
FILE NO: A21/0020892

COMPLAINANT: [REDACTED]

LICENSED PREMISES: The Milton Hotel, Milton – LIQH400119941

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, Dimitri Argeres, Director Compliance & Enforcement, a delegate of the Secretary, Department of Enterprise, Investment and Trade, in relation to the complaint made in respect to The Milton Hotel, Milton – LIQH400119941 (the Hotel) have decided to **take no further action**.

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 satisfies the Secretary that his or her interests, financial or other, are adversely affected by the undue disturbance to which the person's complaint relates.
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;
 - 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; and
 - d) the need to support employment and other opportunities in the –
 - (i) live music industry, and
 - (ii) arts, tourism, community and cultural sectors.

The complaint and background information

The complaint

5. On 22 December 2021, [REDACTED] (the complainant) [REDACTED] [REDACTED] lodged a complaint with Liquor & Gaming NSW (L&GNSW) alleging undue disturbance from the operation of the Hotel. The complainant lodged the complaint on the ground that that [REDACTED] interests (financial or otherwise) are adversely affected by the disturbance alleged in the complaint.
6. The complainant advises [REDACTED] is a director of [REDACTED] and leases the premises located at [REDACTED]. The complainant operates a business at this address called [REDACTED], which is a [REDACTED] [REDACTED] l.
7. The complainant alleges unacceptable levels of music emanates and vibrates into the accommodation [REDACTED] and occurs every Friday and Saturday night from 9pm until 12 midnight, and at other times when the volume of music is turned up. The complainant claims that the disturbance can be attributed to a new entertainment program that includes live music and a published schedule for four nights of entertainment that now exists at the Hotel. Additionally, it is submitted that loud bands at the Hotel are set up directly [REDACTED].

8. The complainant submits that [REDACTED] is unable to operate [REDACTED] business at full capacity and only four of 10 rooms can be booked on nights where there is late entertainment at the Hotel. The complainant submits this has resulted in over \$9,000 in refunds and lost bookings in a three- to four-week period. The complainant expresses concerns that the continued disturbance will 'kill' [REDACTED] business which [REDACTED] alleges is [REDACTED] only source of revenue.
9. The complainant states on 14 November 2021 [REDACTED] forwarded a complaint email from a guest at [REDACTED] to the Hotel's email address, which included a video of glasses shaking in the room. The complaint submits the Hotel offered small promises in response and has taken no action. An email from the Hotel dated 17 November 2021 was also included with the complaint which states that Shoalhaven City Council (Council) advised that [REDACTED] is classified as Class 4 of the National Construction Code and not subject to the same requirements as a residential dwelling. The Hotel further suggested that the complainant amend advertising of [REDACTED] to advise that the accommodation is [REDACTED].
10. The complainant advises [REDACTED] contacted Council on 22 November 2021 concerning the level of noise at the Hotel from the weekend prior and was advised that Council would conduct an inspection. In a follow up meeting with Council on 10 December 2021, the complainant submits Council advised that the Hotel was clearly breaching noise levels and that L&GNSW and NSW Police (Police) are the appropriate regulatory bodies to address the disturbance.
11. The complainant submits at the time of lodging the complaint, [REDACTED] business had been at the current address for four months and two weeks. During this time, a 10-12mm underlay and 11mm thick wool carpet to floorboards had been installed at the cost of over \$30,000.
12. Included with the complaint is email correspondence from [REDACTED], the landlord and premises owner, to Mr Damien Martin, the licensee of the Hotel, and the complainant dated 21 November 2021 and 23 November 2021. [REDACTED] advised that complaints had been received regarding live music and patron behaviour at the Hotel and set out the requirements of the lease contract, specifically relating to the management of music and entertainment. [REDACTED] further recommended the Hotel undertake mitigating measures including reducing the volume of amplifiers, using rubber mats to reduce vibrations from amplifiers and changing the position of the band away from [REDACTED].
13. Also included with the complaint is a statutory declaration by the complainant dated 10 December 2021, seven audio files of music playing from the Hotel, one video recording from inside one of the accommodation rooms showing drinking glasses vibrating and

music playing at the Hotel and a Noise Impact Assessment for The Milton Hotel & [REDACTED] prepared for the complainant by Rodney Stevens Acoustics Pty Ltd (RS Acoustics) dated 9 December 2021 (the Acoustic Report).

The Acoustic Report

14. The Acoustic Report states RS Acoustics were engaged by the complainant to assess potential noise intrusion from live and recorded music at the Hotel and its effect on [REDACTED]. The Acoustic Report details the results of a noise survey during a site inspection at the Hotel and most of the affected accommodation rooms between 9pm and 12am on Friday 26 November 2021. During the site inspection, noise measurements were undertaken during instances of background music playing through mounted speakers and a live band playing at the Hotel.
15. The Acoustic Report advises the main issue of concern includes excessive structural and airborne noise transmission between the ground level of the Hotel and [REDACTED]. This is due to the noise levels created by a live band in addition to the heritage construction of the building.
16. The Acoustic Report provides an assessment of measured noise levels against the Australian Standard AS 2107-2000 "Acoustics – Recommended Design Sound Levels and Reverberation Times for Building Interiors" which contains the recommended noise levels for hotel rooms. The measured noise levels show a high degree of noise intrusiveness that is both non-complaint and has potential to affect the amenity and wellbeing of patrons in staying at [REDACTED]. Further the noise intrusions were exacerbated due to low end frequencies, which were mainly from amplified bass and drums. It was noted that the measured noise level in 'room 8' showed a 21dB(A) exceedance over the maximum recommended internal night-time noise level for hotel rooms in entertainment districts.
17. The Acoustic Report concludes that based on the site visit and noise testing conducted, it is evident significant noise is being transmitted into [REDACTED] from the Hotel. Further, due to the age of the building, inaudibility within [REDACTED] would be difficult to achieve.
18. The Acoustic Report provides the following recommendations for both [REDACTED] and the Hotel to ensure noise levels are reduced inside the accommodation rooms. The Acoustic Report further notes that noise from bands playing at the Hotel will still be audible however at a reduced level.

- Full perimeter acoustic seals must be installed on all service doors that lead from the ground floor storage/entrance area to the hotel upper floor and from the communal bathroom to the corridor;
- All room windows to be inspected for gaps/leakage and improperly fitted rubber seals; and,
- Replace the underlay under the carpet with Pyrotek Silentstep Premium (optional).

The Hotel

- The “Lounge 2” band area to be acoustically treated with direct stick Autex Quietspace 50mm panels or similar material with acoustic reduction coefficient no less than 0.85, including the complete walls and ceiling of the corner enclave area;
 - The drum kit and bass amp must be isolated from the wooden floor in the form of a riser or vibration padding;
 - The fireplace to be closed off as it leads to the upper floor and is essentially a reverberant sound tunnel;
 - The wall mounted background speakers should be lowered from the ceiling as much as is practical and remounted on resilient rubber mounts. This would also allow for music played through the speakers to be lowered by as much as 50% due to the speakers being closer to the patrons;
 - The Hotel to be required to regulate live music noise output by controlling the PA master noise level and the band/DJ live output must be controlled through a multi band spectrum equaliser. Once installed, the PA system must be calibrated by a qualified acoustic consultant to reduce the low frequency intrusion into the above hotel rooms; and,
 - The lounge and bar area ceilings will need to be treated with absorptive ceiling tiles or equivalent material.
19. The complainant’s desired outcome includes that attenuation measures from the Acoustic Report be implemented to facilitate the quiet enjoyment of guests at [REDACTED]. The complainant submits this would involve conditions being imposed on the Hotel’s liquor licence to limit the decibel levels received in [REDACTED]. The complainant also seeks an admission that ‘the building is not fit for purpose’.

The venue, licence details, compliance history

20. The Hotel is located at 74 Princes Highway, Milton. The Hotel’s liquor licence commenced on 9 May 1960. The business owner is [REDACTED] and the licensee is Mr

Damien Anthony Martin (the licensee), both commencing on 27 November 2019. The premises owner is listed as [REDACTED] commencing on 19 October 2017. [REDACTED] (the premises owner) is the Director of the company.

21. The Hotel's trading hours for consumption on premises and takeaway sales are 5am to midnight, Monday to Saturday, and from 10am until 10pm on Sundays. The Hotel holds a minors area authorisation and has two liquor licence conditions relating to the minors area authorisation and a lease for four gaming machines.
22. L&GNSW records indicate no other noise complaints have been received in relation to the Hotel. The Hotel does not have adverse compliance history with L&GNSW.

Submissions

23. Between 7 January 2022 and 4 April 2022, various material was received from the parties to the complaint, including the complainant, the licensee, the premises owner, Police and Council. The material that is before the delegate is set out in **Annexure 1** and is summarised below.

Council submission

24. On 7 January 2022, Council provided a submission in response to the complaint. Council summarise 12 noise complaints received between 31 January 2017 and 22 November 2021 regarding the Hotel. The majority of the complaints relate to noise from live bands and music playing outside the Hotel, with noise allegedly audible within some complainants' residences with doors and windows closed and their own entertainment playing.
25. Council outlines four approved developments relating to the Hotel. It is noted that modified development consent DA18/1372 contains consent condition 37 relating to noise, which relevantly states that 'the use of the approved development must not give rise to transmission of unacceptable vibration or an offensive noise to any place of different occupancy or the public in accordance with the NSW Environment Protection's *Industrial Noise Policy 2000* and the *Protection of the Environment Operations Act 1997* (NSW)'.
26. Council further provides that DA14/1875 (now lapsed and surrendered) contained an additional "Operational Noise" section within the development consent. Condition 25 related to the LA10 noise criteria and Condition 27 outlined the Hotel use and associated amenity requirements which included prohibiting the use of outdoor speakers in any of the outdoor or alfresco areas, ensuring all external windows and doors to the existing lounge/enclosed entertainment area are closed during all live/recorded

performances/music, doors and windows to this area must be glazed and sealed to minimise the escape of noise to the environment, speakers located within the Hotel must not be placed or orientated so they direct amplified noise/music towards any outdoor areas and the licensee must ensure that the behaviour of patrons entering and leaving the Hotel does not detrimentally affect the amenity of the neighbourhood.

27. Council submit that considering the complaints received, there is a need for the following actions to be carried out:

- An acoustic report be prepared to address internal and external amenity noise impacts to residents and guests and said report should be provided to Council for review and comment;
- All amplified performances be restricted to occur indoors with windows and doors to remain closed at all times during the performance with suitable attenuation treatment to be detailed by the acoustic engineer and installed within a reasonable time frame of three months; and,
- A noise limiter be installed and maintained on the Hotel for all future amplified performance.

28. Council further states that acoustic upgrades to the Hotel will need to be reviewed by an accredited certifier to determine if the works require development consent.

Police submission

29. On 12 January 2022, Police provided a submission in response to the complaint. Included with the submission was a copy of three Development Consents for the Hotel containing noise-related conditions. It is noted that Development Consent DA14/1875 lapsed on 1 December 2019 and DA21/1182 relates to Dangerous Ales, a microbrewery located onsite at the Hotel. Police further submit that:

- a) the results of the Acoustic Report indicate disturbance occurred on the testing date and the video files provided by the complainant give cause for concerns.
- b) on 12 January 2022, they met with the licensee and Hotel management informing them of their obligation as a licensed venue to not cause disturbance to neighbouring premises and the neighbourhood. Police submit the Hotel has cooperated with a willingness to respond to the matter in a professional and responsible manner.
- c) in response to the complaint, the Hotel has informed Police that the following measures have been implemented to minimise and control noise being emitted from live music, including:

- spending \$40,000 on a new sound system and raising the stage to help reduce vibration being transmitted through the floor of the building, with the new sound system being more manageable for staff;
- closing off the internal chimney/fireplace to reduce noise travelling [REDACTED] [REDACTED];
- placing rubber matting under all amplifiers and speakers as recommended;
- reducing the volume of all live music to 70% of what it was at the time the complaint was lodged;
- live bands performances now finishing 30 minutes earlier at 11:30pm as opposed to 12am; and
- lowering wall mounted speakers from the ceiling.

30. Police submit these measures are reasonable and there is not much more the licensee can do to address the issues. Police submit that during the meeting on 12 January 2022, the licensee conceded that on the day acoustic testing was conducted they had failed to effectively manage noise emitted from live music on multiple occasions. The measures listed above have since been implemented and the noise has allegedly been effectively reduced and managed since.

31. Police submit the only further reasonable measure recommended to the licensee is to install a noise limiting controller on the Hotel's PA system. This would allow the Hotel to effectively control noise emitted from live music and ensure the volume is set to play at a reasonable level, rather than having to rely on physical monitoring and observation. Police therefore recommend that a noise limiter condition be imposed on the Hotel's licence.

32. Police state they have considered the prospect of an LA10 noise condition being imposed. The licensee has disputed such a condition being imposed advising that the LA10 condition is not applicable to the Hotel as enquiries with Council have identified that [REDACTED] [REDACTED] is not classed as a 'residence', to which the LA10 noise criteria applies. Police therefore doubt whether a LA10 noise condition would be enforceable if it was imposed under its standard wording. However, Police state if the condition was to be imposed, consideration should be given to vary the wording of the condition to include "business" alongside "residence".

33. Police note they have no files on record to show any reported complaints of disturbances caused by the Hotel. Police recognise that although the complainant has suffered some level of financial loss from the activities conducted at the Hotel, it is reasonable that the complainant could ensure that guests staying at [REDACTED] are fully aware of potential live music being held at the Hotel at the time of their booking to avoid any misconception and disappointment.

34. Police conclude by stating that as long as the Hotel regularly abides by the measures outlined above to limit noise emitted from live music, there is nothing further the Hotel can do to address the issues. Police do not find it reasonable to expect the Hotel to restrict live music given that live entertainment at the Hotel is currently restricted to finish at 11:30pm on weekends. While Police believe measures undertaken by the Hotel are sufficient, Police recommend the imposition of a condition on the licence to ensure the responsible practices undertaken by the Hotel consistently continue to assist in a resolution.

Licensee's response to complaint

35. On 12 January 2022, the licensee provided a submission in response to the complaint. Included with the submission are copies of email correspondence with the premises owner dated 22 November 2021 and 6 December 2021, social media posts relating to [REDACTED], a number of reviews from guests of [REDACTED] dated 7 November 2021 to 4 January 2022, and comments from members of the public signing a petition in support of live music at the Hotel.
36. In relation to live music at the Hotel, the licensee advises:
- a) The Hotel has been operating as a live music venue since the 1980s.
 - b) During the licensee's tenure they have always had live music at the Hotel as a feature of their operation. As per the Hotel's 2021-2022 financial statement, over \$24,000 has been spent supporting local artists on a regular basis on Friday and Saturday nights and on Saturday and Sunday afternoons.
 - c) In July 2021, [REDACTED] was employed as the Hotel's events, marketing and promotions manager. Thursday nights have since been added to the Hotel's live music roster and is promoted as a 'locals' night'. [REDACTED] also assisted the Hotel in applying for and gaining a \$50,000 live music grant from the NSW Government to support live music, which was affected as a result of the COVID-19 pandemic.
 - d) Live music is predictable at the Hotel and occurs every Thursday night between 5pm to 9pm, every Friday and Saturday night between 9pm to 11:30pm and every Sunday afternoon between 2pm to 5pm.
 - e) 90% of musicians invited to play at the Hotel are local acts and the Hotel's ongoing support is vital to their livelihood.

37. The licensee submits he recently signed a 10-year lease for their Hotel and microbrewery business. Part of the lease agreement included informing the complainant a week in advance of the Hotel's live music schedule and having the sound professionally managed with sound attenuation in place. Since October 2021, the Hotel has published its monthly live music schedule in the first week of every month for the information of patrons and the complainant. The licensee states he met with the complainant and [REDACTED] on 4 November 2021 to explain that the Hotel is a live music venue and it is alleged the complainant was supportive of live music. The licensee submits the complainant has also been liaising via phone, text and email with [REDACTED], the licensee's business partner.
38. In relation to the complaints made to the Hotel and the premises owner by the complainant, the licensee submits the following:
- a) The first complaint regarding live music was received on 13 October 2021. [REDACTED] [REDACTED] were not open for business at this time and it was the first day the Hotel opened after the COVID-19 lockdown. It is alleged the complainant was dining in the restaurant at the Hotel when [REDACTED] contacted the premises owner regarding loud music.
 - b) A series of complaints to the premises owner followed, resulting in the complainant allegedly encouraging the premises owner to issue the licensee with a breach of lease.
 - c) On 21 November 2021, the premises owner contacted the licensee to inform him of the complaints and requested that action be taken to moderate the effect of live music on [REDACTED].
 - d) On 22 November 2021, the Hotel advised the premises owner they would engage an acoustic engineer to determine the level of noise transmission to [REDACTED] and identify measures that can be put in place to attenuate sound transmission. It was further advised that a number of operational measures would be implemented during live bands and music sets. A copy of the email was included with the submission.
39. The licensee submits the complainant engaged their own acoustic consultant, RS Acoustics, who attended the Hotel on Friday 26 November 2021. The licensee states that the complainant's actions in engaging RS Acoustics early in discussions gave the Hotel no opportunity to implement the attenuation measures outlined in their email on 22 November 2021. The licensee submits this was an extraordinary move given that [REDACTED] [REDACTED] had only been operating for two and a half weeks at the time.

40. The license submits that all potential attenuation measures outlined in the Acoustic Report have been placed solely on the Hotel and argues the supply and installation of carpet and underlay by the complainant is not related to the noise complaint. The licensee submits the complainant retaining an acoustic consultant is an attempt to 'bludgeon [the Hotel] into submission' by recommending what the Hotel should be doing and further contends that the complainant is not taking any effective sound attenuation measures.
41. In relation to [REDACTED] and the business operated by the complainant, the licensee submits:
- a) The complainant has taken no responsibility for operating [REDACTED] [REDACTED] and is attempting to change the existing business model of the Hotel to suit [REDACTED] business.
 - b) The marketing for [REDACTED] doesn't match the reality of [REDACTED] [REDACTED] It is submitted that guests can be better made aware of the Hotel and its live music schedule on both [REDACTED] website and through online booking sites. The licensee states he has placed posters of the Hotel's live music schedule for January near the entrance to [REDACTED] to inform guests, however the complainant continues to remove the posters which is alleged to have been caught on CCTV footage.
 - c) The complainant should inform guests that the Hotel is a live music venue. The licensee submits he has asked the complainant by email to confirm if guests at [REDACTED] [REDACTED] are informed of this to which [REDACTED] has failed to answer on every occasion.
42. The licensee disputes the claim made by the complainant that the Hotel has taken no action about the disturbance. The licensee reiterates the actions taken by the Hotel in response to the complaint and also states that a sound technician has been employed by the Hotel to operate the sound system when larger bands are hosted.
43. The licensee further submits that:
- a) The standard LA10 noise condition is not applicable in this case as the criteria is specifically relevant to residential properties adjacent to licensed premises and the licensee is unaware of any noise complaints being received from the community. The licensee reiterates that the only noise complaints received have been from the complainant.
 - b) Following the complainant contacting Council on 22 November 2021, he received an email from Council regarding the LA10 requirements and the previous DA conditions,

which he states the Hotel is still currently fully complying with. The licensee alleges that Council deemed it to be a 'non-issue' and the email was to serve as a reminder of the Hotel's obligations regarding the LA10 requirement.

- c) Following the complaint to Police on 23 December 2021, the Police attended the Hotel the following day and raised no concerns. The licensee submits there was a jazz/folk duo playing the evening of the complaint and the volume and sound was effectively managed and controlled. The licensee claims that neither Council nor Police are interested in following up the complainant's grievances.
- d) The measures outlined in the Acoustic Report are guidelines only and that at no time has the Hotel agreed that implementation is their responsibility. However, the licensee submits four of the six measures have been implemented in an effort to ease the complainant's concerns. The licensee asserts these actions have not been recognised by the complainant at all.
- e) The volume level of all but two live performances since 14 November 2021 have been monitored by staff and have been significantly reduced, which the licensee personally attests to. [REDACTED] has also been present at most sound checks and live music events, informing bands of volume limits and on occasion requesting the master volume be turned down during performances.
- f) If the complainant continues to claim the volume of music is at the same level to those measured pre-complaint, [REDACTED] may engage RS Acoustics to take additional readings for comparison against the Acoustic Report. Until this occurs, claims of no reduction in the volume of live performances or house music can only be considered subjective and unsubstantiated.
- g) The reduction in overall music volume can be confirmed by recordings taken by [REDACTED] from 26 November 2021 onwards along Wason Street, adjacent to the Hotel. It is submitted that on all but two occasions, when recorded from 15 metres down Wason Street, no music was audible from the Hotel, except when the doors to the deck were opened and closed for patrons entering and exiting the Hotel. The licensee claims that prior to the noise complaints from the complainant, noise from the Hotel could be heard down Wason Street into the adjoining Thomas Street.
- h) The complainant has deliberately placed guests in what [REDACTED] deems the 'noisiest' part of [REDACTED] in an attempt to exacerbate the issue and justify [REDACTED] complaints. The licensee disputes the financial loss the complainant has suffered and states this should be substantiated. The licensee claims he has only been made aware of

complaints from guests of [REDACTED] on four occasions on 11 December 2021, 18 December 2021, 23 December 2021 and 9 January 2022 and questions how a \$9,000 loss as claimed by the complainant is evidenced.

- i) Not all reviews of [REDACTED] refer to noise disturbance and there is a clear discrepancy between the disturbance the complainant claims to occur requiring him to refund guests and the five-star ratings on [REDACTED] website. The licensee further notes that some of the reviews are proven to be from guests staying on weekends when live music was held at the Hotel. The licensee questions both the veracity and accuracy of the claim of the impact that the Hotel's live music has had on the complainant and [REDACTED] business.
 - j) Two weeks prior to providing his submission, an online petition was created to gauge the reaction to the possibility that the complainant's grievances could shut down live music at the Hotel. Since the petition was created, 840 respondents supported the continuation of live music at the Hotel with a number of the comments being provided with the submission. The licensee confirmed that no mention of the complainant or [REDACTED] was made during the petition.
 - k) He met with Police on 12 January 2022 and confirmed the measures the Hotel has already put in place to address the issue. The licensee confirms he will continue discussions with the premises owner regarding putting sound attenuation measures in place and will continue to monitor and control the volume of live music at the Hotel, but strongly rejects the complainant's claims that the Hotel's live music program is affecting [REDACTED] business and causing financial loss.
44. The licensee questions the length of time the complainant has been at their address, arguing that [REDACTED] have only been open since early November 2021, which is supported by social media posts. The licensee points out the complainant's lease was not signed until 11 November 2021, well after the Hotel resumed its live music program, and after the complainant lodged [REDACTED] initial complaint on 13 October 2021. This occurred before [REDACTED] opened. The licensee further questions the complainant's statement that [REDACTED] would not have signed the lease had [REDACTED] known the Hotel had live music to its current extent based on the above facts.
45. On 25 January 2022, the licensee provided an email from the premises owner addressed to the complainant dated 24 January 2022 in response to a complaint. The premises owner requested that the complainant refrain from booking rooms 7 and 8 until the acoustic treatment to the Hotel was completed. The premises owner further requested

that the complainant obtain a quote to have the carpets lifted in rooms 7 and 8 and the hallways so acoustic underlay could be installed.

46. On 27 January 2022, the licensee provided further information to L&GNSW outlining a copy of a review made by a guest of [REDACTED] dated 23 January 2022. The licensee submits the review supports the fact that the complainant is failing to inform guests that the Hotel is a live music venue and notes only a partial refund was offered in this instance.

Premises owner's response to complaint

47. On 21 January 2022, the premises owner provided a submission in response to the complaint. The premises owner is of the belief that [REDACTED] response is important as an independent party.
48. The premises owner submits [REDACTED] is aware of the noise complaints and believes a compromise can be reached. [REDACTED] submits that subject to both parties agreeing to a future plan of action as outlined below, no further action should be taken in respect to the complaint. In discussion with both parties, the complainant agrees that music is an important part of the Hotel's operations, and the Hotel operator understands that the enjoyment of the accommodation by guests is important.
49. The premises owner details a future plan that involves implementing the recommendations outlined in the Acoustic Report, noting that some of the recommendations are currently being installed or underway. The premises owner states that the implementation of the recommended actions and strict managerial control of the volume of music may resolve the issue.
50. The premises owner notes the complainant's concerns that sound transfer [REDACTED] [REDACTED] cannot be prevented and their view that only background noise from the Hotel is acceptable. The premises owner advises that in the event acoustic treatment fails to reduce sound to an acceptable level, further measures can be taken, including the installation of a noise limiter.
51. The premises owner submits the licensee understands that once the recommended acoustic measures are put in place, the two parties should be able to successfully coexist. That is, provided the complainant makes it clear to guests staying at [REDACTED], especially rooms 7 and 8, that there is live music playing at the Hotel from 9pm until 11:30pm on Friday and Saturday evenings.
52. It is the premises owner's recommendation that the acoustic measures in the Acoustic Report be put in place, the Hotel contributes to the cost of supplying and installing the

acoustic material and sound levels be reviewed once the measures are completed. If excessive noise in the affected accommodation rooms persists, a sound limiting device would need to be installed at the Hotel to prevent the music going beyond a set decibel level.

53. The premises owner reiterates that [REDACTED] does not believe any additional action should be taken at this stage.

Complainant's final submission and further complaint material

54. On 18 February 2022, a submission was received from [REDACTED] of JDK Legal on behalf of the complainant. Included with the submission is a table of financial losses allegedly suffered by the complainant dated between 13 November 2021 and 29 January 2022, a log of complaints dated between 14 October 2021 and 15 January 2022, email correspondence between the complainant and [REDACTED] dated 9 December 2021 and screenshots of [REDACTED] website.

55. The complainant also submits that:

- a) [REDACTED] commenced operation on 4 November 2021 and the complainant received complaints from the outset, particularly from guests staying in rooms 7 and 8, regarding loud and excessive noise from the Hotel. As a result, booking fees were refunded and certain rooms on Friday and Saturday nights were unable to be let due to noise. Over a two-month period, this equated to a financial loss of over \$13,000.
- b) On 26 November 2021, due to the Hotel refusing to acknowledge the noise issues and take action to moderate the level of noise, the complainant retained RS Acoustics to conduct acoustic testing. The Acoustic Report was 'damning', showing that in the room being measured, the noise level was 21 decibels above what is an acceptable decibel reading for a commercial accommodation room.
- c) Although the applicability of the LA10 noise criteria is problematic in this situation, it can most certainly be used as a gauge to determine what is 'undue disturbance'.
- d) The Hotel's claim that music levels have been reduced to 70% of its pre-complaint level does not give any comfort as the level of noise emission pre-complaint is not known. Additionally, there is a lack of technical evidence from the Hotel to support the claim that music levels have been reduced and the number of complaints from patrons about live music has continued without abatement since 25 November 2021. It is further contended that the only professional evidence available is the Acoustic Report and its findings are not disputed by Police, Council or the Hotel.

- e) The excessively loud amplified music which [REDACTED] has been subjected to falls comfortably within the meaning of what a reasonable person would consider as 'undue disturbance'. The ordinary dictionary meaning of the two words was provided as context.
 - f) The Hotel is not a live entertainment venue but rather a hotel that provides live entertainment. Live entertainment venues are purpose built and have undertaken acoustic attenuation to ensure they do not create undue disturbance. The Hotel is neither purpose built nor had any acoustic works effected to it, an email from [REDACTED] dated 9 December 2021 acknowledges that the building 'is not fit for purpose'. It is therefore contended that the Hotel does no more than provide live entertainment ancillary to the Hotel's food and beverage operation.
 - g) There is evidence found in all the submissions that the Hotel has in the past, and is presently, unduly disturbing the quiet and good order of the neighbourhood. Evidence has also been presented to demonstrate the extent of financial distress suffered by the complainant, with revenue figures being provided from 13 November 2021 to 29 January 2022, which equals \$13,493.17 in refunds and lost revenue.
 - h) The Acoustic Report, and its findings, are 'damning and incontrovertible' in the manner of the Hotel's operation and the provision of live entertainment. The submission invites the delegate to make a finding that the Hotel has unduly disturbed the quiet and good order of the neighbourhood and continues to do so, along with an order for the Hotel to implement each of the Acoustic Report's recommendations. Additionally, it is requested that there be no further live or amplified entertainment provided at the Hotel until all the recommendations contained in the Acoustic Report have been implemented and approved by RS Acoustics, and evidence of same is provided to the delegate.
 - i) The claim that guests are not informed of the location of [REDACTED] in conjunction with the Hotel is disputed. [REDACTED] are no longer marketed as a four-star accommodation due to the noise issues experienced with the Hotel. It is submitted this criticism misses the point as the issue is about how to address the problem of excessively loud amplified music emanating from the Hotel and not how the complainant deals with the effects of the noise on his business.
56. In response to the Council submission, the complainant submits there has been a litany of complaints to Council about the operation of the Hotel since December 2019 under the current operation and management of the Hotel.

57. In response to the Police submission, it is argued there are further measures that can be undertaken by the Hotel to address noise which are detailed in the Acoustic Report. The installation of a noise limiter, calibrated by RS Acoustics, would be effective and as the Hotel has not implemented this measure, it is submitted that the Hotel is not serious in addressing the issue.
58. The submission disputes the Police statement that it is not reasonable for the Hotel to restrict live music, especially in such a circumstance where the Hotel has shown no concern whatsoever about the effect which the loud music is having on operation of the complainant's business.
59. On 1 March 2022, [REDACTED] provided an update on the matter stating that music recommenced at the Hotel on 24 February 2022, having previously ceased due to COVID-19 requirements. [REDACTED] submits that the issues with loud amplified music have continued without abatement, alleging that a guest checked out after 9:30pm one evening and booked into a motel in Ulladulla.
60. Also enclosed was a copy of a review from a guest's stay at [REDACTED] on 26 February 2022. The review states that the Hotel turned into a 'nightclub' from 8pm to 12 midnight. It is submitted that the licensee has paid no heed to the complaints or the damage that the amplified music is causing to the complainant's business.

Licensee's final submission and other material

61. On 11 March 2022, a final submission was received from [REDACTED] of Kennedy & Cooke Lawyers (K&C Lawyers) on behalf of the licensee, which was supported by an email from [REDACTED] and a letter from [REDACTED] dated 10 March 2021.
62. [REDACTED] describes the letter from [REDACTED] as a letter of support for the Hotel's 'sister company' Dangerous Ales that operates onsite at the Hotel and was relevant to an application for a live music grant which was granted in early October 2021. The letter notes that Milton is a key tourism hotspot on the South Coast and offers support for a 'funding application' for Dangerous Ales, citing the benefits to tourism and new experiences to the community, such as live music, that will increase employment and capability across the region.
63. [REDACTED] advises that the Hotel and the premises owner are unable to consider structural work to the building due to the costs involved. However, [REDACTED] reiterates that they are

open to installing a noise limiter, as recommended by Police, to limit overall volume and cut lower frequencies.

64. [REDACTED] submits the Hotel has faced the 2020 bushfires and COVID-19 restrictions while trying to support local musicians and build a hub for the community. [REDACTED] emphasises that the continuation of live music at the Hotel is essential to both the community and success of the Hotel.
65. The submission from K&C Lawyers, dated 10 March 2022, provides that since the complaint was lodged, the Hotel has taken a number of steps as recommended in the Acoustic Report. K&C Lawyers advises they have been instructed that as of the date of their letter:
- (a) Four out of the six recommendations in the Acoustic Report have been implemented by the Hotel, namely:
 - (i) The installation of rubber underlay under all amplifiers and speakers and a raised bandstand to reduce vibration;
 - (ii) The fireplace has been sealed;
 - (iii) The speakers have been lowered (approximate \$7,000 cost); and
 - (iv) The sound is controlled a new master PA system (approximately \$40,000).
 - (b) Thorough consideration was given to the acoustic treatment of the ceiling and walls, however the required materials and installation, along with the business needing to be closed for a week, would cost approximately \$100,000. It is submitted this is an excessive impost on the Hotel given the costs already expended and concessions made to the complainant.
 - (c) Live music now ends at 11.30pm on Friday and Saturday nights instead of midnight.
 - (d) The live music schedule is published in advance and made available to the complainant.
66. The submission goes on to dispute assertions made by the complainant that there has been a 'litany of complaints' to Council or that the Hotel is responsible for undue disturbance in the past and present. Reference is made to Council's submission and noise complaints received by Council during the tenure of the current licensee. It is emphasised that these complaints related to noise emanating from the outside balcony or deck of the Hotel. Additionally, it is highlighted that over a 24-month period, there have been 9 complaints to Council with all but two reported during the peak of summer (January and February) when most patrons and entertainment offerings are outdoors.

67. The following submissions are made in relation to the statutory considerations under section 81(3) of the Act:

(a) The order of occupancy between the licensed premises and the complainant

The Hotel has been in existence since 1870 and its use over the past several decades has included regular live music events. The licensee acquired the lease for the premises in 2019 and has incorporated live music consistently.

The complainant opened [REDACTED] [REDACTED] in November 2021. It is submitted that the complainant would have heard music emanating from the Hotel during the months of fit out prior to launching [REDACTED] business and there is evidence the complainant was aware of live music being an integral part of the Hotel during discussions held at a meeting between the complainant and representatives of the Hotel.

(b) Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises

The Hotel and [REDACTED] have undergone changes as each was developed and renovated. No structural changes have been made to the Hotel since [REDACTED] commenced, apart from the sound attenuation measures implemented in response to the complaint.

(c) Any changes in the activities on the licensed premises over a period of time

Since [REDACTED] has been in operation, there has been no material or substantial change to the activities carried out on the Hotel by the licensee.

68. The submission contends that based on the tenor of the complaint and emotive language used by the complainant's legal representative, the complainant will not be satisfied until all live music ceases at the Hotel. This would be an outcome not in keeping with the Hotel's Development Approvals nor the often-stated objective of maintaining a live music venue in the area.

69. Additionally, it is argued that responsibility for coexisting in the building has been laid squarely at the feet of the licensee, who occupied the premises prior to the establishment of [REDACTED]. The Acoustic Report outlines matters which the complainant could undertake to reduce the impact of noise and there has been no indication that the complainant has implemented any of these measures or has considered the need do so.

70. Finally, the submission argues that no action should be taken as it has not been established that the Hotel is unduly disturbing the quiet and good order of the

neighbourhood. If deemed to be the appropriate outcome, the licensee has no objection to the imposition of a licence condition as recommended by Police in their submission. It is submitted that if such a condition is imposed, in addition to the steps already taken by the Hotel, the licensee will have undertaken all reasonable steps recommended in the Acoustic Report. The submission concludes by stating that claims by the complainant suggesting that the licensee has shown no concern or has dismissed the complaint is to ignore the steps taken to date and the money expended to assuage the complainant's concerns.

71. On 31 March 2022 [REDACTED] provided a personal letter to L&GNSW in support of live music in the Milton locality. [REDACTED] states she resides in close proximity to live music venues in Milton and as a neighbour is supportive of live music activities remaining without restrictions.
72. [REDACTED] submits that [REDACTED] she has spoken with Council staff to develop strategies to maintain and retain live music scenes in the CBD similar to actions taken by the City of Sydney and hopes to achieve these goals in the coming years. [REDACTED] concludes by offering support for the activities at the Hotel and hopes that common sense prevails and the Hotel can continue such activities unimpeded.

Further complaints lodged with L&GNSW

73. On 4 April 2022, the complainant contacted L&GNSW advising of continued disturbance from the Hotel and provided three video files. The complainant indicates that the videos are recorded from residential properties up to 450m away from the Hotel and submits the situation is getting worse. It is further submitted that the Hotel does not have any security present and crowds linger onto the streets. Also included was a screenshot of an email indicating that the Hotel was closed on 2 April 2022 for dinner service due to hosting a ticketed live music event.

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

74. The Act requires that the Secretary have regard to the following statutory considerations.

The order of occupancy between the licensed premises and the complainant -

75. The Hotel has operated under the current liquor licence since 9 May 1960. The Hotel's current licensee and business owner commenced on 27 November 2019. At the time of making the complaint, the complainant had operated their business, [REDACTED], for approximately four months and two weeks. While this fact is disputed by the licensee, I

consider the Hotel's occupancy to predate the complainant and consider the order of occupancy in the Hotel's favour.

Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises

76. There is no indication of structural changes to the Hotel or the complainant's premises [REDACTED]. The licensee advises that the internal fireplace in the Hotel has been closed off, wall mounted speakers have been lowered and rubber matting has been placed under all amplifiers and speakers as sound attenuation measures. The complainant advises he has installed a 10-12mm underlay and 11mm thick wool carpet to floorboards.

Any changes in the activities conducted on the licensed premises over a period of time

77. There is no indication of significant changes to the activities conducted on the Hotel over a period of time. It is submitted that live music has been a feature of the Hotel since the commencement of the business owner and licensee in 2019 and likely prior to this, noting consent conditions under the previous development application DA14/1875 (approved on 1 December 2014) that relate to amplified music and live performances.

Findings and Decision

Undue disturbance

78. In deciding whether the Hotel has unduly disturbed the quiet and good order of the neighbourhood, I have balanced the submissions made by the licensee, the complainant, the premises owner, Police and Council.

79. A level of disturbance from the normal operation of the Hotel is to be expected, including noise from patrons, live entertainment and music. The complainant must be aware that when deciding to occupy a business [REDACTED] a licensed premises that also provides live music, a greater level of noise and disturbance is to be expected at times. I regard this to be an active business decision on the part of the complainant.

80. After considering the material provided, I am not satisfied that there is sufficient evidence before me to conclude that the Hotel has caused undue disturbance to the quiet and good order of the neighbourhood. However, I do acknowledge that there is evidence to demonstrate that the Hotel has, at times, caused disturbance to [REDACTED] operated by the complainant. In reaching this conclusion I have placed weight on the Acoustic Report as provided by the complainant.

81. The Acoustic Report details the results of a noise assessment conducted at the Hotel during a live band performance and the impact on the most affected accommodation rooms operated by the complainant. Noise levels were assessed against a set of noise criteria relevant to sound levels and reverberation for building interiors. The Acoustic Report identifies a high degree of noise intrusiveness and non-compliance.
82. However, I note acoustic testing was limited to within the building occupied by the Hotel [REDACTED]. Further, the Acoustic Report does not provide an assessment of noise levels from the Hotel at external locations or receivers, nor an assessment of the Hotel's compliance with the LA10 noise criteria, which is the preferred benchmark in NSW for assessing undue disturbance to the neighbourhood. Having considered this and the material before me, I am not satisfied there is sufficient evidence to conclude that the Hotel has unduly disturbed the quiet and good order of the neighbourhood.

Regulatory Outcome

83. In deciding the appropriate regulatory outcome in this instance, I have considered the statutory considerations, the material set out in Annexure 1, and the above finding. I have also had regard to the particular context in which the Hotel operates, noting that it operates [REDACTED] and I am aware of the complexities in addressing noise concerns in this respect.
84. I acknowledge the order of occupancy is in favour of the Hotel. The current business owner and licensee of the Hotel have operated the Hotel prior to the complainant occupying the premises [REDACTED] and operating [REDACTED] business. I am also of the view live music has been a regular feature at the Hotel, although impacted by COVID-19 and the restrictions to the hospitality industry at various periods over the last two years. I have also considered the nature of the Hotel's operation, noting that it does not trade past midnight and that live music during Thursday to Friday nights concludes by 11.30pm.
85. I recognise the complexity in dealing with a dispute between two businesses operating [REDACTED] under separate tenancies. The Hotel operates on the ground floor while the complainant's business [REDACTED]. I am also of the view that a level of responsibility lies with the premises owner (and landlord) to ensure that both businesses can successfully coexist, including the management and resolution of any disputes.
86. I accept that at times there has been disturbance to the complainant's business from live music at the Hotel. I acknowledge the Acoustic Report identifies noise levels from live music as well as the heritage construction of the building as factors to the transmission of

noise [REDACTED] [REDACTED] [REDACTED]. I note that it is reasonable to expect a degree of disturbance when occupying [REDACTED] [REDACTED].

87. I share a similar view with Police in that I do not consider it appropriate to restrict live music at the Hotel. I find that placing restrictions or imposing a ban on amplified music is disproportionate and not in keeping with the Objects of the Act. However, there remains an onus on the Hotel to take necessary and proactive action to mitigate the impact of noise levels from live music.
88. It is evident the Hotel has taken this complainant seriously and proactive steps have been taken to mitigate noise from live music. The Hotel has implemented a number of measures in response to the complaint and the Acoustic Report's findings and recommendations. This includes lowering the speakers from the ceiling so music can be played at a lower volume, closing off the fireplace leading to the upper floor to prevent noise leakage, installing rubber underlay under all amplifiers and speakers, raising the bandstand to reduce vibration, and controlling sound through a new PA system at a considerable cost. Additionally, live music performances now finish 30 minutes earlier at 11.30 pm and the volume of all live music has been reduced to 70% of its levels prior to the complaint.
89. I am encouraged by the Hotel's willingness to co-operate with Police, the premises owner and the complainant and consider the mitigating measures voluntarily implemented by the Hotel to be a positive step to collectively reduce its noise impact. I also note the Hotel is subject to a condition in DA18/1372 relating to noise which will further act as a safeguard to ensure the quiet and good order of the neighbourhood is not unduly disturbed, and further note the role of Council in enforcing compliance with this condition.
90. I acknowledge the complainant is not satisfied with the measures implemented by the Hotel and requests that live music be prohibited at the Hotel until all measures listed in the Acoustic Report are implemented. The recommendations contained in the Acoustic Report are designed to reduce noise levels in [REDACTED] and improve their amenity. However, it is clearly noted in the Acoustic Report that inaudibility within [REDACTED] is difficult to achieve due to the age of the building.
91. The licensee has advised that four of the six recommendations contained in the Acoustic Report have been implemented at the Hotel, in addition to other measures. It is not clear from the complainant's submissions if any of the three recommendations in the Acoustic Report relevant to [REDACTED] have been implemented. Additionally, no further evidence

has been presented to demonstrate that noise levels continue at the same level prior to the measures implemented by the Hotel.

92. I note the Police view that the Hotel has taken all reasonable measures to mitigate disturbance. I also acknowledge that both Police and Council recommend that the Hotel install a noise limiter and that Police recommend that consideration be given to imposing a noise limiter condition on the Hotel's licence. I note the licensee has offered no objection to doing so.
93. A noise limiter condition would require the installation and calibration of a noise limiter by a qualified acoustic engineer to ensure compliance with LA10 noise criteria. The LA10 noise criteria provides a technical benchmark for noise and places restrictions on noise emissions from a licensed premises in relation to residential dwellings. On the totality of the evidence before me and having considered the complex nature of the complaint and the difficulties in the application of the LA10 noise criteria within separate occupancies [REDACTED], I do not find it appropriate to impose a noise limiter or LA10 noise condition on the Hotel's licence at this time.
94. On this point, I note the premises owner's future plan of action as proposed in [REDACTED] submission. It is in the best interest of all parties that the recommendations as outlined in the Acoustic Report be implemented to mitigate disturbance and manage sound levels. I strongly urge the complainant, the licensee and the premises owner implement those recommendations where practical to do so, and that all parties continue to act in good faith to develop and employ reasonable strategies to address any concerns, such as installing a noise limiter. I consider this to be an appropriate response and will provide an opportunity for all affected parties to develop a harmonious and cohesive business relationship.
95. Having carefully considered the material before me, I have determined to take no further action in this matter. While there is evidence of disturbance to the complainant's businesses at times, I do not find there to be sufficient evidence that the neighbourhood is being unduly disturbed, and I am satisfied that the Hotel has taken reasonable measures that in my view will reduce the noise and impact associated with live music.
96. While I have determined to take no further action in this matter, I strongly remind the Hotel to comply with its proposed mitigation measures and of its ongoing obligation to minimise levels of disturbance. I encourage the licensee, the premises owner and complainant to continue to have respectful and meaningful dialogue to address any and all disturbance

concerns as they arise. Should fresh and direct evidence be presented demonstrating undue disturbance, it is open for this matter to be reconsidered.

97. Finally, I am satisfied that this decision is a proportionate regulatory response to the disturbance identified in the complaint.

Decision Date: 27 September 2022



Dimitri Argeres

Director, Compliance & Enforcement

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Enterprise, Investment and Trade

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 25 October 2022. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2.

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 <https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/disturbance-decisions>.

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

1. Copy of the liquor licence dated 7 September 2022.
2. Section 79 Disturbance Complaint lodged by the complainant on 22 December 2021.
3. Submission from Shoalhaven City Council received on 7 January 2022.
4. Submission from NSW Police received on 12 January 2022.
5. Submission from Licensee received on 12 January 2022.
6. Information from Licensee regarding email correspondence between premises owner and complainant received on 25 January 2022.
7. Further information from Licensee regarding a guest review of [REDACTED] received on 27 January 2022.
8. Submission from premises owner received on 21 January 2022.
9. Final submission from JDK Legal on behalf of the complainant received on 18 February 2022.
10. Additional material received from JDK Legal on behalf of the complainant on 1 March 2022.
11. Final submission and supporting material received Kennedy & Cooke on behalf of the licensee on 11 March 2022.
12. Personal letter from [REDACTED] in support of the Hotel received on 31 March 2022.
13. Additional complaint material from the complainant received on 4 April 2022.