

Northern Territory Licensing Commission

Reasons for Decision

Licensee:	Deemat Pty Ltd
Premises:	Katherine Hotel
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 Mr Walter Grimshaw
Date of Hearing:	24 November 2010
Appearances:	Mr Rickie Cullen, Dual Nominee Mr Peter Lee, Dual Nominee Inspector Mark Wood for the Director of Licensing Ms Kelly, Co-proprietor of the Katherine Motel

Background

- 1) Mr Mark Baker, a Director of Kelback Pty Ltd the lessee of the Katherine Motel, lodged a complaint with the Director of Licensing in respect of noise emanating from the Katherine Hotel. The complaint as lodged relates to noise from karaoke in the back bar of the Hotel (the Garden Bar) during the daytime and late night noise from amplified music.
- 2) The Director of Licensing referred the complaint to the Commission pursuant to Section 48(2) of the *Liquor Act* (the Act). The complaint is made in relation to conduct contrary to Section 110 of the Act in that the Licensee failed to comply with the noise condition attached the Liquor Licence.
- 3) Karaoke is being conducted at the Katherine Hotel between the hours of 10am and 3pm, predominately on a Thursday and Friday in the Garden Bar at the rear of the premises. The Katherine Motel is located immediately behind the Hotel. Both premises were previously operated as a single business. The Garden Bar also includes a jukebox and amplified music is sometimes played in this area during the evening.
- 4) Mr Baker's complaint alleges that the levels of the music and singing emanating from the premises can clearly be heard in the surrounding areas and impacts on the amenity of the Katherine Motel which abuts the Garden Bar.
- 5) Formal complaints were received from Mr Baker regarding late night amplified music on 6 March 2010, 17 April 2010 and 8 May 2010. Police have been requested to attend to deal with noise issues on several occasions. A Police report provided to the Director notes 3 callouts on 1 August 2009, 17 April 2010 and 8 May 2010. The Police intervention on 1 August 2009 and 17 April 2010 resulted in the music being turned down at the direction of Police and the Police members attending on 8 May 2010 did not consider the noise to be undue.
- 6) It should be noted that a similar complaint was lodged by Mr Baker against the Licensee of the Katherine Hotel in June 2008. The outcome of the hearing of that complaint is

contained in the Commission's Reasons for Decision, published on 15 December 2008 and included the imposition of a noise condition on the liquor Licence for the Katherine Hotel.

- 7) In respect of the current complaint, informal discussions were undertaken between Mr Baker and Mr Cullen in an attempt to resolve the issues by mutual agreement. On 6 June 2010 Mr Baker complained that measures agreed between parties to minimise the impact of noise disturbance on the Motel had not been enacted and advised that he wished to formalise the complaint.
- 8) Mr Baker's complaint alleges that as a result of the noise both he and his partner have had to move from their residence, which backs onto the Garden Bar, to a motel unit on the other side of their complex to escape the noise and be able to sleep. Also, Mr Baker complains the noise issues have a negative impact on his clients who are unable to sleep at night and are disturbed in their motel rooms throughout the day.
- 9) Inspectors conducted measurements of noise levels using a handheld device in the car park areas of the Katherine Motel and Katherine Oasis Shopping Centre with an average peak result of 67dB during the conduct of karaoke on a Thursday and Friday.

The Hearing

- 10) Following the formal opening of the Hearing the Commission attended the premises of the Katherine Hotel and the Katherine Motel for a viewing of the problem areas. The Commission noted that the residence attached to the Katherine Motel was located only a few metres from the Garden Bar and was separated only by a gate. Noise from the patrons of the Hotel, whilst not at a nuisance level at the time of the viewing, was clearly audible whilst standing next to the residence.
- 11) At the resumption of the Hearing Mr Wood informed the Commission that Mr Baker was to have attended the Hearing in person however he had been called away on business. Ms Kelly, Mr Baker's partner and co-proprietor of the Katherine Motel was in attendance and available to respond to any issues raised during the Hearing.
- 12) Mr Wood advised further that the complaint was accepted by the Licensee and the parties had been attempting to reach an agreed solution for some time, without any significant success in respect of the karaoke noise. Mr Wood conceded there was no specific legislation covering noise issues in the Northern Territory with the result that decibel readings were of little evidentiary assistance in a hearing of this nature as no legislative benchmark has been set as has occurred in other jurisdictions.
- 13) Mr Wood submitted that in determining whether the noise emanating from the Hotel was unreasonable the Commission should take note of the common law definition of nuisance, namely a substantial interference with a person's enjoyment of their property brought about by the unreasonable actions of a neighbour. Mr Wood also referred the Commission to its decisions in respect of noise complaints lodged against the Top End Hotel (29 June 2001) and the Borroloola Hotel (25 June 2002) as well as the NSW Supreme Court Authority of *Domachuk v Feiner* [1996] NSWCA 157. Mr Wood noted Mr Baker's allegation that he was forced to move out of his residence to a motel unit at night time so as to avoid the noise and to get some sleep and advised that the loss of one night's sleep had been found by the courts to constitute a nuisance.
- 14) Mr Wood also noted that both the Hotel and Motel were operating businesses approved by the Planning Authority as being suitable for the premises on which they are located. The Katherine Hotel is located in the CBD in an area that is predominantly commercial with few residential properties in close proximity. Mr Wood noted that the new non-smoking laws had further exacerbated the problem as the Garden Bar is a smoking area where a percentage of the patrons of the Hotel prefer to congregate, regardless of whether they are smokers or not.

- 15) A summary of Police activity in respect of noise complaints against the Hotel was tendered to the Commission. Those complaints concerned night time entertainment and the Commission was asked to note that the night time component of the noise complaints had been resolved by agreement between the parties. Entertainment during the evenings was conducted only inside the premises with the exception of six nights when entertainment would be provided in the Garden Bar. The parties have agreed that any proposed outside night time entertainment would only occur following the provision of two weeks notice.
- 16) The issue that remains of concern to Mr Baker is the noise emanating from the karaoke that is conducted at the Hotel on Wednesday, Thursday and Friday between 10am and 2pm.
- 17) Mr Cullen outlined to the Commission that various steps that had been taken by the Hotel management to try and minimise the noise disturbance to the Motel. He noted that they had tried moving the karaoke to the front bar of the Hotel and, whilst that had reduced the noise impact on the Motel, it had not been successful from a business viewpoint. The volume of the karaoke machine had been set at the lowest useable level however, due to the nature of karaoke, it is impossible to monitor or manage the volume level of the participants. Mr Cullen noted that there were approximately 120 patrons in the Garden Bar that morning when the Commission visited, with no music at all in operation, and yet noise levels as high as 79.6 dB had been recorded from the patrons alone.
- 18) The Commission was informed that the issue with noise from the juke box had been resolved by the installation of a cut out switch that operated when the music exceeded a pre-determined level.
- 19) Mr Cullen informed the Commission that a blanket ban on entertainment in the Garden Bar would have a significantly detrimental impact of the profitability of the premises. He stated that the takings for the premises used to be approximately 75% from the Front Bar and 25% from the Garden Bar. In recent times this had shifted to 55% takings for the Garden Bar.
- 20) The laneway between the Motel and the Garden Bar is an open area and exposes the rooms of the Motel, and in particular the residence of Mr Baker and Ms Kelly, to unreasonable levels of noise. Neither Mr Cullen nor Mr Lee denied that the noise from the Garden Bar impacted on the amenity of the Motel premises. The Nominees of the Hotel had considered the installation of a noise barrier to around head height between the Garden Bar and the Motel however they did not believe that would have any significant effect due to the open nature of the lane way between the premises.
- 21) Ms Kelly confirmed that the gate between the Hotel and Motel is usually locked and is not used as a thoroughfare by patrons of the Hotel or Motel. So far as the parties are aware the laneway is not classified as a fire exit.
- 22) Mr Wood acknowledged that both parties had been trying for some time to resolve the noise issues. Mr Wood conceded that control of the noise levels during the karaoke sessions was problematic and, despite the efforts of the Nominees the problem had not been resolved. He informed the Commission that, given the nature of this complaint and the co-operation of the parties, he was not seeking a suspension of licence by way of penalty but rather a direction from the Commission to the Licensee as to measures to be taken to minimise the impact on the Motel.
- 23) Mr Wood submitted that a possible solution would be the erection of a solid block wall across the alley way between the Garden Bar and the Motel.

Consideration of the Issues

- 24) Mr Baker first lodged a complaint regarding noise from the Katherine Hotel on 18 June 2008. That complaint also related to karaoke being conducted in the Garden Bar of the premises in the morning and early afternoon on weekdays. During the conduct of the previous hearing 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.

- 25) Since that time the parties have been negotiating to try and resolve the noise problems. Whilst there has been some success in respect of late night entertainment the issue with the morning and early afternoon karaoke in the Garden Bar has not been resolved, despite the best efforts and the measures taken by the Nominees.
- 26) Following the Hearing in respect of the 2008 complaint the Licence for the Katherine Hotel contains the following condition in respect of 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.

- 27) The issue for determination by the Commission is 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.
- 28) The Commission, having visited the Hotel and Motel premises whilst the Garden Bar was open for trade has no doubt the karaoke, and the general noise emanating from patrons in that area, is creating a disturbance to the residents and guests of the Motel. The disturbance is particularly prevalent in the residence of Mr Baker and Ms Kelly due to the close proximity between their residence and the Garden Bar.
- 29) In reaching the conclusion that the noise from the Garden Bar is causing a nuisance, the Commission is assisted by Mr Wood's reference to prior determinations and the common law authorities. In particular the Commission notes the considerations taken into account in the noise complaint against the Top End Hotel wherein Presiding Member Mr John Withnall made the following observations in respect of the law on the issue of noise and nuisance:

In Munro v. Southern Dairies Ltd (1955) VLR 332 in the Victorian Supreme Court, after stating the general rule, went on to add that "the locality, however, is of importance such that it is material to consider the general nature of the locality and whether the discomfort or inconvenience of which somebody complains is so characteristic of the general neighbourhood that he ought not to be heard to complain of what other people are accustomed to habitually put up with".

Again in the Supreme Court of Victoria, the Court in *Oldham v. Lawson (No 1) (1976 VR 654 at 655)* outlined the plaintiff's task in establishing a nuisance as follows:

"To establish a nuisance, the plaintiffs must show that there has been a substantial degree of interference with their enjoyment of their use of the 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."

- 30) In the case of the Katherine Hotel, the Commission is satisfied that the conduct of karaoke in the Garden Bar is creating a nuisance and affecting the reasonable enjoyment of the Motel premises by the proprietors and, to a lesser extent, their guests.
- 31) As submitted by Mr Wood, a further consideration in respect of the reasonableness of the noise is the general nature of a mixed-use neighbourhood and of reasonable standards for the enjoyment of premises within that neighbourhood. Mr Baker advised the Commission during the 2008 Hearing that 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 also advised that he was aware the Hotel

provided entertainment, including bands and live music, and that had always been a problem. Fortunately the issues surrounding late night entertainment and live bands appear to have been resolved. However, he did not anticipate the conduct of karaoke on weekday mornings.

- 32) The Katherine Hotel and the Katherine Motel are both located in the Katherine Business District. It would be reasonable for a person operating a business adjacent to a licensed hotel to expect some level of noise to emanate from the premises at particular times. However, in the usual conduct of the business of a hotel it would not be expected that loud karaoke style music would commence as early as 10am and continue through the morning on three working days per week.
- 33) The Commission is satisfied that the noise emanating from the Katherine Hotel during the karaoke sessions is creating a nuisance to the proprietors of the Motel and, as such, constitutes a breach of the licence noise condition. The Commission, as a general proposition, does not consider the conduct of outside entertainment from 10am on mid week days to be reasonable or characteristic of the neighbourhood within which both premises are located.
- 34) Following that finding one option open to the Commission would be to impose a further licence condition prohibiting entertainment in the Garden Bar. The Commission heard from Mr Cullen that the karaoke is popular with patrons of the Hotel and a ban on that form of entertainment would have a serious detrimental impact of the profitability of the Hotel.
- 35) The Commission has no reason to doubt Mr Cullen's submission regarding the financial repercussions of a ban on karaoke in the Garden Bar. However, the noise issues arising from the Hotel and the impact on the Motel have been on-going and remain unresolved despite having been referred to the Commission initially in 2008. Whilst it appears to the Commission that the parties have been engaged in good faith negotiations in an attempt to minimise the effect of the noise the problem with the karaoke remains unresolved some 2 years later.
- 36) During the viewing of the premises the option of installing an effective noise barrier, in the form of a block wall, between the Hotel and Mr Baker's residence was discussed. This proposal was also raised during the Hearing. The Commission is of the view that this option should be further investigated by the Licensee. Whilst the Commission is reluctant to issue a directive to the Licensee to expend monies on alterations that may or may not prove effective, it is mindful that something must be done to alleviate the nuisance to the proprietors of the Motel. The Commission is also aware that, although unlikely, there may be regulatory impediments to the construction of a wall between the premises so far as planning and building permits are concerned.
- 37) The Commission determined, at the conclusion of the 2008 Hearing, that it was not inclined to impose a penalty in the form of a suspension in respect of Mr Baker's noise complaint on two bases. Firstly, the co-operation of the Nominees in trying to resolve the noise problems since the time Mr Baker first lodged his complaint and secondly, as the licence stood in 2008, there was 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.
- 38) The Commission is satisfied that, at certain times, the conduct of karaoke in the Garden Bar constitutes a breach of that condition, despite the best efforts of the Nominees to alleviate the problem. The Commission is not prepared to simply ignore the breach on the basis of the difficulties arising due to the close proximity of the two premises. Mr Baker and Ms Kelly are entitled to quiet enjoyment of their premises and the licence condition was imposed in an attempt to ensure that occurred and that noise emanating from the Garden Bar was of a reasonable level.
- 39) The Commission confirms the view it reached following the Hearing for the 2008 complaint, that the Garden Bar is not an ideal venue for entertainment given the open nature of the building and the proximity to the Motel, and particularly Mr Baker's and Ms Kelly's

residence. The open air nature of the Garden Bar would render 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, ineffective in this case.

Decision

- 40) The Commission has determined to adjourn the current Hearing for a period of three months to allow the Licensee to explore the options for the installation of an effective sound barrier across the laneway between the Hotel and the Motel.
- 41) The Commission is aware there may be constraints preventing this occurring, such as planning, building approvals and fire safety requirements. However it expects the Licensee to fully and properly explore this option. In the event that the noise issues have not been resolved within three months the Commission will be left with little option other than to impose a further condition on the liquor licence prohibiting or significantly curtailing the conduct of entertainment in the Garden Bar area of the Hotel premises.
- 42) The Licensee needs to be aware that if the problems are not resolved there is the very real prospect of a decision being made to ban entertainment in the Garden Area, and particularly the day time karaoke. The Commission reiterates the concern expressed at the conclusion of the 2008 Hearing in respect of the type of patrons the Hotel is trying to attract and the motivation behind the provision of karaoke entertainment so early in mid week days and at virtually at the same time as the Hotel opens for the sale of alcohol.
- 43) The Commission requests that the Director of Licensing forward a further report to the Commission advising whether the noise issue has been resolved to the satisfaction of the parties by the end of March 2011. In the event that the issues are not resolved the Commission will reconvene the Hearing to determine what measures it will need to take to ensure that the Licensee complies with the noise condition contained in its licence.

Richard O'Sullivan
Chairman

16 December 2010