

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Top End Hotel
<b>Licensee:</b>	Trans Media Group Pty Ltd
<b>Nominee:</b>	Mr Chris Tully
<b>Proceeding:</b>	Sec 48 Complaint by Residents of Marrakai Apartments and Sentinel Apartments: Noise Disturbance
<b>Heard Before:</b>	Mr John Withnall (Presiding member) Ms Shirley McKerrow Mrs Barbara Vos
<b>Date of Hearing:</b>	02-05 April 2001
<b>Date of Decision:</b>	29 June 2001
<b>Appearances:</b>	Complaints in person Mr M Phang, Mr C Day, Mr J Manser, Mr A Harris and Mrs P Harris, Mr T Fuller, Mr R Dowsett, Mrs S Tambling and Mr P Grice representing the Body Corporate of the Sentinel Counsel Assisting the Commission: Mr D McConnel For licensee: Mr C Tully and Ms T Jackson for both and Nominee

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This matter proceeded by way of a combined hearing of complaints by a number of persons in relation to noise disturbance from the Top End Hotel. All the complainants reside in one of two buildings, the Sentinel Apartments building in Daly Street or the Marrakai Apartments building in Smith Street. The complaints of Sentinel residents centred for the most part on the operation of the outdoor entertainment area that is part of Lizard's Bar at the Top End Hotel, while the complainant residents of Marrakai were mainly affected by noise emanating from the Top End's night club, the Hippy Club.

Many other persons who had lodged written complaints against the Top End over the same time period elected not to pursue those complaints as far as attending the hearing and giving evidence. Some gave formal notice of their withdrawal, including the earliest complainant, Mr Maurice Kerrigan, who advised prior to the hearing that he had shifted interstate and would not be pursuing his written complaints.

Mr Meng Phang of Unit 57 Marrakai Apartments lodged a written complaint on 9 November 2000. By letter dated 4 January 2001 Mr Phang sought the adjournment of the originally scheduled hearing date and at the same time recorded further complaint of noise disturbance from the Hippy Club in relation to the evening of 2 January 2001, and lodged a further letter of complaint on 21 March 2001.

Mr Phang gave evidence of having diarised many late night episodes of noise disturbance from the Hippy Club up to the end of November 2000, and again from the middle of February onwards after his return from holiday. Mr Phang described the volume of sound from the Hippy Club as appalling, particularly in the early hours of Wednesdays, Saturdays and Sundays. He demonstrated the level of disturbance as being such as to waken him from sleep when he had his windows open, with the lyrics of particular musical numbers and announcements of the DJ still clearly audible even with his windows shut and his air conditioner running.

Mr Phang referred to live music in the Lizard's Bar area generally ceasing about midnight, and although quite loud, not being the subject of his complaint with the hotel.

Mr Phang gave evidence that over the course of the earlier period of his complaints the doors and windows of the Hippy Club had usually been wide open, and that the nuisance would noticeably abate when the windows and doors would be shut following one of his complaints. Disturbance from patrons congregating on the balcony would abate when the doors were closed, but thereafter he was still disturbed intermittently by music and patron noise as the balcony doors were opened and shut from time to time.

Mr Phang did concede that there had been a distinct improvement over the last several weeks before the hearing, such that he thought somebody must be making a conscious effort to keep the windows and doors of the Hippy Club shut, although he remained disturbed by noisy patrons in the street and car parks.

Mr Phang's unit is on level 15 of the Marrakai Apartments, towards the rear, such that his unit faces in the direction of the frontage of the Hippy Club to Mitchell Street.

Mr Chris Day is Mr Phang's partner, residing with him in Unit 57 in Marrakai. Mr Day is of the opinion that the noise from the Hippy Club "is not a problem provided the front doors and windows are kept shut", although he points out that this would not overcome the problem of noise generated by patrons once they have left the nightclub and gathered on the street and in the nearby carpark. Mr Day was mostly concerned with the sound of music emanating from the Lizard's Beer Garden, which he describes as "blasting" loud music to midnight, such that he had to close the windows of his unit and put on his TV and air conditioner.

Mr Day also conceded that things were "considerably better lately".

Julian and Christine Manser of Unit 40 in Marrakai Apartments lodged a written complaint with the Commission by letter dated 14 November 2000. Mr Manser gave evidence. He told the Commission that he had lived in Marrakai for six years, and that while there had always been a level of noise emanating from the Hippy Club in its earlier guises, there had been an increase in the volume of noise therefrom over the last twelve months, being noisy disco type music at excessive volumes. He also complains of the problem of patrons leaving the hotel noisily between 2.00am and 4.30am.

At the time of giving his evidence, Mr Manser conceded that there had been an improvement in recent times and that the volume of music was now better than it had been. He too remained disturbed by late night patron noise.

The windows of the Manser apartment remain open at all times, Mrs Manser being unable to have air conditioning because of a medical problem.

Mr Manser found Lizard's Bar not to be a problem.

Alan and Pamela Harris reside in Unit 15 of the Sentinel Building, on the third floor and facing Lizards Bar at the Top End Hotel. They lodged a written complaint with the Commission on 2 October 2000, complaining of excessive noise levels emanating from both the Lizard's area and later in the night from the "Beachcomber Bar". The noise from the Beachcomber and Lizards was characterised as loud throbbing.

Mr Harris gave evidence of inability to sleep on Friday and Saturday nights. He described loud thumping music even with earplugs, such as prevented him from entertaining or having overnight visitors. He testified that he personally has no problem with the "Beachcomber".

Mrs Harris also gave evidence, also complaining that even with all windows and doors closed, the air conditioners running and with ear plugs in, she could still hear the throbbing of music, mostly from Lizard's earlier in the evening and on some occasions from the Hippy Club later on.

Mrs Harris did concede that Thursdays had "dropped off", and that "lately the music has been a bit better".

Mr Terry Fuller resides in Unit 18 on the fourth floor of the Sentinel and was a signatory to a written complaint of excessive music noise on 23 November 2000.

In terms of its windows and balcony, Mr Fuller's unit faces away from the Top End Hotel, although his entrance is by way of a foyer area most of which has a direct line of sight to the Lizards area. He gave evidence of having to adjust his lifestyle, as he would like to have the door open to benefit from the flow through of breezes, but when the music is playing at Lizards he has to close the door and turn the TV up "a couple of notches". The noise does not keep him awake.

Mr Ronald Dowsett was also a signatory to the group complaint dated 23 November 2000 (at folio 54 of Exhibit 7). His unit too faces away from the Top end, on the sixth floor, but with a line of sight to the Top End from his entrance into the foyer area. He gave evidence of having been disturbed by music from Lizards Bar every weekend ever since he moved into his unit in November 1999. He also complains specifically of an exceptionally bad evening on 4 March 2001, when the volume of music increased significantly between 9.00pm and 10.00pm. He and Mrs Tambling went across to Lizards Bar and verified that a three-person band playing there was producing the noise. Upon return to this unit he telephone Licensing Inspector Mr Greg Lye, and the noise stopped shortly after that telephone conversation.

Mr and Mrs Tambling were also signatories to the group complaint, Senator Tambling having complained in writing to the Manager of the Top End Hotel in June 2000 by letter on his official letterhead. Mrs Tambling subsequently filed a separate complaint with the Licensing Commission dated 4 March 2001 relating to the evening of 4 March.

Mrs Tambling gave evidence that most weekends since they had moved into the Sentinel, "the noise is just appalling". Although their unit on the sixth floor is on the other side of the building from the Top End, nevertheless there are areas of window, and again the front door, which have line of sight to Lizards Bar area. She confirmed the event of 4 March 2001 when she had accompanied Mr Dowsett to Lizards Bar, and testified that she was told by a member of the staff that one of the staff was having an engagement party and that was why the music was particularly loud on that occasion.

Mr Philip Grice gave evidence as the Chairman of the Body Corporate Committee for the Sentinel Apartments. He formally confirmed that the Body Corporate Committee wished to voice its concern with regard to the level of the noise, and the effect that this nuisance may have on property values and residence lifestyles. The decision had not been unanimous.

However, Mr Grice added that on a personal level the noise did not affect him. He said that he occasionally hears some reverberations, but not to the point of being annoyed. His unit adjoins that of Mr Dowsett on the sixth floor, which adjoins the Tamblings.

Other residents gave evidence in support of the licensee of the Top End Hotel, assuring the Commission that they suffered no noise disturbance from the operations of the hotel. We heard evidence along these same lines from Ms Lynette Mills, Ms Jody Gunn, Mr Peter Brown and Mr Greg Ambrose-Pearce. All said that they had been aware before moving into the Sentinel of Lizards being an open air venue that played live music, and all said that they were not disturbed by the level of noise emanating from the operations of the hotel.

Ms Jody Gunn resides in Unit 35 on the seventh floor, the configuration of which within the building being closest to the hotel, with almost all windows and balcony area directly facing the hotel. The unit corresponds in its outlook on the seventh floor with the unit of Mr and Mrs Harris on the third floor. Ms Gunn is a young person, and considers the unit to be in a lovely location. She is so happy living there that she has just renewed the lease for a further term. She does hear music from Lizards, but is not disturbed or disrupted by it, is not inhibited with her entertaining and does not have any problems sleeping although she confesses to being only a light sleeper. She testified that she doesn't really take much notice of the music noise, as it is not at any level that disturbs her.

Mr Peter Brown on the other hand is not a young person, being a businessman of mature age. He has lived in the Territory for 44 years. The unit he leases on the sixth floor corresponds in outlook with that leased by Jody Gunn on the seventh floor and also with that owned by the Harris on the third floor. Mr Brown's unit also faces the hotel, and is on the same floor as the units of Mr Dowsett and the Tamblings.

Mr Brown agrees that he can hear the music out on his balcony, and although it is not his style of music he does not find it intrusive. The music has never woken him up nor prevented him from sleeping. Mr Brown testified that the traffic noise is louder than the noise heard from the Top End Hotel. He made the point that he was fully aware of the extent of the complaints that have been made by residents of the Sentinel in relation to the hearing and declared that he found it difficult to understand those complaints from people residing on the Doctors Gully side of the building, given that his unit directly overlooks the hotel yet he does not suffer an unreasonable level of noise. He initially lived in Unit 12 for six months before moving to his present unit and commented that "at Unit 12 you wouldn't even have known the hotel was there".

Ms Lynette Mills occupies a unit on the ground floor, which faces across Daly Street and up The Esplanade. She hears the sound of distant music on Friday and Saturday evenings, but is never disturbed by it. She finds the noise from traffic, itinerants, children in the pool and the sound systems of other tenants to be far more intrusive. She used to live on Chapman Road at Rapid Creek, and finds the Sentinel to be much quieter.

Mr Greg Ambrose-Pearce shares Unit 22 on the fifth floor, which corresponds in its aspect with the unit of Mr Dowsett on the sixth floor. He entertains on his balcony regularly, and has never found noise to be disturbing. He has always been able to keep his doors and windows open, and has never needed to close them due to noise levels. He finds that the disturbance to entertaining is the noise from other tenants, which can be heard through the balconies.

Mr Ambrose-Pearce has been a patron of Lizards since it opened.

At the conclusion of evidence, we know that some of the residents of Murrakai Apartments and the Sentinel Apartments are disturbed by the sounds of various aspects of the hotel's operations, while there is obviously a body of residents in the Sentinel who are not so disturbed. In the Sentinel there are opinions for and against the hotel by residents of units of like aspect.

It was suggested that the amount of copying of complaints and subsequent correspondence between complainants might generate a degree of scepticism within the Commission, but there were no attacks on the credibility of any of the complainants. It was not squarely put to any of them that they were exaggerating or in any way fabricating their reactions or opinions.

The Commission really has no reason to doubt that all the complainants genuinely feel a grievance, and that the other residents of the Sentinel who gave evidence are genuinely not bothered by the sound of the hotel.

Several of the complainants testified as to comments from hotel staff and police as to the hotel having been there first, and that the complainants were in effect enduring the consequences of having chosen to live so close to a well established operation. The licensee at the hearing advised the Commission of its deliberate decision not to defend its position on that basis. However, the Commission after due consideration is of the view that in this respect the licensee may have given up some ground that may well have been available to be held.

Authorities were cited to us for the proposition that in the common law relating to nuisance it was no defence to show that it was the complainant who had "come to the nuisance" as the expression is. It has never been any answer to a claim in nuisance for the defendant to show that the complaining person brought the trouble on his or her own head by electing to come to reside so close to the defendant's existing activities.

However, the Commission is of the view that the common law in this area is not necessarily to be seen as being of assistance to the Commission in discharging its purely statutory function of regulating liquor and licensed premises. Even so, there are statements in some of the Australian authorities on the common law of nuisance which are not inconsistent with the direction of the Commission's thinking in relation to its present task.

In *Munro v. Southern Dairies Ltd* in the Victorian Supreme Court (1955 VLR 332) the 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.”

The consideration of the general nature of a mixed-use neighbourhood and of reasonable standards for the enjoyment of premises within that neighbourhood would surely see the hotel’s pre-existing operations in the Darwin Central District at the time of construction of a nearby residential block as being a relevant consideration. Not determinative, but relevant. On the evidence, and unavoidably to the personal knowledge of several members of the Commission in any event, the Top End Hotel had been a feature of the Darwin Central District long before any of the complainants purchased their nearby residential units, and indeed long before either Marrakai or the Sentinel were planned or constructed.

The due diligence of many of the complainants as incoming purchasers was touched on in the evidence.

Mr Phang was aware of the proximity of his Marrakai unit to the hotel when he purchased the unit, but he “assumed that a capital city would have noise pollution measures”.

Mr Alan Harris bought his unit in the Sentinel “off the plan” in 1998 knowing that the Top End Hotel was under redevelopment but without checking the Development Plan, nor even checking the hotel’s trading hours. Interestingly and relevantly, he organised the installation of additional insulation in the cavity walls of his particular unit during the construction phase, although he denied that such insulation was put in as any reaction to the proximity of the hotel.

When Mrs Harris was questioned about her knowledge of the hotel being there, her response was that she was from Canberra where “consumers have rights”.

Mrs Harris said that they had the additional acoustic insulation put in during construction because they were expecting some noise problems in that location, although she did not nominate the hotel as an anticipated source.

Mr Terry Fuller was aware of the existence of the hotel over the road when he purchased his unit at the Sentinel. He was aware that the operation included an outdoor beer garden, and expected some noise, albeit not at the level he now complains of. When asked if he had made any enquiries as to noise levels during the negotiations for his purchase of the unit, Mr Fuller told the Commission that the selling agent had mentioned that noise would be an issue, but had said not to worry about it for too long because some high profile people were moving in and as a consequence the noise issue would soon be resolved.

Mr Dowsett was also aware of there being live music in the beer garden at the time he made the decision to move into his unit at the Sentinel.

By contrast, Mr and Mrs Tambling had obviously not considered the noise aspect at all at the time of their purchase. Mrs Tambling testified that she had no idea that there would be any noise at all; they did not go and check out the location before purchase, they made no enquiries about the hotel’s operation and did not query the selling agent in that regard. It seems that they were given a half hour at one stage to take the unit or lose it, whereupon they snapped it up, subsequently swapping the initially contracted unit for one with a better view higher up.

The foregoing evidence as to individual awareness at the time of unit purchases is considered by the Commission to be relevant in any consideration of reasonable standards for the enjoyment of those premises given the nature of the neighbourhood and the location.

It was suggested to us that reasonability should play little part in our consideration of the licensee's relevant obligations because of the rigour of the "noise condition" in the hotel's liquor licence. Condition Number 6 under the heading "Late Trading Premises" reads as follows:

The Licensee shall take all measures necessary to ensure that noise from premises does not cause undue disturbance or discomfort to residents of the neighbourhood.

It was put to us that the licensee therefore must take *all* measures that are necessary to prevent "undue" disturbance, and that the condition should not be read down so as to read all *reasonable* measures. While we agree that the condition is to be given its natural meaning, in the Commission's view the condition is only applicable while the premises are trading as late trading premises.

It was an issue at the hearing whether this condition applied to the hotel's operations generally or only when in late trading mode. In the Commission's view the latter interpretation is clearly correct. The particular condition is not Special Condition No. 6 but No.6 in a subset of conditions headed "Late Trading Premises". It is clear that all the other conditions in that subset relate only to late trading, ie. they prescribe the situation that is to prevail after midnight on any night when trading shall have proceeded past 2.00am (vide condition No.2). Other conditions in the subset such as relate to the cover charge and the issuing of pass-outs are also clearly applicable only to late trading, and the Commission is in no doubt that the noise condition is to be seen as *ejusdem generis* with the other conditions in the subset. The reference to noise from the premises in condition No. 6 can only be a reference to noise while operating as a late trading premises, which is to say that it will apply after midnight on any night that the premises (for which we read any discrete part or unit of the premises: see *post*) trades beyond 2.00am., for the same period during which it is mandatory to provide live entertainment as a "prominent feature" if trading does in fact proceed past 2.00am.

It follows then that no noise produced by the Top End before midnight can be in breach of this condition. Whether or not this situation requires adjustment is another matter, to be dealt with a little later; for the moment we are considering licence conditions as they stand.

Looking then at the situation *only after midnight in the late night venues*, there can have been no breach of the noise condition in relation to Lizards, which is not a late night venue.

It was argued that the noise condition should apply to the hotel as a whole, even in its limited role of only late night applicability, such that if any part of the hotel remains open after 2 a.m. then all other parts of it are subject to such of the late night conditions as can be applied. The illogic of this argument would see the pass-out and cover charge system also coming into play at Lizards at midnight, a situation obviously not intended when the late night conditions are read as a whole.

Hotel licences in the Northern Territory have always contained discrete descriptions of each bar and drinking area within the complex, each with its respective trading hours separately delineated. The Commission has always regarded the late trading conditions to be applicable only to those parts of a hotel complex the discrete trading hours of which render the individual facility a late trading venue.

In any event, Mr Tully's evidence of the entertainment at Lizards ceasing at 12.30am (10.30pm on Sundays) is uncontradicted, and it is obvious that the specifics of the evidence of the complainants in relation to the noise from Lizards cannot persuasively support a finding of breach of the noise condition in relation to the operations of Lizards in the specific half hour between midnight and 12.30.

Our consideration of whether the licensee has breached the noise condition therefore narrows down to the evidence only as to late night disturbance from noise from the Hippy Bar (the sound of patrons in the street and the car parks, however unruly, not being noise "from" the premises).

In this regard the substantive complaints come from the Marrakai Apartments. Admittedly Mrs Harris at the Sentinel logged a disturbance specifically from the "Beachcomber" on a Tuesday, but that is not one of the venue's late trading nights to which the noise condition in the licence can apply. She also made reference to being woken by throbbing music at 2 am one Friday night, but for the most part her problems were with disturbance at earlier times, and her evidence does not go as far in relation to the Hippy Club as leads us to a finding of breach of the noise condition on the part of the licensee.

The complaint of Mr and Mrs Manser specifically targets the Hippy Club, but cannot be upheld; not only was Mr Manser's evidence too generalised to support a finding of breach of licence condition, but his expectation of living with his windows always open in the Central Business Precinct in the vicinity of an established hotel without being disturbed by noise from the nearby entertainment facilities is considered to be unrealistic, however necessary it may unfortunately be.

The evidence of Mr Phang in relation to disturbance from the Hippy Bar cannot be so dismissed, such that a consideration of the word "undue" as a description of the disturbance and discomfort that will be in breach of the condition becomes unavoidable.

As was argued before us in favour of the licensee, the reference to *undue* disturbance and discomfort must acknowledge that there is a reverse concept of "due" disturbance or discomfort, for which we read disturbance or discomfort that is to be *expected* in all the circumstances. It is in this context, in the Commission's view, that the reasonable-ness of all parties' expectations becomes a factor.

We note too that the definition of "environmental nuisance" in the *Waste Management and Pollution Control Act* also addresses the unreasonableness of interference with the enjoyment of a person's place of occupation.

Marrakai is within the Central Business Precinct of the Central Darwin District (vide Central Darwin Planning Concepts and Lands Use Objectives 1999 published by the Department of Lands, Planning and Environment). The Land Use Concept for Marrakai's location is "commercial / residential".

Mr Phang acknowledged in evidence that he was aware when he purchased the unit that there may be a noise issue, and was fully aware that the unit overlooked the Mitchell Street entertainment area, but assumed that a capital city would have adequate noise pollution measures. He considers the noise the subject of his complaints to have been far above any noise to be reasonably anticipated. Mr Phang records a long sequence of disturbance by loud jarring and bumping bass amplification in music emanating from the Hippy Club. While it is obviously a factor in Mr Phang's irritation that he would prefer to be able to have his unit windows open as often as he wished, which we would consider an unreasonable expectation in the mixed use zoning, nevertheless he has testified that when he did shut his windows and put on his air conditioner against the intrusive noise, he could still hear all the words of the music. Given that Mr Phang's complaints relate mostly to the period between 2.00am and 4.00am, it does seem to the Commission that this level of disturbance, at that time of night, on a continuing basis, is what the late night noise condition in the licence was designed to obviate or effectively minimise.

Determinative in the Commission's view of Mr Phang's complaints is his evidence of the occasions when direct complaint to Hippy management or the pollution response line would produce a consequential abatement of the disturbance as a result. Obviously then, there were sound attenuation measures available to the licensee on the nights of Mr Phang's direct complaints, and ergo every night. On the occasion that Mr Phang called the Hippy Club requesting that they shut the front doors and windows, management's compliance with that request reduced the escaping noise to such level as was no longer a nuisance. When towards closing time on that occasion the doors and windows were again opened, again the noise became a nuisance. This occurred on several occasions. On one evening in March 2001 when Mr Phang was awoken at 1.00am by the noise made by people congregating on the front balcony of the Hippy Club, he called the Club and complained of the disturbance, whereafter the noise reduced. For the rest of that night the nuisance was intermittent as doors opened and closed as patrons entered and exited the premises.

Because there were obviously noise attenuation measures available to the licensee on the occasions that Mr Phang's communicated complaints bore fruit, it seems to the Commission that the licensee was in breach of its late night noise condition in not implementing such measures as a general policy before it eventually did. The duration of the continuing pattern of disturbance was relevant to our decision. It is only very recently that Mr Tully's ongoing attention to the problem of noise escaping from the Hippy Bar has at last seemingly resulted in satisfactory containment in compliance with this condition in the licence.

We therefore formally uphold Mr Phang's complaints insofar as they relate to disturbance by the sound of late night music and patron noise within the Hippy Bar. We find that intermittently during the period covered by Mr Phang's complaints, the licensee was in breach of the late trading noise condition.

We do not propose to identify specific week-end occasions giving rise to this finding; we do not specify the breach as other than intermittent over the period covered by Mr Phang in his evidence because in all the circumstances we have determined not to impose any penalty for such breach. The primary purpose of a penalty is to focus a licensee's attention on his obligations. The efforts Mr Tully has been making in implementing strategies in reduction of noise issues have been by the time of the hearing such as to mitigate against the imposition of any penalty for breaches which occurred while he was working his way towards the current measures which are in place.

Admittedly some of the directions taken by Mr Tully in this regard would simply have been a matter of good business practice in any event, but the licensee's recognition of noise issues at this point is undeniable. We itemise the majority of Mr Tully's measures several paragraphs hence; they indicate to the Commission a now satisfactory awareness of neighbourhood issues. The focus is there. A penalty on top of the lost time and expense of the hearing itself is considered unwarranted.

However, the proper disposition of the complaints does not necessarily end with a decision as to whether or not a breach of the *Liquor Act* or licence conditions has occurred. The scheme of Sections 48(2) and 49(4) of the *Liquor Act* envisages the Commission amending the conditions of a licence or issuing directions at the conclusion of a hearing regardless of the formal result. A complaint which does not establish a breach of the Act or of liquor conditions may nevertheless prompt the Commission to take appropriate remedial action by means of Section 49(4). There thus remains the live question of whether or not the evidence heard by the Commission during the course of this particular hearing persuades us that some such course of administrative action would be desirable.

In its further consideration of this matter along these lines, the Commission is sensitive to the disappointment and frustration no doubt felt by those complainants who reside in the Sentinel. They obviously would press for the noise condition to be reworded to be clearly of general application to the hotel at all times, rather than being by way of a caveat on the entitlement to late night trading.

In this regard we believe we need to look at Lizards and the Hippy Bar separately.

Prior to the Sentinel being completed, Lizards had live entertainment on Wednesday nights through to Sunday, using a large amplifier system with unchecked sound levels, and featuring rock and roll style music with quite large bands. Mr Tully has pulled the number of weekly entertainment nights back to three, finishing at 12.30am. on Friday and Saturday nights and 10.30pm. on Sundays, has employed a professional sound engineer to be on site each night, has changed the style of performance from rock and roll to acoustic "mid road" entertainment, and has reduced the size of the amplification equipment. The engineer, Mr Roodenrys, told of attending the locations of complaint and identifying the problem areas as being amplified bass frequencies and high sharp frequencies (such as from snare drums) bouncing off the high rise buildings. Sub bass frequency amplification was then banned (ie no sub woofer speakers) and drum kits have been discouraged to the point of now only featuring as part of a jazz outfit on a Sunday afternoon, in relation to which Mr Roodenrys tells us that "volume is not their thing". He confirms the deliberate move away from rock and roll or "pub" music.



Exhibits 30 (from Mr Tully) and 25 (from Mr Roodenrys) contain full detail of the foregoing measures.

It is to be noted that the Lizard's Bar entertainment area is licensed until 2.00am seven nights per week. The voluntary pullback in actual trading times is seen as significant.

At the Hippy Club, Mr Tully sought to change the style of music, although that may have been in part a reaction to market forces. He abandoned "heavy techno" music, reduced the size and output of all amplifiers and speakers, most importantly has installed a new entrance and exit downstairs to mitigate sound emission when patrons are entering and leaving the premises, and which will now be all the more effective in view of the most recent change, that of the decision to keep the balcony doors of the Hippy Club closed *and guarded* except for emergencies. These doors are not permitted by the fire authorities to be locked, and the first experiment was to remove the wedges of the doors so that their default position was to be swung shut, but not locked. Because these doors have to be able to be opened in an emergency, patrons were not prevented from opening the doors for access to the balcony, which was part of the fuel for Mr Fang's complaint. Two weeks before the hearing, the decision was made to station dedicated security at the doors to prevent passage out onto the balcony except in emergencies.

Security also patrol outside the premises at closing time to encourage patrons to move on out of the immediate area of the hotel.

Mr Tully also indicated that he will be organising a "hotline" for a handheld phone for the duty manager, and will circulate such dedicated phone number to the corporate bodies of the nearby residential buildings in order to expedite local concerns.

All in all, the Commission considers that the licensee is doing enough in relation to both Lizards and the Hippy Bar to satisfy us that the present noise condition need not be strengthened at the present time. However, we do adopt a suggestion that came up during the hearing as to the exit sign to the balcony doors, and we direct the licensee pursuant to section 65(b)(ii) of the Liquor Act to change the present exit signage in relation to the balcony doors to read "Fire Exit" in lieu of "Exit". This is to be done within the next month, unless only that the licensee should receive any contra-indication from the fire authorities.

We acknowledge that those residents of the Sentinel who are disturbed by the sound of music from the Lizards Bar area will remain just as disturbed if no changes are imposed by the Commission in relation to that aspect of the hotel's operation. The question arises as to whether some reasonable and objective ceiling on noise emission levels can or should be imposed by the Commission by way of new licence conditions.

Mr Tully certainly seeks just such an objective standard, complaining of the subjectivity of current assessments of noise disturbance. However, while accompanying Mr Nigel Green in taking sound measurements in Mitchell Street one evening, Mr Tully witnessed an ambient recording of 60 dB while just walking past a restaurant (and 65 dB with just a CD playing in the interior), and is quite alarmed at the low ceilings proposed in the current draft Waste Management and Pollution Control (Environmental Noise) Regulations.

The Commission would need the assistance of clear expert evidence to be able to sensibly fix a measurable maximum level for sound emissions from these licensed premises without the agreement of the licensee. The complainants may well be aware of the result of a recent Commission hearing in relation to the Metro Inn, where a ceiling of 60 dB at the boundaries was imposed by the Commission, but in that case the licensee *volunteered* the undertaking to observe such a limitation. The history of the devolvement of that licence from a private hotel licence, and the specific conditions under which only *limited* entertainment could be offered to the general public in the outside area of the bistro there, have no bearing on the Top End situation. The licensee of the Metro Inn made a deliberate decision to avoid an enquiry into a different issue from that presently before us. There is of course in the Territory a wide diversity of liquor licences in terms of type, facilities, neighbourhood and individual histories.

In the present case Mr Nigel Green did give expert evidence. While not a sound engineer, he is an acoustic consultant of considerable experience, now contracted to the Department of Lands, Planning and Environment in drawing up the new noise pollution regulations. He touched on many difficulties in arriving at any objective standard in all the circumstances.

Mr Green told us that noise control measures are still very much in their infancy and that this is the first time a government has looked at providing noise controls for a mixed-use zone. We should perhaps note here that both the Hotel and the Sentinel are in the Esplanade Precinct of the Central Darwin District, the Government's land use objective for the Precinct being "to blend a variety of tourist, recreation and leisure developments with residential use and entertainment facilities".

Mr Green concedes that there is no noise-receiving area designated in the draft regulations which fits the situation of a mixed entertainment / residential zone. The "default" area designated in the draft, which is to say land not within any of the other specific designated usage zones, has ceiling levels which are no higher than Mr Green discovered to be about the *ambient* noise levels in one of the units at the Sentinel which faces the Lizards Bar entertainment area.

One can sympathise with Mr Tully's alarm, and indeed Mr Green concedes that the problems inherent in providing ceiling levels of general application in a mixed use zone is the reason why the draft legislation is now being reviewed and revamped.

Mr Green also adverted to the problem of subjectivity with fixing ceiling levels in relation to noise disturbance. Each individual has a different annoyance threshold, and reducing gross decibels would not necessarily reduce the irritation, bass vibration so often being the major irritating element. Such vibration can be part of an overall sound level well below any reasonable ceiling, and the irritant factor can survive such clear compliance.

Mr Green is of the opinion that there is very little that can be done in terms of an open entertainment area. An intervening structure *may* affect reception, but sound emanates hemispherically, rolling over even high walls.

Mr Green confirmed in effect the complaint of Mr Tully that acoustic considerations currently seem to play no part in planning and building approvals, and that certain facades help to reverberate noise. Mr Green testified that in his view this was happening at the Sentinel, and was in fact noticed by the members of the Commission during the course of the view that was conducted during the hearing. The members found themselves in agreement with the evidence of Ms Mills that the Sentinel is "a noisy echoey sort of building".

For the moment then we take Mr Green's advice that the issue of attempting to fix any ceilings on noise levels in the mixed use area of the Esplanade Precinct is a highly complex matter which is necessarily under further review in his office as his Department continues to feel its way towards a workable set of controlling regulations. There is simply no comprehensible benchmarking reference at present for the Commission to consider attempting to set its own objective levels for the licensee of the Top End Hotel in the present circumstances.

We certainly await with much interest the finalisation of the noise regulations, as no doubt do those residents of the Sentinel who are disturbed by the noise from Lizards on three nights a week. There is much that is attractive in the Government's objectives for mixed use precincts. It is unfortunate that some of the residents of the Sentinel are suffering what they now perceive as an unexpected downside, but the balancing evidence of those residents of the Sentinel who are not at all bothered by the sound of the hotel illustrates the high degree of subjectivity which must pose such a challenge in arriving at any objective standard for noise levels in a mixed zone.

Mr Green told us of the current proposal of the Queensland authorities to decline to even hear complaints against entertainment venues from occupants of residential premises which had been developed in the availability of knowledge as to the entertainment venue's operation. While we do not go that far, we do say that any assessment of reasonable residential expectations in the mixed-use zone must also involve an assessment of the reasonable expectations of the licensee. The relevance of the nature of the neighbourhood is not to be discounted.

So long as the entertainment in the Lizards area continues to be restricted in terms of the limited number of nights per week and the earlier closing times, and provided that the Hippy Club windows and the doors to the balcony are kept shut, the Commission is of the opinion that the sound of the current operation of the hotel cannot in all fairness be considered to be unreasonable for that precinct. So long as the conduct of the business of the hotel remains consistent with the raft of noise-mitigating practices, undertakings and indications adverted to in the evidence of Mr Tully, Mr Roodenrys and Mr Vimah, there are no further restrictions or sound attenuation measures which the Commission believes it could meaningfully impose at this time without prejudicing the legitimate expectations of the licensee in a location long established as a hotel entertainment complex.

John Withnall  
Presiding Member

29 June 2001