

Northern Territory Licensing Commission

Reasons for Decision

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| Premises: | Steffi & Steve's Bush Restaurant |
| Licensee: | Stephen Charles Bennett |
| Licence Number: | 80516320 |
| Proceeding: | Complaints pursuant to s48(2) of the <i>Liquor Act</i> |
| Complainant: | David Avery |
| Heard Before: | Mr Peter Allen (Chairman) Mr John Withnall Mrs Barbara Vos |
| Date of Hearing: | 24 June 2003 |
| Date of Decision: | 26 June 2003 |
| Appearances: | Complainant in person Licensee in person |

1. Mr Avery divides his multi-faceted complaint essentially into two parts:
 - i) what he calls the trading issue, the operation of the licensed premises in alleged disregard of being restricted to pre-booked functions, and
 - ii) noise disturbance.
2. On the evidence of some of the advertisements tendered by Mr Avery and Mr Bennett's descriptions of the organisation of the weekend jazz events, the Commission is satisfied that on occasions on at least several weekends last year the licensee operated in breach of the licence condition headed "Pre-Booked Function". Mr Bennett points out that the term is not defined, but did not ever seek clarification from the Commission. The term is unequivocal, in the Commission's view. It is a reference to a function booked into the venue by a third party, not a function or event initiated by the licensee to attract custom, even though the custom be pre-booked. It is the *function* that is to be pre-booked, not necessarily the patronage.
3. As to the noise element of his complaint, Mr Avery provided particularity of dates and details. Mr Bennett's response was equally detailed as to many of the occasions complained of. However, Mr Bennett defended his position in terms of the noise complained of not having been excessive, whereas the criterion imposed by the relevant licence condition is whether Mr Avery was unreasonable in claiming that his ordinary residential comfort had been disturbed. That is, the issue is whether the noise was disturbing to the neighbour's reasonable expectation of residential comfort, and only in that limited context is the notion of excess a relevant consideration.
4. Such a condition is admittedly a stringent one, but historically is an outcome of previous mediation and complaint proceedings between Mr Avery and the original licensee. As Mr Avery reminded us, a liquor licence for premises in a residential area is quite rare, and for that reason, we add, quite likely to contain non-standard conditions tailored to that situation. Mr Bennett concedes that he was warned by the vendor prior to the hand over that there had been previous noise complaint proceedings initiated by Mr Avery, a "difficult neighbour", although such information did not prompt Mr Bennett to seek out the

Commission's decision on those proceedings before proceeding to settlement of his purchase.

5. The history of the licence condition is not seen by the Commission as directly relevant to a consideration of Mr Bennett's rights and obligations under the licence. He took on the licence with the noise condition included, and the condition is to have effect according to its terms, whatever its history. It is to have no hidden, specialised or previously agreed meaning.
6. In the Commission's considerations of compliance with the condition it does not necessarily avail the licensee to tell us that his patrons are not inclusive of a particular type of person, or were simply being happy, or that a particular amplifier was a small one or that a particular amplification setting was the lowest available. It is a question of whether Mr Avery is being unreasonable in being annoyed or disturbed by the type or volume of noise, whatever the type or volume may have been. If the boundary of the licensed premises had coincided with the boundary of Lot 8204 the licence condition would even have precluded Mr Bennett from being able to disclaim responsibility for a noisy bus engine; if the noise of a bus on the licensed premises was a concomitant of the operation of the licensed premises, Mr Avery would be able to claim the protection of the noise condition in the liquor licence.
7. It is of course Mr Bennett's position that Mr Avery is in fact behaving unreasonably in pursuing the complaints. The licensee sees such behaviour as consistent with an early unfriendly declaration to Mr Bennett and his partner by Mr Avery of opposition to any business conducted on Lot 8204. Mr Avery, supported by evidence given by his wife, denies venting such opposition on the occasion alleged. Mr Bennett claims to have made a written record of the enmity of the exchange immediately upon his return home, but did not produce such record, nor called his partner to give evidence in confirmation.
8. On the evidence, and looking at what Mr Avery might reasonably expect by way of "ordinary comfort" in terms of noise annoyance, we are satisfied that Mr Avery was not being hypersensitive or unreasonable in being annoyed or disturbed by sound emanating from the licensed premises on 9 March 02 (loud music - conceded by Mr Bennett on that occasion, party noise and late noisy vehicle departures), 5 April 02 (text of amplified speech clearly discernible), 25 May 02 (whip cracking and amplified yarning), 30 June 02 (loud music in afternoon until Mr Avery complained to police), 18 July 02 (fifteen minute burst of loud drumming), 15 November 02 (group singing), 6 December 02 (music with heavy reverberating base, extended yelling and shouting), 7 December 02 (extended cheering and clapping) and 14 December 02 (amplified speech).
9. It should be made clear that this is not a finding that Mr Bennett has necessarily conducted his business on the premises in an irresponsible way on each and every one of those occasions; rather it is a finding that however reasonably or unreasonably Mr Bennett may have been conducting the business on the day, Mr Avery's annoyance at the specified elements on the respective occasions is not considered to be an unreasonable reaction to what he has described being exposed to on each of those occasions. Mr Bennett may well be reasonable in claiming, for instance, that whip cracking, yarning and singing are a normal aspect of a bush restaurant, but the reasonability will not avail Mr Bennett if those elements, however normal, disturb the normal comfort of the adjoining resident. Having a (pre-existing) residential property immediately adjoining the licensed premises is a handicap with which the licence came weighted, and the tailored noise condition in the licence must be adhered to according to its terms.
10. We note too that two of the occasions in relation to which Mr Avery complained of noise disturbance were "Jazz Sundays", at which times we have held Mr Bennett to have been operating outside the terms of his licence in any event. On those two occasions Mr Avery should not have had to put up with *any* sound of the business at all.
11. We formally uphold Mr Avery's complaints to the extent we have indicated.

12. We make no findings as to any failure on the part of the licensee to exclude intoxicated persons from the premises, nor as to the premises trading outside permitted trading hours at any time.
13. Mr Avery's written complaint also complained of the lack of screening of the car park, as required by the relevant Development Permit. Such requirement did not become a condition of the liquor licence. The issue of whether a transferee inherits responsibility for outstanding compliance with the Development Permit is not seen as a matter for decision by the Commission. We note though that the licence was originally approved on the assumption that the conditions of the Development Permit would be complied with. Mr Avery made no submissions on this element of his complaint, and we make no decision on this aspect in these proceedings. We do suggest to Mr Bennett though that he look at the relevant Development Permit before referring us to Mr Avery's "arrogance" in relation to Mr Bennett's proposal for a new fence.
14. Mr Avery's written complaint also alleges that as a consequence of the other elements of his complaint Mr Bennett is not a fit and proper person to hold the licence, and that the licence should be cancelled. Mr Avery made no submissions on this aspect of the complaint.
15. The request for cancellation raises the issue of what should be the consequences of the Commission having upheld the complaints to the extent that it has done so.
16. The Commission considers it inappropriate, if not impractical, to suspend the licence, and has not considered cancellation on this occasion. A period of suspension in the circumstances of this licence's operation would not only be likely to be an ineffective penalty but would for that reason be of little impact or assistance in the parties attaining a workable level of co-existence. There is more optimism to be had in Mr Avery's view of the way forward as being more a consultative process.
17. In all the circumstances we have determined to act pursuant to s.49(4)(a) of the *Liquor Act* by amending the conditions of the licence.
18. The condition headed "Pre-Booked Function" will be deleted, and replaced with the following condition in lieu:

Pre-Booked Functions: (b) Liquor may be served only during the above times and only in conjunction with a meal as part of a pre-booked function. For the purposes of this condition, a pre-booked function means only a function booked into the venue by a third party, and does not include an entertainment event initiated by the licensee for the purpose of taking bookings from the public at large.
19. The following new special conditions shall be inserted into the licence:

Notification of functions: The licensee shall give at least 48 hours written notice of any pre-booked function to the Director and to the occupiers of residential properties immediately adjoining the allotment on which the licensed premises are situate. Such notice may be given by fax or email to an electronic address furnished by the respective recipients. An occupier of adjoining property may relieve the licensee of this obligation in relation to that occupier by providing the licensee with a signed waiver in that regard.

Notification of application to transfer: No application for the Commission's authorisation of a transfer of the licence shall be approved unless the licensee shall have given at least seven days written notice of the application to the occupiers of residential properties immediately adjoining the allotment on which the licensed premises are situate, and unless the Commission shall have considered any resulting correspondence received from any person so notified.
20. There will be the addition of a further sentence to the end of licence condition 9(d) in the following terms:

For the purposes only of the application of s.104 of the *Liquor Act* and of the "Noise Condition" herein contained, "the licensed premises" shall include the driveway, bus turning circle and areas used for parking in Lot 8204.

21. The noise condition itself will be left unaltered, although now affected by the change in definition of the licensed premises.
22. The licensee should be in no doubt that if any further complaint should be upheld in relation to noise disturbance or the bona fides of any function, the licence will be at risk of long-term suspension or even cancellation. We appreciate that the noise condition is a severely limiting factor on Mr Bennett's aspirations for the venue, but he was aware of the limitations of the licence when he bought into it, and Mr Avery has a legitimate expectation of the continuation of the protection of his lifestyle which those limitations afford him.

Peter R Allen
Chairman

26 June 2003