

**FILE NO:** A19/0016046

**COMPLAINANT:** [REDACTED]

**LICENSED PREMISES:** Kingscliff Beach Hotel, Kingscliff - LIQH400116403

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

**LEGISLATION:** *Liquor Act 2007*

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## SECTION 81 DECISION

Under Section 81 of the *Liquor Act 2007* (the Act) I, John Coady, Manager Regulatory Interventions Team, a delegate of the Secretary, Department of Customer Service, in relation to the complaint made in respect to Kingscliff Beach Hotel, Kingscliff (the hotel) have decided to **issue a warning** to the licensee in the following terms:

*Under section 81(d) of the Liquor Act 2007, I, John Coady, Manager Regulatory Interventions Team, Liquor & Gaming NSW, a delegate of the Secretary, Department of Customer Service, warn Taphouse Investments Pty Limited, the corporate licensee of Kingscliff Beach Hotel, that it must ensure that no future undue disturbance is caused by the venue's operation.*

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## 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 and background information**

### *The complaint*

5. On 11 October 2019, [REDACTED], the complainant, of [REDACTED] [REDACTED] lodged a complaint in relation to the hotel. The complainant also owns [REDACTED], which is situated in the building adjacent to the hotel. The complaint alleges disturbance from excessive noise emanating from the hotel and from the behaviour of patrons leaving the hotel. The complainant lodged the complaint as a resident authorised by three other residents.
6. The complainant alleges disturbance is caused by noise emanating from performances in the hotel's open roof alfresco dining area, which was constructed sometime in 2015. This area has been used to host live music performances, usually in the form of rock bands, with regular "Big Band Nights" being held and large fold back amplifiers used. The complainant also alleges disturbance is caused by an adverse developing trend of behaviour from patrons when leaving the hotel. The complainant alleges there are approximately hundreds of patrons who attend these events and often patrons have

fought out the front of the unit or urinated in an authorising resident's garden when leaving the hotel.

7. The complainant submits they have attempted to mediate their concerns with the hotel over the years since an initial complaint was made in 2015. The complainant has also kept a noise log and had advised the hotel of excessive noise. The complainant acknowledges the hotel's intention to cooperate by implementing noise mitigation measures and agreeing to reduce noise levels. However, the hotel has failed to implement appropriate actions to successfully achieve an adequate reduction in noise levels.
8. The complainant seeks conditions be imposed on the hotel's liquor licence in the form of a specific noise limitation condition as well as a condition which requires the hotel to engage increased security staff and ensure they perform boundary patrols on performance nights, including during and for a reasonable period after the event.

*The hotel, licence details, compliance history*

9. The hotel is located at 102 Marine Parade, Kingscliff and holds a full hotel liquor licence. The corporate licensee is Taphouse Hotel Group Operations Pty Ltd, and the approved manager is Ms Amber Jones. The hotel is permitted to sell liquor in multiple areas of the hotel that comprises of various dining areas, functions facilities and a bottle shop.
10. Trading hours for the hotel are specific to each floor of the hotel. On the ground floor, the hotel is permitted to sell liquor in its outdoor footpath and on-street dining area between 10:00am until midnight, Monday to Saturday. The ground floor alfresco bistro garden has trading hours of 10:00am to 10:00pm, Monday to Wednesday and between 10:00am until midnight, Thursday to Saturday. On Sundays, the hotel is permitted to sell liquor in these outdoor areas between 10:00am until 10:00pm. In all other areas on the ground floor, the hotel is permitted to sell liquor until 1:30am, Monday to Saturday and until midnight on Sundays. Trading hours for the first floor are 10:00am until midnight, except for the breakout veranda which can trade until 10:00pm.
11. The hotel's licence is currently subject to several conditions, including conditions relating to LA10 noise restriction, social impact, live music and security personnel. The hotel's licence has authorisations relating to a minors area and extended trading.
12. The hotel has not been subject to any previous complaints made under section 79 of the Act. However, L&GNSW have received four noise complaints against the hotel during 2019.

## Submissions

13. Between 11 October 2019 and 4 March 2021, various material was received from parties to the complaint, including the complainant, NSW Police, Tweed Shire Council (Council) and Hatzis Cusack Lawyers (the Solicitors) on behalf of the hotel. The material that is before the delegate is set out in **Annexure 1** and summarised below.

### *Council*

14. On 6 November 2019, Council advised they had received four noise complaints regarding the hotel between 2016 to 2019. Council outlined the first noise complaint was dealt with through mediation between the parties and the remaining three noise complaints were referred to Liquor & Gaming NSW.

### *Police*

15. On 29 November 2019, Tweed-Byron Police District advised they had no record of receiving any formal complaints in relation to excessive noise. The submission noted several alcohol related incidents during November 2016 to October 2019 but assessed the hotel as medium risk for one of the last five seasons, with the remaining seasons being assessed as low risk.

### *Hotel response to complaint*

16. In response to the complaint, the Solicitors provided a submission on behalf of the hotel on 20 December 2019. David Moore & Associates Pty Ltd (Acoustic Consultants) were engaged to undertake acoustic testing over three weekends when live music was being played at the hotel and provided a report dated 20 December 2019 (Acoustic Report).
17. The Acoustic Report recommended several measures, including the hotel install a cardioid bass system, increasing the height of the south-east boundary wall of the alfresco bistro garden from 4.6 metres to 7.6 metres and performances be played through a dedicated front of house system with noise limits. The Acoustic Report outlined implementing these recommendations would achieve the required noise reduction to comply with LA10 noise condition.
18. As a result of the Acoustic Report, the hotel installed a cardioid bass system and engaged Blueprint Architects Pty Ltd (Architects) and Ardill Payne & Partners (Engineers) to prepare an appropriate design for the wall extension. The hotel also submitted that musicians would perform using the front of house system and noise limit recommendations would be locked into the system.

*Complainant final submission and further complaint material*

19. In response to the hotel submission, the complainant provided a final submission on 8 January 2020. The complainant acknowledges the hotel's attempts to address the noise concerns and welcomed the measures recommended in the Acoustic Report but stated these alone were not sufficient to address their noise disturbance concerns.
20. The complainant maintains that extending the noise barrier does not guarantee maximum noise levels will not be exceeded. The complainant submits imposing a noise limitation condition will ensure maximum noise levels are not exceeded and will also prevent noise spikes. Further, this condition would be binding on current and future licensees, reducing the likelihood of future noise complaints.
21. The complainant submits noise logs recorded by an authorising resident have been compared to the hotel's noise logs. However, there has been continuing disputation regarding the levels recorded by the equipment of the respective parties and the complainant seeks a suitable licence condition that requires a noise limiter on all amplified entertainment.
22. The complainant submits the nights acoustic testing was conducted were atypical and the sound did not impact their building or amenity. In comparison, Big Band Nights significantly impacts the amenity of their living as it rattles railings and pictures, bass sounds can be heard and felt, and the music often leads to ringing in ears and headaches.
23. The noise disturbances that are impacting the residents are mainly from events hosted in the alfresco dining areas. These events are attended by hundreds of patrons in an area which was not designed or constructed for live and loud rock concerts. The complainant does not wish for the hotel to cease hosting these events but are seeking measures to ensure that the noise is kept below maximum permitted levels.
24. The complainant also submits there is increased patron disturbance following events hosted at the hotel. This has had an impact on their amenity as there have been fights and unauthorised patron use of the back garden as a urinal. The complainant notes the hotel's actions in addressing disturbances resulting from patron behaviour, such as increased security oversight, but states the issues continue.
25. The complainant submits that a lasting solution to the noise concerns can only be found if the hotel and residents cooperate with each other. They acknowledge the hotel's attempts to cooperate to achieve an agreement on maximum noise levels but note that ultimately the attempts have not succeeded. The complainant feels they have had no

constructive interaction from the hotel to resolve noise disturbance complaints and thus the noise limitation and security conditions are now necessary.

*Hotel final submission and other material*

26. On 29 January 2020, the hotel confirmed that the architects and engineers had designed the acoustic wall extension and that the cardioid bass system was installed. They stated no development consent was required for the acoustic wall extension and that further testing will be undertaken once the acoustic wall had been erected.
27. The hotel submits the conditions sought by the complainant is onerous and the current LA10 noise condition provides an appropriate balance between the expectation for residential amenity with the expectations of patrons for recreational use, amenity, and enjoyment of the hotel's facilities. Furthermore, the hotel submits substituting one's own criteria for the LA10 noise condition, such as the use of a handheld device, is an overreach when actions are being undertaken based on expert advice. The hotel highlights their continuing attempts to maintain a dialogue with residents to address their noise concerns and keep the noise levels at a minimum.
28. The hotel states the conditions requested by the complainant would be irrelevant if the hotel can achieve compliance with the LA10 noise condition by implementing the measures raised in the Acoustic Report.
29. The hotel rejects there has been a lack of transparency regarding the monitoring logs and the claim the nights chosen for the acoustic testing were atypical. The hotel highlights that the nights selected for acoustic testing were done so by the Acoustic Consultants and the complainants were provided with the report and noise logs.
30. The hotel acknowledges the changes in their operation with the construction of the alfresco area and the provision of live music. They submit that this expansion is nothing more than the natural evolution of the hotel business to meet contemporary patron demands and expectations.
31. The hotel disputes patron disturbance in the walkway is solely due to their patrons. They submit it is a public walkway which has been constructed over an easement on land owned by the hotel and the apartment building. The walkway has significant pedestrians using it all hours of the day, who are not all hotel patrons. Nonetheless they acknowledge concerns raised by the complainant and highlight the walkway is part of the patrol area for the hotel's security personnel. The hotel has attempted to cooperate with all enquiries

from the residents. However, it notes that all requests cannot be complied with, such as CCTV footage requests due to privacy reasons of individuals.

32. The hotel requested and was granted additional time for the acoustic wall to be constructed and further acoustic testing to be conducted to assess compliance with the LA10 noise condition. However due to the emergence of the COVID-19 and border closures between Queensland and NSW, the construction of the acoustic wall was delayed with the hotel submitting the architect, engineer and builder all reside in Queensland.
33. Further delays were attributed to building permit applications and approval and continued restricted movement between Queensland and NSW, creating uncertain timeframes for the completion of the work. As a result of the delays, the hotel initially did not provide live entertainment before restricting live entertainment to soloists and duos.
34. On 4 March 2021, the hotel advised development consent had been obtained from Council, however the builder is reluctant to commence work until they are confident borders will remain open long enough for the work to be completed, approximately six weeks. The hotel provides an undertaking, set out in **Annexure 2**, should the matter be determined prior to the acoustic wall being constructed.

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

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

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

36. The licensed premises has operated under the current liquor licence since 1 December 1955. This predates the complainant, who has resided at their current address for over 23 years. This fact 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*

37. There is no indication that structural changes have been made to the complainant's residence. Structural changes were made to the hotel after a development application was approved by Council in 2013 (DA12/0352) and the construction of the alfresco bistro garden area. This area hosts live music events and is one of the causes of the noise complaints from the complainant and authorising residents.

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

38. Before the hotel built its alfresco dining extension, the block of land beside the complainant remained vacant. Since the approval of DA12/0352 and the construction of the outdoor dining alfresco area, live entertainment has been hosted in this area.

## **Findings and Decision**

### *Undue disturbance*

39. 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, Police and Council.
40. While a level of disturbance from the normal operation of the hotel is to be expected, I am satisfied that there is sufficient evidence before me to reasonably conclude that the hotel has, at times, unduly disturbed the quiet and good order of the neighbourhood. While there is a lack of detailed objective evidence from local regulatory agencies, I have placed weight on the fact the acoustic assessment provided accepts noise disturbance concerns exist and recommended measures to be implemented. I do not question the integrity of this assessment but note the complainant has disputed matters raised in the Acoustic Report.
41. It is also noted that the complainant and residents have kept a record of multiple noise issues from the time the section 79 complaint was lodged. The complainant and authorising residents have contacted L&GNSW on multiple occasions to advise of their concerns with the noise and have also addressed these to the hotel.
42. In making a finding of undue disturbance, I have also been persuaded by the layout of the hotel and the close proximity of the outdoor alfresco area, where the live music events are held, to the complainant and authorising residents. Based on the above factors, I am satisfied that the complainant and authorising residents have been impacted by undue disturbance.

### *Regulatory Outcome*

43. In deciding the appropriate regulatory outcome is in this instance, I have considered the statutory considerations, the material set out in Annexure 1, and the above finding of



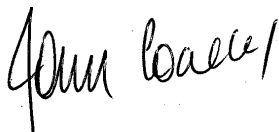
undue disturbance. I have also had regard to the particular context in which the hotel operates.

44. I acknowledge the order of occupancy is in favour of the hotel and that its physical structure and business activities have altered significantly after it constructed its outdoor alfresco dining area and started hosting live music performances in this area. In this context, responsibility lies on the hotel to ensure it does not unduly disturb the quiet and good order of the neighbourhood, particularly those residents who reside adjacent to the hotel.
45. On this point, I acknowledge the noise mitigation strategies the hotel has adopted over time to reduce its noise impact. I am particularly encouraged by the cooperation between the parties and the hotel's actions to implement the measures recommended in the Acoustic Report. However, I note the complainant's concerns and the fact they are not satisfied by the measures implemented by the hotel to guarantee maximum noise levels are adhered to by the hotel.
46. As referenced above, the hotel was under the impression that no development consent would be required for the acoustic wall extension. However, development consent was required and on 20 December 2020 the acoustic wall extension was approved by Council (DA12/0352.05).
47. I note the acoustic wall extension should result in acoustic improvements. Due to the emergence of the COVID-19 pandemic, the construction of the wall has been delayed several times because of state border closures. Whilst the wall has not been constructed, I note the hotel has expressed every intention for this to occur but has been hindered by circumstances outside of their control. Despite the setbacks, I am encouraged by the voluntary undertaking provided by the hotel on 4 March 2021, as set out in Annexure 2.
48. Whilst I note that the complainant is not convinced the acoustic wall extension will address noise disturbance concerns, I am of the view that necessary and appropriate action is being taken by the hotel to address noise concerns. I have determined the voluntary undertaking is a sufficient measure in addressing noise disturbance issues while the acoustic wall extension is being constructed. The undertaking restricts entertainment at the hotel to soloists and duos until the acoustic wall extension is constructed and certificates are obtained from the Acoustic Consultant. This should address the loud music concerns raised by the complainant and authorising residents for the time being.
49. The complainant has also sought additional security on live music nights and that the boundary be patrolled for an extended timeframe after these events. I note the hotel

already has a security condition and this area forms part of the patrol area. I do not consider it appropriate to impose further burdensome conditions for a public walkway which is accessible to the public generally.

50. Based on the evidence at hand, in my view there are no licence conditions appropriate to impose on the hotel's liquor licence at this stage while the construction of the acoustic wall is yet to take place. I do not consider it appropriate for a specific noise limiter condition nor the requested security condition to be imposed.
51. As such, having carefully considered the material before me, I have decided to issue the licensee a formal warning under section 81(d) of the Act. I note the complainant and authorising residents will have reservations regarding the voluntary undertaking and the wall extension in addressing the noise disturbance issues. However, I am satisfied that this decision is a proportionate regulatory response to the disturbance identified in the complaint and the measures being undertaken by the hotel.
52. I remind the hotel that it has a strong obligation to take all disturbance complaints seriously and proactively manage any potential disturbance that may be caused by the hotel. In the event there is an escalation of disturbance or fresh and direct evidence demonstrating poor management of disturbance issues despite the voluntary undertaking, it is open for the matter to be reconsidered and for regulatory intervention to occur.

**Decision Date:** 7 June 2021



**John Coady**

**Manager, Regulatory Interventions Team**

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Customer Service

**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 5 July 2021. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at [https://www.liquorandgaming.nsw.gov.au/documents/ilga/guidelines/Authority\\_Guideline\\_2.pdf](https://www.liquorandgaming.nsw.gov.au/documents/ilga/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](http://www.liquorandgamingnsw.nsw.gov.au)

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

1. Section 79 Disturbance Complaint lodged by the complainant on 11 October 2019.
2. Submission received from Tweed Shire Council received on 6 November 2019.
3. Submission from NSW Police received on 29 November 2019.
4. Hotel submission in response to complaint received on 20 December 2019.
5. Final submission from complainant received on 8 January 2020.
6. Hotel final submission received on 29 January 2020.
7. Further correspondence from the hotel on 18 March 2020, 24 July 2020, 25 August 2020, and 25 November 2020.
8. Tweed Shire Council Modification Approval for construction of the acoustic wall dated 20 December 2020.
9. Voluntary undertaking received from the hotel on 4 March 2021.

No entertainment (otherwise than in the form of soloists and duos) is to be provided at the Hotel unless and until the Hotel has:

- (a) First constructed a form of acoustic wall in accordance with the plans contained in the amended Development Consent DA12/0352.05 approved by Tweed Shire Council (and as modified by that Council); and
- (b) The firm of David Moore & Acoustics Pty Limited has provided a Certificate to the licensee to the effect that the acoustic wall has been constructed in accordance with acoustic report dated 20 December 2019; and
- (c) David Moore & Acoustics Pty Limited certifies that the recommendations contained in its report dated 20 December 2019 have been complied with; and
- (d) A copy of the Certificates referred in paragraphs (b) and (c) above have been provided to Team Leader – Regulatory Interventions Division, Liquor & Gaming NSW.