

<b>FILE NO:</b>	A18/0011596
<b>COMPLAINANT:</b>	[REDACTED]
<b>LICENSED PREMISES:</b>	Bavarian Bier Cafe Manly Wharf – LIQO624003069
<b>ISSUES:</b>	Whether the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed.
<b>LEGISLATION:</b>	<i>Liquor Act 2007</i>

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## 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 disturbance complaint made against the Bavarian Bier Cafe Manly Wharf (the venue) have decided to **impose a condition** on the liquor licence relating to the following:

1. Noise limiter

The details of the condition, including the date on which it becomes effective, are outlined 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:
  - the need to minimise harm associated with the misuse and abuse of liquor;
  - the need to encourage responsible attitudes and practices towards the promotion, sale, supply, services and consumption of liquor; and,
  - 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 14 February 2018, [REDACTED] (the principal complainant) [REDACTED] [REDACTED] lodged a disturbance complaint with L&GNSW alleging undue disturbance to the quiet and good order of the neighbourhood caused by loud music and live entertainment provided by the venue. The complainant lodged the complaint as a resident authorised by 39 other residents, 36 of which also reside at the [REDACTED] and three of which reside at [REDACTED] [REDACTED]
6. A separate complaint was made by [REDACTED] (the second complainant), a resident of the [REDACTED] authorised by two other complainants who also reside within this complex. On 20 February 2018, the second complainant withdrew this separate complaint in order to be incorporated in the above primary complaint, taking the total number of individual parties affected to 43.
7. A third complaint was lodged with L&GNSW by [REDACTED] [REDACTED] serviced apartments located at [REDACTED]. [REDACTED] withdrew his formal complaint on the basis that the alleged disturbance would be considered by L&GNSW under the primary complaint.
8. The principal complainant alleged that the venue generates noise disturbance every week, starting at 5:00pm from Wednesday to Saturday, and from 4:00pm to 7:00pm on Sundays.

9. The principal complainant seeks the venue be required to play all live music indoors with doors and windows closed. He also requests that the venue only serve liquor in their licensed area to prevent encroachment onto the public walkway, and trade according to their liquor licence type (restaurant), as opposed to a hotel.
10. Between 15 March 2018 and 13 July 2018, various submissions were lodged by the parties. A list of the material before the delegate is set out in **Annexure 2**.

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

11. The Act requires that the Secretary have regard to the following statutory considerations.
12. *The order of occupancy between the licensed premises and the complainant* – the licensed premises has operated at its present site on Manly Wharf (in multiple forms) since 26 October 1990. The principal complainant and second complainant have resided at [REDACTED] for approximately 3.5 years and 18 years respectively. As such, I consider the order of occupancy to be in favour of the venue.
13. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – licensing records indicate that the business was transferred to the current owner on 12 July 2004 and the licence name changed from ‘Armstrongs Manly Restaurant’ to ‘Bavarian Bier Cafe Manly Wharf’ on 11 July 2005. The principal complainant alleges the venue has recently expanded outdoor seating capacity on its northern and western boundaries without Council approval and this has led to music being played in the direction of the complainants’ residence. Council did not provide any information addressing or supporting the allegations regarding unauthorised development. There is no evidence that there have been any structural changes to the complainants’ residence.
14. *Any changes in the activities conducted on the licensed premises over a period of time* – the principal complainant asserts that in the last six months the venue has ceased to operate as a restaurant and commenced functioning as a hotel, with a 4-6pm happy hour along with live bands and DJs five nights a week. Police also submit they are concerned the venue may be trading as a general bar, contrary to its restaurant licence type and Primary Service Authorisation. The weight of evidence suggests there has been a change in activities conducted at the venue from a dining focussed business to an increased focus on entertainment and bar offering in addition to the core dining business.

## Other Considerations

### *Undue disturbance*

15. I am satisfied there is sufficient material to support a finding the venue has, at times, caused undue disturbance to the neighbourhood. In making this finding, I have balanced the submissions made by the principal complainant, NSW Police, the Northern Beaches Council and the venue. I have also considered the results of an inspection of the venue undertaken by L&GNSW Inspectors.
16. The venue is located on Manly Wharf, less than 100 metres from the complainants' residence, [REDACTED]. The venue and [REDACTED] are separated by a two-lane road, West Esplanade. The venue adjoins other commercial premises such as Hugos Manly and Nando's, none of which are a party to the complaint.
17. The venue has Extended Trading and Primary Service Authorisations. Consumption on premises (indoors) is permitted from 7:00am until 12:00 midnight Sunday to Wednesday, and from 7:00am until 1:00am Thursday to Saturday. Consumption on premises (outdoors) is permitted from 7:00am until 12:00 midnight every day. Relevantly, the venue's licence is subject to an LA10 noise condition and a condition directing that the external doors to the premises are to be closed from 12:00 midnight to reduce the emission of noise.
18. The complaint alleges repeated disturbance from the venue in the form of loud music from DJs, live bands and instruments. The principal complainant provides a number of photos and videos of the live entertainment offered by the venue which show the use of amplified saxophones, bongo drums and trumpets.
19. Since lodging the complaint, the principal complainant has identified three specific instances of disturbance primarily caused by live entertainment on Saturday evenings at the venue:
  - a) On 7 April 2018 and 8 April 2018, the principal complainant emailed L&GNSW and advised that music from the venue on Saturday night 7 April 2018 was 'out of control' and that the noise level was not acceptable.
  - b) On 25 March 2018, the principal complainant emailed L&GNSW with a video of alleged disturbance taking place on Saturday 3 March 2018. The video appears to be taken from the balcony of their residence, facing the venue. Constant bass, beats and patron noise can be heard.

- c) On Saturday 24 March 2018, the principal complainant emailed L&GNSW and advised the music that night was 'ridiculously loud, very much like a Sunday in the past with drums and a trumpeter'. On 25 March 2018, L&GNSW received a video from the principal complainant to support his allegations. The video appears to be taken from an authorising resident's balcony facing the venue. A constant drum beat and clear sounds from a saxophone or trumpet can be heard.
20. Police submit that they have attended and engaged with the venue on several occasions in relation to noise issues. Police provide video footage taken from immediately outside (and across the road from) the venue on Saturday 31 March 2018 and Sunday 27 May 2018.
21. Police support the concern of the principal complainant that the venue is no longer operating in accordance with its licence type (restaurant) and submit it can be reasonably suggested that the manner in which the venue is operating is affecting the quiet and good order of the neighbourhood. Police go on to recommend that conditions prohibiting amplified live or recorded music outdoors, and restricting outdoor seating, be imposed on the licence.
22. The Northern Beaches Council submit that between 5 June 2017 and 8 March 2018 they have received ten noise disturbance complaints against the venue and note that the venue's development consent is subject to the following condition:
- 'No external sound amplification equipment or loud speakers shall be used for the announcement, broadcast, playing of music or similar purposes'.*
23. On 19 May 2018, L&GNSW Inspectors attended the venue and observed that while noise emitted from the venue could be heard at times, they did not consider it to be undue. They conducted their observations at four different points along West Esplanade outside the complainants' residence, at various distances between 10 and 80 metres from the venue.
24. The venue submits that it operates within the permitted noise levels required by its liquor licence. The venue engaged an acoustic assessment performed by Renzo Tonin & Associates (RTA) on 10 March 2018 and an additional assessment (also performed by RTA) on 6 and 8 April 2018. Both assessments were commissioned by the venue's business owner, and both concluded that the noise levels caused by live entertainment (such as saxophone, drums, guitar, DJ) at the venue were compliant with its LA10 noise condition. For both assessments, noise levels were measured from the footpath on the venue's side of West Esplanade, noting that for the first assessment noise levels were

also measured from a point on the resident's side of West Esplanade, however noise from the venue was barely audible.

25. The Acoustic Group and DJW Acoustics were engaged by the principal complainant to perform an acoustic assessment of the noise levels generated by the venue. Testing occurred on the 5, 6, 20 and 27 of May 2018 from a Level 6 balcony on the southern facade of [REDACTED], and from the footpath on the residents' side of West Esplanade.
26. The assessment indicated that noise generated by the venue's music (which consisted of DJ and saxophone performances) breached the LA10 noise condition at both test locations on each night the test was run. The Acoustic Group's report recommended a condition be imposed on the venue's licence restricting the maximum decibel level of music from the premises.
27. A level of disturbance from the normal operation of a licenced restaurant is to be expected, including noise from live entertainment, patrons, and pedestrian traffic caused by the venue. However, having regard to the results of the acoustic assessment commissioned by the principal complainant, the number of affected residents, the number of recent complaints reported by Council, and Police's observations and recommendations, I have determined that the venue has, at times, caused undue disturbance.

*Action taken to mitigate disturbance*

28. In considering whether to impose conditions on the liquor licence, I have balanced the submissions of all parties having specific regard to the action taken by the venue in response to the complaint and the effectiveness of any measures that have been implemented to address disturbance.
29. Since the complaint, the venue has implemented the following measures to control disturbance, including:
  - Internally monitoring and logging noise levels;
  - Reducing entertainment offerings by 30 minutes each day, (which the owner submits has adversely affected the business financially);
  - Commissioning two acoustic tests to measure noise levels emitted by the venue which indicated it was compliant with the LA10 noise condition; and
  - Installing a noise limiter to amplification equipment to ensure compliance with the LA10 noise condition.

30. The venue submits that the recent installation of a noise limiter to its amplification equipment is *'an additional measure to provide complete assurance that regardless of the date, time and or sound engineering firm taking measurements that the sound could not exceed the requirement of the license condition'*. A compliance certificate from SOS Communications, dated 12 July 2018, for the noise limiter's installation is provided by the venue.
31. Since the venue's installation of a noise limiter, L&GNSW has received one further report of disturbance from the principal complainant. On 3 October 2018, the principal complainant forwarded on an email from an authorising resident complaining that the venue had drowned out professional jazz musicians playing as part of a jazz festival.

### **Regulatory Response**

32. In making my decision, I have considered the submissions of the principal complainant (authorised by 42 other affected residents), the venue, Council and Police. I have also had regard to the particular context in which the venue operates. In deciding whether to impose conditions on the licence relating to noise disturbance, I have considered the following points.
33. I have taken the statutory considerations into account and acknowledge the order of occupancy is technically in favour of the venue. However, given the recent changes in the activities conducted at the venue, which create a much higher risk of disturbing the quiet and good order of the neighbourhood than previous modes of operation, I am inclined to place greater weight on this consideration.
34. It is reasonable to expect some form of noise will be generated from the venue's ongoing operation, however given the finding of undue disturbance, I am satisfied there is a need to manage the noise levels created by the provision of amplified entertainment at the venue, particularly in the outdoor seating area. On this point, I make the observation that the relevant Development Consent appears to prohibit the amplification of music via external speakers.
35. I acknowledge the venue's voluntary installation of a noise limiter and consider the imposition of a licence condition requiring its use to be an appropriate safeguard to mitigate the risk of future disturbance. I am satisfied this measure is a balanced and proportionate response to the issues raised in the complaint. It protects residents from undue noise by mandating a technical system which should prevent undue noise from amplified music and will ensure regulatory certainty that it is deployed and utilised as required by the condition.

36. I am of the view that the measure sought in the complaint, which would require all live music to be played indoors with the windows closed, is not the appropriate outcome in this instance. In forming this view, I have taken into consideration the lack of direct evidence demonstrating a breach of the LA10 condition since the installation of a noise limiter, the observations of L&GNSW Inspectors recorded in the file note dated 21 June 2018, the expense incurred by the venue in order to achieve compliance with the LA10 condition and the nature of the neighbourhood and Manly Wharf area being an area populated by many bars and restaurants and a busy commuter/transport hub.
37. I note the venue holds an on premises licence with a restaurant business type and Primary Service Authorisation, and acknowledge the concerns held by the complainant and Police that the venue is operating outside the scope of its licence. It is also reasonable to form a view that the times at which the restaurant is trading more like a bar, there is an increased risk of it causing disturbance to the neighbourhood. I take this opportunity to remind the venue that it must at all times operate in accordance with its licence type, that is, it must operate at all times as a restaurant where the primary purpose of the business is serving meals to patrons dining at the venue.
38. Should fresh evidence be presented demonstrating continued undue disturbance, it is open for the matter to be reconsidered and for further regulatory action to be taken. In this regard, I note that the venue will be subject to ongoing monitoring and inspections by L&GNSW to ensure compliance with its licence conditions and liquor legislation. I strongly encourage the venue to proactively manage its noise emissions and commit to its stated business practise of engaging with the neighbourhood to minimise complaints.

**Decision Date:** 6 December 2018



**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 **3 January 2018**. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at [www.liquorandgaming.nsw.gov.au](http://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](http://www.liquorandgamingnsw.nsw.gov.au)

Under section 81 of the *Liquor Act 2007* a delegate of the Secretary of the Department of Industry has imposed the following condition on the liquor licence of:

**Bavarian Bier Cafe Manly Wharf (LIQO624003069)**

**Noise Limiter**

At all times when amplified music is conducted, the licensee must ensure all amplifiers or noise generating equipment is under the control of a noise limiter.

- a. The noise limiter levels must be set by an acoustic engineer; and
- b. The noise limiter controller must be contained within a locked container or secure area and is to be only accessible by venue management.

**Date condition effective:** 13 December 2018

## Annexure 2

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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] on 14 February 2018 (incorporating separate complaint lodged by [REDACTED]).
2. Emails and video files lodged on 22 and 25 March 2018 by recording reporting specific instances of disturbance.
3. Submission from [REDACTED], Licensing Unit, Northern Beaches Local Area Command dated 15 March 2018 (including a USB and DVD containing video files from their inspections).
4. Submission from the business owner dated 21 March 2018, and attached acoustic assessment report by Renzo Tonin & Associates dated 21 March 2018.
5. Submission from [REDACTED], Environmental Health Officer, Northern Beaches Council dated 22 March 2018.
6. Further submission from the business owner dated 13 April 2018, and attached acoustic assessment report by Renzo Tonin & Associates dated 13 April 2018.
7. Filenote prepared by [REDACTED], Team Leader, L&GNSW Compliance, Operations dated 21 May 2018 (revised version dated 21 June 2018).
8. Further submission from [REDACTED], Principal, Gwynne Thompson Solicitors, on behalf of the complainant dated 15 June 2018, and attached acoustic assessment by The Acoustic Group dated 12 June 2018.
9. Further submission from the business owner dated 13 July 2018.
10. Email from [REDACTED] dated 3 October 2018.