

FILE NO: A19/0015116

COMPLAINANT: [REDACTED]

LICENSED PREMISES: Thirroul Beach Motel - LIQO660032947

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, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW (L&GNSW) a delegate of the Secretary, Department of Customer Service, in relation to the disturbance complaint made against Thirroul Beach Motel 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. 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 15 April 2019, [REDACTED] (the complainant) of [REDACTED] [REDACTED] lodged a complaint in relation to Thirroul Beach Motel (the venue) alleging undue disturbance to the quiet and good order of the neighbourhood. The complainant lodged the complaint as a resident authorised by 12 other residents.
6. The complainant alleges weekly disturbances from amplified music, operational noise, patron noise and antisocial behaviour from patrons. The complainant submits the primary source of disturbance is from the restaurant of the venue, which trades as Jose Jones Restaurant and Bar (Jose Jones).
7. The complainant seeks a variety of remedies, including:
 - (a) Revocation of the Primary Service Authorisation (PSA) endorsed on the venue's licence.
 - (b) A condition be imposed requiring sufficient soundproofing be installed in the alfresco area of Jose Jones.
 - (c) A condition be imposed that prohibits amplified music in the alfresco area of Jose Jones.
 - (d) The service of liquor to cease at 10:00pm.
 - (e) The venue consult with local community members.
 - (f) Data on noise levels recorded by staff of the venue be made available to local residents on request.
 - (g) Patronage be limited to 39 in the alfresco area of Jose Jones, as per the venue's lapsed development consent.
8. Between 14 June 2019 and 20 September 2019 various submissions were lodged by all parties. A list of material before the delegate is set out in Annexure 1.

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

9. The Act requires that the Secretary have regard to the following statutory considerations.
10. *The order of occupancy between the licensed premises and the complainant* – the venue was granted a liquor licence on 17 June 2016. At the time of lodging the complaint, the complainant had resided at her residence for approximately six years and 10 months. In these circumstances, I am satisfied the order of occupancy is in favour of the complainant.
11. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – there is no evidence of any structural changes to either the venue or the complainant's residence. The material suggests that a Development Application (DA) has been submitted with Wollongong City Council (Council) seeking the installation of a glass panel around the perimeter of the alfresco area of Jose Jones. The Artists' Outlook Pty Ltd has been the corporate licensee and business owner of the venue since commencement of the licence. Mr Jamien Bannister is listed as Approved Manager from 9 March 2017, and Mr Joseph McGuinness has been the premises owner since commencement of the licence.
12. *Any changes in the activities conducted on the licensed premises over a period of time* – L&GNSW records indicate on 8 November 2016 the business type of the licence was updated to include a restaurant classification, permitting the sale or supply of liquor with a meal. On 3 July 2017 the venue was granted a PSA, permitting the sale or supply of liquor without a meal within Jose Jones. The complainant submits that since the venue was authorised to operate as a restaurant, disturbances have arisen and since the PSA was granted it has transitioned into bar with regular live music, attracting a younger demographic of patrons and creating a 'beer garden' atmosphere. This is disputed by Mr McGuinness who contends Jose Jones is a fine dining restaurant attracting urban professionals, couples and families.

Other Considerations

Undue disturbance

13. I am not satisfied the material before me is sufficient to support a finding the venue has caused undue disturbance to the neighbourhood. In making this finding, I have balanced the submissions made by the business owner, the complainant, NSW Police and Council.
14. The venue is located at 222 to 226 Lawrence Hargrave Drive, Thirroul. It is surrounded by residential dwellings and a small number of commercial premises. Opposite the venue and across Lawrence Hargrave Drive is a small commercial shop, a single storey house

and a three storey unit block where the complainant and a number of the authorising residents reside. The remaining authorising residents are spread out in their location including behind the venue on [REDACTED] and adjacent to the venue along [REDACTED]. The only other licensed premises nearby is a restaurant located at 216 to 218 Lawrence Hargrave Drive, Thirroul.

15. The venue consists of three separate areas, the motel, Jose Jones and the first floor above Jose Jones which operates as a hostel. Jose Jones is adjacent to the motel and includes an indoor dining and bar area and an alfresco area. It appears the venue's liquor licence applies to the motel and Jose Jones only. The material further indicates that the venue's ownership has also operated an 'Australian Surf Tours Staff House' located on the adjacent lot at 220 Lawrence Hargrave Drive. This premises is not licensed.
16. The trading hours of the venue vary depending on the area and time of the week. The motel accommodation area is licensed from 5:00am to 12:00 midnight Monday to Saturday, and from 10:00am to 10:00pm on Sundays. The internal areas of Jose Jones are authorised to trade from 10:00am to 10:00pm Monday to Wednesday and Sundays, and from 10:00am to 12:00 midnight Thursday to Saturday. The alfresco area of Jose Jones has authorised trading hours of 10:00am to 10:00pm each day of the week.
17. The complaint alleges disturbances from several sources including:
 - (a) Loud amplified music (live music and DJs).
 - (b) Patron noise including chatter and shouting.
 - (c) General bar and kitchen noise such as bell chimes.
 - (d) Anti-social behaviour from patrons including intoxicated patrons.
 - (e) Noise from staff and patrons on the hostel balconies above Jose Jones noise from patrons and surf school students gathering in the venue's carpark.
18. The complainant submits disturbance is unbearable when there is amplified music and 20 or more patrons raising their voices to speak to each other in the alfresco area of Jose Jones. The complainant also submits that after 10:00pm the venue carpark and hostel balconies above Jose Jones are utilised by staff and patrons causing further disturbance.
19. The complainant makes further allegations of undue disturbance caused by the premises next to the venue located at 220 Lawrence Hargrave Drive, Thirroul. The complainant states this premises is owned by the business owner of the venue and operates as a surf school. It is claimed that staff and surf school students socialise in the carpark and

balconies, causing disturbance to the neighbourhood, particularly residences behind the venue on Redman Avenue.

20. The complainant has provided a number of recorded videos taken from inside the complainant's residence. Music and chatter from the venue is audible, particularly during lulls in traffic.
21. On behalf of the venue, Mr McGuinness strongly denies certain aspects of the complaint, including the use of DJs, the demographic of patrons, the operation of Jose Jones as a bar, contending Jose Jones is an upmarket, family friendly, fine dining restaurant. He further submits that the complainant has been unremitting with her complaints to Council, Police and L&GNSW and continually harasses staff and management.
22. On 14 June 2019, Police provided a submission in relation to the complaint. Police advise the COPS computer system does not show any recorded entries in relation to noise or other disturbance complaints at the venue since the PSA was granted. Police note this is not indicative of actual Police attendance at the venue in relation to disturbance complainants as they are able to deal and acquit complaints through the Computer Aided Dispatch system (CAD). As specific dates and times of calls to Police were not contained within the complaint, searches of the CAD system were not performed.
23. On 18 June 2019, Council provided a submission in response to the complaint. Council submit that complaints have been received in relation to the operation of the venue, but no further detail is provided. Council also advise the consent which permitted public dining (DA-2016/510) appeared to have lapsed on 21 June 2017, and at the time of writing no applications in respect of the venue had been lodged. A review of Council records indicates that a DA to extend this consent has since been lodged by the venue.
24. On Saturday 29 June 2019 about 9:00pm, L&GNSW officers attended the venue. Approximately 15 patrons were observed at Jose Jones with background music of a soft folk style being played inside. No noise from background music or patrons in the alfresco area was audible at the boundary of the complainant. The only audible noise observed at this location was from traffic.
25. L&GNSW officers also attended the venue in 2017 in relation to a previous disturbance complaint from the complainant. On Friday 1 September 2017 about 9:00pm, officers observed approximately 30 patrons dining and consuming liquor with background music played. The music was not deemed to be loud, with passing traffic observed to be significantly louder.

26. In response to the disturbance complaint, the business owner engaged Harwood Acoustics to conduct a noise compliance assessment of Jose Jones against the LA10 noise standard on Friday 2 August 2019 (5:15pm to 5.25pm and 9:20pm to 9.35pm) and Sunday 4 August 2019 (1:30pm to 1:45pm and 3:45pm to 4:00pm). The LA10 noise standard provides a useful technical benchmark which can assist in any determination as to whether undue disturbance has occurred.
27. Following the test an acoustic report was provided to L&GNSW. The report advises on both dates of assessment music was provided in the form of a solo artist with a guitar and amplification. On the first date of assessment, Jose Jones was at capacity with 50 patrons in the alfresco area and on the second date, 30 were patrons present. Receptors were positioned at the boundary of the complainant's dwelling and adjacent to the venue at 220 Lawrence Hargrave Drive.
28. The report found that measured noise levels were below the acceptable noise limits at each receptor during each of the surveys. Relevantly, the report notes that this finding was made despite some extraneous background noise being included in the venue's noise levels, leading to 'conservatively high' readings being attributed to the venue. The report also noted that noise from Jose Jones was 'barely audible and often not audible during the noise surveys whilst steady flows of traffic were passing'.
29. The report advises that the style and volume of music played at Jose Jones are significant factors in complying with acceptable noise limits. The report provides several recommendations to ensure compliance with the LA10 standard, including:
- (a) Avoiding the use of drums and bass guitars.
 - (b) No amplified music after 10.30pm.
 - (c) No noise producing activity after midnight on any day.
 - (d) Management procedures should be put in place to prevent shouting, swearing, loud speech or other unsociable behaviour so far as is reasonably practicable.
30. The report further acknowledges that the venue plans to install a glass screen around the alfresco area of Jose Jones and notes that this will reduce the level of noise from music and patrons at the receptor locations.
31. On the material before me, I have concluded there is insufficient evidence to support a finding the venue has caused undue disturbance in relation to all aspects of the complaint. In reaching this conclusion I have given significant weight to the acoustic report provided by the venue which demonstrated that noise levels were within acceptable limits during

testing conditions similar to the video footage provided by the complainant, that is, live music and capacity patronage in the alfresco area of Jose Jones. I have also considered the lack of objective evidence from Police or Council demonstrating that noise from the venue is an issue, and the observations of L&GNSW staff during the above mentioned inspections, noting the 2019 inspection was not conducted during peak trade. I also note that part of the alleged disturbance is from unlicensed premises and outside the jurisdiction of L&GNSW.

Action taken to mitigate disturbance

32. In considering whether to impose conditions on the liquor licence, I have balanced the submission of all parties, having specific regard to any action taken by the business owner in response to the complaint and the effectiveness of any measures that have been implemented to address disturbance.
33. Mr McGuinness submits that the venue has implemented a range of measures to mitigate disturbance, including:
 - (a) The engagement of an independent noise assessor.
 - (b) Live music is monitored by staff who undertake decibel readings to ensure they are under specified levels. Staff also complete a sound checklist.
 - (c) Speakers have been detached from their mounts and repositioned.
 - (d) The venue's plan of management has been updated in relation to noise management.
 - (e) DJs are not permitted (noting that the venue has never engaged a DJ).
 - (f) Live music indoors after 6:00pm.
 - (g) A DA has been lodged with Council for the installation of a glass sound proof barrier around the alfresco area of Jose Jones.
34. The complainant submits the proposed glass panel will be ineffective and that the movement of speakers has had little impact. The complainant further asserts that the timing of the acoustic testing was beneficial to the venue, which is at its busiest during summer, and that there is no evidence that the venue monitors its noise output. The complainant also notes that the testing did not address the use of DJs.

Decision

35. In making my decision, I have considered the submissions on behalf of the venue, the complainant, Police and Council. I have also had regard to the particular context in which the venue operates.

36. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the complainant. I also acknowledge that the venue updating its licence business type and being granted a PSA are significant changes in business activity requiring careful planning and consideration on behalf of the venue.
37. In light of my finding that there is insufficient evidence to conclude the venue has caused undue disturbance, it follows that the extensive outcomes sought by the complainant are unduly burdensome to the venue. However, given the above statutory considerations and proximity of the venue to residences, in my view the potential for undue disturbance exists. I therefore strongly encourage the venue to implement the range of noise mitigating measures mentioned in its submissions on an ongoing basis.
38. I acknowledge the venue's engagement of acoustic consultants demonstrating compliance with the LA10 noise criteria and providing guidance regarding ongoing noise mitigation. I again encourage the venue to implement the recommendations set out in the related report and to strictly adhere to and monitor recommended noise levels. While the complainant has suggested the timing of this acoustic report was beneficial to the venue as it was conducted outside the busier summer months, I note that this was incidental to the timing of the complaint. In a similar way, I note that the inspections conducted by L&GNSW officers in September 2017 and June 2019, were in response to complaints lodged in August 2017 and April 2019 respectively.
39. The issues raised by the complainant regarding the venue operating without or outside council development consents are, particularly in the absence of a finding of undue disturbance, best addressed by Council. Similarly, any disturbance that arises from the unlicensed premises adjacent to the venue would most appropriately be dealt with by Police or Council.
40. In the absence of a finding there has been undue disturbance from the available material, I have decided to take no further action. This decision reflects my conclusion that there is insufficient evidence of undue disturbance and acknowledges the mitigating measures the venue is progressively implementing to improve the management of potential disturbance.
41. Finally, I note the venue has an ongoing obligation to manage and minimise levels of disturbance to the community. I encourage the licensee, owner and venue management to proactively manage noise and patron behaviour to ensure that the venue continues to contribute to, and not detract from, the amenity of the neighbourhood. The venue should

be aware that if fresh and direct evidence be presented demonstrating undue disturbance, it is open for the matter to be reconsidered and for formal regulatory action to be taken.

Decision Date: 25 November 2019



Sean Goodchild

Director Compliance Operations

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Customer Service

Application for review:

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 23/12/19. 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.liquorandgamingnsw.nsw.gov.au

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

1. Section 79 Noise Disturbance Complaint received on 15 April 2019.
2. Police submission dated 12 June 2019.
3. Council submission dated 18 June 2019.
4. Business owner's response dated 19 June 2019.
5. Business owner's legal representative response dated 10 July 2019.
6. Acoustic report dated 9 August 2019.
7. Submission from authorising resident dated 21 August 2019.
8. Complainant submission in reply dated 30 August 2019.
9. Business owner and legal representative's submission in reply dated 20 September 2019.