

Northern Territory Licensing Commission

Reasons for Decision

Premises:	The Victoria Hotel Smith Street Mall Darwin NT 0800
Licensee:	MINKIE (NT) Pty Ltd
Licence Number:	80300989
Nominees:	Mr Russel Wilkes and Mr Andrew John Chigwidden
Proceedings:	Hearing into a Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> - Breaches of the 'Noise Disturbance' and 'Late Trading' Liquor Licence Special Conditions.
Heard Before:	Ms Merran Short (Presiding Member) Ms Kerri Williams Ms Jane Large
Date of Hearing:	6 March 2008
Appearances:	Mr D Crowe for Licensee Mr P Timney for Director of Licensing

Background

1. On 31 July 2007 at approximately 11.18 pm a phone call was received on the Pollution Hotline from a resident reported to live at Cardona Court, Darwin relating to excessive noise emanating from the licensed premises known as the Victoria Hotel. Mr R Eacott MSc, Senior Environmental Scientist, from the Environment Protection Agency, ("Mr Eacott") attended at Cardona Court, Darwin and then at the Victoria Hotel ("the Hotel") in his capacity as an Authorised Officer under the *Waste Management and Pollution Control Act*. Mr Eacott's assessment of the noise level emanating from the upstairs area of the Hotel was that it was extremely loud and excessive and he requested the bar manager of the Hotel to turn the noise level down. This request was not actioned and the Nominee of the premises, Mr Russell Wilkes ("Mr Wilkes"), was contacted on the phone and advised that if the music was not turned down then it would have to be turned off. Mr Wilkes attended the Hotel and an argument ensued.
2. Eventually the music was turned off on the upstairs area but shortly thereafter it commenced in the downstairs area of the premises. Mr Eacott returned to Cardona Court and noted that the level of noise had reduced but still could be clearly heard. He then returned to the Victoria Hotel and advised Mr Wilkes that all downstairs windows and doors were to be kept closed and no music was to be played upstairs. During this discussion between Mr Eacott and Mr Wilkes a third person joined in the conversation and Mr Eacott, being concerned that a physical confrontation may ensue, left the premises.
3. At 1.30 am on 1 August 2007 Mr Eacott contacted the Police and requested that they have an officer check that the doors and windows of the premises had been closed. On 3 August 2007 Mr Eacott made a complaint under the *Liquor Act* via e-mail to Licensing and Regulation, Department of Justice, supported with a Statutory Declaration sworn 10 August 2007.

4. At the commencement of the Hearing Mr Timney addressed the Commission on his role as Counsel, on behalf of the Director of Licensing, who was bringing legal action against the Licensee and Mr Timney, identified Mr Eacott as the complainant and main witness with the other witness appearing at the Hearing being Inspector Tribe.
5. Mr Crowe, on behalf of the Licensee, expressed confusion as to the role of the Environment Protection Agency ("EPA") in this matter. He tendered a letter (exhibit 1), dated 15 February 2008, from himself to the Department of Natural Resources, Environment and the Arts ("the Department") which showed that he presumed that Mr Eacott was prosecuting a noise complaint against his client pursuant to the *Liquor Act* ("the Act"). In this letter it was further asserted that the Nominee for the Victoria Hotel was unaware of the EPA's powers as the Department does not appear to have appropriately educated liquor Licensees as the compliance requirements relating to noise under the *Waste Management and Pollution Control Act*.
6. Mr Crowe stated that until 5 March 2008 he was unaware that Mr. Timney was actually Counsel for the Director of Licensing rather than representing the EPA. He said he would need an adjournment to get instructions from his client and due to the pending sale of The Victoria Hotel he requested a very short time frame for this adjournment.

Consideration of the Issues

7. It was clear to the Commission that there were several issues that needed to be considered and decided prior to hearing oral evidence from the witnesses. In reaching any decision at this point the Commission took into account the documents in the Hearing Brief, the submissions made by both Counsel and the letter tendered by Mr Crowe.
8. The Commission had no doubt that the Director of Licensing was bringing the action for a breach of the Act against the Licensee of The Victoria Hotel based on a complaint made by Mr Eacott from the EPA. However, because of:
 - the EPA's initial involvement in the matter;
 - the information in the correspondence of 5 September 2007 from the Licensee's Counsel to the Director of Licensing; and
 - the correspondence on 13 February 2008 to the Department of Natural resources, Environment and the Arts; plus
 - the statement from Mr Crowe,

the Commission reached the conclusion that there was genuine confusion by the Licensee and his Counsel as to which party was prosecuting for the alleged breach of Liquor Licence - Noise Disturbance and Late Trading Special Conditions ("the Special Conditions"). This didn't lessen the complaint against the Licensee but did support the application for an adjournment.

9. When examining all the information provided at this stage in the Hearing, the Commission identified a significant concern in relation to whether there was a case to be answered in regards to the breaches of the licence Special Conditions. The Special Conditions subject to the breaches in this Hearing are:

"Noise Disturbance: The Licensee shall not permit or suffer the emanation of noise from a Licensed Premises including the Courtyard of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises". (emphasis added)

"Late Trading Premises (6) The Licensee shall take all measures necessary to ensure that noise from the premises does not cause undue disturbance or discomfort to residents of the neighbourhood." (emphasis added)

10. Mr Timney stated that the witnesses to substantiate the breaches were to be Mr Eacott, EPA and Inspector Tribe, Licensing and Gaming. It appeared clear that the noise emanating from the Hotel on the night of 31 July 2007 was extremely loud even when measured at Cardona Court which is some four blocks away. However, in regards to a breach under the Special Conditions, whilst both Mr Eacott and Inspector Tribe may be lawful occupiers of a residential premises in the Northern Territory, on the night in question there is no indication that Inspector Tribe was in the vicinity of the Victoria Hotel and Mr Eacott was at Cardona Court in his role of Authorised Officer under the *Waste Management and Pollution Control Act* not as a resident. For a breach of the Special Conditions the complainant needed to be either “*lawful occupiers of any residential premises*” or “*residents of the neighbourhood*”. This raised the question as to whether either witness could provide evidence that the emanation of noise from the Victoria Hotel caused a negative impact on *residents* of Cardona Court.
11. Without a resident from the neighbourhood giving evidence at the Hearing the Commission was then left with the telephone call relating to excessive noise to the Pollution Hotline purporting to come from a resident in Cardona Court. In this era of mobile phones, without the ‘resident’ appearing before us at the Hearing, some evidence would need to be provided to show that the phone complaint was indeed made by a resident in Cardona Court and the noise emanating from the Victoria Hotel caused undue disturbance or discomfort to a lawful resident of the neighbourhood in accordance with the Special Conditions.
12. Given the confusion as to the roles of the EPA and the Director of Licensing in pursuing these breaches the Commission allowed a short adjournment in order for Counsel for the Director of Licensing to obtain further instruction. Normally, any decision on whether there is a case to answer is made after hearing evidence submitted by the prosecution. However, the Commission, having identified a concern about the proposed evidence, felt that, in the adjournment period, it was only fair and reasonable to allow Counsel for the Director of Licensing, to seek instructions from his client and review the evidence to be given at the Hearing. Counsel for the Licensee had made it clear that the Licensee was willing to implement an updated ‘Noise Policy’ to the Licensees internal practices and procedures.
13. Following the adjournment both Counsel jointly submitted an agreement whereby the Victoria Hotel’s Employees Practices and Procedures would be amended to include a specific noise policy. Both parties agreed that, without the need for a full hearing, this would be a satisfactory outcome to the matter.
14. The attitude of the management and staff at the Victoria Hotel in this matter is cause for grave concern. Based on his Statutory Declaration, Mr Eacott was legally performing his duties as an authorised officer under the *Waste Management and Pollution Control Act*. Not only was his request not actioned immediately but he faced an argumentative Nominee and suffered verbal abuse to such an extent that he was concerned about a physical confrontation. The Hearing Brief documents show that the Nominee was unaware of Mr Eacott’s powers to shut down premises or give directions to reduce or cease noise. We have not heard any oral evidence on this matter and without receiving both sides of the story it is not appropriate for the Commission to reach any final conclusion. However, it does appear that there would be benefits to both the EPA and Licensees if information about the *Waste Management and Pollution Control Act*, the role of the authorised officers under that Act and the ramifications of breaches against this Act was disseminated throughout the liquor industry.

Decision

15. The Licensing Commission views, any disturbance and discomfort to neighbourhood community arising from noise emanating from a licensed premises, very seriously. There are Special Noise Conditions included in all liquor licences and a breach of this condition could result in a suspension of the licence. In this case, on 31 July 2007 the noise

emanating from the Victoria Hotel was clearly excessive and in all probability gave rise to a telephone complaint from a resident of the neighbourhood. Unfortunately, there was no written evidence submitted nor was any 'resident' to be called as a witness to give oral evidence of disturbance or discomfort from this noise. It is a very unique situation as there may well have been a breach of the *Waste Management and Pollution Control Act* but there is doubt whether there is a breach of the Liquor License Special Condition. Therefore, in this instance, the Commission accepts, as the best outcome for the complaint made under the *Liquor Act*, the agreement reached between both parties for a specific noise policy to be included in the Victoria Hotel's Employees Practices and Procedures as follows:

"Noise Policy"

The Vic Hotel lies within a developing residential community and to ensure that we have a minimal impact on our community, we need to be aware that noise does travel and can be a disturbance on others. To ensure that we keep this to a minimum the following need to be considered and adhered to.

- a. *Front balcony doors to verandah, overlooking the Mall, are to remain closed and not to be opened unless in an emergency under the direction of a Duty Manager;*
- b. *Ensure that when removing rubbish from the hotel it is done with a minimum of noise;*
- c. *After 22:00 hours and subject to occupational health and safety (including fire safety) legislation:*
 - c1 *All windows to be closed;*
 - c2 *Best endeavors to ensure front door is closed when not being used by patrons entering or leaving.*
- d. *When exiting the building, via the back doors, at the end of your shift remember to consider others who live in the area and reduce conversational noise to a minimum.*

Merran Short
Presiding Member

18 March 2008