator.
59. At the conclusion of the further hearing on 11 March 2022 the Commission invited the Licensee and the Director to suggest a new range of licence conditions including the licence concept which might more clearly articulate the constraints under which these open air premises must operate within the city centre if they are not to have an adverse impact on the local community. The subsequent submission by the Licensee which was supported by the Director was disappointing. It inaccurately described some of the existing conditions and appeared to be little more than a thinly veiled attempt to remove any of those conditions aimed at reducing the impact of the premises on the local community, which were the cornerstone of the original licence grant, without offering anything constructive in return.
60. Accordingly, the Commission has determined to not embark upon any wholesale tidying up of the licence condition and to leave the licence concept as it currently exists. If the Licensee wishes to change the licence concept or any of the restrictive conditions then it can make an application in the normal way for a variation of conditions, which will enable the local community to express a view on the merit of the proposed changes.
61. The current entertainment condition although imperfect will remain however live entertainment will only be permitted:

Sunday to Wednesday  
10:00 to 23:00 hours

Thursday to Saturday as well as a day preceding a public holiday in the Northern Territory  
10:00 to 24:00 hours

The Licensee should clearly understand that if there are further breaches of the entertainment condition similar to these breaches, the subject matter of these complaints then it is likely that no entertainment will be permitted at all in the Alfresco Dining Area.

62. The current noise condition will be deleted and replaced with the following:
  - 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.



- The Director of Liquor Licensing on her or his own initiative may review noise issues pertaining to the licensed premises, and notwithstanding compliance by the Licensee with the foregoing, the Licensee shall implement such sound attenuation and noise mitigation measures as the Director of Liquor Licensing in her or his discretion may notify to the Licensee in writing at any time as having become in the Director of Liquor Licensing's view a reasonable requirement in the circumstances then prevailing.

63. The two conditions which related to late trading at opium entitled "Persons may Remain on Premises" and "After Hours Snacks to be made Available" are no longer relevant as this Licensee is not operating the Opium Nightclub and are therefore deleted from these licence conditions.

## **Notice of Rights**

64. Section 31(1) read with section 166(7) of the Act provides that the decision set out in this decision notice is reviewable by 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.

65. 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 complaint.



RICHARD COATES  
CHAIRPERSON, NORTHERN TERRITORY LIQUOR COMMISSION  
3 May 2022

On behalf of Commissioners Coates, Carson and Corcoran