

**FILE NO:** A17/0009073

**COMPLAINANT:** [REDACTED]

**LICENSED PREMISES:** Flow Espresso Bar - LIQO660011620

**ISSUES:** Whether the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed.

**LEGISLATION:** *Liquor Act 2007*

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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 a delegate of the Secretary, Department of Industry, in relation to the complaint made in respect to Flow Espresso Bar (the venue) have decided to **impose a condition** on the liquor licence relating to the following:

1. LA10 noise condition.

The details of the condition, including the dates in which it become 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:
  - a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
  - b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
  - c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.
5. The Secretary must also 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 21 February 2017, [REDACTED] of [REDACTED] lodged a complaint in relation to the venue, alleging undue disturbance from loud music being played in the alfresco area. The complainant lodged the complaint as a resident authorised by three other residents.
7. The complaint referenced three specific instances of disturbance occurring on the nights of 16 and 17 December 2016, and the afternoon of 18 December 2016. He claims that disturbance occurs predominately on Friday nights and Sunday afternoons (live entertainment), Saturday nights (when there is a private function), and public holidays (live entertainment). The complainant seeks the venue be restricted to playing music indoors with no drums permitted.
8. Between 11 April 2017 and 2 August 2017, various submissions were lodged by all parties. A list of the material before the delegate is set out in Annexure 2.

### **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 under the current licence at its present site since 17 November 2011. Whilst the licensee submits the building has a history of live music under various formats including a dance hall, it has operated in its current function as a restaurant for approximately six years. The complainant's occupation of his residence predates the venue's operation. This fact is not in dispute and I consider the order of occupancy to be 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 that there have been any changes to the complainant's residences. Structural changes were made to the venue with the addition of an outdoor stage in the alfresco area.
12. *Any changes in the activities conducted on the licensed premises over a period of time* – the complainants allege that since the licensee took over operations in 2014, business operations have shifted towards live music. On the available material, the venue remains focused on an offering of food and beverage accompanied by live music on busier trading days.

### **Other Considerations**

#### *Undue disturbance*

13. I am satisfied the material before me is sufficient 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 licensee, the complainant, Police, and Council.
14. The venue occupies the ground floor of a boutique hotel on the corner of Clerke and David Streets, Old Bar. The surrounding area comprises primarily of residential housing, a primary school, and Old Bar Beach. The venue's liquor licence authorises it to trade as a restaurant for consumption of premises, Monday to Saturday 5:00am to 12:00 midnight and from 10:00am to 10:00pm on Sunday. In addition, the venue is authorised to trade as a catering service from 10:00am to 10:30pm on all days except for Sunday, when it is required to end by 10:00pm.

15. The complainants' residences are all located within 100m on or about the same roadway as the venue. I note the venue has provided letters of support received from residents of a closer proximity than the complainants.
16. I have considered the complainant's allegations of repeated undue disturbance from live entertainment at the venue. The complainant provides three specific examples of disturbance, including dates and approximate times.
17. A level of disturbance from the normal operation of a venue is to be expected, including noise from live entertainment, patrons, and pedestrian traffic generated by the venue. Both Council and Police have acted to mitigate the risk of undue disturbance associated with noise emission from the venue, and its effect on the amenity of the area.
18. Council advised that since January 2015, there have been twelve recorded noise complaints against the venue. This includes repeated complaints from three residents in the last 12 months. Whilst there are no conditions on the development consent restricting noise, the aforementioned residents have not accepted an offer by Council to conduct a noise assessment. I do note however, that the complainant's submission included a noise assessment performed by Council in December 2015. On this occasion, Council did not consider the noise to be offensive.
19. NSW Police advise that live entertainment at the venue on 22 January 2015 was the initial source of three separate disturbance complaints by nearby residents (all of whom are a party to this complaint). Police engaged with the licensee and comment that since this date, complaints to Police have been minimal and made repeatedly by the same resident, [REDACTED] (a co-complainant). Police further note that they have not had an opportunity to assess whether the noise generated from live music would be considered excessive due to priority workload or non-reporting by the co-complainant at the time of any alleged disturbance.
20. In response to the disturbance complaint, the licensee engaged Matrix Thornton Consulting Engineers to conduct an acoustic test of the hotel's compliance with the LA10 noise standard from 7 April 2017 for a period of ten days. The test was carried out whilst amplified music was played in the alfresco area of the venue. The report concluded that the venue can operate successfully in compliance with the LA10 criteria if it limits the maximum volume of music played in the stage area and further recommended the installation of a noise alert system to monitor noise emissions and warn when the programmed sound limit had been exceeded.

21. There is limited direct evidence to support a finding that the venue has, since the events of January 2015, caused undue disturbance. Nonetheless, I have determined that on the balance of probabilities, there is likelihood that the venue has *at times* caused undue disturbance. In this regard, I have been persuaded by the licensee's admission to purposefully exceeding the LA10 noise standard as established by the acoustic report.

*Action taken to mitigate disturbance*

22. In considering whether to impose conditions on the liquor licence, I have balanced the submissions of all parties, having specific regard to any action taken by the licensee in response to the complaint and the effectiveness of any measures that have been implemented to address disturbance.

23. The licensee acknowledged noise level concerns raised in January 2015, and implemented the following measures to control disturbance including:

- a) the installation of an acoustic wall and panelling;
- b) the purchase of additional sound equipment to control noise levels more evenly across the venue's outdoor dining area;
- c) restricting the use of drums to Sunday afternoons only, with performers required to use brushes and not drum sticks;
- d) engaging a sound operator to control the venue's sound system; and
- e) utilising an iPhone decibel application to monitor the venue's noise levels.

24. The licensee advises that since the disturbance complaint, an additional acoustic wall facing Clerke Street has been constructed to mitigate noise escape to nearby residences.

25. Since the initiation of this matter, L&GNSW has received correspondence from the complainant about ongoing disturbance from the venue in relation to entertainment over the October 2017 long weekend.

**Findings and conclusion**

26. I have considered the submissions of the licensee, the complainant, Police, and Council. I have also had regard to the particular context in which the venue operates. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the complainant, however note it is reasonable to expect some noise will be generated by the venues ongoing operation.

27. I acknowledge the licensee has implemented a range of measures to mitigate disturbance, including the installation of acoustic sound barriers and other operational measures.
28. The acoustic report recognised that the venue could comply with the LA10 criteria and made practical recommendations to assist the licensee in complying with the LA10 criteria. The licensee has not fully implemented recommendations, particularly relating to dB levels at measurement points within the venue which were intended to provide a proxy measure for the noise that would be heard at the boundary of affected residences (e.g. a measurement point 8 meters from the stage)..
29. Whilst such proxy measurements may be useful at an operational level to provide a guide for compliance, it is my view that the LA10 criteria should be outcome focussed, i.e. the condition does not need to prescribe how compliance is achieved, it simply seeks compliance with the LA10 criteria which is an established and broadly accepted criteria when it comes to measuring noise from licensed premises.
30. I consider the imposition of an LA10 noise condition to be an appropriate safeguard to prevent disturbance without unduly burdening the licensee. I am satisfied this measure is a balanced and proportionate response to the issues raised in the disturbance complaint. It protects residents from undue noise, but it does not unduly burden the licensee in providing live music entertainment at the venue.
31. On the material before me, I do not consider a condition requiring the restriction of drum use to be reasonable. I have taken into account the significant effort and financial cost sustained by the licensee in addressing disturbance, and the subsequent improvement as noted by Police. The complainants concerns will be mitigated by the LA10 noise condition along with the voluntary measures undertaken by the licensee to mitigate the risk associated with the use of drums during entertainment.
32. Finally, I note the venue may be subject to monitoring and inspections by L&GNSW compliance officers to ensure the condition is being complied with and that the risk of undue disturbance is being effectively mitigated.

**Decision Date:** 18 December 2017



**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 15 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:

**Flow Espresso Bar (LIQO660011620)**

**LA10 Noise Condition**

The LA10\* noise level emitted from the licensed premises shall not exceed the background noise level in any octave band frequency (centred on 31.5 Hz-8 kHz inclusive) by more than 5dB between 7:00am and midnight at the boundary of any affected residence.

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any octave band frequency (centred on 31.5 Hz-8 kHz inclusive) between 12:00 midnight and 7:00am at the boundary of any affected residence.

Notwithstanding compliance with the above, noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 7:00am

*\* For the purpose of this condition, the LA10 can be taken as the average maximum deflection on a sound level meter of noise emitted from the licensed premises.*

**Date condition effective:** 15 January 2018



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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] on 21 February 2017.
2. Submission from Licensing Coordinator [REDACTED], Manning/Great Lakes Police Command dated 3 April 2017.
3. Submission from [REDACTED], Mid Coast Council dated 21 April 2017.
4. Submission from licensee dated 29 May 2017 and attached acoustic report prepared by Matrix Thornton Consulting Engineers dated 17 May 2017.
5. Response to the licensee's submission from complainant dated 19 June 2017.
6. Final submission from licensee dated 2 August 2017.
7. Email from complainant re further disturbance dated 3 October 2017.

