
FILE NO: A21/0019659

COMPLAINANT: [REDACTED]

LICENSED PREMISES: Iluka On Baywater – LIQO660035633

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

LEGISLATION: *Liquor Act 2007*

SECTION 81 DECISION

Under Section 81 of the *Liquor Act 2007* (the Act) I, Dimitri Argeres, Director Compliance & Enforcement, a delegate of the Secretary, Department of Enterprise, Investment and Trade, in relation to the complaint made in respect to Iluka On Baywater have decided to **take no further action**.

Details of the material before the Delegate are set out in **Annexure 1**.

REASONS FOR DECISION

Legislative framework

1. Section 79 of the *Liquor Act 2007* (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 to the matters set out in section 3(2) which are:
 - a) *the need to minimise harm associated with the misuse and abuse of liquor;*
 - b) *the need to encourage responsible attitudes and practices towards the promotion, sale, supply, services and consumption of liquor;*
 - c) *the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life; and*
 - d) *the need to support employment and other opportunities in the –*
 - (i) *live music industry, and*
 - (ii) *arts, tourism, community and cultural sectors.*

The complaint and background information

The complaint

5. On 25 August 2021, [REDACTED] (complainant) lodged a complaint with Liquor & Gaming NSW (L&GNSW) alleging undue disturbance from the operation of Iluka On Baywater (the venue). The complainant lodged this complaint as a resident authorised by two other residents.
6. The complainant alleges disturbance occurs daily from 7am and impacts residents living above the venue. The disturbance is said to be worse around “opening time” caused by the arrival of patrons who wait outside the venue for takeaway coffee and engage in conversations that are audible within their properties, including when windows are closed. Disturbance is also alleged to occur from staff shouting coffee orders, noise from the venue’s sound system, music, patrons sitting on stairs at the rear of the venue and patrons smoking around the exterior of the building. The complainant alleges that the noise disturbance often disrupts sleep.
7. The complainant submits that on 11 October 2020, he raised the matter of the noise disturbance and other mechanical noise issues with the premises owner [REDACTED]. On 6 November 2020, the complainant met with the Licensee, Mr Gregory Barclay and explained the issues of noise and patron disturbance. The complainant was allegedly informed by the Licensee that an attempt would be made to resolve the issues.

However, the complainant alleges that none of the issues raised have been addressed. Further, the complainant alleges Council have taken no action regarding a complaint made in January 2021 pertaining to patron noise.

8. The complainant seeks the following outcomes:

- A noise management plan be implemented and a “genuine attempt” made by the venue to resolve the issues raised;
- Staff training with staff to request patrons keep noise to a minimum while waiting for takeaway orders or seated outside;
- Rear doors of the venue to be closed between 7am and 9am (at least) to prevent patron congregation at the building footprint and on the stairs;
- Closure of the front awning cover at all times;
- Signage relating to noise be displayed at the venue;
- Patrons not permitted to wait around the building and engage in conversation; and
- Dog bowls to be removed from the building common property.

The Venue, licence details, compliance history

9. The venue is located at Shop 3, 48 Baywater Drive, Wentworth Point and has held an on-premises restaurant licence since 11 September 2020. Mr Gregory Barclay has been Licensee since the licence start date. The venue is located on the ground level of a building which has commercial businesses on the ground floor with residential units located above. The building and the venue are located closed to Homebush Bay and are separated from the shoreline by a small area of grass and a promenade.
10. As outlined in the venue’s liquor licence, trading hours for the indoor area are 10:00am to 11:00pm, Monday to Saturday and 10:00am to 10:00pm on Sundays. For the outdoor area, the trading hours are 10:00am to 10:00pm each day of the week.
11. The venue has not received any other noise complaints and there is no adverse compliance history according to L&GNSW records.
12. The relevant parties associated with the venue are identified below:

Licensee

- Mr Gregory Ian Barclay (Licensee), with a start date of 11 September 2020;

Business Owners

- [REDACTED], with a start date of 11 September 2020; and

- [REDACTED] with a start date of 11 September 2020.

Premises Owners

- [REDACTED], with a start date of 11 September 2020.
- [REDACTED] with a start date of 11 September 2020.

Submissions

13. Between 25 August 2021 and 17 December 2021, various material was received from parties to the complaint, NSW Police and City of Parramatta Council (Council). The material that is before the delegate is set out in **Annexure 1** and summarised below.

Council

14. On 16 September 2021, Council was invited to provide a submission in relation to the disturbance complaint and a submission was received on 14 October 2021.
15. Council provided the following as its submission: *"I can advise that Council would like to submit that we have been in receipt of multiple complaints in relation to this premises from July 2020 to present, with five separate complaints being received that relate to noise and after-hours service of alcohol with customers also allegedly continuing their drinking outside the premises and causing disturbance."*
16. L&GNSW requested further information relating to the complaints and outcomes, however no further submission or information was received from Council.

NSW Police

17. On 16 September 2021, Auburn Police Area Command were invited to make a submission regarding the disturbance complaint.
18. On 19 October 2021, Police advised a submission would not be provided, stating that *"Due to the nature of the complaint being a noise disturbance and not alcohol-related, Police will not be making a submission"*.

Licensee submission

19. On 3 October 2021, the Licensee provided a submission in response to the disturbance complaint.
20. The Licensee submits the following regarding the allegation that venue patrons congregate around the licensed premises and can be heard within residential properties:

- The area surrounding the venue is common property and utilised by many people who are not patrons. They utilise this space for walks, including with pets and also engage in conversation while walking or admiring the view.
 - The Licensee acknowledges patrons, including those with dogs, congregate around the venue, however loud or obnoxious behaviour is not tolerated.
 - The venue promotes respect for residents in the buildings around the venue and has placed signage at the promenade entrance that states “*Please respect our neighbours and leave the venue quietly*”.
 - The Licensee contends the venue is a café, not an entertainment premises, and ambiance and a comfortable environment are essential to its success.
21. Regarding the allegation that venue patrons sit on the building stairs at the rear of the venue and smoke around the venue’s footprint/exterior, the Licensee submits these persons cannot be confirmed as patrons of the venue. Further, smoking is not permitted within the boundary of the venue, and it is not the responsibility of the venue to prevent people from smoking outside of the venue boundary. Patrons are not allowed to smoke within the venue’s boundary and those that smoke and come close to patrons are requested to move on.
22. Regarding the allegation that noise disturbance is caused by venue staff shouting out coffee orders, the Licensee submits staff calling out orders to patrons waiting outside for their order is necessary noise and only happens on occasion. The Licensee submits most of their patrons are known to staff and calling out orders is not required the majority of the time.
23. Regarding the allegation that noise disturbance is generated from the venue’s sound system/music and often causes disruption to the complainant’s sleep, the Licensee submits an acoustic report was completed during the busiest time of trade and with music levels set to the maximum volume the venue would ever use. The report found music levels were almost inaudible from properties above or to the side of the venue. The Licensee submits music is always ambient background music as loud music deters patrons from communicating.
24. The Licensee further contends the complainants have lodged multiple complaints with Council, Strata, local media and community associations since the venue opened on 9 October 2020. Additionally, the Licensee submits the venue has restricted its trade to until 3pm daily, instead of 10pm, due to the ongoing harassment from complainants. The Licensee also alleges that one complainant has been abusive to staff and management.

25. The Licensee contends they run an extremely respectful business that sponsors local communities and individuals. Further, the Licensee alleges the complainants would have known a commercial premises existed next to or under their property prior to purchasing.

Complainant final submission

26. On 6 November 2021, the complainant provided a final submission in response to the submissions from Council and the Licensee.
27. The complainant reiterates that since the venue commenced operations, disturbance and disruption including to their sleep has continued. The complainant sets out the most notable issue causing disruption to sleep is the congregating of patrons at the rear of the venue. A video dated 31 October 2021 was provided in support of the complainant's submission. The complainant submits noise from the venue can be heard inside the complainant's unit with the windows closed, that orders continue to be heard being shouted by venue staff, and that these noise issues weren't present prior to the opening of the venue.
28. The complainant submits patrons congregate on common property or community estate land where they are served food or drinks. A suggestion was allegedly made to the owner of the venue by the complainant that the rear doors to the venue be closed during the first two hours of trade to prevent patrons from congregating outside the complainant's balcony however this was allegedly rejected.
29. The complainant submits that in November 2020, they attended the venue along with a building executive committee member. The issues regarding patron and venue noise amongst other issues were raised with the Licensee during that engagement. The complainant submits there has been no improvement regarding the matters raised.
30. The complainant's submission includes a photo of the signage raised in the Licensee's submission. The complainant submits the sign is manifestly inadequate, is only attached at the rear of the venue and is not noticeable.
31. The complainant notes that he has reviewed the acoustic report dated 10 March 2021 that is raised in the Licensee's submission. The complainant submits the report is not sufficient with reference made to the location of sound measurements, frequency of readings taken and the time of day. Further, the acoustic report is not comprehensive in relation to patron noise and neither their property, nor the property of another of the authorising residents were subject to an acoustic assessment. The acoustic report has not been provided to L&GNSW in the submissions of either the Licensee or the complainant.

32. The complainant's submission goes on to raise a number of other issues relating to the use of the residential garbage room, storage of items in a car space, offensive odours and noise coming from loud mechanical ventilation which the complainant advises was turned off following an infringement notice issued by Council in March 2021 for failing to comply with a Council development control order. The complainant has also generally alleged the venue has a disregard for building by-laws, Council regulations and Development Application conditions that are said to apply to the venue and its operation.
33. The complainant's submission contains an email dated 16 July 2021 from [REDACTED], Team Leader Building Compliance, from the Council that relates to where the venue is located. The email advises an infringement notice was issued on 26 March 2021 in relation to failure to comply with a development control order served on 5 March 2021. The email from Council does not go into further detail about the nature of the breach of the development control order. The development control order has also not been provided as part of this complaint.
34. The complainant's final submission also contains responses from the two authorising residents to the complaint. Their responses similarly speak to a number of issues raised in the complainant's final submission, with additional matters raised summarised below:
- Delivery trucks arrive at all hours during the morning and night creating noise.
 - In the complainants' view, the venue is in breach of Strata by-laws of the building relating to odour, fumes and smoke that comes from the venue.
 - From as early as 7am, they are woken by patrons talking, laughing and their dogs barking as they attend the venue to purchase coffee and congregate.
 - The venue has been in breach of many conditions set out in the Development Application, including in relation to a noisy duct installed in the car park that was removed.
 - Loud music is frequently played, evidenced by complaints to the building manager. It is further alleged the acoustic report's purpose was to measure sound from mechanical ventilation, not noise generated by patrons and staff during the time when the venue is operating.

Venue final submission

35. On 17 December 2021, a final submission was received from the Licensee of the venue in response to the complainant's final submission and submission from Council.

36. The Licensee submits the complaint made to Council regarding after hours service of alcohol is a “false allegation” and that all complaints made have been from parties to this complaint.
37. The Licensee submits the signage requesting patrons to leave quietly was in response to a request and has been complied with. Further, they are happy for the Strata committee to erect signage in relation to community compliance with noise levels.
38. The Licensee states the acoustic report was conducted comprehensively during a peak period, being 12:00pm on a Saturday, and in the residence of one of the parties to this complaint. The Licensee states mechanical ventilation was assessed in the report as well as the noise emanating from the venue.
39. The Licensee submits they have identified issues with their current suppliers and have taken substantial action to ensure deliveries do not occur outside of delivery hours.
40. The Licensee acknowledges mechanical ventilation was shut down to comply with orders from Council. The Licensee submits they are allowed to trade in their current capacity and every aspect of their Development Application has been complied with. They allege multiple inspections from Council and Police, including licensing, have been carried out and no issues have been identified.
41. The Licensee alleges continual harassment from the complainants is “taxing”. The Licensee submits the location of the venue has always been for a commercial business. The Licensee advises the venue is a café that can seat 44 people and was previously set for a larger restaurant of up to 100 people before a subdivision occurred.
42. Additionally, the Licensee submits it is communicated to property purchasers they will be living next to or above a place of a business.
43. The Licensee submits they provide support for the community through sponsorship and food assistance, running a business that aims to support the local community and contribute to the economy.

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

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

The order of occupancy between the licensed premises and the complainant

45. The venue has operated under their current liquor licence since 11 September 2020. At the time of the complaint, the complainant alleges they have resided at their address for

nine years and 11 months and predate the venue. This fact is not in dispute, and I consider the order of occupancy is in favour of the complainant.

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

46. There is no indication changes have been made to the complainant's residence. The Licensee submits the location where the venue is located could previously cater to a larger restaurant of up to 100 people, but now caters to 44 people after a subdivision. Aside from this, there is no indication of any other changes, including structural, to the premises occupied by the venue.

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

47. There is no indication of significant change to activities conducted at the licensed premises over a period of time. The material indicates due to COVID-19, for a period of time, the venue was restricted to takeaway sales only to comply with public health orders in force at the time. It appears based on the material this may correlate to an increase in noise generated by patrons as they were required to be outside of the venue while waiting to be served food and drinks from the venue.

Findings and Decision

Undue disturbance

48. In deciding whether the venue has unduly disturbed the quiet and good order of the neighbourhood, I have balanced the submissions made by the Licensee, the complainant, and Council. I note Police have elected not to provide a submission as they have stated the matter is not, in their view, alcohol-related.
49. In considering what amounts to undue disturbance, I find it necessary to consider a broad range of factors including the nature and environs of the neighbourhood and the particular context in which the venue operates. It is also important to consider undue disturbance in the context of liquor legislation and the objects of the Act. The Act provides a regulatory framework to address undue disturbance. Further, it allows for regulatory action to be taken against a venue with a liquor licence as a remedy appropriately implemented where disturbance is attributed to liquor operations and the sale and supply of liquor.
50. The venue operates as a café located in a waterfront area and is surrounded by residential apartments, communal areas, and a promenade walkway. The venue is located on the ground floor of a residential building and has approval to operate a small outdoor courtyard area. Having considered the nature of the venue, its location and its proximity

to the complainant's residence, I find it reasonable to expect some level of noise and disturbance at times will be generated from the venue's ongoing operation.

51. Turning my attention to the complaint, it appears the primary aspects of the complaint centres on patron and staff noise during the early morning trade, particularly patrons congregating and conversing outside the venue while waiting for takeaway coffee and food. The complainant seeks a number of outcomes, including the closure of the rear doors of the venue from 7am to 9am in order to mitigate patron noise as they allege patrons congregate at the rear of the venue and cause noise disturbance. I note the venue can only trade under its liquor licence from 10am each day and it is evident the matters raised in the complaint are largely not related to operations and activities under the venue's liquor licence. I consider only undue disturbance which relates to liquor operations, including that which relates to patron noise, ought to be considered relevant for the purposes of this decision.
52. While patron noise can amount to undue disturbance in certain circumstances where it is attributable to liquor operations, I would not consider the disturbance outlined by the complainant to meet the threshold of undue disturbance. I note the venue operates as a restaurant/café, does not hold a Primary Service Authorisation allowing liquor to be sold without being ancillary to a meal, has a small outdoor area operating under standard trading hours of 10am to 10pm daily and liquor consumption is permitted inside the venue until 11:00pm daily.
53. The complaint also raises issues relating to people smoking around the building, offensive odours, mechanical noise and disputes around the use of communal areas. Without clear evidence of a link to the sale, supply or consumption of liquor at the premises, all of these matters fall outside of the scope of the Act. These matters may be more appropriately addressed by Council and/or the building's Strata management.
54. In regard to the allegations of undue disturbance caused by music played from the venue, it appears this aspect of the complaint relates to music played over speakers located in the venue. None of the material before me indicates live music is conducted at the venue. I am not satisfied there is sufficient evidence before me, outside the complainant's allegations, to demonstrate music from the venue is causing undue disturbance.
55. Having considered all the available material before me, I am not satisfied there is sufficient evidence to conclude the venue has unduly disturbed the quiet and good order of the neighbourhood. Additionally, I find the aspects of the complaint are largely not related to the liquor operations of the venue and there is no evidence, including from local enforcement agencies, being the local Licensing Police and Council, that the liquor

operations of the venue are causing undue disturbance. It is further noted the time at which noise disturbance is primarily alleged to occur by the complainant is prior to the time at which the venue is permitted to exercise its liquor licence to sell and supply liquor.

Regulatory Outcome

56. In deciding the appropriate regulatory outcome in this instance, I have had regard to the statutory considerations, noting the order of occupancy is in favour of the complainant, the lack of evidence of significant changes to the venue or the complainant's residence, and the similar lack of evidence of any significant changes to the activities at the venue over time. I have also considered the material set out in Annexure 1, and my finding above.
57. Due to my finding that there has been **no undue disturbance**, the appropriate response in context of this disturbance complaint is to take **no further action**. In the event there is fresh and direct evidence that liquor operations and activities relating to the exercise of the venue's liquor licence may have caused undue disturbance, then this matter may be reconsidered upon receipt of a new complaint.
58. While I have determined to take no further action, I strongly encourage the Licensee to be vigilant in minimising disturbance and noise from both the activities of the venue and of patrons insofar as such activities relate to the sale, supply or consumption of liquor.

Decision Date: 28 June 2022



Dimitri Argeres

Director, Compliance & Enforcement
Liquor & Gaming NSW

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

Application for review:

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 26 July 2022. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published on the Liquor and Gaming NSW website.

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



Annexure 1

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

1. Section 79 Disturbance Complaint lodged by the complainant on 25 August 2021.
2. Submission from City of Parramatta Council received on 14 October 2021.
3. Response from NSW Police received on 19 October 2021.
4. Licensee's first submission received on 3 October 2021.
5. Final submission from the complainant received 6 November 2021.
6. Final submission from the Licensee received on 17 December 2021.