



DOC16/120312

**FILE NO:** A15/0006736

**COMPLAINANT:** [REDACTED]

**LICENSED PREMISES:** The Federal Hotel, Nimmitabel LIQH400110928

**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, NSW Department of Justice, in relation to the complaint made in respect to The Federal Hotel, Nimmitabel (the hotel), have decided to **issue a warning** to the licensee.

The warning is detailed in the following terms:

*"Under Section 81(d) of the Liquor Act 2007 (the Act) I, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW (L&GNSW), a delegate of the Secretary, NSW Department of Justice, warn Mr Kelvin Paul Fahey, licensee of The Federal Hotel, Nimmitabel that he must ensure that no future undue disturbance is caused by patron behaviour or amplified or live entertainment at the Federal Hotel, Nimmitabel."*

### REASONS FOR DECISION

#### Legislation

1. Section 79 of the Act permits a person to 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. In addition, section 79 of the Act provides a complaint may also be lodged by a person whose interests, financial or other, are adversely affected by the undue disturbance to which the person's complaint relates.
4. 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 the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no further action.
5. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and 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**

6. On 18 December 2015, [REDACTED] the complainant, of [REDACTED] Nimmitabel, lodged a complaint in relation to the hotel. The complaint alleged undue disturbance from amplified music coming from inside the hotel, as well as noise from patrons in the beer garden area. The complainant asserts the disturbance occurs daily including, afternoons, evenings and late at night after the premises has closed. Initially the complainant lodged the complaint as a resident authorised by two other residents. I note that during the complaint process, the complainant has placed her home for sale and is not presently residing at the home on a full-time basis.
7. Between October 2015 and August 2016, various submissions were lodged by all parties. A list of the material that is before the delegate of the Secretary is set out in Annexure 1.

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

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

9. *The order of occupancy between the licensed premises and the complainant*

The hotel was built in 1890 and, according to the Cooma-Monaro council, has operated as a hotel since that time. The current liquor licence has been in effect for over 60 years. For approximately two years the hotel was closed due to fire damage. It was during this period of non-trading that the complainant purchased her home. She has owned the home for approximately 10 years. I therefore consider the order of occupancy consideration is in favour of the hotel. However, I have given regard to the fact that at the time the complainant purchased her home, the hotel had ceased trading and remained closed for a significant period of time.

10. *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 material structural changes to either the hotel or the complainant's residence prior to the complaint being lodged.

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

As detailed in the complaint, a fire caused the hotel to cease trading and remain closed for a number of years. However, approximately two years after the complainant purchased her home, the hotel reopened for a time before closing again. The current licensee reopened the hotel in August 2015, it has remained open since that time. The licensee submits while the hotel previously provided loud, amplified music, he has only permitted acoustic shows at the hotel in an attempt to minimise the risk of bass music or other loud instruments such as drums, causing disturbance in the neighbourhood.

### **Consideration of *undue disturbance***

12. I am satisfied that the material before me is sufficient to support a finding the hotel has, at times, caused undue disturbance to the neighbourhood. I have balanced the submissions of the complainant, licensee, Police and the local council. I have also had regard to the particular context in which the hotel operates (including statutory considerations mentioned above). Despite my finding that undue disturbance has occurred, I am persuaded by the substantial remedial works undertaken by the

licensee to mitigate disturbance. Based upon this, I have decided to issue a warning to the licensee and not impose any conditions on the liquor licence of the hotel.

13. A person may complain to the Secretary that the quiet and good order of the neighbourhood of licensed premises are being *unduly* disturbed because of:
- a. the manner in which the business of the licensed premises is conducted; or
  - b. 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).

The test implies there is a certain level of disturbance expected from the operation of a licensed premises, but, only when that disturbance is *undue* are there grounds to prove a complaint.

14. Effectively, there is a threshold test that must be met under the legislation that the level of disturbance must be *undue* for action to be taken under the disturbance provisions of the Act.

15. Determining what amounts to undue disturbance necessarily involves consideration of a broad range of factors, including the nature and environs of the neighbourhood and the nature of the subject premises. In this case, the hotel is located in the small country town of Nimmitabel, it is the only hotel of its kind in the vicinity. Given the size of the town, approximately 30 patrons constitutes a large crowd for the hotel, as detailed by the acoustic report prepared and submitted by Rudds Consulting Engineers. The hotel is authorised to trade 5:00am to 12:00 midnight Monday to Saturday, and 10:00am to 10:00pm on Sunday. The complainant alleges the disturbance relates to amplified music inside the hotel, as well as noise caused by patrons congregating in the beer garden area of the hotel, occurring on a nightly basis and at various points throughout the day.

16. The submission from the local council indicates in the six months prior to the complaint being lodged, they received one written complaint and four phone complaints regarding music and patron noise from the hotel.

#### *Complainant Submissions*

17. The complainant's home is located to the southwest of the hotel, approximately 80 metres from the rear door. The complainant indicates from within her home she can hear amplified music, as well as patrons in the beer garden, which faces her home. She submits she is disturbed by the hotel, even with doors and windows closed. Much of the noise complained of emanates from the rear beer garden.

18. The licensee submitted a number of letters from fellow neighbours, all of which indicate they are not disturbed by the amplified music or the noise caused by patrons, despite their proximity to the hotel. However, the lack of disturbance in one residence does not guarantee there is not disturbance in another.

#### *Acoustic Report*

19. Acoustic consultants of Rudds Consulting Engineers attended the hotel on 23 April 2016. While there was live, amplified music on the date of testing until 10:00pm, the beer garden was not in use after 8:00pm. The report does suppose had the beer garden been in use in the late evening hours, it is likely the exceedance would have been even greater than that which was measured. The acoustic consultants found the noise from patrons was at times louder than the music.

20. On the date of testing, there were approximately 30 people in the hotel, including staff and musicians. Staff indicated this was a relatively large event for the hotel. The consultants conducted noise measurements at the rear of the hotel property. The report indicates the level of noise would likely be less from the complainant's residence than from where the noise measurements were taken at the border of the hotel's property. In light of this, the acoustic consultants note their conclusions are conservative assessments of the noise on the premises.

21. The report concludes while the hotel would likely be compliant with the LA10 noise level during the day given the higher level of background noise, they were likely to be noncompliant in the evening hours as the background noise diminishes and the beer garden is in use or there is live music.

#### **SUMMARY AND CONCLUSION**

22. In determining whether the disturbance is undue, I have considered the hotel has recently reopened under new management of the current licensee, and amplified acoustic music is provided at the hotel during the evening hours. In the context of the quiet country town in which the hotel is located, I am of the view the amplified music as well as patron noise has, at times, caused undue disturbance.

23. Despite this, I am persuaded by the substantial remedial works undertaken by the licensee to manage disturbance. The licensee has installed a sound lock around the doors to the beer garden as well as an acoustic barrier in the beer garden in accordance with the acoustic report recommendations. The licensee further submits he installed a sound screen in the walls of the lounge area as well as a hydraulic door

restraint on the door leading to the beer garden. Further, he has placed furniture in the lounge area to capture sound and has installed a CCTV system. Finally, he has planted a number of trees and shrubs along the fence line of the hotel to reduce noise.

24. These remedial works are not insubstantial, particularly considering the hotel's limited source of revenue given that it is located in a small country town. It appears the licensee has undertaken a genuine effort to improve the hotel and minimise the risk of future disturbance. Therefore, I consider a warning to the licensee to be an appropriate regulatory intervention as it provides an escalation path in the event undue disturbance occurs in the future. The licensee should be aware that if I receive further reports of undue disturbance regarding the hotel, I may revisit this decision and consider imposing conditions on the licence.

Decision Date 16 JANUARY 2017



**Sean Goodchild**  
**Director Compliance Operations**  
Liquor and Gaming NSW  
Delegate of the Secretary of the Department of Justice

**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 **13 February 2017**. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at [www.liquorandgaming.justice.nsw.gov.au](http://www.liquorandgaming.justice.nsw.gov.au)

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

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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] dated 10 December 2015, received 17 December 2015.
2. Submission from Cooma-Monaro Shire Council dated 5 January 2016, received 7 January 2016.
3. Submission from Police received 15 January 2016.
4. Submission from licensee dated 16 January 2016.
5. Email from licensee dated 6 April 2016.
6. Email from licensee dated 22 April 2016.
7. Email from licensee dated 20 June 2016.
8. Email from licensee dated 8 July 2016.
9. Rudds Consulting Engineers acoustic report dated 10 May 2016, received 20 June 2016.
10. Email from Cooma-Monaro Shire Council dated 15 July 2016.
11. Email from Police dated 12 July 2016.
12. Email from [REDACTED] dated 19 July 2016.
13. Submission from [REDACTED] dated 12 July 2016, received 18 July 2016.
14. Submission from licensee dated 24 August 2016, received 26 August 2016.
15. Email from licensee dated 19 September 2016.
16. Email from licensee dated 22 December 2016.

