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**FILE NO:** A19/0016206

**COMPLAINANT:** [REDACTED]

**LICENSED PREMISES:** Halcyon House Cabarita Beach – LIQO660031768

**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, John Coady, Manager Regulatory Interventions Team, a delegate of the Secretary, Department of Customer Service, in relation to the complaint made in respect to Halcyon House Cabarita Beach (the venue) have decided to **issue a warning** to the licensee in the following terms:

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

Details of this condition, including the date it becomes effective, is set out in **Annexure 1**.

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## REASONS FOR DECISION

### Legislative framework

1. Section 79 of the Act provides that a prescribed person may complain to the Secretary, that the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed because of the manner in which the business of the licensed premises

is conducted, or the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

2. For the purpose of section 79 of the Act, a person who has standing to make a complaint includes a person who is a resident in the neighbourhood of the licensed premises and is authorised in writing by two or more other residents.
3. Section 80 of the Act enables the Secretary to deal with a complaint by way of written submissions from the licensee and any other person the Secretary considers appropriate. After dealing with the complaint, section 81 of the Act provides that the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no action.
4. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and must have regard to the matters set out in section 3(2) which are:
  - a) the need to minimise harm associated with the misuse and abuse of liquor;
  - b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, services and consumption of liquor; and,
  - c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

## **The complaint and background information**

### *The complaint*

5. On 26 November 2019, [REDACTED] lodged a complaint with Liquor & Gaming NSW (L&GNSW) alleging undue disturbance from the operation of the venue. The complainant lodged this complaint as a resident authorised by four other residents.
6. The complainant alleges disturbance is a result of patron noise from both inside and outdoor areas of the venue, as well as from patrons as they exit the venue. Disturbance allegedly occurs most frequently on Friday and Saturday afternoons and nights. The complainant further alleges that disturbance is caused by a public address system used during functions, and the removal of glass bottles. It is alleged that nearby residents are restricted in the use of their homes, with doors and windows needing to remain shut during both the day and night, as well as being unable to use outdoor spaces such as verandas due to excess patron noise.

7. The complainant seeks a reduction in noise emitted from the use of both internal and external parts of the venue. The complainant requests that the venue complies with existing noise related conditions on its licence.
8. On 11 November 2019, an additional complaint was made to L&GNSW alleging disturbance from the operation of the venue. Following assessment of this complaint, the additional complainant was advised of the existing disturbance matter and was given the opportunity to join the existing complaint. On 6 January 2020, this complainant was added to the disturbance complaint, increasing the number of authorising residents to five.

*The venue, licence details, compliance history*

9. The venue is located at 19-21 Cypress Crescent, Cabarita Beach. The complainant and venue share a common fence, being the rear fence of each property. The venue is permitted to sell liquor in its indoor areas between 8:00am and midnight, Monday to Saturday. The venue is further permitted to sell liquor in its outdoor area between 10:00am and 10:00pm Monday to Saturday. On Sundays, the venue is permitted to sell liquor in both the indoor and outdoor areas between 10:00am and midnight, under an extended trade authorisation (ETA) granted on 31 January 2017.
10. The venue is currently subject to an LA10 noise restriction condition, a plan of management condition, social impact and disturbance complaint register conditions. These conditions were imposed by a delegate of Authority at the time the ETA was granted in 2017.
11. On 25 September 2017, as a result of a prior disturbance complaint made pursuant to section 79 of the Act, the then delegate of the Department of Industry issued a warning to the venue on the basis that undue disturbance had at times been caused by the venue, particularly during functions and events (the 2017 Decision). The delegate was of the view that strict compliance with the venue's recently imposed conditions would maintain the amenity of the neighbourhood, but indicated that any escalation of disturbance issues could see further regulatory intervention. The 2017 Decision also relevantly noted that residences were very close in proximity to the function and outdoor operations of the venue, making disturbance difficult to manage.

**Submissions**

12. Between 12 December 2019 and 24 February 2021, various material was received from parties to the complaint, NSW Police and Tweed Shire Council (Council). The material that is before the delegate is set out in **Annexure 1** and summarised below.

### *Council*

13. Council advised that they issued a penalty notice to the venue on 20 December 2019 for a breach of its development consent in November 2019. Council confirmed that the penalty notice was a direct result of noise complaints from nearby residents.
14. Council subsequently noted that, on 25 November 2020, the construction of an acoustic wall and roof was approved (DA20/0288). Council advised that these alterations would provide appropriate acoustic screening for residents to the south of the venue (Palm Avenue) but will not change the acoustic outcomes for those to the north (Cypress Avenue). Council also noted that the venue has five years to commence construction from 25 November 2020.

### *Police*

15. Tweed-Byron Police District advised that, as of 2 January 2020, they had no adverse records in relation to the venue. Police advised, however, they were aware of recent noise complaints made in October 2019.

### *Venue response to complaint*

16. In response to the complaint, the venue provided a submission on 19 December 2019. The approved manager, Mr Mauro De Riso, submitted that all alcohol sales cease at 10:00pm and guests are taken inside with all windows and doors closed. He also advised that outside music volume is reduced at 6:00pm and turned off completely by 10:00pm.
17. Mr De Riso confirmed that a bottle crusher is in use at the venue. Bottles are stored and only moved between the hours of 10:00am and 5:00pm. They have also introduced a food compost system to limit the amount of garbage collection required.
18. Included with the submission was a letter from MWA Environmental who conducted noise testing at the venue. Testing was conducted between 4:00pm and 11:00pm on Saturday 7 December 2019 and between 9:00am and 11:00am on Sunday 8 December 2019.
19. The report concluded that the venue was operating in accordance with its noise requirements, when operating low level background music. The report noted that patrons were the main source of noise from the venue, but this was not considered excessive, particularly considering the restaurant was full, internal and external facilities were in use, and doors and windows remained open until 10:00pm. Background music was playing through amplified speakers and was at a level that permitted speaking.

20. Staff were also observed and interviewed throughout the testing process. They were found to be knowledgeable and were observed to request patrons to reduce noise when needed.

*Complainant final submission and further complaint material*

21. In response to the venue submission, the complainant provided a final submission on 14 January 2020. The complainant disputes claims that the venue always ceases outdoor operation at 10:00pm and believes that the venue is operating outside its authorised hours.
22. The complainant feels they have had no recent interaction from the venue to resolve complaints. The complainant confirmed that the venue has previously spoken to them in 2017 and 2018 regarding the installation of an acoustic wall and that they had agreed to its installation. Residents were informed that installation would occur during the winter break, however this never occurred.
23. In response to the acoustic report, the complainant believes that the report findings may be conflicted, as the report was commissioned by the venue. Further, the complainant submits that the observation time is insufficient to garner a full understanding of the operation of the venue and the potential noise impact. The complainant also believes that the report lacks any observation of noise generated from the accommodation rooms within the venue.
24. Additional complaint material was forwarded to L&GNSW by an authorising resident to the complaint on 20 March 2020 alleging disturbance on 7 March 2020, 15 March 2020 and 19 March 2020. In summary, this complaint material alleges disturbance caused by an outdoor function (7 March 2020), and groups of patrons in the outdoor bar area after 10:00pm (15 March 2020 and 19 March 2020).
25. It is noted that between November 2020 and February 2021, the complainant and an authorising resident to the complaint contacted L&GNSW to advise that the venue continues to disturb the neighbourhood.

*Venue final submission and other material*

26. On 5 February 2020, Mr De Riso stated that the venue adheres to its outdoor trading hours, guests are inside by 10:00pm and all liquor sales after this time come from the restaurant bar. This applies for special events, including New Year's Eve. He submits that all noise emissions from the venue comply with noise parameters provided by the venue's

acoustic expert and the related licence conditions. A noise meter is used regularly to check and manage noise levels.

27. Regarding guest noise from room balconies, Mr De Riso submits that it is in the venue's best interest, as well as the best interest of its neighbours, to ensure guests are quiet. This is to protect the experience of other hotel guests. He states a 24-hour reception operates to manage guests and the site after the restaurant closes.
28. Mr De Riso claims that staff proactively monitor and seek the reduction of noise generated by guests utilising outdoor areas and leaving the venue. He submits the venue will install signage in the car park and front concourse area to request patrons leave quietly.
29. Included in the venue's final submission was correspondence from MWA Environmental regarding a 30 December 2019 consultation at the venue. During the consultation, noise limits were determined for the upcoming entertainment on New Year's Eve, to ensure its use would comply with the existing LA10 condition. The acoustic consultant further advised that the installation of an acoustic screen would enhance the amenity of the complainant's residence. He advised he was engaging with the venue to design the acoustic screen.
30. In response to residents' concerns regarding the validity of information provided from acoustic testing, the acoustic consultant also wished to confirm his advice was impartial and without bias, despite the venue paying for his services.
31. On 12 June 2020, Mr De Riso responded to the additional complaint material relating to alleged disturbance in March 2020. He submitted that the venue had no record of complaints in relation to the evenings in question and rejects the information set out in the additional complaint material. Mr De Riso further noted that the venue fronts a public park which is frequented by members of the public, indicating there is a possibility it may not have been patrons of the venue causing this alleged disturbance.
32. On 23 June 2020, L&GNSW sought further information from the venue in relation to its existing plan of management and complaint register conditions, as well as further information regarding the installation of an acoustic wall. On 3 August 2020, the venue provided L&GNSW with a copy of the plans for the proposed acoustic wall and a recent copy of its complaint register, which included complaints received between 7 January 2018 and 8 December 2019.
33. On 13 August 2020, Mr De Riso provided a copy of the venue's Noise Management Plan, and on 18 September 2020 the venue's Plan of Management.

34. On 24 February 2021, Mr De Riso indicated construction of the acoustic wall would commence in the coming weeks.

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

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

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

36. The licensed premises has operated under the current liquor licence since 6 February 2014. This does not predate the complainant, who has resided at his current address for 18 years. 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*

37. There is no indication that structural changes have been made to the complainant's residence. Structural changes were made to the venue as a result of a development application (DA) approved by Council in 2013 (DA12/0170). This saw the construction of additional accommodation suites, a function area with the capacity to accommodate 120 guests, a restaurant, and indoor and outdoor bars.
38. As referenced above, on 25 November 2020, the construction of an acoustic wall and roof was approved by Council (DA20/0288). It is noted that the venue has five years to commence construction from the approval date.

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

39. Before becoming licensed, the venue offered accommodation only. It now offers other facilities including a restaurant and outdoor bar areas and the hosting of functions.

**Findings and Decision**

*Undue disturbance*

40. 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, NSW Police and Council.
41. While a level of disturbance from the normal operation of the venue is to be expected, I am satisfied that there is sufficient evidence before me to reasonably conclude that the venue has, at times, unduly disturbed the quiet and good order of the neighbourhood.

While there is a lack of detailed objective evidence from local enforcement agencies, I have placed weight on the fact Council have recently taken regulatory action against the venue as a result of disturbance complaints in the form of a penalty notice and written communication requesting certain noise-mitigating measures are adhered to.

42. In making a finding of undue disturbance, I have also been persuaded by the layout of the venue and the close proximity of its outdoor areas to the complainant and authorising residents, without any acoustic screening in place. I further note the number of authorising residents to the complaint and the previous finding of undue disturbance against the venue in 2017 which resulted in a warning to the licensee pursuant to section 81 of the Act.
43. I acknowledge that the acoustic assessment provided by the venue indicated compliance with all licence conditions. I do not question the integrity of this assessment, however I note it captures only a small sample size of the venue's total operation.

#### *Regulatory Outcome*

44. In deciding the appropriate regulatory outcome is in this instance, I have considered the statutory considerations, the material set out in Annexure 1, and the above finding of undue disturbance. I have also had regard to the particular context in which the venue operates, noting its regional location and the practical implications this has from a monitoring and enforceability viewpoint.
45. I acknowledge the order of occupancy is in favour of the complainant and that the venue's physical structure and business activities altered significantly after it became licenced and offered dining, outdoor bar facilities, and the hosting of functions. In this context, it is reasonable to state that significant responsibility lies on the venue to ensure it does not disturb the quiet and good order of the neighbourhood, particularly those residents who purchased their homes next to a motel operation only.
46. On this point, I acknowledge the noise mitigation strategies the venue has adopted over time to reduce its noise impact. I am particularly encouraged by the recent development of a Noise Management Plan and the Council approval to build acoustic screening, which the venue has indicated will occur shortly. I note that while this screening should result in acoustic improvements to residences on the southern boundary, the scope of works will not change the acoustic outcomes for those to the north. In light of the fact there are authorising residents to this complaint who reside on the northern boundary of the venue, I strongly recommend the venue continue to explore noise mitigating options with a

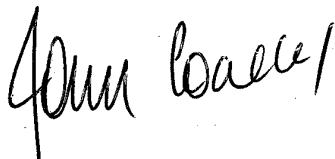


qualified acoustic engineer and Council to ensure these residents do not continue to be affected.

47. I note under the noise management plan that venue staff are briefed to monitor noise levels using an in-house sound level meter to verify compliance with noise limits. There is no evidence before me to demonstrate that this ensures compliance with the LA10 condition and in my view is not a long-term solution. Should the venue wish to continue to provide amplified entertainment and operate a PA system, I strongly recommend it engage a qualified acoustic engineer to install a noise limiter to ensure compliance with this condition.
48. I note condition 3060 on the venue's liquor licence states '*The premises are to be operated at all times in accordance with the Plan of Management dated October 2016 as may be varied from time to time after consultation with the Local Area Commander*'. I have reviewed the venue's Plan of Management alongside its recently created Noise Management Plan, noting the latter, naturally, deals with noise mitigation more thoroughly. In light of this, and noting the wording of condition 3060, it would appear to be an opportune time for the venue's Plan of Management referenced by condition 3060 to be updated in consultation with local Police. The importance of this consultation can't be over-stated as, given the regional location of the venue, enforceability of the venue's licence conditions on a day-to-day basis is primarily achievable via local Police. I request that the approved manager, Mr Mauro De Riso, provide evidence that they have consulted with NSW Police and provide a copy of the venue's updated and signed plan of management to this office **within 28 days of the date of this decision**.
49. Based on the evidence at hand, in my view there are no licence conditions appropriate to impose on the venue's licence at this stage, particularly after the venue's Plan of Management has been updated to incorporate the Noise Management Plan, and the above recommendations to install a noise limiter and explore noise mitigating measures for residents on the northern boundary are adopted. As such, having carefully considered the material before me, I have decided to issue the licensee a further formal warning under section 81(d) of the Act.
50. I am satisfied that this decision is a proportionate regulatory response to the disturbance identified in the complaint and the strength of the evidence at hand. Noting the residential area in which the venue is located and the order of occupancy being in favour of the complainant, I again remind the venue that it has a strong obligation to take all disturbance complaints seriously and proactively manage any potential disturbance that may be caused by the venue. This includes investigating and adopting the recommendations set

out in this decision. In the event there is an escalation of disturbance or fresh and direct evidence demonstrating poor management of disturbance issues, it is open for the matter to be reconsidered and for further regulatory intervention to occur.

**Decision Date:** 8 March 2021



**John Coady**

**Manager, Regulatory Interventions Team**

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Customer Service

**Application for review:**

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 5 April 2021. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at

In accordance with section 36C of the Gaming and Liquor Administration Act 2007 this decision will be published on the Liquor & Gaming NSW website at [www.liquorandgamingnsw.nsw.gov.au](http://www.liquorandgamingnsw.nsw.gov.au)

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

1. Section 79 Disturbance Complaint lodged by the complainant on 26 November 2019.
2. Material received from Tweed Shire Council received on 15 January 2020, 19 November 2020, 18 February 2021.
3. Submission from NSW Police received on 2 January 2020.
4. Venue submission in response to complaint received on 19 December 2019.
5. Final submission from complainant received on 15 January 2020 and further complaint material received on 20 March 2020.
6. Venue final submission received on 5 February 2020 and response to further complaint material received on 12 June 2020.
7. Emails from the venue enclosing complaint register (received on 3 August 2020), Noise Management Plan (received on 13 August 2020) and Plan of Management (received on 18 September 2020).
8. Email from the venue in relation to the construction of an acoustic wall received on 24 February 2021.