

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Katherine Hotel
Licensee:	Deemat Pty Ltd
Licence Number:	80101789
Proceeding:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> Conduct of Premises Relating to Excessive Noise
Heard Before:	Mr Richard O'Sullivan (Chairman) Mr Philip Timney Ms Kerri Williams
Date of Hearing:	19 November 2008
Appearances:	Mr Mark Baker, Complainant Mr Michael Whelan for the Licensee Mr Anthony Adams, Dual Nominee Inspector Mark Wood for the Director of Licensin

Background

- 1) On 18 June 2008, a complaint was lodged pursuant to Section 48(2) of the *Liquor Act* with the Director of Licensing by Mr Mark Baker, a Director of the company operating the Katherine Motel ("the Motel"). Mr Baker's complaint concerned the noise emanating from the Katherine Hotel ("the Hotel") during the day when a karaoke machine is operating in the Garden Bar and at other times when a juke box is in operation, also in the Garden Bar.
- 2) The Hotel and Motel were, in the past, operated as a single entity and managed by the same company. Some years ago the premises were separately leased with the Hotel and Motel being operated by separate companies. That remained the situation at the date of the hearing.
- 3) Following receipt of the complaint Licensing Inspectors engaged in informal discussions with management of the Hotel and Motel in an attempt to reach some agreement regarding noise levels. Whilst the parties, commendably, reached an agreement in terms of control of the noise, the negotiations were ultimately unsuccessful and Mr Baker requested that his complaint be referred to the Commission for hearing.

The Hearing

- 4) Following the formal opening of the hearing the Chairman advised that the Commissioners wished to undertake a view of the premises. This was then arranged with the consent of the parties.
- 5) During the course of the viewing the juke box machine in the Garden Bar area was activated and turned to full volume. The Commissioners then moved to one of the standard motel rooms at the Katherine Motel. Once inside the Motel room with the door closed the noise from the juke box was barely audible and, at least in the consideration of the Commission, not of a sufficient level to cause annoyance to a guest in the room. Mr Baker agreed with this view and confirmed his main concerns were with the karaoke and live music. He added that, when the Garden Bar was open for trade, patron noise added to the juke box noise and exacerbated the problems for Motel patrons.

Submissions of Mr Baker

- 6) Mr Baker advised the Commission that he first made his complaint regarding noise from the Hotel on 18 June 2008. The complaint was mainly in respect of the karaoke being conducted in the Garden Bar of the Hotel premises two (2) days per week, Thursdays and Fridays, from 10.00 am to 2.00 pm.
- 7) Mr Baker gave evidence that the noise emanating from the Hotel at certain times, and in particular when the karaoke was in operation, was affecting the operation of his business. The laneway between the Motel and the Garden Bar is an open area and exposed the exposed rooms of the Motel, those nearest to the Garden Bar, to unreasonable levels of noise. He advised the Commission that he had received numerous complaints from his guests regarding noise disturbance. He also advised that on a number of occasions prospective guests had refused to check in when they heard the karaoke in operation whilst they were out the front of the reception area of the Motel.
- 8) Mr Baker further advised the Commission that there was an issue with bad language and loud patron noise, particularly during and after the karaoke sessions and that was also impacting on the operation of his business. Guests subjected to the noise often checked out early, refusing to pay, or demanding a refund. Many of his guests would not pay the additional costs for one of the superior rooms at the premises, which were located further from the Hotel and not as exposed to noise generated by entertainment at the Hotel and its patrons.
- 9) Mr Baker confirmed that since his initial complaint he had had discussions with the management of the Hotel and had reached an accord as a means of reducing the noise problems. The accord included the agreement of the Nominee to reduce trading hours by earlier closing times and lowering the volume of the juke box and karaoke. He submitted that the problems had eased for a period of ten (10) to twelve (12) days following which the noise levels had increased again. Mr Baker had agreed to a further two (2) week extension of the accord and then a further four (4) week trial. Mr Baker submitted that, despite some initial abatement of the noise, there had been no significant improvement in the situation during that time and, in his opinion, the Licensee was not complying with the voluntary accord reached between the parties. That was the reason he had requested that his complaint be re-activated and referred to a hearing before the Commission.
- 10) Mr Baker advised that he had been operating the Motel for a period of two years (2) and one (1) month. He was aware at the time he took over the premises that the Hotel was located next to the Motel and he was aware there may be noise problems due to the close proximity of the two premises. Mr Baker advised that he was aware the Hotel provided entertainment, including bands and live music, and that had always been a problem.
- 11) Mr Baker advised that he resided at the Motel premises and that his residence was immediately adjacent to the Garden Bar of the Hotel. He advised the Commission that on a number of occasions he and his family were forced to leave their residence and move into a Motel unit to avoid the noise generated from the Hotel and to get some sleep.

Submissions of Mr Whelan on Behalf of the Licensee

- 12) Mr Whelan noted that Mr Baker was the only complainant in respect of noise emanating from the Hotel and submitted that the complaint was in the nature of "payback" following an objection by the Hotel management to an application by Mr Baker for a variation of the licence for RJ's Bar at the Motel. Mr Whelan sought to tender a letter dated 29 May 2008 objecting to the variation of licence.
- 13) The letter was marked as Exhibit 1 however the Chairman informed the parties that the Commission did not see the letter as being particularly relevant to the complaint being considered and was unlikely to place significant weight on the contents of the letter.

- 14) Mr Whelan added, as indicia of malice on the part of Mr Baker that, following the lodging of the complaint, staff of the Hotel had subsequently been banned from RJ's Bar and that Mr Baker no longer purchased alcohol for sale at RJ's from the Hotel as a form of retaliation.
- 15) Mr Whelan submitted that Mr Baker's objection related to concerns about the noise levels of the karaoke, the juke box and live entertainment (bands etc). He added that, following the visit to the premises, the Commission could be satisfied that the juke box did not present a noise issue for patrons of the Motel, more so as guests were unlikely to be in their motel rooms during the day. In addition the technical problem with the juke box activating automatically at odd hours had been resolved.
- 16) Mr Whelan advised the that Commission that karaoke had been operating at the Hotel for around four (4) years, on and off, and had been in operation at the time Mr Baker took over the Motel. He said further that no changes in the conduct of the karaoke had taken place in that time and it only operates from 10.00 am to 2.00 pm two (2) days per week, although it sometime extends to 3.00 pm.
- 17) Mr Whelan advised that the noise levels of the karaoke had been reduced since the initial complaint from Mr Baker and that the Nominee of the Hotel had voluntarily entered the agreement with Mr Baker. He stated that bar staff had been instructed about the arrangements and, so far as his client was concerned, the accord was being adhered to.
- 18) Mr Whelan submitted that Mr Baker's complaint did not allege a breach of any licence condition and that the Police complaint of A/Sergeant Gillian Sanders did not relate to the operation of the karoake. He stated that the Hotel is a meeting place and a level of noise is expected from patrons, however this has not increased over the past 6 months. Mr Whelan submitted that the test is "unreasonable disturbance" and that had not been demonstrated here. He stated that there had been no corroboration of Mr Baker's complaint by clients of the Motel.

Submissions in Response by Mr Baker

- 19) Mr Baker denied that he was motivated to make the complaint by malice or as a result of the objection by the management of the Hotel to the variation of the licence for RJ's bar. He stated that he would not have asked the Commission to consider the complaint if the noise level had abated. Mr Baker denied that he had banned the staff of the Hotel from RJ's bar. He advised further that he had ceased purchasing bulk supplies of alcohol from the Katherine Hotel for commercial reasons and not out of malice.
- 20) Mr Baker accepted that the noise from the juke box in the Motel room during the viewing was not excessive but added that patron noise adds to the noise when the Hotel is open for business. Mr Baker reiterated that his main concern is the karaoke sessions. He stated that he did not have formal written complaints from Motel guests as most of the guests who were bothered by the noise were not inclined to make formal complaints or, alternatively, simply did not check in if the karaoke was playing when they arrived.
- 21) Mr Baker advised the Commission that he does not agree that the noise levels have abated since his initial complaint. He stated that the noise level in the Garden Bar had reduced for a short period but has subsequently increased again.

Submissions of Licensing Inspector Mark Wood

- 22) Mr Wood informed the Commission there was little legislation in the Northern Territory in respect of noise levels. He referred the Commission to a Noise Restrictions fact sheet (Exhibit 2) produced by the Queensland authorities as evidence of the levels of noise considered acceptable for various venues in that state. Mr Wood confirmed that there was no general or specific special condition attached to the licence of the Hotel in respect of noise control.

- 23) Mr Wood indicated that there had been building works undertaken some years ago on the rear wall of the Hotel by way of a wall designed to reduce noise coming from the Garden Bar to the Motel rooms. He stated that he had conducted some tests of noise emanating from the Hotel and noted that he obtained a reading of 110 dB in the Garden Bar for a short period during the karaoke. In Mr Wood's opinion the karaoke would be somewhat disturbing at times for patrons of the Motel.
- 24) At this point the Chairman invited the parties to make closing submissions and asked also that the parties make submissions in respect of a solution to the problem.

Mr Baker

- 25) Mr Baker reiterated that the noise level was greater with the karaoke itself and the associated patron noise. He said the loud voices and regular swearing were not pleasant for his guests. The noise emanating from the Hotel had caused him to lose sleep, had an influence on the way he conducted his personal and business life and was an impost on his business through loss of trade and guest complaints.
- 26) Mr Baker submitted that he would like to see the operating hours for the Garden Bar reviewed and does not want the karaoke to be conducted on Thursday and Friday mornings and early afternoons, from 10.00 am to 2.00 pm. He would like to see the Garden Bar area closed at 9.00 pm Monday to Wednesday, 10.00 pm on Thursdays, midnight on Fridays and Saturdays and at 8.00 pm on Sundays.

Mr Whelan

- 27) Mr Whelan submitted that Mr Baker knew what he was getting into when he took over the Motel and yet he now appeared to be seeking to restrict the hours of business of the Hotel and to ban the karaoke altogether. He restated that the complaint was motivated by malice and as a result of friction between Mr Baker and the Hotel management.
- 28) Mr Whelan advised that karaoke had long been a part of the entertainment at the Hotel, including as a day time activity, and had certainly been operating prior to Mr Baker taking over the Motel. His client has stated that the noise has been reduced since Mr Baker's initial complaint and that no guests of the Motel had lodged complaints about the noise in support of Mr Baker.
- 29) Mr Whelan submitted that the Commission should dismiss the complaint.

Inspector Wood

- 30) Mr Wood referred to a previous decision of the Commission dated 29 June 2001 in respect of a complaint against the Top End Hotel. In that matter the Commission noted that the authorities on common law nuisance were not inconsistent with the direction of the Commission's thinking in terms of dealing with noise complaints. The Top End Hotel decision is also relevant to the extent the complainants in that case were people who purchased properties in proximity to the Top End Hotel knowing it was an entertainment venue.
- 31) Mr Wood also referred the Commission to a decision of the Supreme Court of Victoria in the matter of *Oldham v Lawson (No 1)* [1976] VR 654, that sets out applicable principles in determining the degree of nuisance that must exist to found a complaint in public nuisance and interference with enjoyment of premises. A copy of that authority was tendered as Exhibit 3.
- 32) Mr Wood noted that the licence for the Katherine Hotel did not include the standard noise condition normally associated with a venue that provides regular entertainment, including bands and live music, for patrons. Mr Wood also noted that in the past the Hotel and Motel

had operated as a single enterprise however the Hotel, Motel and TAB premises are now individually operated as separate business entities.

- 33) Mr Wood also referred the Commission to a recent decision involving the Golf Links Motel and complaints from residents in the vicinity of the premises. Mr Wood tendered an extract from the licence for the Golf Links Motel (Exhibit 5) which provides that any other music or other entertainment in the outdoor bistro area of the Golf Links Motel shall not exceed a LAEQ level of 60 decibels at the boundary of the licensed premises.
- 34) Mr Wood also tendered the following Exhibits as examples of the types of conditions included in license where noise is likely to be an issue. Namely:
- Noise condition for Special Licence to sell Liquor (Exhibit 6);
 - Late Night Trading condition in respect of noise for the top End Hotel (Exhibit 7);
 - The Live entertainment condition included in the licence for the Airport Hotel (Exhibit 8); and
 - The general noise condition included in the licence for the Palmerston Tavern (Exhibit 9).
- 35) Mr Wood submitted that it would be appropriate for the Katherine Hotel, being a venue that currently provides entertainment, including karaoke commencing at 10.00 am, to have a condition of licence imposed in line with those applicable to similar venues. Mr Wood submitted that should the Commission find Mr Baker's complaint to be made out it should consider inserting an appropriate noise attenuation condition in the licence for the Katherine Hotel

Matters taken into consideration

- 36) The Commission obtained significant benefit from the view of the Hotel and Motel premises and noted the close proximity of several motel rooms, and Mr Baker's personal residence, to the Garden Bar area when entertainment is provided on regular occasions.
- 37) Commissioners noted that when the juke box was turned to full volume during the view the music was barely audible in the Motel rooms that abut the Garden Bar area. However, the music was clearly audible in the small alley between the premises, at the front of the reception area of the Motel and presumably in the rear bedrooms of Mr Baker's residence. The Commission accepts that the noise emanating from the Garden Bar would increase when the juke box noise was combined with normal or boisterous patron noise.
- 38) Whilst there was no opportunity for the Commissioners to visit the premises whilst the karaoke was in operation and compare noise levels to that from the juke box, the Commission accepts Mr Baker's submission that the karaoke noise would be louder and, given the nature of that type of amateur entertainment, at least potentially more annoying to persons within hearing range.
- 39) The Commission noted also that some time in the past alterations had been made to the rear wall of the Garden Bar, including the installation of sound insulation. Clearly, in the Commission's view, the alterations were made in response to previous noise issues associated with the Hotel and the proximity to the Motel premises.
- 40) The Commission has no reason to doubt that Mr Baker is genuinely aggrieved by the level of noise he says emanates from the Hotel during periods when entertainment is provided given the open nature of the Garden Bar area and the lack of any effective sound barrier at all along part of the boundary line between the premises. More problematic is the issue of whether the noise emanating from the Hotel is of a sufficient level to constitute a nuisance to neighbouring premises, including the manager and patrons of the Motel.

- 41) The Commission was urged by the Licensee to take account of the fact that Mr Baker took over the Motel in full knowledge that the Hotel was next door and there were likely to be noise issues when entertainment was provided for/by Hotel patrons. Whilst that is a relevant consideration the Commission notes that at common law it is no defence to a complaint of nuisance to assert that the complainant brought the nuisance on his own head by moving to the neighbourhood. See for example *Munro v Southern Dairies Ltd* (1955) VLR 332.
- 42) Whilst not wishing to bog the Commission down in technical legal argument, some assistance can be gleaned from the authorities referred to the Commission by Mr Wood. In the Victorian Supreme Court decision of *Oldham v Lawson (No 1)* (1976) VR 654 at 655 the court set out the matters a plaintiff would need to satisfy in order to make out a complaint of nuisance as follows:
- “To establish nuisance, the plaintiffs must show that there has been a substantial degree of interference with their enjoyment of the use of their house*
- What constitutes such a substantial degree of interference must be decided according to what are reasonable standards for the enjoyment of those premises. What are reasonable standards must be determined by common sense, taking into account relevant factors, including what the court considers to be the ideas of reasonable people, the general nature of the neighbourhood and the nature of the location at which the alleged nuisance has taken place, and the character, duration and time of occurrence of any noise emitted, and the effect of the noise.”*
- 43) The Hotel and the Motel are located in the central business district of Katherine and people residing or working in similar areas must expect that a hotel would generate noise from entertainment and general patronage of the hotel. However, in the Commission’s view, it is not within normal expectations that loud entertainment would be operating as early as 10.00 o’clock in the morning through to 2.00 or 3.00 o’clock in the afternoon during week days. Whilst one would not normally expect Motel guests to be in their rooms during those hours Mr Baker gave evidence that some of his regular clients, particularly those in the transport industry, do use the Motel’s rooms to sleep during the day.
- 44) Whilst not the subject of this hearing, the Commission expresses some concern as to the type of patrons the Hotel is trying to attract and the motivation behind the provision of karaoke entertainment so early in a working day and at virtually at the same time as the Hotel opens for the sale of alcohol.
- 45) The Commission accepts the evidence of Mr Baker that prospective patrons of the Motel would be deterred from checking in if the karaoke was in full swing and clearly audible at the Motel reception area.
- 46) The Commission commends the parties for their genuine attempts to negotiate a solution to the problems raised by Mr Baker. Unfortunately the agreement reached between the parties did not satisfy Mr Baker’s complaints and the complaint was ultimately referred to the Commission for determination following the failure of the voluntary accord.
- 47) The Commission places significant emphasis on the evidence that, at least at the beginning of the accord, there was some reduction of the noise emanating from the Hotel. Whilst Mr Baker gave evidence that the noise levels subsequently increased it is clear to the Commission that the Nominee of the Hotel is able to take some steps to ameliorate the noise emanating from the premises, regardless of whether the noise is generated by the juke box, the karaoke machine or through the engagement of live bands.
- 48) The Commission notes from its view of the Hotel that the Garden Bar is not an ideal venue for entertainment given the open nature of the building. Whilst an attempt at noise attenuation has been made through the erection of the sound proofing wall it is impossible to seal the premises by closing doors and windows to minimise the impact of noise on neighbours. The imposition of conditions requiring the closing of doors and windows during

the time when entertainment is provided, as has occurred in previous matters heard by the Commission, is not possible in these circumstances and given the structural nature of the Garden Bar.

- 49) The Commission, on the evidence presented at hearing, is unable to determine that the Licensee caused significant nuisance to the operation of Mr Baker's premises at any particular time or on any particular date. However, having viewed the premises and heard the evidence from the parties the Commission is satisfied that the Hotel has noise issues that need to be addressed. The Commission's view in this regard is supported by the fact A/Sergeant Gillian Saunders complained of the noise emanating from the Hotel at approximately 2.00 am on 11 July 2008. At the time Ms Saunders was visiting the post office and thought the noise coming from the Hotel "was excessive".
- 50) Mr Wood, in his report to the Commission made the following observations in respect of noise levels measured during the operation of the karaoke:

"Inspectors have measured the levels of noise using a hand held device in the car park areas of the Katherine Motel and the Katherine Oasis Shopping Centre with an average peak result of 76dB."

Whilst there is currently no specific legislation in the Northern Territory dealing with noise pollution 76dB exceeds the recommended maximum levels allowable under the legislation in place in Western Australia.

- 51) The Commission notes particularly the evidence of Inspector Wood that he also obtained a reading of 110 dB in the Garden Bar, albeit for a short period. The Commission is in no doubt that a noise level at that magnitude is excessive and likely to impact on the amenity of neighbours of the Hotel.
- 52) In addition, and to the credit of the Licensee, certain measures were put in place following Mr Baker making the complaint. Those measures seemed to have had a positive effect, at least for a short period. Whilst the agreement between the parties ultimately failed to achieve a resolution it did demonstrate that there are options available to the Licensee to reduce the noise emanating from the Hotel and impacting on the operation of the Motel business and on the normal enjoyment by Mr Baker of his residential premises.
- 53) In all the circumstances the Commission is convinced, on the balance of probabilities, that there are noise issues associated with the Hotel and those noise issues have the potential to pose a nuisance to others residing or operating businesses in the neighbourhood, particularly the Motel due to its close proximity to the Hotel.
- 54) Katherine Hotel operates under Liquor Licence number 80101789 which contains no provision relating to amplified music or other noise as is the case for other venues offering similar entertainment. The Commission notes that the Hotel is without doubt an entertainment venue with a late night trading licence. As such the Commission is of the view the licence should be subject to usual special condition relating to noise control that currently applies to similar licensed venues.
- 55) The Commission is not inclined to impose a penalty in respect of Mr Baker's noise complaint on two (2) bases. Firstly, the co-operation of the nominee in trying to resolve the noise problems since the time Mr Baker first lodged his complaint and secondly, as the licence presently stands there is no condition relating to the control of noise emanating from the premises on which the Commission could rely as founding a breach of licence condition.
- 56) In addition, the Commission notes the submissions of Mr Wood and particularly his evidence regarding the decibel readings he obtained whilst standing at the Motel premises. Whilst acknowledging that no equivalent noise legislation exists in the NT at present, the Commission notes that the readings obtained by Mr Wood exceed what would be acceptable in states where noise control legislation exists.

Decision

57) The Commission has determined that, from the date of publication of this decision, Liquor Licence number 80101789 held in respect of the Katherine Hotel shall be subject to the following special condition:

Noise Control: Noise levels emanating from any part of the premises must be such as to not cause unreasonable disturbance to the businesses or ordinary comfort of lawful occupiers of neighbouring premises to any other persons in the vicinity.

Richard O'Sullivan
Chairman

15 December 2008