



FILE NO: A18/0014060

COMPLAINANT: [REDACTED]

LICENSED PREMISES: Basement on Market Street, Newcastle – LIQS220000039

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 Industry, in relation to the complaint made in respect to Basement on Market Street, Newcastle – LIQS220000039 have decided to **issue a warning** to the licensee in the following terms:

Under section 81(d) of the Liquor Act 2007, I, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW, a delegate of the Secretary, Department of Industry, warn Jordan Mizrahi, licensee of the Basement on Market Street, that he must ensure that future disturbance caused by the operation of the venue, including the provision of amplified entertainment and patron noise, is minimised by adequate measures including the closure of doors and windows at appropriate times.

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 19 November 2018, [REDACTED] (the complainant), of [REDACTED], lodged a section 79 noise disturbance complaint with L&GNSW alleging undue disturbance to the quiet and good order of the neighbourhood caused by amplified music and patron noise emanating from Basement on Market Street (the venue), located at 1/2 Market Street, Newcastle. The complainant lodged the complaint as a resident authorised by two other residents who reside in the [REDACTED] building (the residence) located at [REDACTED].
6. The complainant alleges disturbance is caused by excessive noise from both amplified music and patron noise. The complainant alleges the disturbance occurs on Thursday, Friday and Saturday nights, however the disturbance is not isolated to these nights. The disturbance forces the complainant to close doors and windows at their residence, which does not totally eliminate amplified noise, bass beats and patron noise from penetrating the walls of the residence.

7. The complainant seeks a variety of remedies, including adherence to the LA10 noise condition at all times, installing a noise limiter, making appropriate noise reduction additions to the venue, closing all doors and windows by 6:00pm, advising patrons about disturbance and respecting neighbours and returning furniture in a quiet manner when the venue is closing.
8. Between 21 November 2018 and 11 April 2019, various submissions were lodged by all parties.

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 has operated at its present site since 19 August 2015. The complainant has lived at the residence for approximately four years. The two authorising residents to the complaint have lived at the residence for approximately 17 and 20 years. The complainant's occupancy predates that of the venue, though not by a great deal of time. I also have regard to the authorising residents who have resided at their current address for a much greater period of time. I am satisfied that 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* – the venue has been operated as a small bar since it commenced trading in August 2015. Throughout the submission process, the parties have argued about the additional outdoor area which the licensee was permitted to utilise as part of a council trial of outdoor trading in Market Street. The outdoor area in question was previously a parking area. The effect of this added outdoor area reduced the proximity of the boundary of the venue to the residence from 20 metres to 11 metres. The licensee advised in his submission of 9 April 2019 that the lease for this additional area ceased at the end of March 2019. The outdoor area is now confined to the footway just outside the venue.
12. *Any changes in the activities conducted on the licensed premises over a period of time* – The complainant submits the venue has varied its activities since opening in 2015. The venue hosts live amplified music events, parties and functions multiple times a week. These activities have the effect of transforming the venue from a small bar to a nightclub. The complainant alleges the addition of a 'happy hour' which advertises cheap drinks and food, will attract a 'university' or 'pub' style patronage. The licensee

disagrees and submits the venue's target demographic is patrons aged around 35 – 70 years old due to the food and live entertainment options on offer. The licensee also submits the promotional material for the venue is not targeted towards young people and he does not consider nearby nightclub venues as competitors due to the different demographics targeted.

Other Considerations

Undue disturbance

13. I am satisfied the material before me is sufficient to support a finding the venue has at times in the past, caused undue disturbance to the neighbourhood. In making this finding, I have balanced the submissions made by the licensee, the complainant, NSW Police and Council.
14. The venue holds a small bar liquor licence. Mr Jordan Mizrahi has been the licensee and business owner since the grant of the licence in August 2015. The venue is situated at 2 Market Street, Newcastle. It occupies the ground floor of a multistorey building, which houses both residential and commercial premises. In this part of Newcastle, there are a number of similar premises housed in both residential and commercial properties. Market Street is a no through road shared by pedestrians and vehicles and sits adjacent to Hunter Street Mall, which is housed in the Newcastle CBD. Within 300 metres of the venue there are numerous licensed venues including three large hotels, the closest being the Queens Wharf Hotel which is about 60 metres away. Also, a disused railway line has been transformed into the Market Street Lawn, which acts as a community space.
15. The venue is located [REDACTED] from the complainant's residence, however was only [REDACTED] from the complainant's residence when the outdoor area was in use. The venue faces Market Street, towards the back of the residence. The residence extends from the corner of Scott and Market Street and runs parallel to the venue. The residence also faces the Three Bears Kitchen, a café holding an on-premises restaurant licence which trades from 7:00am to 3:00pm (though is licensed to trade until 10:00pm). The residence is also subject to noise from other venues in the nearby area, including ambient noise which is common in a CBD, including traffic and urban hum. This is referenced in the acoustic response provided by Mr Ross Hodge dated March 2019, which is highlighted further below, and states 'the ambient noise in the vicinity of the bar and nearby residences is generally higher than the noise criteria due to the contribution of the various noise sources in the inner city area'.

16. The venue is open from 12:00pm to midnight seven days a week, with the outdoor area in use until 9:00pm. The venue hosts live jazz music events on most Thursday nights. Relevantly, the venue's licence is already subject to an LA10 noise condition, which was imposed at the grant of the licence. Other conditions on the licence include outdoor trading hours be ceased at 9:00pm, reduce noise to a background level 30 minutes prior to closure, and liquor can only be consumed outside at the seated tables within the outdoor dining area in conjunction with a meal.
17. The complainant and authorising residents have previously lodged complaints with L&GNSW, Police and Council. The complainant submits they have communicated with these government bodies over 100 times regarding noise disturbance in connection with the venue. L&GNSW records indicate that since 2016, there have been nine noise complaints in relation to the venue. All complaints have come from parties to this complaint. Each of these complaints relate to disturbance caused by patron noise, live or amplified music.
18. Between 2016-2019, L&GNSW have conducted a total of 34 audits of the venue, including remote desk audits and on-site inspections. Of these audits and inspections, five breaches have been identified on two occasions. One inspection identified minors in the venue and several breaches of licence conditions relating to service of beverages and seating of patrons. Four Warning Notices and one Penalty Notice have been issued to the licensee in relation to these breaches. Of the ten on-site inspections by L&GNSW Inspectors identified no undue noise disturbance. All inspections were tasked with the specific objective of monitoring and observing noise and disturbance levels at the venue.
19. Since the initiation of this matter, L&GNSW has received three submissions from the complainant about disturbance from the venue. This correspondence has been accompanied by photographs of the venue from different apartments within the complainant's residence. The complainant alleges disturbance is caused mainly by amplified music and excessive noise from patrons. The photographs highlight instances where windows and doors are open during live performances and at times they are meant to be closed, patrons standing outside the outdoor area, and patrons remaining within the outdoor area once closed.
20. Police provided a submission on 20 November 2018. Police submit that between 17 September 2015 and 20 October 2018. They have responded to two noise complaints and have conducted four business inspections relating to noise disturbance. Half of the inspections caused Police to speak with venue management regarding the noise, with

one instance resulting in Police issuing a noise abatement order. The two most recent inspections in 2018 record minimal noise being heard from the venue. Police also submit they object to granting applications to lift conditions on the liquor licence relating to the outdoor trading area and seating. Police disapprove of a change because it may unduly affect noise disturbance at the venue due to patrons being able to congregate in groups and in higher numbers.

21. Council provided their submission on 26 November 2018. Council submit that between 7 April 2017 and 5 October 2018 they have received eight noise disturbance complaints about the venue. Council did not provide any details regarding the outcome of these complaints. Council provided a copy of Development Application 2014/1322 which identifies permissible operating hours, confirmed there are no pending development applications and they did not consider any other matter relevant.
22. The DA and liquor licence indicate the venue must comply with the LA10 noise criteria between 7:00am and 12:00 midnight at the boundary of any affected residence, doors must be closed at 6:00pm and all external windows must be closed between 10:00pm and 12:00am during the provision of low level music. I also note there is some dispute as to whether the three bi fold doors are windows, and therefore are not required to be closed at 6:00pm. Further, drums and drum machines are not permitted for live performances.
23. The licensee has submitted two noise impact assessments and one acoustic response relating to the venue. The first noise impact assessment was obtained in December 2014 by Muller Acoustic Consulting when the venue was known as Zula Bar. The second noise impact assessment was obtained in January 2019 by Mr Ross Hodge of Spectrum Acoustics. The acoustic response, also by Mr Hodge, was obtained in March 2019 and was made to address relevant acoustic components found in the assessment of January 2019. To ensure the evidence and data for this decision is both current and relevant, I will only be discussing the two noise impact assessments from January and March 2019.
24. The licensee submits the venue operates within the permitted noise levels required by its liquor licence. The licensee had two recent noise impact assessments performed by Spectrum Acoustics in January 2019 and March 2019 in response to the complaint. Testing was completed both within the venue and at the boundary of the residence facing towards the venue. Following testing, the acoustic consultant recommended the following:

- a) Doors and windows to Market Street must be closed at all times while there is entertainment at the venue;
 - b) Performers, bands and speakers must be set up to face towards the bar and not towards the outdoor area;
 - c) A sound level meter be used to measure noise level at a location of three metres from the speakers on an hourly basis to ensure compliance;
 - d) The first measurement should be made within 10 minutes of the entertainment commencing on any given day;
 - e) Measurements be made by a responsible person who is adequately trained to take accurate and valid noise measurements. All readings must be entered into a register and signed off by this person with records kept up to three months;
 - f) The noise level measures at three metres from the speaker is to be limited to 80dB;
 - g) Outdoor areas to the venue must be closed at 10pm and all patrons moved inside the building;
 - h) Staff be instructed about potential consequences of noise exceedances and the level of noise that is appropriate to the residential area; and
 - i) Staff to move quickly to quieten down any patrons who are creating, or showing potential to create excessive noise.
25. The assessments indicate that noise from entertainment in the venue will comply with the LA10 provided the doors and windows are closed and the noise level is regulated by a sound level meter. Noise from patrons at the venue may also cause a negligible exceedance of the LA10 noise criteria, so long as the venue does not allow patrons to be in outdoor areas of the venue after 10pm. The assessment carried out in January 2019 notes, however that readings were affected by strong winds and from other ambient noises from within the Newcastle CBD.
26. I now refer to the complainant's response to the findings in the noise impact assessment and subsequent acoustic response. The complainant submits they agree with the findings that the venue be required to close all doors and windows during the provision of live or DJ music within the venue. The complainants however, do not agree that noise emissions from patrons may cause a negligible exceedance of the LA10 noise criteria, rather they submit that through their photographic evidence, the acoustic consultant's hypothesis and recommendations relating to patron noise are flawed and should be

discarded. The complainant goes further, questioning the times and days the venue was tested, which calls into question the validity of the findings.

27. The first test was conducted on the evening of Thursday 29 November 2018, which is normally when the venue hosts live jazz music. The second test, which was conducted regarding patron noise, was conducted on the evening of Friday 8 March 2019. These days are noted by the complainant as being two of the worst nights for disturbance. Testing was completed both inside and outside the venue at the boundary of the residence. The acoustic consultant made findings based on noise levels in the venue and noise at the residence which included all noise, bar noise and a worst case scenario noise reading. Both assessments found that the venue may exceed the LA10 noise condition, but referred to the impact of other noise sources within the CBD, including traffic and urban hum. Recommendations to avoid possible exceedances were made. Considering the above, I do not agree with the complainant's submission that the findings of the acoustic consultant are flawed and have determined the findings are relevant to the complaint.

28. I note that the standard LA10 noise condition, which was developed many years ago in consultation with the acoustic consultant industry, provides a useful technical benchmark which can assist in any determination as to whether undue disturbance has occurred. The condition only sets a requirement that noise from licensed premises not be audible in any habitable room in residential premises between midnight and 7:00am. The complainant alleges that because the venue may breach the LA10 noise condition, in line with the results of the testing, this implies that the venue has already been in breach and is thus causing undue disturbance. While the results of acoustic testing indicate there is potential for the venue to breach the LA10 noise condition if certain recommendations are not implemented, I am not satisfied that this must result in a finding of undue disturbance. Acoustic testing results which illustrate potential non-compliance with the LA10 condition are just one factor among a number of factors in determining whether or not there has been undue disturbance. Testing also in my view provides a snapshot of disturbance over a short period of time and cannot solely determine disturbance over a long period of time. I also note that the LA10 condition does not have any legislative basis.

29. Taken as a whole, the material indicates the venue may have at times in the past caused undue disturbance. I note particularly the evidence presented in the Police submission of historic issues. These instances occurred on 17 September 2015, when a noise abatement order was issued, 23 January 2017 and 29 April 2017. However, aside from these historic issues, the submissions from Police, Council and L&GNSW

inspection records all indicate a relatively low level of disturbance created by the venue. I note in particular the observations of Police contained in their submission. L&GNSW has previously committed substantial resources to resolve this issue, however has been unable to identify undue disturbance.

30. A level of disturbance from the normal operation of a licensed premises is to be expected, including noise from amplified entertainment, patrons, and pedestrian traffic caused by the venue. This may be compounded due to other licensed premises in the areas and disturbance commonly found in a busy town centre. The recommendations made by the acoustic consultant support the licensee's submission that they have not caused undue disturbance, but also provides practical solutions that the licensee can implement to further ensure compliance with the LA10 noise criteria.

Action taken to mitigate disturbance

31. Since the complaint was lodged, the licensee submits that he has implemented the following measures to control disturbance, including:

- a) Restructuring management policies to ensure a more hands on approach to the venue's obligations and responsibilities by the licensee and business owner;
- b) Commissioning two noise impact assessments;
- c) Removing the base sound system following initial noise complaints;
- d) Reducing the live entertainment schedule;
- e) Amending waste disposal hours to reduce noise impacts at the end of the night;
- f) Windows and doors closed by 10pm in accordance with recommendations made by the three noise impact assessments;
- g) Maintaining an incident register from August 2015;
- h) Purchasing a Digitech QM-1589 noise monitoring device which was recommended by a construction engineer with a wealth of knowledge in the acoustic field;
- i) Training led by acoustic consultant on the use of the above noise monitoring device to the licensee and staff. A video of which was included in the licensee's final submission;
- j) Erecting signage at the venue's exit requesting respect for neighbours from departing patrons; and

- k) Voluntarily acquiescing the additional outdoor area, thereby ceasing the lease and reducing the proximity between the venue and residence.
32. The licensee strongly opposed remedies sought by the complainant in this matter. These remedies relate to implementing automatic monitoring devices and automatic closing devices, closing of all doors and windows by 6:00pm, employing security to manage patron egress, and limiting the variety of entertainment offered. The licensee has suggested additional remedies, including closing all windows and doors prior to and for the duration of any live music performance and leaving all outdoor furniture in place on the pathway after close of business to limit noise impacts when returning furniture inside the venue (subject to Council approval). Further, the licensee proposes to continue closing the main access entry at 6:00pm and the window at 10:00pm and setting the noise monitoring instrument at the outset of the evening and keeping it unchanged for the duration for the remainder of the night. This would include adjusting the employment induction pack to reflect acoustic requirements and demonstration of correct use of the noise monitoring instrument.
33. The licensee advised they have invited the complainant to refer any issues they have by contacting them on a separate phone line. This resulted in one of the authorising residents to the complaint to distribute her own correspondence to all neighbours at the residence to report all queries and complaints to L&GNSW and by-pass the alternative phone line. Further, the licensee organised for a cease and desist letter to be sent to this person as they were taking photographs of the venue and patrons both outside and inside the venue. While the licensee admits mediation would be the preferred option, it is clear that the relationship between the venue and complainants is poor and would not result in a productive outcome.
34. The licensee has also explored changing their liquor licence type from a small bar to an on-premises restaurant licence with a Primary Service Authorisation. The licensee has discussed this change with local liquor licensing Police. The licensee submits this would entail a restructure in the business, which in his view is already a food-oriented business. This change would enable the venue to transition to a family friendly venue, and would appease all parties in mitigating noise disturbance.
35. The licensee's submissions indicate that action has been taken to mitigate disturbance and the licensee proposes to close all windows and doors prior to and during live entertainment and using a noise monitoring device at the venue during hours of operation. The licensee needs to be vigilant in ensuring that undue disturbance is not caused by the operation of the venue or patron behaviour. I encourage the licensee to

continue to mitigate noise disturbance at the venue by implementing the recommendations suggested by the acoustic consultant.

Regulatory Response

36. As I have found that there has been some historic instances of undue disturbance, I now turn to consider what, if any, regulatory action should be taken in response. In making my decision, I have considered the submissions of the complainant (authorised by two other affected residents), licensee, Police and Council.
37. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the complainant. Notwithstanding this, I find it reasonable to expect some form of noise will be generated from the ongoing operation of the venue, especially noting its position within the Newcastle CBD. The complainant must be aware that living in the inner city will result in noise disturbance given the commercial and residential mixed usages of the area. It is noteworthy that Council through its planning and DA process has permitted this mix to occur.
38. Considering the material presented by the parties to the complaint, I am satisfied that the imposition of licence conditions is not warranted in this instance. I note that the liquor licence is already subject to the LA10 noise condition. I take note of the noise impact assessments, particularly the acoustic report of January 2019 which indicates a possibility of minor exceedance which would be rectified by the closure of doors and windows.
39. I have determined to issue the licensee a warning in this matter. This decision reflects my conclusion that there is not sufficient evidence of recent undue disturbance, though I note that there has been some historical undue disturbance and measures which the licensee can implement to improve the management of disturbance. In issuing a warning I will provide the licensee an opportunity to implement the recommendations made by the acoustic consultant. In reaching this decision I have taken into account the absence of any recent evidence of undue disturbance and that the submissions of Police and Council support the licensee and the two noise impact assessments.
40. I again firmly encourage the licensee to continue to be proactive in the management of disturbance, in particular closing doors and windows prior to and during amplified entertainment and by monitoring and recording noise levels through the use of the sound level meter. The licensee should be aware that if fresh and direct evidence be presented demonstrating further undue disturbance or disregarding his responsibilities

in relation to mitigating noise, it is open for the matter to be reconsidered and for formal regulatory action to be taken.

Decision Date: 25 June 2019



Sean Goodchild

Director Compliance Operations

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Industry

Application for review:

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 23 July 2019. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at www.liquorandgaming.nsw.gov.au

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

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

1. Copy of the liquor licence dated 12 April 2019.
2. Section 79 Noise Disturbance Complaint lodged by the complainant on 16 November 2018.
3. Submission from NSW Police dated 21 November 2018.
4. Copy of an Approval to use Footway for Outdoor Trading Purposes from Council to the Venue dated 8 November 2018. A copy of this document was also annexed to the Licensee submission.
5. Copy of a Notice of Determination Development Application from Council to the Licensee dated 17 February 2015. A copy of this document was also annexed to the Council and Licensee submission.
6. Submission from Council dated 26 November 2018.
7. Submission from the Licensee dated 17 January 2019.
8. Noise impact assessment from Muller Acoustic Consulting dated 18 December 2014.
9. Noise impact assessment from Spectrum Acoustics dated January 2019.
10. Email correspondence between the Licensee and Inspector [REDACTED] of L&GNSW dated 2 November 2018.
11. Copy of an image of a Digitech QM-1589.
12. Eight photographs of [REDACTED] an authorising resident to the complaint.
13. Copy of a letter from Bilbie Dan Solicitors and Attorneys addressed to [REDACTED] dated 5 October 2017.
14. Copy of four incident register excerpts dated 10 March 2018, 15 June 2018, 21 June 2018, 29 June 2018 and 23 November 2018.
15. Copy of correspondence from [REDACTED] to [REDACTED] residents dated 18 May 2017.
16. Photograph of a sign outside the venue regarding noise.
17. Second submission from the complainant dated 13 February 2019.
18. Response from the complainant to the noise impact assessment dated 12 February 2019.
19. Second submission from the Licensee dated 25 March 2019.
20. Copy of a letter from Council to the Licensee dated 3 May 2017.
21. Noise impact assessment from Spectrum Acoustics dated 14 March 2019.
22. Additional information from the complainant dated 26 March 2019.
23. Final submission from the complainant dated 4 April 2019.
24. Response from the complainant to the Council letter of 3 May 2017 dated 2 April 2019.
25. Final submission from Licensee dated 9 April 2019.
26. Additional material to the final submission from the Licensee dated 10 April 2019.
27. L&GNSW compliance report.