# Northern Territory Licensing Commission

## Reasons for Decision

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| **Premises:** | **Monte's Lounge**<br>95 Todd Street<br>Alice Springs NT 0850 |
| **Applicant:** | Monte's Bar & Bistro Pty Ltd |
| **Nominee:** | Matt Mulga |
| **Licence Number:** | 80515500 |
| **Proceeding:** | Complaint pursuant to Section 68(1) of the *Liquor Act* for Alleged Breaches of Section 110 of the Act |
| **Heard Before:** | Mr Richard O'Sullivan<br>Mrs Helen Kilgariff<br>Mr Paul Fitzsimon |
| **Date of Hearing:** | 24 November 2011 |
| **Appearances:** | Mr Matt Mulga on behalf of the Licensee<br>Inspector Wayne Sanderson for the Deputy Director of Licensing |

## Background

1) A complaint was lodged on 15 September 2011 against Monte's Lounge and following its acceptance by the Deputy Director, the Northern Territory Licensing Commission ("the Commission") determined to accept the complaint and conduct a Hearing into the matter pursuant to Section 69(5) of the *Liquor Act* ("the Act"). The complaint alleges breaches of Section 110 of the Act under which a Licensee must not contravene licence conditions.

2) The background to this complaint follows:

   - Following a Hearing into unauthorised material alterations at Monte's Lounge, the Commission on 30 December 2010 lifted a suspension imposed on 12 August 2010 and granted a liquor licence subject to certain conditions.

   - On 31 December 2010 the Deputy Director South reminded the Nominee, Mr Matt Mulga that he was required to have the Northern Territory Fire and Rescue Services ("NTFRS") allocate patron numbers before commencement of trading.

   - On 10 January 2011, 2 February 2011, 4 February 2011 and 9 February 2011 Mr Mulga was contacted by Licensing Inspectors by phone or email over the requirement for the premises to have patron numbers determined.

   - Following completion of various material alterations and related works at the premises, Mr Mulga on 29 July 2011 met with Licensing Inspectors, his Building Certifier and a representative of NTFRS. Following this meeting Mr Mulga opened the restaurant for trading. At this time no assessment of patron numbers had been undertaken.

   - On 2 September 2011 an application was lodged with the Commission for the emergency suspension of the Monte's Lounge liquor licence on the grounds that no patron numbers had been determined. This suspension was lifted following a meeting with the Certifier, the Licensing, Licensing Inspectors and representatives

of NTFRS where patron numbers were determined at one hundred and fifty (150) persons.

- During August 2011 the Licensee also sought variations to the current licence conditions. In advertising this application the Licensee at the bottom of the advertisement stated *"the kitchen is always open, you don't have to have a meal to have a drink but the food is fantastic so you should"*.

- In response to the events cited above a complaint has been laid against Monte's Lounge alleging:

    - That during the period 29 July 2011 and 2 September 2011 the premises traded without maximum patron numbers being obtained from NTFRS and that during this period patron numbers were not displayed as required under the following licence condition:

        ***Fire***

        *(a) Liquor shall not be sold or supplied at, on, or from the licensed premises, without the Licensee having the current written requirement of an Authorised Officer of the Northern Territory Fire and Rescue Service as to the maximum number of persons permitted to occupy the licensed premises, at any one time.*

        *(b) The Licensee at all times shall display such requirements of the Northern Territory Fire and Rescue Service, or a true copy thereof, in a prominent location in the licensed premises and in each part of the premises to which the requirement may discretely relate, all to the satisfaction of the Director of Licensing.*

        *(c) At all times that the licensed premises are trading or are otherwise open to the public for any purpose, the number of persons in or upon the licensed premises or any part thereof shall not exceed the current requirement of the Northern Territory Fire and Rescue Service.*

    - On 26 and 30 August 2011 an advertisement relating to an application for licence variation also contained an advertisement for the sale of liquor without a meal in contravention to the following Monte's Lounge licence condition:

        ***Consumption of Liquor***

        *Consumption of liquor without a meal will not be advertised or promoted.*

- A response to these alleged breaches was provided by Mr Matt Mulga on 13 October 2011 outlining the complexity of getting certifications and other approvals for the alterations done at the Heritage listed property but not contesting the complaint relating to patron numbers and the need for their display at the licensed premises.

- In relation to the advertisement of an alcoholic drink without a meal, Mr Mulga points out that the main thrust of the advertisement was to advise that the venue variations being sought would not change most of the operational conditions applying at the restaurant.

- The letter from Mr Mulga states:

> *"I wanted to point out four main points of our licence.*
>
> 1. *We were not applying to have drink without a meal for patrons already could.*
> 2. *We are not attempting to extend our trading hours past 2.00am.*
> 3. *The kitchen has to remain open at all times.*
> 4. *The venue would still give the appearance of a restaurant, this would not change."*

- Mr Mulga maintains that the reference to *"you don't have to have a meal to have a drink but you should"* was not intended as a promotion but a mere statement of a licence condition and therefore the breach was unintended.

## The Hearing

3) Senior Inspector Sanderson outlined the complaint in that from 29 July 2011 until 2 September 2011 the premises traded:

   - without written authorised maximum patron numbers being issued; and
   - without display of the maximum patron numbers allowed for the licensed area.

4) Furthermore on 26 and 30 August 2011 an advertisement appeared in the Centralian Advocate which advertised the ability of a patron to purchase a drink without a meal.

5) Mr Mulga admitted to the complaints outlined above but advised the Commission that the breaches were unintentional.

6) Senior Inspector Sanderson then presented as a witness Mr John Oliver, Senior Fire Safety Officer with NTFRS. In response to questions he advised that he was contacted on 2 September 2011 over the issue of maximum patron numbers for the premises. He explained that normally a very regulated process leads up to patron numbers being determined which usually followed the issue of a Certificate of Occupancy ensuring all building works and alteration comply with the Building Code.

7) Mr Oliver advised was that no issue of patron numbers prior to this was possible as no Certificate of Occupancy had been produced following material alterations at the premises. On 2 September 2011 he was able to issue patron numbers for an area of the licensed premises due to the presentation of the Certificate of Occupancy and assisted by discussions with the Licensee's Certifier at the site.

8) He explained that the issues of toilet numbers and the width of the exit gateway were relevant in his determination. Maximum patron numbers would be greater with alternative exits or the widening of the existing exit gateway.

9) The one hundred and fifty (150) maximum patron numbers related to capacity in the internal area (former CWA Hall) and the alfresco areas facing Todd Street. Further building development is taking place and once this is completed Mr Oliver stated the Licensee may apply for a further increase in maximum patron numbers, assuming adequate toilets and emergency exits.

10) Under cross examination from Mr Mulga, Mr Oliver advised that at an onsite meeting on 29 July 2011, the date the venue recommenced trading, a colleague from NTFRS had been present with the Certifier, Licensing Inspector and Nominee. He stated that the representative of the NTFRS was "not across the issues" and was therefore unable to

determine numbers and therefore no capacity numbers were issued from this date following the onsite meeting.

11) Senior Inspector Sanderson then continued with an outline of the breaches relating to a patron's ability to have a drink without a meal. He advised the condition that the wording of Mr Mulga's advertisements clearly offended Monte's Lounge licence conditions which states:

*"Consumption of liquor without a meal will not be advertised or promoted."*

12) In response Mr Mulga admitted that the advertisement technically breached his licence condition. He queried why, after the advertisement appeared on Tuesday 26 August 2011, he was not advised by Licensing, Regulation & Alcohol Strategy that his advertisement offended his licence condition. Consequently the advertisement appeared again on Friday 30 August 2011 in the Centralian Advocate as two (2) notices are required to be placed in the newspaper to conform with requirements.

13) He stated that Monte's Lounge does a variety of advertising through various media and none of these advertisements breached his licence conditions. The advertisements were to reaffirm that trading at Monte's Lounge was not to change significantly with the variations to licence conditions he was seeking. His argument proffered was that the notice was not promotional advertising but public information. He further advised that the advertisements appeared in the Public Notice section rather than the main text of the newspaper, thereby lessening any promotional value.

14) In reference to the patron numbers breaches he stated that in January and February 2011 he was unable to get patron numbers due to the status of the work being done and the absence of necessary documentation. He stated that he approached the NTFRS to set up the meeting of 29 July 2011 and that during this meeting NTFRS seemed okay with matters following the testing of his fire hydrants and other emergency exit issues.

15) He stated that a Licensing Inspector was present during this meeting and that all present appeared to indicate that matters were okay and on this basis he commenced trading on the evening of 29 July 2011.

16) The chronology of events leading to the Commission suspending his licence on Friday 2 September 2011 (which was lifted later that day) was that on 1 September 2011 the Deputy Director advised him of the absence of maximum patron numbers following which he immediately contacted the Certifier over the need to have the NTFRS inspect the premises and issue maximum patron numbers.

17) On 2 September 2011 he spent the entire day dealing with this issue and following site inspection with Mr Oliver from NTFRS and his Certifier, he was given a maximum patron capacity of one hundred and fifty (150). He advised the Commission that this was based on an exit gate width and claimed his gate was actually wider than the span taken into consideration by NTFRS. He, however, accepted the numbers due to the pressing and urgent nature of removing the Suspension Notice.

## Submissions on Penalty

18) Senior Inspector Sanderson advised the Commission that the Deputy Director of Licensing was seeking a two day suspension of the licence for breaches of not having maximum patron numbers determined by an authorised officer of NTFRS and the related failure to display such maximum patron numbers.

19) In relation to the advertising of alcohol without a meal he stated the Deputy Director sought the removal of a licence condition providing for alcohol without a meal or, if the Commission was disinclined to this penalty, the submission was that the Commission imposed licence conditions that any promotion of the venue was to refer to Monte's Lounge as a restaurant.

20) Senior Inspector Sanderson stated that the Deputy Director had sought such penalties as there was some history with venues operated by Mr Mulga. On 30 June 2008 a letter of reprimand had been issued to Annie's Place licensed premise operated by Mr Mulga as a consequence of a breach and that in March 2010, following the upholding of a complaint into the serving and removing of an intoxicated person, Annie's Place had imposed on it a requirement to install CCTV cameras and also incurred a one day suspension of trade.

21) He also referred to the Commission decision of December 2010 which followed a breach of the Act for commencement of alterations on the premises prior to making application to the Commission for the required approval. This decision followed a suspension of the licence in August 2010 when the Commission became aware of the unapproved material alterations.

22) Mr Mulga submitted that the recommendation of the two day suspension was harsh. He advised that he did not mean to trade without patron numbers being determined and displayed but in the haste of finalising all arrangements for his opening on 29 July 2011 he had overlooked this requirement and was not reminded of it by the Inspector present nor any other party present at the onsite meeting that day. He had many things on his mind over the arrangements necessary for his opening and under the circumstances he simply forgot this specific licence requirement.

23) With regard to the penalty submitted by Senior Inspector Sanderson for the advertising of liquor without a meal, Mr Mulga opined that removal of the ability to serve liquor without a meal was an extreme penalty. He submitted that he would be happy to accept the alternative penalty ie the requirement that all promotion and advertising contain the word "restaurant".

## Consideration of the Issues

24) The Commission is aware of the history of Mr Matt Mulga and Monte's Lounge. He had taken over a failed business at the premise that traded as Bluegrass Restaurant and commenced material alterations soon after to upgrade the premises but failed to seek approval for such alterations.

25) The issuing of a Certificate of Occupancy and maximum patron numbers remained outstanding during the period when the restaurant licence was suspended. In effect the failure to meet regulatory requirements resulted in the restaurant not trading from 12 August 2010 until 29 July 2011.

26) Issues of Certification, Heritage approval, Certificate of Occupancy, allocation of maximum patron numbers and related documentation matters have dogged this premises in its recent history. It is clear that the Licensee has little regard for regulatory requirements and possibly views them as a complicating burden to his operation. Nonetheless it must be reinforced to this Licensee that licence requirements have well founded and legitimate reasons for their existence and issues such as maximum patron numbers underpin and protect patron safety in the case of a fire or other emergency.

27) The Commission does note that due to material alterations and the necessity for certification the Licensee had not traded for a period of approximately twelve months from a suspension issued in August 2010 where the Commission determined that there was a requirement to apply for an have approval for material alterations.

28) The complexity of the works and the necessary documentation would have meant that Mr Mulga was in a great state of relief on 29 July 2011 when, on evidence presented to the Commission, a representative of NTFRS, together with the Certifier and a Licensing Inspector advised that all was ready to go with his opening.

29) The Commission has received no contradicting evidence that this was not the outcome of the meeting on 29 July 2011 and has not received any evidence that at this meeting he was reminded that he did require maximum patron numbers to be determined before opening. The benefit of the doubt can therefore be extended to the Licensee in that the breach of not

obtaining maximum patron numbers was not deliberate at this time but was an unintentional, although serious, oversight.

30) In the matter of advertising the availability of liquor without a meal, the Commission is mindful that the main purpose of this advertisement was to advise that Monte's Lounge application for a licence variation and the reference to *"the kitchen is always open, you don't have to have a meal to have a drink but the food is fantastic so you should"* appeared at the bottom of the advertisement which was situated in the Public Notices. Commission members are of a view that should Mr Mulga wish to promote this aspect of his trading it would have been in the general news section of the paper and been the main subject of the advertisement. This is not the case in this instance and therefore while a breach has occurred, it is at the lower scale of gravity.

31) The penalty recommended by the Deputy Director takes into account Mr Mulga's trading history with Annie's Place. The 2008 offence relates to Inspectors purchasing alcohol without being required to have a meal as stipulated by the licence condition. In relation to seriousness, the Commission stated: *"This particular breach must be seen as being at the lower end of the scale in terms of offending".* Following this the Licensee voluntary gave up its takeaway licence which was anomalous and brought about by the premise operating under a Public Hotel category licence.

32) The second breach in 2010 resulted in a CCTV camera installation requirement and a Monday short period trading suspension from 9.00pm until close. The Commission commented: *"It also notes that the suspension is not drastically punitive in itself"*.

33) Monte's Lounge is a different venue operating under a different licence so therefore the Commission can give little weight to matters raised in regard to the Annie's Place licence.

34) The Monte's Lounge previous breach, resultant from unauthorised material alteration, has, as a consequence, led to a virtual twelve (12) month cessation of trading, at some considerable cost to Mr Mulga. Although it is evidence of a prior breach and gives weight to the argument that the Licensee is complacent with regulatory requirements, considerable financial detriment has resulted and to a degree the Commission therefore classes it somewhat likened to "a spent conviction".

35) The Licensee has entered a plea in relation to the complaints and the Commission therefore does not need to deal with the complaint being made out but has to turn its mind solely to the issue of penalty.

36) The advertising breach was inadvertent and the Commission finds that no commercial advantage was gained by the words being included in the Public Notice advising of an application for licence variation. The breach is one of a stupid oversight of the licence condition with little consequence being derived.

37) Accordingly the Commission is not inclined to the initial penalty recommended by the Deputy Director, that is removal of the Licensee's ability to serve liquor without a meal, rather it is inclined to the alternative penalty suggested, namely the insertion of a licence condition that mandates the reference to "restaurant" in all advertising and promotion.

38) On the matter of the failure to obtain maximum patron numbers and the failure to display maximum patron numbers at the licensed premises from 22 July 2011 to 2 September 2011, the Commission finds that this is a serious matter, although based on an apparent oversight by the Licensee. It determines a penalty under Section 70 of the Act which has a maximum monetary penalty of one hundred penalty units.

39) In this instance, taking into account the omission was unlikely to be deliberate but based on a serious oversight, the Commission imposes a penalty of $400. However the Licensee is warned that if further procedural or regulatory breaches occur in the future the Commission will take a far less forgiving attitude to the lapses of duty and care evident in the Licensee's behaviour.

## Decision

40) The penalties below relate to separate breaches of Section 110 of the Act whereby Licensees must not contravene licence conditions.

41) The first applies to the failure to obtain maximum patron numbers by an authorised officer of NTFRS and a failure to display such maximum patron numbers. On this account the Commission imposes a penalty of $400, payable to the Receiver of Territory Monies within twenty-eight days of this decision.

42) The second applies to advertisements appearing in the Centralian Advocate on 26 August 2011 and 30 August 2011 where the ability of a patron to purchase alcohol without a meal is advertised. On this account the Commission varies the licence condition relating to advertising to include the requirement that all advertising and promotion of Monte's Lounge must include the word "restaurant".

Richard O'Sullivan
Chairman

5 December 2011