

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE

MATTER: APPLICATION FOR APPROVAL OF MATERIAL ALTERATION TO LICENSED PREMISES AND VARIATION OF LICENCE CONDITIONS

REFERENCE: LC2021/005

LICENCE NUMBER: FLL1063

LICENSEE: Dom's Bar & Lounge Pty Ltd

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

LEGISLATION: Sections 96 and 110 of the *Liquor Act 2019*

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

DATES OF HEARING: 11 & 12 February 2021

DATE OF DECISION: 5 March 2021

Decision

1. For the reasons set out below and in accordance with sections 96 and 110 of the Liquor Act 2019 ("the Act") the Northern Territory Liquor Commission has determined to approve the application for a material alteration to extend the liquor licenced area to shop 6 of 60 Aralia Street Nightcliff on the following conditions:
 - a. No business is to be conducted on the premises while the alteration is being made unless the Licensee has been provided with written approval of the arrangements that the Licensee will put in place to conduct the business while the alteration is being made.
 - b. The Commission delegates the approval of these arrangements to the Director of Liquor Licensing ("the Director").
 - c. The Licensee shall not sell or supply liquor in the extended premises (shop 6) until such time as it provides proof to the satisfaction of the Director, that it has obtained all the necessary planning, building and fire safety approvals.
2. The application for material alterations to extend the licensed area to include the footpath and the arcade toilets were withdrawn and are therefore refused.

3. The application to vary the conditions of licence to extend the liquor trading hours of the arcade area to match those of the internal bar in shop 7 is refused.
4. The application to vary the special condition limiting the nature of and time during which music can be played in the arcade area is refused and the Special Noise Control Condition imposed subsequent to Disciplinary proceedings by the Commission in Decision Notice dated 2 March 2021¹ now apply to this licence, including that additional part of the premises (shop 6) that will be created once the license has satisfied the requirements of para (1) above.
5. Licence condition (b) and (c) in relation to use of the arcade are now amended to read;
 - (b) It is not being used as a public thoroughfare and appropriate signage is erected at the Cunjevoi or Aralia Street entrances, or both, informing the public.
 - (c) A barricade is placed at the end of the licensed footprint in the arcade to prevent the public inadvertently traversing the licensed area of the arcade.

STATEMENT OF REASONS

Background

6. Dom's Bar & Lounge Pty Ltd ("the Licensee) is the holder of liquor licence number FLL1063 for premises known as Dom's Bar & Lounge, situated at shop 7 and partial arcade area of 60 Aralia Street, Nightcliff.
7. On November 2020 an application was lodged by Dominic Wundke on behalf of Dom's Bar & Lounge Pty Ltd, where the Licensee was seeking material alterations and permanent variations to the liquor licence.
8. The application was required to be clarified with the Licensee where on the 12 November 2020 the Licensee provided the following clarifications and was seeking the following:

Material Alterations

- Proposal to extend the liquor licensed area to include the outside footpath area
- Proposal to extend the liquor licensed area to include the arcade toilets
- Proposal to extend the liquor licensed area to include the area known as shop 6

Permanent Variation

- Proposal to change the liquor trading hours of the arcade area to match the trading hours of the internal area known as shop 7 and Dom's Bar and Lounge Internal area on the liquor licence.
- Proposal to change current special condition that states "Live music in the arcade must be of an acoustic nature with only amplification of the vocalist and

¹ Northern Territory Liquor Commission, *Dom's Bar & Lounge Pty Ltd Decision Notice Disciplinary action pursuant to the Liquor Act 2019*: (2 March 2021)

must cease by 22:00 hours" and change to "Live music in the arcade must cease by 24:00 hours"

9. Since publication of the application, which included the above proposals, the Licensee has since amended the application as following:
 - The application to extend the licensed area to include the public toilets was withdrawn on the 26 November 2020
 - The application to use the public footpath in front of the premises has been withdrawn as of the 15 January 2021. The concurrent application to the City of Darwin to use this public space has also been withdrawn.
10. The following supporting documents were supplied:
 - Affidavit from Dominic Wundke
 - Community Impact Assessment
 - Public Interest and Community Impact Assessment Summary
 - Public Interest documents
 - Copy of letter from landlord and proposed lease
 - Letter from Licensee outlining application to DCA for change of use of shop 6
 - Letter from Dominic Wundke re Section 95 of the Act re no contravention with legislation
 - Proposed licensed footprint as of date of original application
 - Smoking management plan
 - Letter of support from Music NT
11. Subsequent to this matter being referred to the Commission, advice was provided that the Development Consent Authority had approved the use of shop 6 as part of the small bar. That is not surprising given the fact that the Authority has previously approved the use of the adjoining shop 7 as a hotel prior to the original application.

PUBLICATION AND CONSULTATION

12. The application was published by way of two notices in the NT News on Saturday 14 November 2020 and Wednesday 18 November 2020. A green advertising sign was also erected at the premises for the course of the advertising period.
13. As a result of public advertising eight objections were received from:
 - a. Paul and Susan Walsh who were nearby residents that objected on the basis that extending the licensed footprint as well as the hours of trade in the arcade would increase what was already an unacceptable level of noise disturbance;

- b. Mark and Alex Kersemakers who were also local residents objected in similar terms;
 - c. Paul and Rosanna van den Herik were also local residents and objected along broadly similar lines;
 - d. Kirrily Chambers and Dale Bennett were also local residents who objected along similar lines;
 - e. John and Anong Bell do not reside in the area but own the licensed restaurant and three town houses which abut the licensed premises. They objected on the basis of ongoing noise disturbance which would be exacerbated if the applicant was allowed to trade on the footpath or increase the hours and scope of operation in the arcade;
 - f. Nikki Curnow is a fellow tenant of the applicant. She operates a hairdressing business at shop 2. Prior to the hearing of this matter she wrote to the Commission to the effect that her issues with the applicant had now been resolved and she no longer objected to the application;
 - g. Keith Francis another tenant of the arcade (shop 4) objected on the grounds that children were “belting” on the piano that the applicant had installed in the arcade and the fact that the Licensee could commence trade from 3:00pm on weekdays conflicted with the needs of his customers to have unimpeded access to his shop during normal business hours. The concerns raised by Mr Francis would normally be regarded as an issue between him and his landlord. The Commission notes that he has taken no further part in these proceedings and assumes he has resolved any issues with his fellow tenant and the landlord.
 - h. Darwin City Council objected on the basis of the proposed use of the footpath as licensed premises. It is noted that the applicant is no longer proceeding with that aspect of its application which is no doubt why the Council has not taken any further part in these proceedings.
14. In accordance with the requirements of the Act the CEO of the Department of Health and the Commissioner of Police were notified of the application. Neither provided any adverse comment on the merits of the application.
15. The Commission was aware that two separate complaint files had also been referred relating to breach of licence conditions and noise complaints. These matters had all arisen subsequent to the Director exercising an emergency delegation to extend the licensed footprint to assist NT licensees comply with the social distancing requirements that were introduced in response to the COVID-19 pandemic. On 27 May 2020, the Director approved an extension of the licensed footprint to encapsulate the Cunjevoi Street footpath and extended the hours of trade in the arcade to match those of shop 7. Following noise complaints, the Director revoked the approval to use the footpath on 12 August 2020. On 17 September 2020 the Director revoked the emergency extension of hours of trade for the arcade area. Some of the objectors were critical of the Director’s decision to relax the restrictions the Commission had imposed on this Licensee’s arcade trade. However those criticisms ignore the fact that these were emergency measures designed to protect public health in a situation where it was impracticable to properly assess the merits of each individual proposal. As the

Commission made clear in its decision on the complaint matters, the blame for what ensued rests squarely on the shoulders of the Licensee.

PUBLIC HEARING

16. This matter was referred to the Commission by the Director on 21 January 2021. At the time of referral the Commission had already been referred the two complaint files – LC2020/056 on 11 November 2020 and LC2021/002 on 11 January 2021. The Commission had informed the parties that it was not disposed to deal with this application until it had heard the evidence concerning the complaints. It was ultimately decided to hear the two complaints followed by the application over two days on 11 and 12 February 2021. The Public hearings were conducted at one of the Darwin Local Courts and where possible the evidence provided by complaint witnesses was also admitted as evidence in support of an objection where that witness was also an objector.
17. On the application for a material alteration and a variation of conditions Mr Wundke appeared to represent the Licensee and Mr Jeff Verinder appeared to represent the Director. Paul Walsh, Peter van den Herik, John Bell and Kirrily Chambers also spoke in support of their objections. The Commission thanks all the parties for their assistance in this matter.

ASSESSMENT OF THE MATTER

18. Pursuant to section 23 of the Act the Commission is not bound by the rules of evidence and may inform itself in any manner it considers appropriate. The Director's referral brief was tendered and admitted into evidence without objection. That brief included the applicant's community impact assessment and public interest test. It also contained various letters of support for the Licensee's business and proposed expansion as well as the Licensee's response to the objections.
19. In considering the application, the Commission has had regard to the purposes of the Act (section 3), the application of the public interest and community impact test (section 49), the community impact assessment guidelines issued by the Attorney-General and Minister for Justice on 2 March 2018, pursuant to section 50, and the onus on an applicant to satisfy the Commission that the approval of the application is in the public interest and will not have a significant adverse impact on the community (section 51).
20. These premises have only been operating as a small bar since November 2019. Although the current objectors had all opposed the granting of the licence most of them were prepared to concede in these proceedings that the business had caused minimal disturbance to the amenity of their neighbourhood until the emergency COVID variation of conditions in late May 2020. Between June and November the Licensee hosted a number of "dance party" type events which caused significant disturbance to local residents. Details of the particular events and the evidence upon which the Commission relied to determine it was appropriate to take disciplinary action against the Licensee are set out in the Commission's Decision Notice (LC2020/056 and LC2021/002) concerning the complaints.
21. The Commission has been very much focussed on the need to minimise further unwarranted noise disturbance from these premises in its consideration of these applications. On the evidence accepted by the Commission in the complaint proceedings the proposal to extend the trading hours for the arcade to match those of

the internal bar and allow live music in the arcade until midnight clearly has no merit. Even if there had not been any complaints associated with the use of the arcade the Licensee would have been hard pressed to persuade the Commission that later trading hours and less restrictions on music in the arcade would not cause undue noise disturbance. In its original decision the Commission identified the arcade as a potential source of noise because of the open louvres along the roof line and the absence of a solid door at the Cunjevoi Street entrance.

22. Having now received evidence as to the noise disturbance which occurred when the arcade trading hours were increased, the Commission is left in no doubt that it is not appropriate to allow any further extension of trade in that area.
23. The Commission was not impressed by the Licensee's claimed justification for the use of a heavily amplified DJ performance in the arcade. The Licensee's argument that it did not contravene the no amplification condition because it was not a "live performance" is disingenuous. Mr Wundke has been "pushing the envelope" with the type of entertainment being provided in the arcade and this has clearly backfired as far as his relationship with his neighbours is concerned.
24. When questioned by the Commission as to whether he would need to use the arcade for any entertainment purposes if the internal bar was extended to shop 6, Mr Wundke agreed that he would be able to confine all such events to the internal bar space. He did however want to be able to play ambient, pre-recorded music through the fixed speakers in the arcade. It was suggested by the Director's representative that the Commission could impose a condition limiting the music played in the arcade speakers to "easy listening background music". However individuals will differ over what they regard as "easy listening" and the Commission has no desire to impose a bland, non-descript type of music on patrons using the arcade. What we do expect is that any music that is played over the fixed speakers in the arcade is played at a low background level and is not so loud as to require patrons to raise their voices to talk over it or encourage them to dance.
25. The Commission has therefore determined to refuse the application to extend the trading hours in the arcade. Furthermore, rather than relax the restrictions on live music in the arcade, the Commission has, pursuant to discipline action on the complaint matters imposed the following condition in relation to entertainment in the arcade:

There shall be no live music, DJ performance or any other entertainment in the arcade area. The only music that is permitted in the arcade shall be through the installed speakers and be in the nature of background music which is not so loud as to impede normal conversation or encourage patrons to dance. These speakers must be turned off no later than 22:00 hours².
26. Although the Licensee is to be commended for his vision in revitalising this old building through the establishment of an aesthetically pleasing, popular small cocktail bar, the use of the arcade as part of the licensed premises presents a number of problems for a Licensee. When the Commission dealt with the original licence application it was made clear to the applicant that the arcade could not be used for the consumption of liquor if it was also being used as a thoroughfare by members of the public or by customers attending any of the other shops that are accessed via the arcade.

² Northern Territory Liquor Commission, *Dom's Bar & Lounge Pty Ltd Decision Notice Disciplinary action pursuant to the Liquor Act 2019*: (2 March 2021)

27. The current licence conditions in relation to use of the arcade are as follows;

The hours of operation for the arcade area apply only if:

- (a) The Licensee has exclusive control over who is entitled to enter and remain within the licensed area of the arcade;*
- (b) It is not being used as a public thoroughfare and appropriate signage is erected at the Cunjevoi Street entrance informing public;*
- (c) A barricade is placed at the end of the licensed footprint in the arcade to stop delineating the licensed footprint in the arcade to stop patron or public access through the arcade.*

28. During this hearing some of the objectors alleged that the Licensee was not abiding by these conditions and that the arcade was being used as a thoroughfare when the bar was open for business. Mr Walsh tendered a photograph and video both taken at 4:18pm on 5 February 2021 which clearly showed school children using the arcade as a thoroughfare at a time when it may have been used as licensed premises. It is not certain that the arcade area was actually being used at that time for the consumption of liquor however there appeared to be glasses on some of the tables. As the Commission reminded Mr Wunke, he is responsible for complying with the terms of his licence and if he does not have exclusive control of his part of the arcade he cannot serve liquor there.

29. On 14 February 2021, subsequent to the hearing the Licensee wrote to the Commission by email advising that after considering the issues of smoking, persons congregating on the footpath and restricting the use of the arcade as a public thoroughfare he had spoken to his landlord about the option of closing the Cunjevoi Street entrance to the arcade when the bar was operating. He said;

“This would essentially direct all after hours access to the Aralia Street entrance and would almost entirely mitigate any patron noise on Cunjevoi Street. The smoking area could then be moved to the Aralia Street side of the building..... A potential additional benefit of this arrangement is that noise in the arcade can be further contained by installing sound proofing panels to the interior of the metal swing gate located at the Cunjevoi Street entrance, which would be closed when the arcade licence is in operation”.

30. Mr Wundke would be wise to get on the “front foot” with the residents of the Aralia Street apartments about his plans to relocate the entrance to his bar and respond in a timely manner to any legitimate concerns they may have about his patrons using Aralia Street to enter and exit the premises. However he is to be commended for the initiative he has shown in attempting to alleviate some of the longstanding areas of concern for the Cunjevoi Street residents.

31. In order that the Licensee can be confident that the current licence conditions will not impede its ability to change the point of ingress and egress for the arcade, the Commission has determined to exercise its power under section 113(1) and (6) of the Act to vary sub condition (b) governing the hours of operation of the arcade (referred to in paragraph 27 above). It should now read:

- (b) It is not being used as a public thoroughfare and appropriate signage is erected at the Cunjevoi or Aralia Street entrances or both, informing public.

Furthermore, as there is clearly a misstatement in the terms of condition (c) it will also be amended to now read:

- (c) A barricade is placed at the end of the licensed footprint in the arcade to prevent the public inadvertently traversing the licensed are of the arcade.

THE MATERIAL ALTERATION

32. Although the applicant in his Public Interest and Community Impact Assessment summary dated 2 November 2020 (Attachment H exhibit 1) asserted that his local member Natasha Fyles was “supportive of what we are doing”, Minister Fyles in a letter dated 4 February 2021 to the Director made it very clear that she was not supporting this application. The Licensee has however been able to garner a significant level of support for his bar from a wide range of people including a Mr Oliver who lives at 10 Cunjevoi Crescent, Hannah Illingworth Director of the Darwin Fringe Festival and Mark Smith Executive Director of Music NT. In his evidence to the Commission Mr Wundke conceded that some of the events he had hosted under the COVID exemptions had not worked but he stressed that no one was ever assaulted on his premises nor were the Police required to attend to deal with any criminal behaviour. The Commission accepts that Mr Wundke has a passion for the hospitality industry and has demonstrated that there is a market for an alternative entertainment experience to that on offer from the traditional Mitchell Street venues. However as was pointed out to him during this hearing, it is unlikely that he will ever be able to operate anything larger than a small bar from this location and if he has plans of hosting major music events or expanding the size of his operations then he will only realistically be able to achieve that goal at another more appropriate venue.
33. The application for the material alteration to extend the internal bar area of shop 7 into the adjoining shop 6 was made on the basis that the premises will still only operate under a small bar authority with a maximum limit of 100 patrons.
34. The Licensee has obtained permission from the landlord to remove the wall between shop 7 and 6 to create an internal bar area twice the size of that which presently exists. Plans of the proposed renovation together with computer generated photographs of the furnishings and layout were provided to the Commission. The additional bar area will be furnished in the same style as exists within shop 7 and the Commission is satisfied that the existing concept of a small, high quality cocktail bar can be maintained through the proposed extension.
35. The Licensee has agreed to confine all entertainment including DJ performances to the internal bar area and submits that this will significantly decrease the level of noise emanating from the premises.
36. Although the proposed material alteration was not as strongly opposed by the objectors as was the extension of trade in the arcade or on to the footpath, they still argued that doubling the internal space will double the number of patrons that will be leaving the premises at 1:30am on weekends and thereby create on going noise disturbance.
37. The Commission does not accept that argument. At page 151 of the Director’s referral brief, the Licensee provided a graph which portrayed the level of liquor sales with reference to the time of day over the period 8 January 2020 to 8 January 2021. It clearly shows that the great majority of sales are occurring between 6:00pm and 9:00pm. After 9:00pm, the level of sales decline at a significant rate such that by midnight, they are

at a minimal level. This does not mean that there is no risk that noisy patrons will leave the premises after midnight only that increasing the internal bar area will not necessarily increase the number of late night patrons.

38. It is relevant to note that prior to the original licence application coming before the Commission in August 2019, the applicant had been through a lengthy planning process and obtained DCA approval for use of the premises as a "Hotel". The Commission's decision of 11 September 2019 limited that approved use to the operation of a small bar with no more than 100 patrons. The Commission cannot understand what valid community benefit has been achieved by requiring this applicant to once again obtain planning approval to include an identical shop within the same building as part of the same small bar. That process has no doubt played a part in raising the stress levels of local residents who lodged planning objections and for the Licensee who was put to the time and expense of participating in another bureaucratic process, the outcome of which, we would have thought was beyond doubt.
39. The Commission finds that increasing the internal space of these premises within the confines of a small bar authority is likely to diminish the risk of further interference to residents rather than raise it.
40. Having had regard to the purposes of the Act (section 3), the application of the public interest and community impact test (section 49) and the Community Impact Assessment Guidelines the Commission is satisfied that approving this application for a material alteration is in the public interest and will not have a significant adverse impact on the community.
41. Accordingly, for the reasons outlined in this Decision Notice the Commission has determined to approve this application for a material alteration to the Applicant's premises in the terms outlined at the commencement of this Decision Notice. The applicant was advised that the material alteration application had been approved at the conclusion of the hearing.

Notice of Rights:

42. 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.
43. 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 or a licensee's licence, authority or licensed premises and the persons who made the submission, complaint or objection.

Richard Coates



CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
5 March 2021
On behalf of Commissioners Coates, Dwyer and Hart