

FILE NO: A22/0021211

COMPLAINANT: [REDACTED]

LICENSED PREMISES: Queens Wharf Brewery Hotel, Newcastle - LIQH400118147

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, Jane Lin, a delegate of the Secretary of the NSW Department of Enterprise, Investment and Trade, in relation to the complaint made in respect to Queens Wharf Brewery Hotel, Newcastle (**the Hotel**) have decided to **take no further action**.

REASONS FOR DECISION

Legislative framework

1. Section 79 of the Act provides that a prescribed person may complain to the Secretary, that the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed because of the manner in which the business of the licensed premises is conducted, or the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).
2. For the purpose of section 79 of the Act, a person who has standing to make a complaint includes a person who 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.
4. Section 81 of the Act provides that after dealing with the complaint, the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no action.
5. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and is required to have due regard to the matters set out in section 3(2) which are:
 - (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
 - (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
 - (c) the need to ensure that the sale, supply and consumption of liquor, and the operation of licensed premises, contributes to, and does not detract from, the amenity of community life,
 - (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

6. On 10 January 2022, [REDACTED] (the Complainant) of [REDACTED] Newcastle lodged a complaint in relation to the Hotel. The complaint alleged noise disturbance that occurs frequently whenever there is a band or DJ playing on the open air wharf at the Hotel, generally four days a week on Thursday, Friday, Saturday and Sunday. The Complainant lodged the complaint as a resident authorised by four other residents, in accordance with section 79(3)(a) of the Act.
7. The Complainant made a number of allegations regarding the disturbance at the Hotel which are set out in the following paragraphs.
8. The Hotel conducts music entertainment on the outdoor wharf area of the Hotel, involving a mixture of live bands and DJ's. The complainants submit that music volumes remain intrusive in their homes on a frequent basis. With doors and windows closed, the

complainants say they are able to identify the start and finish of music sets and individual songs on a frequent basis when music is operated from the outside wharf of the Hotel.

9. The complainants state that they continue to experience noise disturbance since the finalisation of a disturbance complaint made to Liquor & Gaming NSW (L&GNSW) under section 79 of the Act regarding the Hotel on 15 December 2017 and determined under section 81 of the Act on 21 September 2018 (**2018 Disturbance Complaint**). This resulted in the imposition of an LA10 noise condition and a condition relating to a noise limiter on the sound system of the Hotel.
10. Since the imposition of the LA10 and noise limiter conditions, the complainants have monitored the Hotel for noise disturbance. Informal complaints were lodged on 18 January 2020, 17 December 2020 and 2 January 2021 to L&GNSW. These allegedly did not result in meaningful change to the Hotel's operation.
11. Noise disturbance from the Hotel has only regularly ceased due to COVID-19 related lockdowns. With the end of lockdowns and recommencement of music, the complainants are again experiencing disturbance from music.
12. In support of the complaint, sound recordings were taken by the Complainant from their property to illustrate how clearly audible music from the Hotel is on multiple occasions. These recordings were stated to have been made with a low sensitivity microphone in a mobile phone. It was further noted that individual songs were identifiable.
13. The Complainant also made submissions regarding general information about the Hotel and its operation. These are set out in the following paragraphs.
14. On 23 December 2016, the wharf area of the Hotel was included in the licensed area. Music operations were gradually moved from within the building into the outside wharf area of the Hotel.
15. On 29 July 2019, the Hotel was granted consent to a modification of its development consent conditions (DA2015/0486.01). As a result, the Hotel has increased its development application (DA) approved music operations from the wharf area of the Hotel. This has resulted in increased periods of music operation on Saturdays and Sundays, along with the commencement of music operations on Thursday evenings.
16. The Complainant also made submissions regarding the desired outcome for the disturbance complaint. These submissions are relevantly set out in the following paragraphs.

17. The Complainant's "*ultimate desired outcome is the peaceful enjoyment of the amenity of the homes of multiple residents without interference from the for-profit activities of a single licensed premises*".
18. The Complainant also seeks that noise assessments relating to the music operations of the Hotel be performed in order to assess compliance with the Hotel's LA10 condition. This testing was requested to occur at the boundary of complainants' residences, on more than one occasion on different dates and times and without the prior knowledge of the Hotel.
19. It was noted by the Complainant there is no definition of 'excessive noise' in the liquor and gaming legislation. It was suggested the definition of 'offensive noise' outlined in the *Protection of the Environment Operations Act 1997* (NSW) be utilised as a proxy definition. It was further submitted that "*regardless of whether the current noise levels that we are experiencing are found to be within the applicable LA10 limit, that it constitutes "excessive noise" as per the above definition.*"
20. The Complainant further advised it is difficult to ascertain compliance or non-compliance with the Hotel's LA10 condition, as it requires an acoustic engineer with specialised and calibrated equipment. This cannot be conducted on an ad-hoc basis to capture alleged breaches of the condition as they occur. Police also do not provide assistance in relation to determining if there has been a breach of the LA10 condition. Accordingly, the Complainant requested an amendment to the wording of the LA10 condition. The following was submitted as a new appropriate wording:

"Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises at any time. Interior noise levels which, although restricted in accordance with the above condition, still exceed safe hearing levels, are in no way supported or condoned by the Authority."
21. The Complainant also made submissions regarding the order of occupancy, referring to the previous determination made in the 2018 Disturbance Complaint. These submissions have been relevantly set out in the following paragraphs.
22. The 2018 Disturbance Complaint found that the order of occupancy was in favour of the Hotel. This appears to have been based on the Hotel licence start date of 10 November 1959. However, the Complainant submits that the Hotel has only been operating at the site since 1988, according to council DA's and open internet sources. Accordingly, there

may have been a licence transferred to the site of the Hotel but it could not have been operating prior to 1988.

23. The Complainant submits that the relevant date to be considered for the purpose of this complaint should be 23 December 2016. This was the date the Hotel was granted the authority to operate from the wharf, which is stated to be a major cause of the disturbance.
24. The Complainant notes that L&GNSW references the date a complainant first occupies their residence as the relevant date when considering order of occupancy, rather than the date the residence is first occupied for residential use. Accordingly, the Complainant submits that the same criteria should be applied to the Hotel. It follows that as the current licensee commenced on 13 April 2017, and this should be the date to consider the order of occupancy for the Hotel.
25. The Complainant also submitted that the movement of music operations at the Hotel from internal areas to the outside wharf would be considered a structural change to the Hotel per section 81(3) of the Act. This is in contrast to the finding in the 2018 Disturbance Complaint.
26. The Complainant attached additional evidence and material they had gathered. A summary of this material is set out as follows:
 - A total of 34 audio and video recordings purporting to show noise disturbance emitted by the Hotel. These typically consisted of videos of what is alleged to be music performances occurring at the Hotel, with noise of patrons occasionally audible.
 - “*Application to Modify a Development Consent*” form of The City of Newcastle council under the *Environmental Planning and Assessment Act 1979* dated 30 May 2018.
 - A document titled “City of Newcastle Development Tracker” and a document titled “Queens Wharf Wikipedia Entry”. Both of these documents were stated as showing the start date of the Hotel at its current location as 1988.
 - A document titled “*Annexure 1- QWB Entertainment Schedule from Website*”. This was purported to show musical performances that had been booked in at the Hotel, from the period of December 2014 to April 2018. An additional document titled “*Annexure 2- Analysis of Starting Times for Historical/Future Music Performance Schedule as advertised on Licensee’s website*”. Both documents were stated as

having been part of the submission for the 2018 Disturbance Complaint, as evidence of the Hotel's alleged prior breaches of their DA.

- Copies of three complaints and their accompanying supporting material lodged to L&GNSW on 18 January 2020, 17 December 2020, and 2 January 2021.

The venue, licence details and compliance history

27. The Hotel is located at 150 Wharf Road, Newcastle and has been trading under a full hotel liquor licence which commenced on 10 November 1959. However, the Hotel has only operated from its current location since approximately May 1988.
28. The relevant parties associated with the Hotel are as follows:
 - The Licensee is Mr Stephen James Smyth, with a start date of 13 April 2017.
 - The Business Owner is [REDACTED] with a start date of 26 March 2014.
 - The Premises Owner is Newcastle City Council with a start date of 15 September 2008.
29. With the exception of the outdoor area, the Hotel's trading hours for consumption on premises are from 5:00am until 3:30am on Monday to Saturday, and from 10:00am to 12:00 midnight on Sunday. For the outdoor area, the trading hours are from 10:00am until 10:00pm on Monday to Wednesday and Sundays, and from 10:00am to 12:00 midnight on Thursday to Saturday.
30. The Hotel is subject to a number of conditions including conditions that relate to noise. These being an LA10 noise condition and a condition requiring that when amplified music is conducted, all amplifiers or noise generating equipment is to be controlled by a noise limiter with levels set by an acoustic engineer to ensure compliance with the LA10 noise criteria.
31. The Hotel is located adjacent to Newcastle harbour, in an area with nearby residential dwellings along with retail and commercial premises and businesses.
32. Since the finalisation of the 2018 Disturbance Complaint, L&GNSW records indicate that the Hotel has received four complaints regarding noise. These four complaints were dealt with by remedial action and engagement with the Hotel, with two of those complaints also noted as containing insufficient evidence to substantiate the complaint.

Submissions

33. Between 25 February 2022 and 19 May 2022, various submissions and associated material were lodged by the Complainant, NSW Police and City of Newcastle Council (**Council**).
34. The material that is before the delegate is set out in **Annexure 1** and summarised below.

Police Submission

35. On 25 February 2022, a submission was received from NSW Police in relation to the disturbance complaint.
36. Police noted that the Hotel's licence has an LA10 noise condition and a noise limiter condition. Police advised that they do not possess the necessary skills or training in order to test the conditions insofar as they relate to the *"octave band frequency or ensuring levels by acoustic engineers are correct."* Police advised they are only able to assess whether noise emanating is deemed to be offensive.
37. Police noted that if they are invited into residential premises they would be able to make a determination regarding the part of the LA10 condition that states *"noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 7:00am."*
38. However, Police also advised that for this to occur, attending Police would need to be aware the licence conditions exist. Police noted these conditions are not readily accessible to general duty Police due to the nature of operational policing and the large number of licensed premises in the area.
39. The Police submission provided an outline regarding the compliance history of the Hotel since 1 January 2021 to the date of the submission. This outline is that four Police events have been created regarding the Hotel. Three of these events were stated to involve "licensing legislation" including one matter involving "Powers- Move on". The fourth matter was in relation to an assault. There have been 48 business inspections of the Hotel during that time. Police have reviewed their computer aided dispatch (CAD) system for the dates that the Complainant has noted were dates when offensive noise was emanating from the Hotel. Police were only advised of offensive noise on 14 November 2021 and the noise had ceased by the time of their arrival.
40. Police also attached a document being a Notice of Determination Development Application in relation to the Hotel dated 24 November 2015. The document outlines the

consent granted by Council for the extension of the licensed area of the Hotel to include the wharf outdoor seating area.

Licensee Response to Complaint

41. On 31 March 2022, [REDACTED] of Shotters Lawyers, on behalf of the Licensee, provided a submission in response to the disturbance complaint.
42. The submission advised a noise limiter had been installed in accordance with the noise limiter condition. Attached as evidence of the installation and recalibration of the noise limiter were three tax invoices from Technology, Sound and Vision Pty Ltd dated 1 August 2019, 27 November 2020 and 17 March 2022.
43. It was submitted that modified development consent DA2015/0486.01 granted on 29 July 2019 permits live or musical entertainment on the wharf area of the Hotel between 12 noon to 11:00pm on Mondays to Saturdays and from 12 noon to 10:00pm on Sundays.
44. The submission stated the Licensee conducts noise testing with a sound level meter at 5 metres away from the speakers of any live or musical entertainment and from Wharf Road within 10 minutes of the commencement, and thereafter on an hourly basis to ensure compliance with the LA10 condition. The readings taken with the sound level meter are entered into a register, with the registers for 2021 and 2022 attached. Any omissions in the registers are submitted to be due to the Hotel not being open or not conducting live or musical entertainment due to COVID-19.
45. The submission also addressed the considerations under section 81(3) of the Act. These being, the Licensee concedes the Hotel has operated from its current location since approximately May 1988. Accordingly, the order of occupancy remains in favour of the Hotel. The Licensee submits that there have been no changes in the Hotel, including structural changes, nor changes in the activities conducted at the Hotel over a period of time.
46. The submission commented on other issues that were generally raised in the complaint. These being, the Licensee denies breach of the LA10 noise condition or excessive noise disturbance of the Hotel's neighbours. Any musical entertainment that occurs on the wharf area of the Hotel is subject to the noise limiter that has been installed. The Licensee conducts noise testing to ensure compliance with licence conditions of the Hotel. The Complainant is able to undertake qualified acoustic testing at the boundaries of their residence, which they have not. The LA10 condition is the accepted standard

regarding neighbourhood disturbance by licensed premises. The Licensee objects to any modification or extension of the LA10 condition.

47. The submission also sets out additional points regarding the material included in the disturbance complaint:

- Annexure 1 of the Complainant's material appears to be advertisements for entertainment at the Hotel between 5 December 2014 and 28 April 2018. As the 2018 Disturbance Complaint was determined on 21 September 2018, this material is irrelevant to the present complaint.
- Annexure 2 of the Complainant's material appears to be observations of conduct on the wharf area of the Hotel between 5 December 2014 and 28 April 2018. This was again submitted as irrelevant to the current complaint.
- Regarding the Complainant's audio files, this material was submitted as not constituting objective evidence in support of the complaint. It was again noted the Complainant is at liberty to undertake the conducting of qualified acoustic testing.

48. The submission concludes that the current complaint does not establish that the quiet and good order of the neighbourhood has been unduly disturbed by the Hotel. The Licensee of the Hotel is complying with the licence conditions imposed on the Hotel, particularly the LA10 and noise limiter conditions. Evidence of compliance with the conditions has been provided by the Licensee. Accordingly, it is submitted that no further action should be taken by L&GNSW regarding the complaint.

Council Submission

49. On 1 April 2022, a submission was received from the Council in relation to the disturbance complaint.

50. Council records indicate two complaints were received relating to alleged noise disturbance from the Hotel in the past 12 months, both from the same complainant. It was noted that Council officers corresponded with the Licensee in relation to these complaints. Previous complaints raised in relation to the Hotel date back to 2020 and earlier. Council has no pending development applications or modifications that are currently under assessment for the Hotel.

51. On same date, L&GNSW emailed Council requesting more information regarding the outcome of the complaints outlined in its submission.

52. On 20 April 2022, Council provided L&GNSW the outcome of the complaints referred to in its submission and follows:

- *PH2021/04353 – Received 12/12/2021*

Customer alleged that the Queens Wharf Hotel was operating in breach of its development consent conditions concerning noise emanating from the premises. CN staff spoke with the owners/operators of the venue to advise them of the allegations and remind them of their obligations under the conditions of their development consent. CN staff determined that the breaches were minor in nature and did not have any adverse impact upon the amenity of the neighbourhood, as such no formal regulatory action was taken in relation to this matter and the matter was closed.

- *PH2022/00500 – Received 15/02/2022*

Customer alleged that the Queens Wharf Hotel was operating in breach of its development consent conditions concerning noise emanating from the premises and the location of the music stage. CN staff undertook a site visit on 25/03/2022 and met with the owners/operators of the venue. The stage location has no acoustic impact on the customer and the acoustic report prepared by the hotel's consultant supports the existing direction of the speakers. The hotel was advised to apply for a variation to their development consent condition to enable the stage to be repositioned. CN staff determined that the breaches were minor in nature and did not have any adverse impact upon the amenity of the neighbourhood, as such no formal regulatory action was taken in relation to this matter and the matter was closed.

Complainant Final Submissions

53. On 26 April 2022, the Complainant provided a final submission regarding the disturbance complaint and submissions from Council, Police and the Licensee. Attached were two additional documents, one being a marked-up version of the Licensee's submission and the other a document titled "*Modification Report Including Original Acoustic Report - 150 Wharf Road Newcastle - 150 Wharf Road Newcastle*" (**Modification Report**) dated 30 May 2018.

54. The Modification Report is an application addressed to Council to extend the hours of operation, trading and entertainment for the outdoor wharf seating area of the Hotel. It noted a Development Consent had been previously granted by Council on 24 November

2017 to extend the licensed area of the Hotel to include the outdoor wharf seating area *“to formalise the existing arrangement and ensure the development consent correctly reflected the applicable liquor licence”*.

55. The proposal in the Modification Report was to extend the approved trading hours of the outdoor area from Sunday to Wednesday 10 am to 10pm and Thursday to Saturday 10am to midnight to 10am to midnight Monday to Sunday (including public holidays). It also sought to extend the approved hours of live or musical entertainment on the wharf area of the Hotel from 6:00pm - 11:00pm Friday to Saturday and 12 noon - 9:00pm Sundays to 12 noon-11:00pm Monday to Saturday, 12 noon-10:00pm Sunday and 12 noon-11:00pm Public Holidays.
56. Included with the Modification Report as annexures was a report dated 18 October 2017 prepared by Spectrum Acoustics- Noise and Vibration Consultants. In general, this document stated that compliance with the existing noise criteria for the proposed extended hours of operation and entertainment would not cause adverse impacts, provided noise management measures as outlined in the document continued to be enforced.
57. In relation to the submission from Council, the Complainant submitted Council’s finding of breaches of the development consent conditions support that the Licensee has an established history of non-compliance with conditions, either on the development consent or the liquor licence. The Complainant further advised that Council has not provided the basis for its conclusion that the breaches identified in its complaints *“did not have any adverse impact upon the amenity of the neighbourhood”*.
58. In relation to the submission from Police, the Complainant submitted that residents have found little benefit in making noise complaints regarding the Hotel to Police. They no longer perceive Police are able to assist regarding noise disturbance from the Hotel. Further, the enforcement of an amended LA10 condition with the additional wording as proposed by the Complainant would still be difficult to be enforced, due to the difficulties outlined by Police including that attending Police may not be aware the condition exists.
59. The Complainant concedes the Hotel has installed a noise limiter which has been *‘intermittently recalibrated’*. However, this is not evidence that the settings of the noise limiter are an appropriate level to limit noise to the applicable LA10 requirements. The Complainant submits the installed noise limiter referred to in the invoices provided by the Licensee is based on overall sound level and not individual octave bands. It is therefore possible for the noise levels to breach the requirements of the LA10 condition.

Additionally, noise limiters can be circumvented when performers use their own amplifiers.

60. The Complainant submitted that copies of the Licensee's register of noise readings are not evidence of compliance but show multiple occasions of non-compliance:
- The Complainant stated that pages 14-18 of the Modification Report include an acoustic report prepared on 18 October 2017. Table 1 of that document notes the overall limit for the time period 7am to 12am is 51 dB(A).
 - The Complainant submitted that the registers provided by the Licensee show 677 instances of the 910 total "street readings" exceed the 51dB limit provided by the Hotel's acoustic consultants in the Modification Report.
 - On the readings in the register provided for 2 January 2021, seven of the readings are in exceedance of the 51dB limit and corresponds to a noise complaint made on that date by the Complainant to L&GNSW.
 - Accordingly, the Complainant submits that the Hotel's own evidence shows it is frequently causing undue disturbance to the neighbourhood noise environment.
61. Regarding the order of occupancy, the Complainant argued the occupancy date relevant to the Hotel should be 23 December 2016, the date the Hotel licence was extended to include the wharf area. The Complainant has occupied their residence since April 2008, with two authorising residents occupying from a similar timeframe and the third authorising resident occupying their residence since November 1999. Accordingly, the facts support a conclusion that the order of occupancy is in favour of the complainants.
62. Regarding the audio files included in the complaint, the Complainant submitted that "*The important thing to note are the relative sound levels, i.e. the music relative to ambient sound levels, and how easily audible the music is over background sound levels. The reviewer will note that individual songs are identifiable.*" The Complainant contends the audio recordings do add weight to the complaint, contrary to the view of the Licensee. Particularly, the correlation between the dates of recordings and apparent breaches of the LA10 limit as recorded on the Hotel's own registry readings. The Licensees assertion that the costs of further "*qualified acoustic testing*" should be paid by the Complainant is unreasonable.
63. The Complainant concluded that the evidence of the acoustic readings of the Licensee, supported by the Complainant's evidence, establishes that despite the noise limiter the Hotel has breached its LA10 limit on numerous occasions. The proposed amended LA10 noise condition may not protect residents from noise disturbance on an ongoing basis

and the Complainant therefore suggested the restriction of music operations to the interior of the Hotel and banning music operations on the outside wharf area should be considered on an ongoing basis.

Hotel Final Submissions

64. On 19 May 2022, [REDACTED] provided the Licensee's final submission in relation to the submissions from Police and Council and the Complainant's final submission.
65. The submission noted there had been 48 business inspections by Police since 1 January 2021 which have resulted in the four Police events. Police have recorded one complaint in relation to noise from the Hotel on 14 November 2021. The submission also noted Council had investigated two noise complaints concerning the Hotel on 12 December 2021 and 15 February 2022. Council determined the alleged breaches were minor in nature, did not have any adverse impact on the amenity of the neighbourhood and did not result in regulatory action.
66. The submission advised the Licensee has provided tax invoices from Technology Sound and Vision Pty Ltd that evidence recalibration and testing of the noise limiter is carried out on a regular basis. There is no evidence that performers at the Hotel use their own amplifiers.
67. The submission advised the Licensee denies that the noise register is evidence of non-compliance with the LA10 noise condition. The submission attached a letter dated 3 May 2022 authored by [REDACTED] of Spectrum Acoustic Pty Limited which is relied upon in response to the Complainant's submissions. The letter provides an acoustic response to the submission from the Complainant relating to the Hotel. Relevant points raised in this letter are as follows:
 - The Complainant's submissions include discussion of the register of noise measurements made by Hotel staff, those readings taken at two locations in the vicinity of the Hotel whilst there was musical entertainment at the Hotel.
 - The data presented in the register does not show there is non-compliance with the Hotel's conditions. Essentially, the data obtained is simplistic, is not considered representative of the entertainment noise and cannot be used for compliance purposes.
 - The intent of the noise monitoring condition outlined in the Hotel's Plan of Management was to measure entertainment noise from the Hotel at a location where that noise dominated the acoustic environment. That is at 5 metres from

the speakers, the noise of the speakers would be measured and can be compared against criteria specified in the Plan of Management.

- The noise recording condition specified in the Hotel's Plan of Management predates the installation of the noise limiter and its intent is to perform a similar task to which a sound limiting device would provide. Actual noise measurements taken by Hotel staff cannot be used for compliance purposes and the instruments used do not measure noise through the relevant octave bands.
- Noise measurements detailed in the register were taken five metres from the speakers and at a location that is either at the entry to the car park on Wharf Road or on the corner of Scott and Newcomen Streets. Neither of these locations are noise monitoring compliance locations and the second locations (street locations) are not included in the procedures in the Plan of Management. Further, the acoustic environment at the street locations is complex and noise from many sources would contribute to the overall noise measurement.
- The determination of LA10 noise levels requires detailed analysis of the data that has been measured and *"Acoustic consultants do this by measuring the total noise over a representative period and taking detailed field notes which describe each and every noise source and event, the level and duration of these and, where applicable and discernible, the frequency signal of the various noises that contribute to the overall. Compliance monitoring should also note relevant atmospheric conditions"*.
- The sound limiting device of the noise limiter, if calibrated and operating to the correct settings (as determined by an acoustic consultant) would provide necessary data to ensure the overall entertainment noise levels of the Hotel are compliant.
- It is recommended staff of the Hotel continue to monitor noise and undertake measurements at the location in the Hotel 5 metres from the speakers and the two locations previously used but should be accompanied by notes *"to describe the measured environment and the relative contribution of any entertainment noise if it is audible"*.
- It was also recommended that Hotel staff undergo further training from a qualified acoustic consultant. This would ensure full understanding of the required noise testing procedures.

68. The submission goes onto to dispute the Complainant's assertion that the order of occupancy favours the Complainant. It was submitted the Licensee was not granted a liquor licence for the wharf area of the Hotel on 23 December 2016, and so this is not

the relevant date to determine the order of occupancy. The Hotel has operated from its current location since about May 1988. Accordingly, the order of occupancy favours the Hotel.

69. Regarding the audio files provided with the Complaint, it is maintained that the recordings made by the Complainant do not constitute objective evidence in support of the Complaint. It was reiterated that the Complainant is at liberty to conduct their own qualified acoustic testing.
70. The submission stated that much of the Complainant's submissions rely on the noise register that has been provided by the Licensee. It was noted the noise register is a requirement of the Development consent. The submission contends the noise register is not evidence of non-compliance with the LA10 condition and the Licensee relies on the report of Spectrum Acoustic Pty Limited dated 3 May 2022.
71. The submission further stated the Police and Council do not support the disturbance complaint and that the Licensee denies breach of licence conditions, particularly the LA10 condition, and also denies excessive noise disturbance to neighbours of the Hotel. The submission argued the complaint does not establish the quiet and good order of the neighbourhood of the Hotel is being unduly disturbed because of the manner in which the Hotel is conducted and no further action should be taken in relation to the complaint.

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

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

The order of occupancy between the licensed premises and the complainant

73. According to the liquor licence, the Hotel has operated from its present site at 150 Wharf Road, Newcastle since 10 November 1959. However, as was outlined in the Complainant submissions and Hotel Submissions, the Hotel has only operated from its present site since approximately May 1988. Accordingly, this is the time from which the Hotel is taken to have operated from its current location.
74. While I note the position of the Complainant, order of occupancy is considered from the time that a licensed venue is first occupied and not from the commencement date of the current licensee or from changes to its licensed boundary. As both parties have conceded the Hotel was occupied from approximately May 1988, I consider this to be the date from which the order of occupancy should be considered. The Complainant submits they commenced occupation of their residence in April 2008. Therefore, I consider the order of occupancy in favour of the Hotel.

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

75. As outlined in the 2018 Disturbance Complaint regarding the Hotel, L&GNSW records indicate that an authorisation to sell and supply liquor for consumption on the premises for the outdoor area was granted on 23 December 2016.
76. There is no evidence before me of any structural changes to the Hotel or the Complainant's residence.

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

77. The Complainant and the Licensee refer to Modified Development Consent DA2015/0486.01 approved on 29 July 2019 that extended the hours of live or musical entertainment on the wharf to 12 noon to 11:00pm on Mondays to Saturdays and from 12 noon to 10:00pm on Sundays. The Complainant submitted this has resulted in increased periods of music operation on Saturdays and Sundays along with the commencement of music operations on Thursday evenings.
78. There is no indication of any other significant changes to the activities conducted at the Hotel over a period of time since the finalisation of the 2018 Disturbance Complaint.

Findings and Decision

Undue disturbance

79. In deciding whether the Hotel has unduly disturbed the quiet and good order of the neighbourhood, I have balanced the submissions made by the Hotel, the Complainant, Police and Council.
80. After considering the material before me, I am not satisfied there is sufficient evidence to conclude that the Hotel has caused undue disturbance to the quiet and good order of the neighbourhood. In reaching this conclusion I have considered the evidence provided in the submissions of all parties to the disturbance complaint.
81. As outlined above, in general the disturbance complainant has alleged the main source of the disturbance is musical entertainment involving a mixture of live bands and DJs played on the external wharf area of the Hotel typically on four days of the week, being Thursday, Friday, Saturday and Sunday. While the Complainant did not specify the time of these alleged disturbances, the time of the Complainant's audio recordings shows the range is typically between approximately 2:00pm and 11:00pm on those days.

82. The submission by Council does not indicate there has been undue disturbance. The two complaints Council had received were regarding allegations the Hotel was breaching its DA conditions concerning noise and the placement of the stage and speakers in the wharf area of the Hotel. Both were concluded with no further action, with Council finding the *“breaches were minor in nature and did not have any adverse impact upon the amenity of the neighbourhood”*. The submission by Police also does not indicate there has been any undue disturbance despite Police performing 48 business inspections from 1 January 2021 to the date of their submission.
83. I have considered the audio/video recordings made by the Complainant. I note the Complainant states those recordings are evidence of non-compliance, which is disputed by the Hotel. My conclusion is that these recordings would not constitute objective evidence that could establish that the musical entertainment was in breach of the LA10 condition. They were not recorded on an appropriate device or recorded by an independent appropriately qualified person such as an acoustic engineer that would allow the Secretary to rely on them in order to form the basis of any relevant conclusions.
84. I note the Hotel currently maintains a sound level meter register for dates when musical entertainment occurs in the wharf area of the Hotel, as required under the Hotel’s development consent. The Complainant alleges these registers show repeat instances of non-compliance. However, I consider the submissions of the Hotel outlined by Mr [REDACTED] of Spectrum Acoustic Pty Limited as more persuasive, noting compliance or non-compliance with the LA10 noise condition cannot be determined from the sound level meter registers.
85. I have also reviewed L&GNSW compliance holdings and note that since the lodgement of this disturbance complaint, there have been no complaints from other persons regarding noise disturbance from the Hotel.
86. In consideration of the above and the material before me, I am not satisfied there is sufficient evidence to conclude that the Hotel has unduly disturbed the quiet and good order of the neighbourhood.

Regulatory Outcome

87. In deciding the appropriate regulatory outcome, I have considered the statutory considerations, the material set out in **Annexure 1**, and the above finding. I have also had regard to the particular context in which the Hotel operates, noting that it is located in the same general area as the Complainant’s residence and there are multiple other

businesses, including licensed premises, and residential buildings in the same general area.

88. The Complainant's suggestion that a definition of "offensive noise" should be effectively imported from the *Protection of the Environment Operations Act 1997* (NSW) is not an appropriate outcome as that is not a definition that applies under the Liquor Act, and has not been applied in other decisions made under section 79 of the Act. The relevant consideration is whether any disturbance is considered "undue". As I have found above, there is insufficient evidence to make a finding that there is undue disturbance caused by the Hotel.
89. The Complainant's request that the wording of the LA10 condition be amended is also not an appropriate outcome. This condition has standard wording drafted in reference to industry standards. To change the condition in the way the Complainant proposes would impose a regulatory burden on the Hotel that exceeds the requirements of other venues with an LA10 condition. This is particularly so as in this case there is insufficient evidence to determine there has been undue disturbance caused by the Hotel.
90. The Complainant has also alleged DA breaches on the part of the Hotel regarding noise disturbance. Any non-compliance with DA conditions is a matter for Council and NSW Police to determine, and I note that some of these complaints have been investigated by Council with no serious adverse findings made.
91. As I have not found there to be sufficient evidence of undue disturbance, I cannot consider imposing a condition that would limit musical entertainment at the Hotel to its interior areas, also noting that Council, through development consents, has permitted live or musical entertainment on the wharf area of the Hotel. Having considered this and the nature of the Hotel's operation, I find it reasonable to expect some level of noise and disturbance at times from the Hotel's general operation.
92. As a result of the 2018 Disturbance Complaint, the Hotel is already subject to an LA10 condition and a noise limiter condition. The Hotel has provided submissions and documentation that outlines a noise limiter has been installed at the Hotel. I also note the comments made by [REDACTED] of Spectrum Acoustic Pty Ltd that outline that the noise limiter, if utilised appropriately, would ensure the sound equipment does not exceed the LA10. I also have no evidence before me to indicate that the noise limiter is not operating correctly.
93. Having carefully considered the material before me, I have determined to take no further action in this matter. While it is possible that noise disturbance is occurring in the

residences of the complainants, I do not find there is sufficient evidence to determine that the relevant noise disturbance is attributable to the Hotel, or that it has reached the threshold of 'undue'.

94. While I have determined to take no further action in this matter, I remind the Hotel of its ongoing obligation to minimise levels of disturbance from its operations. I strongly recommend that it take the steps recommended by Spectrum Acoustic Pty Ltd to ensure that staff of the Hotel undergo further training from a qualified acoustic consultant to ensure full understanding of the required noise testing procedures, and accompany their noise measurement records with additional notes as suggested. The Hotel should be aware that if fresh and direct evidence is presented demonstrating undue disturbance, it is open for the matter to be reconsidered and for formal regulatory action to be taken.

Decision Date: 26 April 2023



Jane Lin

Executive Director, Regulatory Operations & Enforcement

Liquor & Gaming NSW

Delegate of the Secretary, 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 24 May 2023. 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 <https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/disturbance-decisions>.



Annexure 1

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

1. Copy of the liquor licence dated 17 March 2022.
2. Section 79 Disturbance Complaint lodged by the Complainant on 10 January 2022.
3. Submission from NSW Police received on 25 February 2022.
4. Submission from the Hotel received on 31 March 2022.
5. Submission from Council received on 1 April 2022.
6. Further submission from Council received on 20 April 2022.
7. Final Submission from the Complainant received on 26 April 2022.
8. Final Submission from the Hotel received on 19 May 2022.