



DOC18/239810

**FILE NO:** A18/0013839

**COMPLAINANT:** [REDACTED]

**LICENSED PREMISES:** The Flinders Hotel - LIQH400100086

**ISSUES:** Whether the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed.

**LEGISLATION:** *Liquor Act 2007*

## SECTION 81 DECISION

Under Section 81 of the *Liquor Act 2007* (the Act) I, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW, a delegate of the Secretary, Department of Industry, in relation to the complaint made against The Flinders Hotel, Darlinghurst – LIQH400100086, have decided to **issue a warning** to the licensee.

The warning is detailed in the following terms:

*'Under Section 81(d) of the Liquor Act 2007 I, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW, a delegate of the Secretary, NSW Department of Industry warn Vinko Petrinovic, licensee of The Flinders Hotel, Darlinghurst – LIQH400100086, that he must ensure no future undue disturbance is caused by live entertainment or patron noise at the hotel.'*

## REASONS FOR DECISION

### Legislative framework

1. Section 79 of the Act provides that a prescribed person may complain to the Secretary, that the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed because of the manner in which the business of the licensed premises is conducted, or the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

2. For the purpose of section 79 of the Act, a person who has standing to make a complaint includes a person who is a resident in the neighbourhood of the licensed premises and is authorised in writing by two or more other residents.
3. Section 80 of the Act enables the Secretary to deal with a complaint by way of written submissions from the licensee and any other person the Secretary considers appropriate. After dealing with the complaint, section 81 of the Act provides that the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no action.
4. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and must have regard to the matters set out in section 3(2) which are:
  - a) the need to minimise harm associated with the misuse and abuse of liquor;
  - b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, services and consumption of liquor; and
  - c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

### **The Complaint**

5. On 26 September 2018, [REDACTED], the principal complainant, of [REDACTED] lodged a disturbance complaint with Liquor and Gaming NSW (L&GNSW) alleging undue disturbance to the quiet and good order of the neighbourhood caused by loud music emanating from The Flinders Hotel (the hotel), located at 63-65 Flinders Street, Darlinghurst. The principal complainant lodged the complaint as a resident authorised by two other residents who also reside in [REDACTED]
6. The principal complainant alleged that for three weeks prior to the lodging of the complaint, disturbance was caused by loud music was emanating from the premises after 12:00 midnight to 3:00am. The principal complainant alleges the disturbance occurs every Friday and Saturday night and was repeated for at least four weekends prior to the lodgement of the complaint.
7. The principal complainant seeks that no music can be heard in the residential area after midnight on Friday and Saturday.
8. Between 15 October 2018 and 14 December 2018, various submissions were lodged by all parties. A list of the material before the delegate is set out in **Annexure 1**.

**Statutory considerations under section 81(3) of the Act:**

9. The Act requires that the Secretary have regard to the following statutory considerations.
10. *The order of occupancy between the licensed premises and the complainant* – the hotel has operated at its present site on Flinders Street since 24 October 2005. The principal complainant has resided at [REDACTED] for approximately three years and eight months. The hotel predates the principal complainant's occupation of their residence. This fact is not in dispute and I consider the order of occupancy to be in favour of the hotel.
11. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – there is no evidence that there have been any structural changes to the principal complainant's residence. Licensing records indicate the business was transferred to the current owner and licensee on 21 December 2016. The licensee submits they have recently installed acoustic foaming, soundproofing and curtains to help reduce noise emissions from the hotel. On 30 October 2018, Sydney City Council (Council) issued a cease use notice and fire order on the licensee in relation to the use of the first floor. The licensee has since lodged a development application in order to use the first floor of the hotel, the outcome of which is not known at the time of making this decision.
12. *Any changes in the activities conducted on the licensed premises over a period of time* – the principal complainant submits that issues with noise commenced in late 2017. On 29 March 2018, L&GNSW granted a live entertainment exemption in accordance with clause 102 of the Liquor Regulation 2018 following an application by the licensee. Police submit that within two months after the exemption was granted, noise complaints from nearby residents commenced. Police also submit the hotel has significantly changed its operations and promotions by targeting a younger audience through social media. The licensee submits they hire 20 live performers every week. The weight of evidence suggests there has been a change in activities at the hotel, primarily moving to an increased focus on live entertainment offered to a younger demographic.

**Other Considerations**

*Undue disturbance*

13. I am satisfied the material before me is sufficient to support a finding that the hotel has at times, caused undue disturbance to the neighbourhood. In making this finding, I have

balanced the submissions made by the licensee, the principal complainant, two authorised residents to the complaint, NSW Police and Sydney City Council.

14. The hotel is located at 63-65 Flinders Street, Darlinghurst, which is around [REDACTED] metres away from the principal complainant's residence on [REDACTED]. The hotel and the principal complainant's residence are separated by a two-lane road on Chisholm Street, a block of houses, and a seven-lane road on Flinders Street. It is located in a mixed commercial and residential area. It is also close to other licensed premises, sitting around [REDACTED] metres away from The Beresford and [REDACTED] metres from ARQ Sydney.
15. According to the hotel's liquor licence, trading hours are from 5:00am to 5:00am Monday to Saturday and 5:00am to 3:00am Sunday. The hotel has an Extended Trading Authorisation. Take away is permitted from 5:00am to 12:00 midnight every day. The hotel is situated within the Sydney CBD Entertainment precinct and is listed as a high risk venue within Schedule 3 of the Act. Due to this, the venue is subject to special licence conditions which affect the hotel's licence hours and the liquor sales cessation period. As mentioned above, the hotel was granted a live entertainment exemption, which made exemptions to special licence conditions, namely the lockout being extended to 2:00am and the liquor sales cessation period being extended to 3:30am. The hotel offers live entertainment on Friday and Saturday nights. Relevantly, the hotel's licence is already subject to an LA10 noise condition and a condition requiring doors to the ground floor bar area and windows be closed after 10:00pm when entertainment is provided
16. The principal complainant alleges repeated disturbance from the hotel on Friday and Saturday nights in the form of loud music, primarily from DJ's and other live performances. The principal complainant also alleges that they can hear disco beats and bass between the hours of 12 midnight to 3:00am, which disrupts the principal complainant while sleeping.
17. Since lodging the complaint, the principal complainant and an authorised resident to the complaint, [REDACTED], have identified further specific instances of disturbance caused by live entertainment at the hotel and have consolidated the total number of noise complaints as set out below:
  - a) The music was reported to be louder than ever during 1:00am to 3:00am on Friday and Saturday nights on 2 and 3 November 2018 and 9 and 10 November 2018.
  - b) There have been 20 noise disturbance complaints between 22 May 2018 to 11 November 2018 to Sydney City Council and NSW Police.

18. Council provided their submission on 15 October 2018. Council submit that between 23 October 2017 and 5 October 2018 they have received 15 noise disturbance complaints about the hotel. No further action was taken in 13 of these noise complaints as the noise was deemed not to be offensive. In four of these complaints, however, Council rangers spoke with the licensee or manager at the time about the disturbance. They complied with Council directions by either turning the music down or agreeing to monitor the level of noise.
19. Council also submit there have been numerous compliance related inspections since February 2017, which revealed non-compliance issues relating to fire safety. Council recently conducted an investigation into the use of the first floor in relation to patron numbers. A cease use notice and fire order was issued against the licensee regarding the use of the first floor.
20. NSW Police provided their submission on 17 October 2018. Police submit they have received nine noise complaints within the previous six months, relating to excessive loud noise emanating from the hotel. Police note that all but one of these complaints was received after midnight. The most recent complaint of 13 October 2018 had Police attend the principal complainant's residence where they heard music permeating the walls of the residence. Police also conducted street patrols on 13 and 14 October 2018, noting there was excessive noise emanating from the hotel. These and other patrols have identified anti-social behaviour being caused by patrons loitering near the hotel, which contributes to noise disturbance. Police submit the disturbance is caused by loud music from the hotel, primarily from DJ's, and from overcrowding on the balcony and first floor.
21. Police refer to Development Application DU/1998/101/C, a copy of which was submitted by the authorising resident, which currently applies to the hotel, states at section 19(c) that:

*'The noise from the use (of the premises) must not be audible within any habitable room in any residential property between the hours of 12:00 midnight and 7:00am'.*

Police also submit they spoke with the licensee on 17 October 2018 where he advised he was waiting for the approval of a government grant for soundproofing, which Police note has been mentioned multiple times since June 2018. He also advised that he had not considered engaging an acoustic consultant as advised by L&GNSW. Police submit that disturbance will only be resolved by imposing a noise limiter and a plan of management condition as well as revoking the live entertainment exemption.

22. The licensee submits that the hotel operates within the permitted noise levels required by its liquor licence. The licensee had a Noise Impact Assessment performed by Rodney Stevens Acoustics Pty Ltd (RSA) on 3 December 2018. This assessment was commissioned by the hotel's business owner in relation to a development application submission regarding the use of the first floor. Unattended noise monitoring was conducted between 14 November and 20 November 2018. Noise levels were measured from commercial receivers at 61 and 67 Flinders Street and residential receivers at 8 Hill Street and 70-74 Flinders Street. The assessment concluded that noise emissions from the use of the hotel comply with the L&GNSW noise criteria. The consultant made two additional recommendations to manage noise caused by the hotel, including closing the external balcony door after midnight and that signs are posted advising patrons to leave in a quiet manner.
23. A level of normal disturbance from the normal operation of a licensed premises is to be expected, including noise from live entertainment, patrons, and pedestrian traffic caused by the hotel. However, having regard to the hotel's increased focus as a live entertainment venue, the number of recent complaints by Council, and Police's observations and recommendations, I have determined that the hotel has, at times, caused undue disturbance. Notwithstanding, I do not consider the level or frequency of undue disturbance to be at the high end of the scale.

*Action taken to mitigate disturbance*

24. In considering whether to impose conditions on the liquor licence, I have balanced the submissions of all parties, having specific regard to any action taken by the licensee in response to the complaint and the effectiveness of any measures that have been implemented to address disturbance.
25. Since the complaint, the licensee has implemented the following measures to control disturbance, including:
- Engaging Sydney Sound Proofing Acoustic Solutions to sound proof all windows and doors, install acoustic foaming throughout the hotel and remove the subwoofer off the floor to stop vibrations. Sound proofing was completed on 27 November 2018.
  - Refusing to hold weekly events on Wednesday and Thursday nights, due to respecting nearby residents from possibly creating disturbance.
  - Hiring six security guards each night live entertainment is provided. Security are instructed to keep all doors and windows closed at all times unless patrons are

leaving or entering the hotel as well as moving on patrons 50 metres away unless they are waiting for transport, like taxis.

- Proposing to invest in double glazing windows or sound proofing walls to the principal complainant's residence at the licensee's cost.
  - Installing a 50Hz high pass filter on the sound system processor, reducing the capacity of the sound system which will reduce sound and rumble.
  - Lodging a new development application for the use of the first floor. As mentioned above, a Noise Impact Assessment was conducted as part of the application process and found that the hotel is complying with both L&GNSW and Council criteria.
  - Engaging with nearby residents who reside on Flinders and Hill Street, who have indicated that they were unable to hear any music or bass coming from the hotel at any time. This includes the licensee accessing a place of residence on 7 December 2018 at 1:30am and 8 December 2018 at 11:00pm and 2:00am.
26. The licensee submits the principal complainant is being unreasonable by remaining anonymous as it is more difficult to locate the source of the disturbance without their assistance. The licensee also submits that they conducted a mail drop to all nearby residents where he provided a contact number, should any resident have any further issues with the hotel. The licensee has been willing to engage with the complainants, however, at this stage there has been no engagement between the parties.
27. At this stage, it appears that the licensee has taken measures to mitigate disturbance. This has come primarily in the form of sound proofing works and reasonable attempts by the licensee to engage with residents. The Noise Impact Assessment also indicates the hotel is complying with both L&GNSW and Council requirements in relation to noise. However, the material indicates the licensee has submitted a development application regarding the use of the first floor. Police note that patrons overcrowd the balcony, creating patron noise which further impacts residents.
28. It remains to be seen whether the potential to use the first floor will adversely affect residents. The licensee should continue being vigilant in ensuring no undue disturbance is caused as a result of the first floor being used, if the development application for its usage is granted. Ultimately, there needs to be further evidence as to whether these mitigating measures make an impact regarding noise, but as for the licensee's intent, the material indicates that he is taking the complaint seriously and making a reasonable attempt to mitigate noise at the hotel.

## Decision

29. In making my decision, I have considered the submissions of the principal complainant (authorised by two other affected residents), [REDACTED], an authorised resident to the complaint, licensee, Police and Council. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the hotel. I also find it reasonable to expect some form of noise will be generated from its ongoing operation and acknowledge the submission by Police that disturbance is also caused by patron noise emanating from the hotel, which is supported by the Noise Impact Statement.
30. Considering the material presented by the parties to the complaint, I conclude that the measures sought by the principal complainant and Police to be unduly burdensome on the licensee. These measures include that music cannot be heard in the residential area after midnight on Friday and Saturday, imposing a Noise Limiter and Plan of Management condition and revoking the Live Entertainment Exemption. The disturbance submitted in the complaint does not, in my view, rise to such a level as to warrant consideration of these measures. Further, the licensee has implemented changes to mitigate noise disturbance caused by live entertainment and patron noise. I have taken into account the efforts made by the licensee in addressing disturbance.
31. The Noise Impact Assessment found that the hotel could comply with L&GNSW and Council noise criteria and made practical recommendations to assist the hotel in complying with these standards. This includes practical measures like closing the balcony door after midnight and posting signage advising patrons to leave in a quiet manner, which will assist with undue disturbance caused by patron noise.
32. I note that the hotel sits within the Sydney CBD Entertainment precinct and carries a market orientation towards live entertainment. The hotel was granted the live entertainment exemption for this reason. The concept of *undue disturbance* as articulated in the Liquor Act must be considered having regard the nature of the neighbourhood and the venue being a hotel located in an entertainment precinct. In this context, it is reasonable to expect the hotel will generate some level of noise from live entertainment and patron behaviour. Further, the complaints highlighted in the submission by Council shows that disturbance is in most cases barely audible and does not always appear to readily constitute undue disturbance. Having regard to this information I consider that a warning is the appropriate response and that further action in the form of licence conditions is not required.
33. Notwithstanding, should fresh and direct evidence be presented demonstrating further undue disturbance, it is open for the matter to be reconsidered and for further regulatory



action to be taken. I strongly encourage the licensee to proactively manage any disturbance caused by live entertainment and patron noise at the hotel and to implement the recommendations set out in the Noise Impact Assessment.

**Decision Date:** 24 May 2019



**Sean Goodchild**

**Director Compliance Operations**

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Industry

**Application for review:**

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 21 June 2019. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at [www.liquorandgaming.nsw.gov.au](http://www.liquorandgaming.nsw.gov.au).

In accordance with section 36C of the Gaming and Liquor Administration Act 2007 this decision will be published on the Liquor & Gaming NSW website at [www.liquorandgaming.nsw.gov.au](http://www.liquorandgaming.nsw.gov.au).



**The Material before the delegate of the Secretary in making this decision comprises:**

1. Section 79 Noise Disturbance Complaint lodged by the principal complainant on 26 September 2018.
2. Submission from Sydney City Council dated 15 October 2018.
3. Submission from NSW Police dated 17 October 2018.
4. Submission from the licensee dated 21 October 2018.
5. Copy of a letter from GAS Audio Services regarding noise limiter.
6. Submission from the principal complainant on 12 November 2018.
7. Submission from an authorised resident to the complaint, dated 18 November 2018.
8. Copy of an Order from Sydney City Council addressed to Consolidated Assets Management Pty Ltd dated 30 October 2018.
9. Copy of an Order from Sydney City Council addressed to Vinpetrin Pty Ltd dated 30 October 2018.
10. Copy of a Fire Safety Order from Sydney City Council addressed to Consolidated Assets Management Pty Ltd dated 30 October 2018.
11. Copy of a Section 96 Modification Approval for Development Application DU/1998/101/C from Sydney City Council addressed to Christopher J Milne Flinders Hotel dated 30 June 2008.
12. Submission from the licensee dated 14 December 2018.
13. Copy of a Fire Safety Statement from the Department of Planning and Environment dated 11 October 2018.
14. Copy of a Noise Impact Assessment from Rodney Stevens Acoustics Pty Ltd dated 3 December 2018.
15. Copy of a letter regarding Equipment and Soundproofing Upgrade from Sydney City Council addressed to the licensee dated 2 November 2008.
16. Copy of a tax invoice from Sydney Sound Proofing Acoustic Solutions to the licensee dated 14 December 201