

DOC18/174560

FILE NO: A18/0012670

COMPLAINANT: [REDACTED]

LICENSED PREMISES: Moore Park View Hotel – LIQH400104006

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, A/Director Compliance Operations, Liquor & Gaming NSW a delegate of the Secretary, Department of Industry, in relation to the complaint made in respect to the Moore Park View Hotel, Waterloo (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, Dimitri Argeres, A/Director Compliance Operations, Liquor & Gaming NSW, a delegate of the Secretary, Department of Industry, warn John Doble, licensee of the Moore Park View Hotel, Waterloo, that he must ensure that future disturbance caused by operation of the hotel, including patron behaviour, is minimised while the remedial noise mitigation construction work agreed to by the licensee is undertaken as soon as possible.

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 23 April 2018 [REDACTED] the principal complainant, of [REDACTED] [REDACTED] lodged a complaint with Liquor & Gaming NSW (L&GNSW) in relation to the hotel, alleging undue disturbance caused by the manner of its operation. [REDACTED] lodged the complaint as a resident authorised by two other residents.
6. The principal complainant alleges disturbance is caused primarily by patron behaviour, through singing, yelling and generally arguing, however includes noise from the hotel's Public Address system and vehicle noise. He also alleges disturbance from hotel guests congregating on a fire escape landing who drink, sing loudly and play music through portable speakers.
7. Between 23 April 2018 and 23 August 2018, various formal submissions were lodged by all parties including the original complaint. Final information relating to the complaint was provided by the principal complainant on 20 September 2018 and the licensee on 25 September 2018.

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

8. The Act requires that the Secretary have regard to the following statutory considerations.
9. *The order of occupancy between the licensed premises and the principal complainant* – the hotel has operated at its present site for some 80 years and has operated under the current licence since March 1947. Accordingly the operation of the hotel predates the principal complainant's occupation of the residence. This fact is not in dispute and I consider the order of occupancy is in favour of the hotel.
10. *Any changes in the licensed premises and the premises occupied by the principal complainant, including structural changes to the premises* – There is no evidence of relevant changes to the hotel or the principal complainant's residence prior to lodgement of the complaint.
11. *Any changes in the activities conducted on the licensed premises over a period of time* – There is no specific evidence of any changes in the activities conducted on the licensed premises over a period of time. The principal complainant does however allege that due to the construction boom in Waterloo the patronage of the hotel by tradespeople and construction workers has increased. He further alleges that this is the largest contributor to the noise issue.

Other Considerations

Undue disturbance

12. I am satisfied the material before me is sufficient to support a finding the hotel has at times caused undue disturbance to the neighbourhood. In making this finding, I have balanced the submissions made by the licensee, the principal complainant, NSW Police and Council.
13. The principal complainant's residence is one of 24 residential units in an apartment block located directly adjacent to the hotel overlooking the rear of the hotel and the hotel carpark.
14. Since the initiation of this matter, L&GNSW has received information from the principal complainant about disturbance from the premises via the initial complaint, his response to the licensee submission and a final email dated 20 September 2018. The complainant has also provided two short video and sound recordings taken from his balcony. In an

email dated 24 July 2018 he confirmed that the videos were taken on the afternoon of Sunday 27 August 2017.

15. The principal complainant also provided a letter from an architect, [REDACTED] dated 13 July 2018. She notes that work done to the semi-enclosed patio adjacent to the car park, specifically cladding the perimeter fence with poly-carbonate sheeting, may not provide an effective reduction to noise levels. The patio is open at the top, allowing sound to escape through a void without hindrance. She suggests that an acoustic survey be conducted by an independent third party in the warmer months. Finally she notes that she cannot locate a DA approval for construction of the patio and its legal origins should be further investigated.
16. The principal complainant also provided a letter dated 20 July 2018 from [REDACTED] of [REDACTED] Strata Management addressed to L&GNSW. The letter noted that they act for all residents of the apartment building at [REDACTED] in relation to the noise issue from the hotel. The letter states that 'all units with rear balconies in this building overlook the hotel. It is winter now and noise levels at present are unacceptable. In summer it would be expected that the noise levels may be even higher as more patrons will congregate outdoors.' It also states that 'the licensee has been approached by the Strata Committee of [REDACTED] with complaints and also been asked to consider ways as what physical measures could be in place by the licensee...' The letter advises that residents have agreed to set aside funds to conduct an acoustic survey.
17. The principal complainant alleges disturbance is caused by a number of factors, including:
 - Unbearable noise from patrons in the patio area at the rear of the hotel adjacent to the hotel car park, which faces residential high density buildings. Doors to the patio are not closed.
 - The noise from patrons is a combination of noise from patrons, singing, arguing and generally yelling, combined with noise from the internal public address system and vehicle noise from an unspecified area. The noise at times is so great that he cannot sleep or have a conversation in his unit, even with the windows closed.
 - The hotel has a number of accommodation rooms on the first floor. The guests make a great deal of noise and allegedly regularly violate WH&S regulations. They have set up a coffee table and chairs on a fire escape landing where they drink alcohol, play loud music through portable speakers and sing loudly. Patrons also sunbathe on the awning to the patio.

- The disturbance occurs several times a week, particularly on Tuesdays which is trivia night and Fridays, Saturdays, Sundays and whenever a major sporting event occurs.
18. In his final submission the principal complainant advises that he and the residents of his apartment building are not confident that the measures proposed by the licensee will have a meaningful impact on the reduction of noise levels emanating from the hotel and seek to have it addressed. The opinion of the residents is that the only satisfactory solution to the noise from the patio is its full enclosure. The principal complainant reaffirms that noise from the hotel has increased over the last three years to the point it is unbearable.
 19. *Council submission* - The City of Sydney's submission notes only two complaints received from residents concerning the hotel, one dated 24 May 2017 and one 17 December 2009. The former alleges disturbance from patrons making noise in the rear beer garden and carpark and that the disturbance is worst on Tuesday and Wednesday nights between 10.00pm and midnight, when the hotel closes. The hotel advised no incidents had been recorded on the relevant nights for some weeks and manager asked that the complainant call them so that the hotel could identify and rectify the problem.
 20. The latter complaint alleged noise from the backyard of the hotel from patrons speaking loudly and singing. Every night noise can be heard from 7.00pm to midnight. The Council conducted a night inspection, which identified only 20 patrons in the hotel, with eight in the rear smoking area. Minimal external noise emission was identified, however patron voices were audible in the rear carpark adjacent to the smoking area.
 21. The submission also summarised current development consents applicable to the use of the premises as a hotel. None of these appeared directly relevant to the issue of disturbance. There was also an issue raised about Council approved trading hours dating back to the 2000 Olympics.
 22. *Police submission* - The Police submission includes a number of photographs. These clearly demonstrate the close proximity of the complainant's apartment to the hotel carpark, which is directly adjacent to the partially enclosed patio area of the hotel. The photos also clearly demonstrate the fire escape landing on the first floor of the hotel, where hotel residents congregate and set up chairs.
 23. Police have conducted five licensed premises inspections in the previous 12 months. These inspections did not detect any notable issues, with the maximum number of patrons observed being 100. Police believe that it is probable that the issues raised by the complainant have some basis, however suggest 'this should be tempered by the fact

that the hotel has been operating at the location for many decades' whereas the complainant's apartment building 'has only appeared in the last decade'. The submission notes the principal complainant would have been aware of the hotel's proximity before taking up residence.

24. Police agree that the suggested solution in the complaint that the patio area at the rear of the hotel be enclosed has merit in that it would be a proactive, cost effective noise mitigation measure. The venue's plan of management should be updated to reflect the current trading challenges. The use of the residents' fire escape landing on the first floor should not be allowed except for entry and exit. Police note the roof adjacent to the landing was also being used by residents with chairs and milk crates set up.
25. *Further evidence of disturbance* - The licensee has engaged acoustic consultants Wilkinson Murray to conduct preliminary acoustic testing at the hotel. Testing was conducted over a week and background noise measurements were undertaken on a balcony of an apartment in the same building as the complainant, overlooking the covered patio area.
26. Wilkinson Murray produced a short draft report dated 21 June 2018 which provided an estimate of the maximum number of patrons permitted in the covered patio area at various times in the evening before the L&GNSW standard LA10 noise condition levels were exceeded. The report did not note when testing was conducted however it appears it was done during the colder months. The report also does not address directly whether evidence of a breach of the LA10 noise condition was detected.
27. While a certain level of disturbance is expected due to the nature of the premises operation as a hotel, there is evidence to suggest that on occasions disturbance is undue in the context of the proximity of the principal complainant's apartment and the hotel's partially covered patio area and the fire escape landing. This undue disturbance appears primarily due to increase patronage in recent years in the hotel generally and particularly in the partially covered patio area, due to the increase in local population density due to the building of residential apartment buildings in the local area, including the complainant's building. A secondary source of disturbance is the congregation of patrons at times on and around a fire escape landing on the first floor with access via a fire door. No significant changes have been made to the partially covered patio area other than installation of 10mm polycarbonate sheeting. A full comprehensive assessment of increased noise disturbance from patron behaviour, particularly from the partially covered patio area has not been yet conducted nor a final effective solution to mitigate noise disturbance developed or put in place.

28. *Action taken to mitigate disturbance* - In considering whether to impose conditions on the liquor licence, I have balanced the submissions of all parties, having specific regard to any action taken by the licensee in response to the complaint and the effectiveness of any measures that have been implemented to address disturbance.
29. The licensee in his first submission in response points out that the hotel has operated at its present site since the late 1930s, when the area was far less populated than it is now, with the current owners taking over in 1992. In the last 20 years there has been an increase in the local residential population and the hotel is now more frequented in the evening hours due to a changing patron demographic.
30. The principal complainant has purchased an apartment in a building adjacent to the hotel. The licensee contends that the development of the building should have included an appropriate acoustic treatment to deal with surrounding noise from South Dowling St and surrounding businesses, including the hotel.
31. Before purchasing his apartment, the principal complainant as part of due diligence should have considered the location of the hotel. The proximity of the hotel would have been a factor in determining the price of the apartments, in the same way as properties near motorways, train lines and airports. With appropriate acoustic treatment in the apartment, including soft furnishings and appropriate window treatments, noise from the bedrooms should be minimal.
32. It is infrequent that the beer garden area is occupied by large numbers of patrons after 10.00pm in winter. Doors to the terrace are rarely open due to hotel heating. The hotel closes at 10.00pm on Sundays and after 8.00pm the number of patrons is typically minimal. It is possible that noise in the outdoor areas on Fridays and Saturday evenings after 10.00pm as would be normal for a hotel. This could have been anticipated by the principal complainant prior to purchasing an apartment adjacent to a hotel. A review of trading figures over the last two years has seen an increase in trading along with the increase in population in the order of 15%.
33. Major sporting events are typically held on weekends with the occasional mid-week or late night event. Again it could have been reasonably foreseen that during these rare events hotels would be busy and noisy and should have been a consideration when purchasing an apartment adjacent to a hotel.
34. The licensee advises he is attempting to reduce the impact of noise on adjacent residences but believes that the onus should also be on the apartment owner/occupant

to ensure that they have done everything possible at their end to reduce the impact on their own amenity as a result of a pre-existing environment.

35. The licensee in his first submission in response to the complaint advises that he has implemented the following noise mitigation measures:

- Requested staff to attempt to reduce noise levels by closing the primary doors to the beer garden by 10.00pm, trying to limit use of the PA to periods by 10.00pm (noting trivia may go past 10.00pm but is always concluded by 10.30pm) and putting up signage around external areas advising patrons to be considerate of neighbours at all times, particularly in relation to noise.
- Engagement of an acoustic consultant to complete a noise assessment of the impact on neighbouring properties. Monitoring is complete and a report will be issued outlining strategies and physical modifications to assist in reducing impact on those properties.
- 10mm polycarbonate sheeting is to be installed to the face of the slated side fence to the beer garden area.
- Tenants of the hotel accommodation have been advised they are not to have gatherings on the rear fire escape after 8.00pm and are not to access the roof.
- Installation of an air conditioning system inside the hotel has commenced. This should be commissioned by the start of summer and should see doors to the rear deck closed more often during the hotter and busier months.

36. In his final submission the licensee notes that the videos provided by the complainant on the patio area on 27 August 2017 show patrons watching the Conor McGregor/Floyd Mayweather fight. Bar trade was eight times the average for a Sunday and this day should be regarded as an anomaly.

37. The licensee also notes that since July 2018 access to the partially covered patio area is limited to 10.30am. Experts have been consulted to develop an architectural solution to reduce acoustic emissions from this area. DA plans and necessary reports should be ready within six weeks and construction should commence in the not too distant future. The licensee notes in later correspondence dated 24 September 2018 that he would like the construction to be completed by Christmas 2018, however notes that at this time the building industry is busy and obtaining the necessary consulting advice has been more time consuming and slower than he would have liked.

38. The short draft acoustic report provided by the licensee does not provide any technical information as to whether or not the standard LA10 noise condition has been breached. It rather gives a general guideline by way of estimates of the number of patrons in the

partially covered patio area, which if exceeded at certain times and environmental conditions, would probably breach the condition.

39. The principal complainant has advised in a final email on 20 September 2018 that in his view there has been no change to the noise levels from the hotel since his formal response in his complaint. Noise levels from the beer garden area have been steadily increasing over the last couple of weeks due to recent warm weather. The noise levels have not been as bad as they were over the last summer and autumn, however the complainant expects it will get worse as the weather warms.
40. The principal complainant has also not noticed any structural changes or changes to operating procedures at the hotel after a recent visit to the hotel. He also advises he has not been directly in communication with the licensee during the complaint process.

Findings and conclusion

41. I have considered the submissions of the principal complainant, licensee, Police and Council. I have also had regard to the particular context in which the venue operates. In deciding whether to impose conditions on the licence relating to disturbance, I have considered the following points.
42. I am satisfied that the issue of order of occupancy, which I am required to consider under section 81(3)(a) of the Act when making a decision as what regulatory action is appropriate, has more than the usual significance in this matter. I have found that the hotel has caused undue disturbance to residents in the principal complainant's apartment building, which is adjacent to the hotel. I accept that the primary source of that disturbance is the partially covered patio area and the secondary source is patrons congregating on the fire escape landing. However in this case the only apparent clear change in the operation of the hotel is that its patronage has increased over the last few years. I note the licensee's advice that a review of revenue over the last two years shows an increase of 15 per cent. I am satisfied that this is due to the changing nature of the local precinct with the construction of a number of residential apartment buildings, with an increase in residents and construction workers as patrons. I note the principal complainant's advice there are two more buildings to be constructed in the vicinity of the hotel.
43. Although I am satisfied this increase in patrons is sufficient for me find there is an onus on the licensee to take the necessary action to mitigate undue disturbance from the hotel, I also find there is some onus on the principal complainant and other residents to also take what action they reasonably can to contribute to that mitigation. I find the

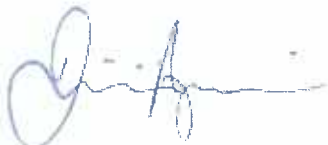
licensee's submissions on this point have some substance. Even though I accept that disturbance from patrons, particularly from the partially enclosed patio has increased to some degree over the last few years, a reasonable purchaser of the complainant's apartment or any other apartment in the building, would have been on notice that a level of disturbance from the hotel would be expected and increase over time due to the increasing population density in the local area.

44. I note the actions taken to date by the licensee to mitigate the disturbance and in particular the action taken to identify and implement a construction solution to disturbance from the partially covered patio area. The licensee has engaged relevant professionals including an acoustic engineer, architect, town planner and Building Code of Australia consultant to advance this proposed solution. Preliminary layout plans have been completed. The licensee advised on 25 September 2018 that the appropriate documentation should be lodged with Council within a month, however it is not anticipated that building would be completed by Christmas 2018. I note the principal complainant's advice that he seeks the full enclosure of partially covered patio area as a primary solution to the disturbance issue.
45. The licensee has advised that one of the noise mitigation measures he has implemented is advising tenants of the hotel accommodation that they are not to have gatherings on the rear fire escape after 8.00pm and are not to access the roof. I note the principal complainant's advice that he considers that this breaches WH&S regulations. I also note the Police comment that use of the resident's fire escape landing should not be used except for entry or exit. L&GNSW has no legislative oversight over this issue but the Police view would seem to be common sense.
46. I also note that the licensee has undertaken to shut down the partially covered patio area from 10.30pm and advises he has done so since July 2018. This will mitigate noise disturbance from that time, however I note and accept the principal complainant's advice that disturbance occurs on occasions at times earlier than this.
47. After considering all the information before me I have decided that the appropriate regulatory action to take at this time is to issue a warning to the licensee to ensure that disturbance at the hotel is minimised until final remedial works to mitigate disturbance from the partially covered patio adjacent to the hotel carpark is completed. I have not decided to impose conditions on the licence of the hotel at this time. The primary reason for this is that I am satisfied that the licensee's proposal to pursue a construction solution based on expert advice and approved by Council, to address the disturbance from the partially covered patio area, appears to me to be best manner in which to

resolve the disturbance issue in the short to medium term. I accept however the licensee's advice that this may take some time to complete. Having acknowledged that, I have decided to include in the warning a requirement that the licensee must ensure that this remedial construction work is completed as soon as practicably possible.

48. Accordingly, I recommend that the licensee continue with efforts to minimise disturbance, including ensuring that the noise mitigation measures proposed are implemented. The licensee and staff should be vigilant in these efforts and should also monitor patron behaviour closely and intervene appropriately if disturbance is identified.
49. I note my previous comments about the order of occupancy and accordingly I also recommend that the principal complainant and his building's body corporate identify and consider noise mitigation strategies appropriate for his and other apartments in his building.
50. I consider the warning issued to the licensee to be an appropriate and measured regulatory response at this time to the identified disturbance issues. I note that the hotel will be subject to ongoing monitoring and inspections by L&GNSW to ensure that the risk of undue disturbance is being effectively managed. Should further undue noise disturbance be identified this matter may be revisited, resulting in further regulatory intervention.

Decision Date: 3 January 2019



Dimitri Argeres

A/Director Compliance Operations

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Industry

Application for review:

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than **31 January 2019**. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at www.liquorandgaming.nsw.gov.au.

In accordance with section 36C of the Gaming and *Liquor Administration Act 2007* this decision will be published on the Liquor & Gaming NSW website at www.liquorandgamingsw.nsw.gov.au



Annexure 1

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

1. Section 79 complaint form dated 23 April 2018
2. NSW Police submission dated 4 June 2018
3. Licensee first submission in response to complaint dated 4 June 2018 including emails dated 14 and 20 June 2018
4. Sydney City Council submission dated 22 June 2018
5. Final submission from complainant dated 23 July 2018 with attachments including letter from architect dated 13 July 2018 and letter from strata manager dated 20 July 2018
6. Final licensee submission dated 20 August 2018
7. Final email from complainant dated 20 September 2018
8. Final email from licensee dated 25 September 2018 with attachments including plans and draft acoustic report

