

FILE NO: A17/0011198

COMPLAINANT: [REDACTED]

LICENSEE: Christopher Fowler (from 13 November 2018)
Jeremy Glasson (from 25 May 2017 – 12 November 2018)

LICENSED PREMISES: The Newport – LIQH400104170

ISSUES: Whether the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed and whether regulatory action is warranted.

LEGISLATION: Sections 79 and 81 of the *Liquor Act 2007*

SECTION 81 DECISION

I, Paul Newson, Deputy Secretary, Liquor, Gaming & Racing, a delegate of the Secretary, Department of Industry, have decided to **issue a warning** to the licensee under section 81(1)(d) of the *Liquor Act 2007* (the Act) in relation to the provision of amplified entertainment in the following terms:

'I, Paul Newson, Deputy Secretary, Liquor, Gaming & Racing, a delegate of the Secretary, Department of Industry, warn Christopher Fowler, licensee of The Newport – LIQH400104170, that he must ensure that amplified entertainment provided by live performers, including DJs, performed or broadcast in the outdoor areas of the hotel, does not cause undue disturbance to local residents.'

I, Paul Newson, Deputy Secretary, Liquor, Gaming & Racing, a delegate of the Secretary, Department of Industry, have also decided to **impose a condition** under section 81(1)(a) of the the Act on the liquor licence of The Newport – LIQH400104170, relating to management of patron behaviour as follows:

'The licensee must deploy a minimum of two licensed uniformed security guards in hi-visibility vests to patrol the vicinity of the hotel on Fridays, Saturdays, public holidays and special occasions from 9.00pm until the last patron has left the vicinity to assist in dispersing patrons from the vicinity.'

Documentary material reviewed is detailed at **Annexure 1**.

Note: The warning in relation to undue disturbance caused by live entertainment is issued to the current licensee, who commenced 13 November 2018. I note that this complaint was received in December 2017 during the tenure of the former licensee, Mr Jeremy Glasson, who was licensee during the period subject to the complaint.

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 19 December 2017, [REDACTED] the complainant, of [REDACTED] Newport, lodged a complaint in relation to The Newport (the hotel), alleging undue disturbance. The complainant lodged the complaint as a resident authorised by 17 other residents. Sixteen of these authorisations were served on the licensee. However, one of the 17 residents requested to remain anonymous.
6. The complainant alleges disturbance is caused by loud music (live bands and DJ entertainment) and patron behaviour, particularly when leaving the hotel.
7. On 20 December 2017 the complaint was served on the licensee who was provided the opportunity to lodge a submission in response. A response was received by L&GNSW on 8 February 2018.

8. On 16 February 2018 the licensee's submission in response was served on the complainant who was provided the opportunity to lodge a final submission in response, which was provided on 3 April 2018.
9. On 21 February 2018, Northern Beaches Council provided a submission.
10. NSW Police provided their full submission on 21 August 2018.
11. On 7 September 2018, all outstanding material was served on the licensee who was provided the opportunity to lodge a final submission in response, the bulk of which was provided on 16 October 2018. A final acoustic report, which formed part of the licensee's submission, was provided by the licensee on 22 October 2018. Receipt of this report by L&GNSW constituted the end of due process in this matter.
12. A summary of the complaint material is as follows.

Complainant first submission – the complaint

13. The complainant alleges disturbance from two sources, the first being amplified entertainment and the second being patron behaviour. The complainant claims that a significant change in the hotel's operation has resulted in amplified music noise coming from the hotel being 'excessive, highly intrusive and relentless'. The hotel plays pre-recorded music and has DJs most days in addition to hosting live music performances up to five days a week.
14. The complaint makes a number of claims regarding disturbance from the hotel including that the music from the hotel can be heard in the streets and public areas over a wide area of Newport and Mona Vale; that the music is often at a volume where the complainant can hear every drum beat and note of each musical instrument; and, at times the complainant cannot sleep in her bedroom and has to move to her lounge room with all doors and windows closed.
15. The complainant alleges that since 2017 when conditions were placed on the hotel licence, music in some instances has become somewhat quieter at times, though noise levels have been highly variable, particularly on 'event days' and weekends and when live bands are playing. At these times music is usually much louder than on an 'ordinary' Monday or Tuesday.
16. The complainant believes the hotel is not complying with the noise conditions imposed on the licence and advised that the complainant's husband, a sound engineer, on one occasion took readings at the boundary of their residence showing levels of 10-12dB above ambient with peaks of 16-20dB over ambient.
17. The complainant asserts that layout of the hotel has a significant impact on noise. A large open-air beer garden effectively forms an amphitheatre. Music and associated noise from patrons can be heard over a significantly wide area of the neighbourhood and surrounding areas. The complainant submits that it is imperative that no music of any kind be played in the external areas of the hotel.

18. The complainant alleges that noise disturbance is exacerbated by patrons yelling, screaming and swearing over the loud music; that this occurs day and night but becomes more aggressive in tone at night and that security does little to deal with yelling, swearing, fighting and other anti-social behaviour. The complainant further alleges that on occasion this disturbance is caused by intoxicated patrons late at night after the hotel has closed and that patrons regularly walk to and from the hotel consuming alcohol e.g. pre-loading in nearby Dearin Reserve.
19. The complainant lists a number of specific examples of disturbance and anti-social behaviour including:
- a resident saw five young men urinating in Dearin Reserve near a bus stop;
 - at about 11.30pm one Saturday night while investigating loud music from the venue the complainant observed an intoxicated young man outside the entrance to the hotel;
 - on Friday 10 November 2017 at about 9.00pm, the complainant's son witnessed a group of young men and women sitting and drinking on the grassed area outside the hotel bottle shop, he witnessed one of the women urinate and defecate;
 - on Saturday 25 November 2017 at about 8.30pm, the complainant witnessed four intoxicated young men stumbling down the middle of her street, yelling, swearing and kicking cars.
20. The complainant alleges that music is generally much louder on Wednesdays to Sundays inclusive and on all public holidays and event days such as Melbourne Cup day. It also becomes progressively louder overall as the weather warms up.
21. The complainant advises she has engaged with the hotel on occasions regarding the disturbance but without success.
22. The complainant notes the significant change in business model under new management with regular live bands and DJs. She notes that under the old management live music was offered on average only once a month and a DJ on Saturday nights. These events were audible but not overly so.
23. The complainant claims the current style of operation of the hotel is completely inappropriate considering the environmental and social context in which it is situated. It is essential that there be a complete end to disturbance from noise and patrons. There should be no amplified music of any kind in any of the exterior spaces of the hotel due to the hotel's location and the open-air amphitheatre section of the hotel, which is elevated over water. All music should cease at 10.00pm and the hotel should more rigorously police patron behaviour.

Licensee first submission – response to complaint

24. The licensee refutes the allegations of undue disturbance by the complainant on a number of grounds. In summary the licensee notes there are residents closer to the hotel who have not complained. The Acoustic Group (TAG), an acoustic consultant engaged by the licensee, is of the opinion that the complaint is incorrect with respect to acoustic matters.

25. The licensee asserts that the hotel has a positive effect on the community. The hotel is a significant employer in the area and imposition of conditions requested would likely have an effect on employment.
26. The licensee raises the proximity of other licensed premises to the hotel including the Metro Mirage Newport, Royal Prince Alfred Yacht Club, Royal Motor Yacht Club, Four Pines Public House Diner and the Newport Bowling Club to demonstrate that these venues may be the source of undue disturbance.
27. The hotel undertakes regular noise monitoring at four locations determined by its acoustic consultant, TAG, and will add another location following a recommendation in TAG's February 2018 acoustic report. This report confirms that the hotel is operating in compliance with all relevant noise criteria, except for a minor breach identified that can be resolved by restricting the use of fold back speakers. The licensee argues that if the complainants are seeking inaudibility, this is an unreasonable expectation, which ignores the order of occupancy and the hotel's right to operate in accordance with its planning consent and existing liquor licence.
28. The licensee notes the complainant's husband recorded noise levels from the band playing at the hotel on a Sunday afternoon to be 10 to 12dB above ambient and to be 16 to 20dB above ambient on another occasion. The licensee submits that the complainant's husband has not provided sound engineer qualifications and TAG cannot accept these readings to be accurate. The sound system at the hotel, as calibrated is incapable of causing such emissions and if it did it would be reasonable to expect that the hotel would receive a large number of noise complaints, which it has not.
29. The licensee asserts that with respect to the alleged incidents of anti-social patron behaviour complained of, the complainant generally lacks time and date details, which make it almost impossible for Merivale to investigate and verify complaints.
30. The licensee claims that a review of Merivale records does not support the matters complained of being attributed to the hotel. The review indicates the perpetrators were either not patrons of the hotel or were managed professionally by the hotel.
31. The licensee notes that in response to the 2016 disturbance complaint the following actions were implemented:
 - engaged TAG to undertake testing and provide noise mitigation advice,
 - reviewed and adjusted location and direction of speakers,
 - installed sound limiters on amplifiers based on TAG's recommended settings,
 - promoted use of in-ear monitors for artists instead of fold back speakers,
 - installed sound curtains around the stage,
 - reviewed and modified the stage configuration where necessary,
 - briefed artists on appropriate setup configuration and noise obligations,
 - engaged a permanent on-site sound technician,

- implemented a sound testing regime with readings recorded in a register,
- planted 40 trees around the hotel perimeter,
- briefed hotel and security staff re obligations to maintain the amenity of the neighbourhood,
- continuously monitored the sound system to ensure appropriate noise levels,
- implemented maintenance of a detailed complaints register, and
- completed an audit of the plan of management and security procedures.

32. In response to the current complaint, the licensee has taken the following further action:

- engaged TAG to undertake testing and provide advice,
- reviewed records in respect of the matters complained of,
- engaged with local licensing Police to ascertain any concerns regarding the operation of the hotel, and
- continued with the management measures instituted after the 2016 complaint.

33. The licensee asserts that Northern Beaches licensing Police conduct regular inspections of the hotel and Merivale representatives liaise regularly regarding the outcome of such inspections. Consistent feedback from Police is that they are satisfied with the management of the hotel generally and particularly with patron management during hours of trade and specifically during egress from the hotel.

34. The licensee submits that the request that all music in the hotel cease at 10.00pm daily or alternatively that there is no music played in any external areas of the hotel is extraordinary. The licensee has taken substantial steps to address the complaint including the procurement of expert acoustic advice and although acoustic monitoring indicated a marginal exceedance at one monitoring location due to use of fold back speakers, this does not warrant the imposition of further conditions sought by the complainant. Merivale undertakes to avoid such an occurrence in the future by implementing TAG's recommendation to limit fold back speakers as well as on stage monitoring.

Council submission

35. A submission from Northern Beaches Council notes four complaints regarding noise from the hotel as follows:

- 29 March 2016 – two complaints regarding live music, DJ and crowd noise. The complainants were referred to L&GNSW.
- 3 January 2017 – one complaint regarding late night noise. The complainant was advised to report their concerns to Police.
- 21 September 2017 – one complaint regarding noise from plant and equipment which was referred to the Council Environmental Health Team.
- 20 November 2017 – one complaint regarding noise after 12.00am.

36. Council does not otherwise offer a view on the complaint or the measures proposed by the complainant.

Police submission

37. On 15 August 2018 NSW Police provided a submission. Police note a meeting with residents in November 2017 who had complained about the noise and effect of patrons entering and leaving the hotel which was causing disturbance to residents and community. Police continued to observe the conduct of patrons, exercise of the licence and overall management of the hotel.
38. Police have provided an evidence matrix outlining COPS events from October 2017 to June 2018. These include assault, move on directions, patrons remaining in the venue after being asked to leave for being intoxicated, violent or quarrelsome. All incidents involved patrons of the hotel and those who had interaction with Police were described as moderately or well affected by alcohol. Police have continued communication with the licensee and staff throughout this period.
39. Police note that New Year's Eve is one of the hotel's largest trading days and Police records indicate there have been capacity figures of up to 2700 patrons. There is no condition on the hotel's development consent relating to patron capacity, despite significant renovations to the hotel. Throughout the summer of 2017/2018 Police spoke to the licensee about patrons and the closure process.
40. Police submit that they were informed several times that the hotel had a shuttle bus. This bus was observed parked in the driveway of the hotel and it is believed not used until 2018 due to mechanical issues. There is only one public bus service that services Kalinya Street and this is limited, particularly on Sunday mornings. There are only two public bus services after midnight ceasing at 12.50am.
41. Police specifically refer to COPS Event E66385103: on Friday between 11.45pm and 12.00am in December 2017 Police observed 350 patrons leave the hotel in 15 minutes with 100 to 150 patrons waiting for transport outside the hotel. Police submit that one public bus arrived and took 10 patrons and that others waited long periods of time for Uber services. Police advise that 10 security guards were patrolling the area attempting to quieten crowds as they waited in the street. The hotel courtesy bus was a seven seater Kombi van, which was not being used as the driver had gone home at 11.15pm.
42. Police also refer to a violent incident on 12 November 2017 involving patrons who had left a wedding held at the neighbouring Newport Mirage hotel. Security from the Newport assisted in apprehending offenders and rendering first aid. Police are aware of concerns relating to patrons of the Newport Mirage, however Police records do not show consistent violence, intoxication or disturbance coming from the Newport Mirage.
43. Police advise that on occasions when they have attended the Newport, they have observed the licensee to have control of the sound amplification system and have seen the licensee alter the

controls for the DJ, who consistently plays until the hotel closes. Police are aware of residents' noise complaints and note that music is amplified through the sound system throughout the entire hotel, particularly in the outdoor area.

44. Police note observations and video recording of patrons leaving the Newport on Friday 15 June 2018 in various states of intoxication. These patrons were seen to leave directly out to Kalinya St and sit in the front garden bed of the hotel from 10.30pm. Other patrons were seen to leave the hotel and reappear with alcohol purchased from the hotel bottle shop. They remained on Kalinya St yelling and causing general disturbance. No security were patrolling at the time. Police notified staff and spoke to the licensee and security manager who were on site.
45. Licensing Police attended the Newport on 4 August 2018 and raised concerns about the incidence of intoxication after making covert observations inside the hotel. Police recommend that conditions be placed on the licence regarding the following:
 - Two licensed security guards in hi-vis vests to patrol the vicinity of the hotel including Beaconsfield St, Kalinya St and Queens Pde from 9.00pm to ensure patrons entering and exiting the hotel do not caused disturbance. The patrols must be continuous until the last patron has left the vicinity.
 - The licensee must provide a shuttle bus to remove patrons from the vicinity of the hotel and must cease once the last patron has left the vicinity.
 - The licensee must refuse entry to any patron observed consuming alcohol while approaching the hotel.
46. A representative sample of further incidents detailed by Police follows:
 - COPS Event 68455861 – Friday 10.30pm 15 June 2018
Police observe patrons leaving the hotel showing clear signs of intoxication leaving the hotel. A group of patrons sat in the hotel's front garden with some lying in flower beds. Police also observed patrons consuming a mixed vodka drink, which Police believed was bought from the bottle shop, outside the premises. Police filmed some of the patron behaviour as they believed patrons were creating a clear disturbance. One male patron was showing clear signs he was about to vomit. No hotel staff were patrolling or speaking to patrons outside the hotel. Police entered the hotel and spoke to the licensee and security manager.
 - COPS Event 67577907 – Saturday 10.00pm 21 April 2018
Two male patrons well-affected by alcohol were inciting each other to fight. They left the premises and a fight ensued. Police attended and issued infringement notices for offensive behaviour.
 - COPS Event 69124651 – Saturday 12.20am 24 February 2018
Licensing Police were observing the close of the hotel and were alerted to males acting aggressively and yelling outside the hotel. Police observed males interacting with security who were asking the males to leave the area quietly. Police intervened and a male became

aggressive. He was argumentative, slurring his words and was affected by alcohol. Police issued him with a move on direction.

- COPS Event 289079394 – Sunday 10.15pm 24 December 2017

Police were called to the hotel by staff after they attempted to remove a male from the premises due to intoxication. While walking him out of the hotel the male punched a security guard to the eye resulting 3-4cm cut to his eyebrow. An ambulance attended and treated him. The male patron was issued a field court attendance notice by Police.

- COPS Event 66565541 - Saturday 9.00pm 21 October 2017

Police attended the hotel as a result of a female patron refusing to leave the premises after being asked to leave due to her intoxication. The female was lying in the driveway of the hotel and staff could not move her. Police spoke to the female and left her in the care of a responsible person.

Acoustic reports

47. TAG conducted acoustic testing on three occasions in 2016 on behalf of the hotel. TAG provided acoustic reports dated 21 June 2016 and 20 October 2016. This testing was associated with the first section 79 complaint lodged in April 2016. The first round of testing on 11 June 2016 detected occasions where live amplified music from the band exceeded the standard LA10 noise criteria. TAG associated these exceedances with percussion instruments and mid and low frequencies of vocals and guitars. By contrast music produced by the DJ was found compliant. Accordingly, TAG recommended a number of changes to reduce amplified music escaping the hotel and causing undue disturbance.
48. TAG undertook further testing on 8 and 9 October 2016. On 8 October 2016 testing revealed the hotel continued to exceed the LA10 noise criteria. Again this exceedance was caused by the live band and not the DJ. On this occasion the cause was the use of a separate amplifier used by the band not channelled through the noise limiter. Testing conducted on 9 October 2016 found both the live band and DJ were compliant with the standard noise criteria.
49. As a result of the current disturbance complaint, TAG conducted further acoustic testing relating to live band and DJ operations on Saturday 27 January 2018 and Saturday 3 February 2018. TAG provided a report dated 7 February 2018. The first test was conducted without prior knowledge of hotel management. At one location on Saturday 27 January 2018 levels exceeded the LA10 noise criteria for the live band. This appeared to be caused by fold back speakers. Testing conducted on Saturday 3 February 2018 was compliant with the LA10 noise criteria for both the DJ and live band.
50. Also as a result of the current disturbance complaint L&GNSW commissioned acoustic testing from professional acoustic engineers PKA Acoustic Consulting (PKA), which was conducted on the evening of Saturday 24 March 2018 and afternoon of Sunday 25 March 2018. PKA provided a report dated 5 June 2018. On Saturday 24 March 2018 exceedances of the standard LA10 noise criteria were detected at three locations. On Sunday 25 March 2018 exceedances of the standard LA10

noise criteria was detected at one location. On both dates, the report indicated that the apparent primary cause was amplified music from live bands.

51. The licensee has also provided two reports from TAG as part of the licensee's final submission. The first report dated 20 June 2018 is essentially a review of the PKA report of acoustic testing on 24 and 25 March 2018. It is highly critical of the PKA report. TAG notes that the findings of the report do not accord with its own assessments. TAG is also concerned with the report's measurement data and that noise from sources other than the Newport have been attributed to the hotel. TAG also alleges that this is not the first time that PKA have made significant errors and refers to proceedings in the Land and Environment Court in which both TAG and PKA were involved as experts. The report then goes on to detail a number of alleged technical deficiencies in the report. One example is that the report describes testing conducted at three locations on 24 March 2018 between 8.00pm and 9.00pm was attributed to music from a live band. TAG advises that they are instructed that the entertainment schedule for the night shows only a DJ playing during that timeframe. L&GNSW have been supplied with a copy of the entertainment schedule by the hotel, which appears to confirm this. Another example is TAG's comment that the absence of the identification of the source of the weather information in the report is in their view a critical omission.
52. The second report dated 16 October 2018, details acoustic testing conducted by TAG at locations around the hotel on 4 August 2018 between 4.30pm 7.00pm. Continuous monitoring occurred at one location as a reference and monitoring was also conducted at two other locations. Testing covered both band and DJ operations. The testing was commissioned by the hotel's solicitor and was conducted without advising hotel management or staff. Exceedances of the standard LA10 noise criteria were detected at two testing locations and ascribed to live bands, however, the exceedances were described as negligible.

Other venues

53. On 8 August 2018 L&GNSW Inspectors engaged with management of six licensed premises named by the licensee as likely to be the source of disturbance, rather than the hotel itself. The purpose of the engagement was to obtain a general understanding of their mode of operation and the likelihood of the venue to be an alternative source of disturbance. The Inspectors' findings are summarised below:

Royal Prince Alfred Yacht Club

54. The club is located some 450m from the hotel and focuses on yacht racing activities and is not a social club. The Club has two function spaces. The ground floor space has a capacity of 120-150 and the upstairs space has a capacity of 180-200. Functions relate to racing e.g. guest speakers, wakes and birthday parties, which are generally held for 60th, 80th and 90th birthdays. The venue has the capacity to amplify music and occasionally does this. However the average age of patrons is 65 and members would complain if they could not hear themselves above the music.

Newport Bowling Club

55. The club is located 877m from the hotel and has some 150-160 members with an average age of 75. The club has a jukebox and sometimes offers a solo artist playing a guitar.

4 Pines Public House Diner

56. The venue is located 952m north-east of the hotel and holds an on-premises licence. It trades 4.00pm till late on Monday to Thursday and midday till late from Friday to Thursday. Live music is offered on Saturday nights from 7.00pm and is generally connected to the in-house amplification system. The venue does not have an outdoor area.

The Newport Mirage

57. This accommodation hotel is located 40m from the Newport. It holds an on premises licence and has a current business model focusing on accommodation, conference spaces and functions (weddings). For the 2018 financial year the venue hosted 23 weddings. The average wedding has approximately 80 patrons. If there are more than 80 security is engaged, using the same company the hotel uses.
58. The restaurant is used for weddings and adjoins an outside area. No music is played in the outside area, which is usually used for the ceremony itself, with the restaurant used for the reception. Weddings usually have either live music, ambient music or DJs. Live music is set up away from the wall leading to the outside area and a special glass wall has been installed to abate the sound of music. Music ceases at 10.45pm and the bar closes at 11.00pm. Although sometimes music can be heard outside the venue, locals have not complained to him specifically and have told him they do not have issues with noise coming from the venue.

Royal Motor Yacht Club

59. The club is located one kilometre north-west from the hotel. The club has a patron capacity of 150 with a patron demographic average age of 50-60. It hosts weddings that occasionally have live bands that do not go on later than 11.00pm. Every Friday the venue hosts live solo artists, amplified but not loud. Occasional band nights are held but again are not loud. Any live performers are directed so sound travels away over the water.

Pittwater Aquatic Club

60. The club is located 516 metres south-west of the hotel. The club has approximately 400 members. It is run by volunteers and has no paid staff. The club house has a capacity of 100 persons. Social sailing events occur every month, followed by a BBQ from 7.00pm. The club does not usually hold other functions other than an annual working bee where members enjoy free food and beer and a Christmas daytime function. Music is not played at events. The club is not aware of any complaints from resident neighbours, some of whom are members.

Complainant's final submission

61. The complainant describes the licensee's submission in response to the complaint as highly unsatisfactory, repetitive, generalised and frequently misleading. She claims that it only serves to compound the community's distress at the loss of amenity caused by the hotel's current manner of operation. The general tenor of the complainant's final submission affirms the position put forward in the initial complaint. Some particular points raised in the submission are described below.
62. The complainant points out that she does not dispute that the hotel has been in existence for a number of years in various guises. However she maintains that although she purchased her current home four years ago she has an association with the local area dating back over 25 years and has been a patron of the hotel since the 1970s. Accordingly she is very familiar with the manner of operation of the hotel before the reopening under Merivale management in 2016.
63. The complainant refutes the licensee's claim that the hotel is not located in a quiet residential neighbourhood, saying it is a misreading of the *Pittwater Local Environment Plan 2014*.
64. The licensee's claim that disturbance attributed to the hotel is caused by other venues such as the Mirage, the Royal Prince Alfred Yacht Club, the Royal Motor Yacht Club, the Four Pines and the Newport Bowling Club is also challenged by the complainant. She describes the claim as ludicrous and reprehensible and then explains her view of the mode of operation of these venues.
65. The complainant reaffirms her claims of disturbance from patrons of the hotel, including urinating in public, fighting, yelling, revving car engine and broken glass and other rubbish. She notes that accounts of patron disturbance described to her by other residents have been included in the complaint due to the consistency in the nature and locations of the disturbance. The complainant has respected the integrity of these eyewitnesses and their desire that the disturbances be noted, however cannot include their details as she does not have their authority.
66. The complainant describes her husband, [REDACTED] years experience in the audio industry, including working in Australia and overseas on major stage productions as a sound engineer. As part of the complainant's final submission, [REDACTED] provided a short report addressing the hotel's response to the disturbance complaint. In summary, [REDACTED] notes that the licensee's response proposes that the results of extremely limited instances of professional acoustic measurement reflect broad and consistent L&GNSW noise compliance. He believes that this position is unproven, unsupported and appears unlikely. The hotel's response in his view depicts a continued absence of management processes to effectively manage electro acoustic variables in the venue sound systems. The recent proposals put forward by the venue to address the situation appear unworkable.
67. The licensee's claim that the hotel beer garden 'frequently' hosted bands under the management prior to Merivale is challenged by the complainant. She maintains that this has not been her experience as a long-standing patron of the hotel. It previously did not have a permanent stage as it

has now and never hosted up to 11 live acts on weekends as well as music in between, along with music on every other night of the week, as is the case under current management.

68. The complainant states finally that she and the authorising residents continue to advocate that further conditions be placed on the hotel's licence. Music should cease to be played in all external areas of the hotel. All music should cease by 10.00pm to control recurrent noise and anti-social behaviours associated by the younger demographic that now attends the hotel in the evenings.

Licensee's final submission

69. The licensee reiterates that the complainant has an unreasonable expectation of noise inaudibility both inside and outside her residence. This ignores the order of occupancy and the hotel's lawful right to operate in accordance with planning consent and its liquor licence. Inaudibility inside and outside residential premises is not the lawful criteria to be applied for noise before midnight.
70. The licensee considers the complainant's submission an attack on the zoning of the hotel's land and refers to the *Pittwater Local Environment Plan 2014*. The complainant is considered as objecting generally to the hotel being operated by the Merivale group and persists in raising various issues, including noise that cannot be substantiated by reliable evidence. It appears that the complainant's aim is to seriously curtail the operations of the hotel to a point there is no noise, which is indefensible and unreasonable.
71. The licensee challenges the noise readings relied on by the complainant as they do not comply with Australian Noise Standards (ANS). The lack of information as to the identification of equipment compliant with the ANS, calibration and the location of the testing highlights that the person undertaking the testing does not have the appropriate experience to participate in this process. The suggestion by the complainant and her husband, [REDACTED], that noise emissions cannot be controlled further highlights the absence of appropriate experience.
72. The advice from TAG, the licensee's acoustic consultant is that [REDACTED]'s submission of 3 April 2018 should be rejected. TAG details a number of alleged deficiencies in the submission and then claims that even if he was an appropriately qualified expert, which he is not and his measurements complied with the ANS, which they do not, his opinion should be disqualified due to a conflict of interest arising from his relationship with the complainant.
73. The licensee refers to the file note of L&GNSW detailing the interviews with various other venues in the vicinity of the hotel. The licensee submits that it would be unlikely for any venue to admit to generating excessive noise in the context of those interviews. Also, based on the advice of TAG, the only reliable way to assess whether noise is being generated by another source is to commission reliable, independent acoustic testing at times when those venues are operating with live, recorded or DJ music. TAG's February report notes that noise emanating from venues other than the hotel are identified and the hotel itself keeps records of instances of loud music from other venues.

74. The licensee submission addresses the Police submission. The licensee claims that in the majority of cases set out in the evidence matrix, hotel staff had asked the patrons to leave the premises because they were approaching intoxication. Where patrons refused to leave or became quarrelsome or aggressive, Police were called in accordance with RSA guidelines.
75. The licensee notes that during the period under review by Police not one infringement notice was issued by Police for any breaches of the law, its liquor licence conditions or any other regulatory approval. The interaction between the hotel and Police has been cordial, supportive and often complimentary.
76. In relation to the mention by Police of New Year's Eve, the licensee notes that the suggested patron attendance of 2,700 is approximate only and relates to the whole evening, including patrons coming and going at different times. The hotel provided 10 security guards for 100-150 patrons waiting for transport home. This is one guard per 15 patrons which is more than the standard one guard per 100 patrons. As to the incident of 12 November 2017 involving wedding guests at the Mirage, hotel management and security assisted in managing intoxicated Mirage guests and rendered first aid. The hotel is aware of issues relating to the Mirage and understands it does not have contracted security to manage events.
77. The licensee asserts that a regular shuttle bus has operated for patrons since the beginning of 2018 and that the 50 seater bus broke down three months ago and will be replaced with a 12 seater bus due to the lack of patrons wishing to use this service. In the meantime an eight seater Kombi and Kia wagon are used. Any criticism of this service should be directed to the lack of a more regular public bus service.
78. The licensee submits that other arrangements for the orderly departure of patrons include use of the Kombi for small group egress, timing egress from parts of the hotel to coincide with the Council bus timetable and security guards patrolling to ensure patrons are moving on and not loitering in the area. Any issue with lack of lighting at the public wharf is a government matter.
79. The licensee asserts that Merivale continues to work tirelessly to provide its customers with a safe, well-lit and beautiful venue which any demographic can attend, subject to lawful requirements. Merivale continues to work closely with the Police and regulatory bodies to ensure the venue is operated safely and lawfully.
80. The licensee notes that since the submission of 8 February 2018 the recommendations of TAG regarding fold-back speakers have been implemented and no further issues have been identified. TAG's expert advice is that the hotel is complying with its licence conditions.
81. The submission notes the Police recommendations in their submission and comments that the hotel agrees to recommendation five, relating to refusing entry to persons consuming alcohol, as it is in the hotel plan of management and a lawful requirement. The licensee indicates that the hotel agrees to

implement the other requirements recommended by police for a trial period of 6-12 months to assess the effectiveness of the recommendations. Those measures being:

- The hotel will deploy a minimum of two licensed security guards to patrol the vicinity of the hotel on Fridays, Saturdays, public holidays and special occasions from 9.00pm until the last patron has left the vicinity.
- The guards will wear hi-visibility vests.
- The hotel will continue to operate a shuttle service as required by patrons on Fridays, Saturdays, public holidays and special occasions to assist in dispersing patrons from the vicinity until the last patron has left the vicinity.

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

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

The order of occupancy between the licensed premises and the complainant

83. The complainant advises she has lived at her residence for four years. The current licence dates back to 1956 and the licensee indicates that a hotel has operated on the site for at least 100 years. This is not in dispute and I consider the order of occupancy is in favour of the hotel.

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

84. The licensee advises that after purchasing the hotel in 2015, Merivale conducted extensive renovations over nine months until reopening in March 2016. These renovations included alterations to the ground floor, increasing the number of dining areas and erection of a stage. The beer garden was converted into a dining area and the bar areas upgraded. The licensee also advises that the sound system was replaced with a new sound system designed to improve sound quality within the hotel and decrease noise impact to neighbours. There is no evidence before me that there have been changes to the complainant's residence. The complainant notes that the renovations to the hotel included a stage in the beer garden. She also notes the enhancement of the sound system resulting in music being able to be played in all parts of the venue, including the bottle shop. Based on the material before me, I accept that since a change of ownership in 2015, there were changes to the structure and design of the hotel to improve its attractiveness to patrons, enhance opportunities for entertainment offerings and to increase patronage at the hotel. I am satisfied that these structural changes have resulted in the increased activity at the hotel, particularly in relation to outdoor areas.

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

85. The licensee has conducted extensive renovations over a period as indicated above. The licensee refutes the complainant's allegations that these renovations are associated with a significant change in the business model since the hotel re-opened in 2016. The complainant claims that the new model is based on regular offerings of live entertainment in the outside areas of the hotel several days a

week, both during the day and evenings, causing undue disturbance. The complainant further claims that the renovations and the new business model attracts a large younger patron demographic, particularly in the evenings that cause undue disturbance and anti-social behaviour, a claim refuted by the licensee. On the material before me I accept that the hotel has for a long period of time offered entertainment as part of its various offerings as a hotel. I also accept that whilst the type of activities may not have changed (i.e. bands and DJ's operating at the hotel), since the change of ownership the scale and frequency of entertainment offerings has increased.

Other considerations

Previous history

86. I note that the history of disturbance complaints about the hotel date back to not long after the hotel recommenced trading in March 2016. This resulted in the first section 79 disturbance complaint, to which the current complainant was an authorising resident. On 2 February 2017, the delegate made a finding that the hotel had at times caused undue disturbance and imposed an LA10 noise condition and a noise limiter condition on the liquor licence of the hotel. During the course of determining the complaint the delegate relied on evidence demonstrating exceedance of the LA10 criteria contained in professional acoustic testing conducted on behalf of the licensee in 2016. I will refer to this testing again later in this document in the context of further professional acoustic testing conducted on behalf of the licensee and L&GNSW.

Undue Disturbance

87. In making my determination as to whether the hotel has caused undue disturbance I have considered the submissions of the complainant and licensee and submissions from Police and Council. I have also considered a number of acoustic reports from The Acoustic Group (TAG) commissioned by the licensee and one from PKA Acoustic Consulting (PKA) commissioned by L&GNSW along with a file note dated 10 August 2018 detailing engagement by L&GNSW Inspectors with other licensed premises in the same locality.

88. I note that during the course of this complaint, the principal complainant has remained firm in her claim that the hotel has caused undue disturbance from the provision of amplified live entertainment, particularly in the outdoor areas of the hotel and from patron behaviour, particularly when leaving the hotel. I note that the complaint is authorised by 17 authorising residents. This is a significant number of authorising residents alleging disturbance. While this does not of itself provide a basis for any conclusion, it does go to the credibility of the complaint.

89. I also note that the licensee has consistently denied that the hotel has caused undue disturbance and has evidenced steps taken to mitigate the risk of undue disturbance. The licensee has engaged a qualified acoustic expert to provide information to identify and treat any ongoing disturbance issues and to assist in the determination of this matter.

90. A certain level of disturbance is to be expected from the operation of any licensed premises. It is only when that disturbance is *undue* that the question of possible regulatory action arises. Under section 79 of the Act, undue disturbance may result from either the general manner of operation of the premises or particularly the behaviour of patrons once they leave the premises.
91. Consideration of what amounts to undue disturbance necessarily involves an evaluation of a broad range of factors, these include the nature of the local neighbourhood, the manner of operation of the subject premises, the type of amplified entertainment offered and its frequency, patron capacity and patron demographic and patron behaviour, possible sources of disturbance other than the subject premises, any reports prepared by qualified acoustic engineers and the details of incidents recorded by Police.
92. The hotel is situated on the shores of Pittwater in a largely residential area. It is located on Kalinya St, Newport and extends to the south-west with a large beer garden terrace overlooking Pittwater. The surrounding area contains a small suburban commercial precinct, which services a large number of residences surrounding it. I note there has been some debate between the complainant and the licensee about a local planning instrument, however I am satisfied that this short description of the local environment is sufficient for the purpose of my making a decision as to undue disturbance. It is clear on the basis of the material before me, including the file note of L&GNSW Inspectors, that the hotel is a significant development and does have the capacity, by virtue of its size and operation, to cause greater disturbance than other premises in the immediate area.
93. The hotel is located approximately 195 metres south of the principal complainant's residence at [REDACTED]
[REDACTED] Residences of the authorising residents are scattered in various directions around the hotel and are located at various distances from it.
94. Although there is no detailed information before me as to patron capacity, I am satisfied that after the renovations, the hotel has a high patron capacity. I am advised that during the development process with Council, no patron capacity was specified. Nevertheless a high patron capacity is confirmed in my view to some degree when noting estimates of patron numbers described by Police. In particular an estimate of some 2,700 patrons attending on New Year's Eve. This is a very large patron capacity, even allowing for the licensee's comment that it is an estimate of all patrons coming and going.
95. The licensee has indicated that other licensed venues in the locality may be the source of undue disturbance. I note the engagement by L&GNSW Inspectors with these venues and their findings. I am of the view that it is possible that one or more of these venues, particularly those closer to the hotel, may on occasion contribute to overall disturbance in the area. However I am also satisfied after considering matters canvassed by L&GNSW Inspectors that any disturbance is not comparable to that of the hotel with its large capacity and regular offerings of live amplified entertainment.
96. It is perhaps useful to consider the issue of whether there has been undue disturbance giving separate consideration to the two quite distinct allegations that are made being firstly noise from amplified music and secondly, disturbance from patrons leaving the hotel.

Undue disturbance from amplified music?

97. I note that complaints about disturbance commenced not long after the hotel re-opened in 2016 following a change of ownership and significant renovations and have been regular and ongoing, with a hiatus between the resolution of a prior section 79 complaint in February 2017 and the lodging of this complaint in December 2017.
98. Changes to the hotel included a large-scale renovation of the outdoor area to encompass a stage, several dining stations and notably a large number of speakers. The submission on behalf of the hotel indicates that in excess of 180 speakers are located within the hotel's 11,000 square metre footprint.
99. I am satisfied that these renovations were associated with a change in the business model of the hotel whereby live amplified entertainment via live bands and DJs are offered more regularly to create an atmosphere which is more appealing to patrons. The hotel has a large capacity and a younger demographic, particularly in the evenings, who are attracted by regular offerings of live entertainment.
100. In my view, results of acoustic testing by professional acoustic engineers is one criterion that can assist in a determination as to whether or not undue disturbance has occurred. I note the licensee's comments about acoustic readings conducted by [REDACTED] and how I should ignore them, primarily due to his lack of formal engineering qualifications and use of equipment that does not meet the required standards. I also note the licensee's comments regarding hotel staff conducting acoustic readings using ANS compliant devices. I have placed very little weight on the readings in both cases. I acknowledge that the taking and interpretation of acoustic data is a complex area and best done by a professional, experienced and qualified expert acoustic engineer.
101. I note that the standard LA10 noise condition, which was developed many years ago in consultation with the acoustic consultant industry, provides a useful technical benchmark which can assist in any determination as to whether undue disturbance has occurred. The condition only sets a requirement that noise from licensed premises not be audible in any habitable room in residential premises between midnight and 7.00am. The licensee appears to advance a view that as the premises only trades to midnight that audibility is not an issue and therefore if compliance with the remainder of the condition can be predominately demonstrated by professional acoustic testing, then undue disturbance cannot occur. I do not agree with this view. Acoustic testing results determining breaches or compliance with the LA10 condition are just one factor among a number of factors in determining whether or not there has been undue disturbance. Testing also in my view provides a snapshot of disturbance over a short period of time and cannot solely determine disturbance over a long period of time. I also note that the LA10 condition does not have any legislative basis.
102. During TAG's involvement with the hotel they have detected exceedance of the standard LA10 noise criteria on four occasions, in June and October 2016 and more recently in February and August 2018. In March 2018 further exceedances were detected by acoustic engineers PKA engaged by L&GNSW

over two days. It appears the primary cause of all these exceedances was the provision of live amplified entertainment via live bands. However I note a further TAG report dated 20 June 2018, which is devoted to commenting on the PKA report. The TAG report is highly critical of the PKA report. In particular it notes that although PKA notes that the breaches of the LA10 condition were from a live band, they were in fact from a DJ. I note that L&GNSW has an entertainment schedule provided by the hotel suggesting that this is correct.

103. In any event, I am satisfied that breaches of the LA10 noise criteria have been established. I give some consideration to TAG's characterisation of these breaches, which I acknowledge have been detected at a limited number of sites, as "marginal", though it is a consideration which goes towards illustrating disturbance generated by the hotel.
104. After careful consideration of the material before me and the issues discussed above I have come to the conclusion that the hotel has caused undue disturbance from time to time from the provision of amplified live entertainment.

Undue disturbance from patrons leaving the hotel?

105. I note the Police evidence of intoxication and anti-social behaviour by way of their evidence matrix, contradicts to some degree the licensee's claim that local licensing Police are happy with the management and operation of the hotel. The licensee claims that these incidents either involved patrons from other venues, or if they did involve patrons from the hotel, then staff and security acted lawfully and appropriately by ejecting them from the hotel and calling Police where necessary.
106. When weighing up the assertions of the licensee and the evidence provided by Police, I prefer the evidence provided by Police, particularly in the form of the COPS reports provided as examples. COPS reports are a contemporaneous record of what a Police officer observed or what was reported directly to a Police officer. The evidence contained in COPS Events 68455861, 67577907, 69124651, 289079394, 66565541 as detailed in paragraph 46 of this decision document, when considered together, demonstrate a pattern of incidents occurring in the vicinity of the hotel, involving patrons affected by alcohol which have caused disturbance to the neighbourhood in the form of alcohol related violence or anti-social behaviour.
107. Whilst not at the most serious end of the spectrum when considering undue disturbance due to patrons leaving a licensed venue, in my view these incidents amount to what I consider to be undue in the context of a hotel located in close proximity to residential premises.

Regulatory action

108. Having found that the hotel has on occasions caused undue disturbance both from amplified music and from patrons leaving the hotel, I now turn my mind to what regulatory action, if any, is appropriate. I note that due to a section 81 decision on 2 February 2017, a delegate imposed an LA10 noise condition and a noise limiter condition on the liquor licence of the hotel. In relation to this complaint I have three options under section 81 of the Act. I can take no further action, issue a formal

warning or impose another condition or conditions on the liquor licence of the hotel. After carefully considering all the material before me I am of the view there is a need for regulatory action.

109. I have considered the licensee's submissions and in particular the measures taken since the initiation of the first section 79 disturbance complaint to lessen the risk of undue disturbance, particularly from amplified music. In relation to the undue disturbance caused by patrons, I am satisfied that the licensee has deployed sufficient security in relation to managing the number of patrons attending the hotel from time to time. I am not entirely satisfied however that at peak trading times hotel management is exercising sufficient supervision over security to ensure that disturbance to the local community is minimised, particularly when patrons leave after closing. I have also had regard to the fact that the licensee has indicated a willingness to implement controls recommended by police to address this issue.
110. In relation to the undue disturbance due to the provision of amplified live entertainment, particularly in the outdoor areas of the hotel, I have considered issuing a warning or imposing a further condition. Given the exceedances of the LA10 criteria, whilst amounting to undue disturbance, were marginal and at the lower end of the spectrum of seriousness, and given the actions taken by the licensee to address ongoing issues of this type of disturbance, I have formed the view that in the circumstances a warning is the appropriate action.
111. In respect to the aspect of the undue disturbance from patrons leaving the hotel, to ensure regulatory certainty, I have decided to impose a condition on the licence mandating that the licensee will deploy a minimum of two licensed uniformed security guards in hi-visibility vests patrol the vicinity of the hotel on Fridays, Saturdays, public holidays and special occasions from 9.00pm until the last patron has left the vicinity to assist in dispersing patrons from the vicinity.
112. Finally, I am satisfied that the above action is a proportionate, measured and appropriate regulatory response to the identified risks of undue disturbance in this case. I remind the hotel that should further complaints be received and fresh evidence provided, further regulatory action may be taken if findings of undue disturbance are made.

Decision Date:



Paul Newson

Deputy Secretary

Liquor, Gaming & Racing

Delegate of the Secretary of the NSW Department of Industry

7 December 2018

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 **4 January 2019**. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at

https://www.liquorandgaming.nsw.gov.au/Documents/ilga/publications-and-guidelines/Authority_Guideline_2.pdf

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.liquorandgamingnsw.nsw.gov.au

Documents reviewed

1. Section 79 disturbance complaint lodged by [REDACTED] dated 19 December 2017
2. Licensee's submission in response to complaint dated 8 February 2018
3. Submission from Northern Beaches Council dated 21 February 2018
4. Complainant's final submission dated 3 April 2018
5. Acoustic report of PKA Acoustic Consulting dated 5 June 2018
6. NSW Police evidence matrix dated 3 July 2018
7. File note of L&GNSW Inspectors dated 10 August 2018
8. NSW Police submission dated 15 August 2018
9. Licensee final submission dated 16 October 2018
10. The Acoustic Group reports dated 21 June 2016 and 20 October 2016