



FILE NO: A16/0007251

COMPLAINANT [REDACTED]

LICENSEE: Halcyon Cabarita Beach Pty Ltd

APPROVED MANAGER: Mauro De Riso

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, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW (L&GNSW), a delegate of the Secretary, NSW Department of Industry, in relation to the disturbance complaint made against the Halcyon House Cabarita Beach (the venue), 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 I, Sean Goodchild, Director Compliance Operations, Liquor & Gaming (L&GNSW), a delegate of the Secretary, NSW Department of Industry warn Halcyon Cabarita Beach Pty Ltd, licensee of Halcyon House Cabarita Beach, Cabarita Beach that it must ensure that no future undue disturbance is caused by functions and events hosted at the Halcyon House Cabarita Beach, Cabarita Beach'.

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. 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 9 April 2016, [REDACTED] of [REDACTED] lodged a disturbance complaint under section 79 of the Act concerning Halcyon House, a boutique accommodation venue that caters for events and functions, that holds an on-premises liquor licence. The venue also includes a restaurant. The complainant lodged the complaint as a resident authorised by two other residents.
6. On 7 June 2016, [REDACTED] of [REDACTED] lodged a similar disturbance complaint in regard to the venue. For the purpose of this decision, I have considered [REDACTED]'s complaint as part of the original complaint from [REDACTED].
7. The complaint asserts that there has been undue disturbance following the redevelopment and extension of the existing motel into a premises with a liquor licence that includes a restaurant, function area and outdoor bar.
8. The complaint asserts that disturbance occurs predominately after 10:00pm on Friday and Saturday nights. The complainant submits disturbance is caused by excessive noise from patrons and the general operation of the outdoor bar and restaurant areas, particularly when the venue is used to host functions and events, which involves the use of a PA system or live bands performing in the outdoor areas.

9. The complaint asserts that another source of disturbance is noise emanating from an open side door to the bar as well as the staff practice of disposing empty glass bottles in bins at all hours.
10. The complaint asserts that disturbance is particularly noticeable when patrons of a function or event are also guests staying in accommodation at the venue. The complainant submits that the restaurant within the venue has exceeded its patron capacity on one occasion when used for a function. Further disturbance is caused by the venue's inappropriate use of a public walkway, which is utilised by patrons as part of the function space.
11. The complainant provides details of specific examples of disturbance, including dates, times and descriptions of events occurring at the premises.
12. The complainant and other affected residents have engaged with the venue owners in an attempt to address their concerns with little success. Local Council is apparently aware of the disturbance issues, but has so far ignored the residents' concerns.
13. Included in the complainant's submission is advice from *Liquor & Gaming Specialists*, on behalf of the licensee. This letter, originally sent to residents as part of the venue's application for a liquor licence, outlines measures the licensee proposed to implement to manage disturbance following the venue's refurbishment. The complainant submits these measures have not been implemented.
14. The complainant also made submissions relating to the impact of the venue's operations on the amenity of the street, including restricted access to residential parking and space for emergency service vehicles. Local planning laws determine the appropriate use of premises including business type, patron capacity, trading hours and their impact of the amenity of the neighbourhood. Accordingly, I have not considered the concerns relating to street parking in this decision.
15. Between 24 June 2016 and 21 November 2016, various submissions were lodged by the parties. A list of the material that is before the delegate of the Secretary is set out in Annexure A.

Statutory Considerations

16. The Act requires that in certain cases the Secretary have regard to the following considerations.
17. *The order of occupancy between the licensed premises and the complainant* – The venue has operated under the current licence at its present site since 6 February 2014, with the current approved manager starting on 18 May 2015. This does not predate the complainants, who have resided at their nominated addresses since 1999 and 2001

respectively. This fact is not in dispute and I consider that the order of occupancy consideration is in favour of complainant.

18. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – Over the last three years, the venue has undergone significant structural change. The owners lodged a development application (DA) with local council, DA12/0170, which was approved on 18 February 2013. The DA sought alterations and additions to the existing and unlicensed *Hideaway Motel*. The structural changes resulted in additional individual accommodation suites, a function area with the capacity to accommodate 120 guests, a restaurant and indoor and outdoor bars. The initial grant of the DA incorporated a provision for a trial period of extended trading hours until 12:00 midnight seven days a week.
19. The complainant's residence also underwent significant structural change. [REDACTED] completed the construction of a new three storey home, including a balcony, which is less than five meters from the boundary between his home and the venue, and overlooks the venue's functions area. [REDACTED]'s residence was also recently renovated.
20. *Any changes in the activities conducted on the licensed premises over a period of time* – The complainant alleges substantial change in the activities conducted at the venue since the grant of the liquor licence on 6 February 2014. Previously, the venue offered accommodation only. The venue now offers other facilities in addition to accommodation, including functions for up to 120 patrons, and hosts a range of events, including weddings, which utilise the restaurant and outdoor bar areas. This differs significantly from when the premises was an unlicensed motel.
21. Since the initiation of this disturbance complaint, the licensee has successfully sought an extended trading authorisation from the Authority. This authorisation allows the venue to trade in all areas from 8:00am to 12:00 midnight on Sundays.

Other Considerations

Undue disturbance

22. A person may complain to the Secretary that the quiet and good order of the neighbourhood of licenses 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 licensed premises operations, but, only when that disturbance is *undue* are there grounds to prove a complaint.

23. I have balanced the submissions made on behalf of the venue, the complainant, NSW Police and the Tweed Shire Council. I have also considered the results of an inspection of the venue undertaken by L&GNSW staff.
24. I am satisfied the material before me is sufficient to support a finding that the venue has, at times, caused undue disturbance to the neighbourhood.
25. The venue is situated on the shores of the Cabarita beach, in a largely residential neighbourhood. The venue houses 21 individual guest accommodation suites. The surrounding area comprises primarily of residential housing as well as retail premises and restaurants. The complainants' residences are located on the north and south boundaries of the venue respectively. The venue's liquor licence authorises it to trade indoors from 8:00am to 12:00 midnight Monday to Saturday, 10:00am to 12:00 midnight on Sunday and outdoors from 10:00am to 10:00pm Monday to Saturday, and from 10:00am to 12:00 midnight on Sunday.
26. I have considered the complainant's allegations of repeated undue disturbance from the venue operating as a function venue, and a lack of adequate noise mitigation measures, as well as more specific complaints about noise caused by patrons and staff at the venue after midnight. The complainant provides several specific examples of disturbance, including dates and times.
27. Both Police and Council acted proactively to mitigate the risk of undue disturbance associated with the change of business model from an unlicensed motel to a licensed premises. Police successfully sought the imposition of a LA10 noise condition at the time the liquor licence was granted by the Independent Liquor and Gaming Authority (the Authority), with Council imposing a similar condition as part of the venue's development application process, following concerns raised by residents.
28. As part of the process for approving the extended trading authorisation, in addition to imposing the LA10 noise condition proposed by Police, the Authority also imposed conditions on the liquor licence requiring the licensee to be an active participant in the local liquor accord and maintain a register of disturbance complaints. A review of the disturbance complaints register indicates that no formal complaints have been recorded by the venue staff since that licence condition came into effect on 31 January 2017.

29. The conditions also require that the venue operate in accordance with a plan of management and other specific supporting documents submitted as part of the process for obtaining the extended trading authorisation.
30. Council advises that noise emission and its effect on the amenity of the area was a relevant consideration in approving DA12/0170. The venue was afforded temporary hours of operation of until 12:00 midnight, seven days a week on a six months trial basis, with no noise complaints received since the commencement of the development.
31. Police submit they have no records of adverse incidents, including noise complaints against the venue. Police did undertake two random inspections at approximately 12:00 midnight on Saturday 11 June 2016 and at around 10:00pm on Tuesday 7 November 2016, with no compliance or disturbance issues identified.
32. On Saturday, 26 November 2016 at 9:45pm, L&GNSW Inspectors attended the venue to conduct observations in relation to disturbance.
33. Inspectors determined the balcony of the nearest residence to be less than five metres from the boundary between the two properties, noting that the small function room and grassy area used for weddings was located almost directly underneath the complainant's balcony. In these circumstances, Inspectors acknowledged that disturbance would be difficult to manage while the premises utilises any outdoor space.
34. Inspectors observed minimal noise from the venue. Inspectors contacted the complainant, who also advised there was minimal disturbance and that there had been fewer disturbances since the venue 'stopped hosting weddings'.
35. The licensee submits they have some history with the complainant and has made efforts to incorporate new procedures into their business practices to minimise any impact caused by the operation of the venue.
36. The licensee generally refutes the complainant's submission as it relates to specific examples of disturbance, either disagreeing with the facts (i.e. no record of a function occurring on a particular night), or submitting the venue was compliant with the licence and other relevant conditions. Regardless, the licensee submits care will be taken to ensure impacts from future functions are minimised.
37. The LA10 noise criteria is accepted as the preferred benchmark for assessing undue noise disturbance from licensed premises. As the venue is already bound by a requirement to comply with the LA10 noise criteria, the licensee was invited to undertake independent acoustic testing to demonstrate whether the criteria was being complied with. I note that no such testing was undertaken.

38. There is limited direct evidence to support a finding that the venue is causing undue disturbance. Nonetheless, I have determined that on the balance of probabilities, there is a high likelihood the venue has *at times* caused undue disturbance. In this regard, I have been persuaded by the complainant's submissions in the context of the proximity of their residence to the premises.
39. Observations from Inspectors confirm that the venue and its functions area is located in extremely close proximity to residential properties, and that effective management of disturbance in these circumstances would be challenging. This observation is supported by both Police and Council actions in seeking and subsequently imposing conditions on the venue relating to noise management. It is apparent that in the context of the circumstances, Council and Police anticipated a high risk of undue disturbance being caused by the venue.
40. Two separate complaints were made to L&GNSW, providing specific details on dates, times and activities when disturbance was considered by residents to be undue. Most of the examples provided focus on patron noise and use of the outdoor area and usually during functions or events hosted at the venue.
41. I acknowledge the licensee has contested the examples given by the complainants for one reason or another. However, in the absence of an acoustic test carried out during a function at the premises, it is essentially a case of accepting one set of facts over another. On the material before me, and taking into account the physical context of the circumstances, I am satisfied that the venue has, at times, caused undue disturbance.

Actions taken to mitigate undue disturbance

42. In considering whether or not to impose conditions on the venue's 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 to the disturbance.
43. Since the initiation of the complaint, the licensee submits they have implemented new business practices to mitigate disturbance, including purchasing a bottle crusher to minimise noise from the disposal of glass bottles. The licensee has also made effort to dim lighting in the outdoor area, to turn music down at 6:00pm for all functions and to ensure doors and windows to the restaurant area are closed to contain the noise. However, the licensee submits the operation of the business, while conducted in a reasonable and considerate manner, will still carry with it certain impacts, which must be accepted by local residents.

44. I have considered the submissions of the complainant, licensee, Police and Council. 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 disturbance, I have considered the following points.
45. In determining that the disturbance is undue, I have considered the venue has operated for over three years under its current licence, and it is reasonable to expect some noise will be generated by its ongoing operation, both as a venue offering accommodation services and as a restaurant offering casual dining, including hosting functions and events.
46. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the complainant. Furthermore, the venue has undergone substantial change, particularly in regard to its business model and layout.
47. Observations of the venue's layout and its proximity to the complainant's residence support a finding effective noise management would be exceptionally challenging while the premises utilises any outdoor space. While these observations highlight the high possibility of undue disturbance occurring, I am mindful that they do not amount to actual evidence of undue disturbance.
48. Both Police and L&GNSW Inspectors observed minimal disturbance and general compliance at the venue on the nights they attended between June and November 2016. By their own admission, the complainants have noted some improvement in disturbance, however this appears to be only when the venue is not hosting functions.
49. Since the initiation of this complaint, the following conditions have been imposed on the liquor licence relating to disturbance:
 - a) LA10 condition
 - b) plan of management condition
 - c) condition requiring the business to operate in accordance with the wellbeing of the broader community as provided in the community impact statement
 - d) licensee must join a local liquor accord, and
 - e) maintenance of a disturbance complaint register and requirement to respond to any disturbance complaints in a timely and effective manner.
50. I am satisfied it is likely that undue disturbance has occurred at various times in the past, particularly when functions or events are being held at the venue. However, the conditions imposed by the Authority, including the disturbance complaint register and plan of management appear to have provided a remedy to this issue.

51. I am of the view that strict compliance with the existing LA10 noise condition, and the recently imposed conditions by the Authority will maintain the amenity of the neighbourhood. It is appropriate to provide the licensee the opportunity to comply with these conditions before considering whether additional conditions should be imposed.
52. Therefore, I have determined it is appropriate to issue the licensee with a warning in this instance. Future undue disturbance ought to be addressed by way of enforcement of the licence conditions.
53. The licensee should be aware that the venue will be subject to monitoring and possible enforcement action to ensure compliance with licence conditions, with a particular focus on the relevant disturbance mitigating measures.
54. I strongly encourage the licensee to proactively manage this issue. In the event there is an escalation of disturbance or fresh and direct evidence presented which demonstrates poor management of disturbance issues, then it is open for the matter to be reconsidered and for regulatory intervention to occur.

Date of decision: 25 September 2017



Sean Goodchild

Director Compliance Operations
Liquor & Gaming NSW
Delegate of the Secretary, Department of Industry

IMPORTANT NOTES

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

You should also note that in accordance with the provisions of section 36C of the *Gaming and Liquor Administration Act 2007*, this decision will be published on the Liquor & Gaming NSW website at www.liquorandgaming.nsw.gov.au



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

1. Liquor licence document.
2. Primary Section 79 Noise Disturbance Complaint, lodged by [REDACTED] on 9 April 2016.
3. Secondary Section 79 Noise Disturbance Complaint, lodged by [REDACTED] on 7 June 2016.
4. Submission from [REDACTED], Team Leader Development Assessment, Tweed Shire Council dated 24 June 2016.
5. Submissions from [REDACTED], Licensing Unit, Tweed/Byron Local Area Command dated 14 June 2016 and 21 November 2016.
6. Submission from Mr Matthew Jones of Liquor & Gaming Specialist, on behalf of the licensee, dated 25 July 2016.
7. Submission from the complainant dated 13 January 2016, including material from [REDACTED] and a letter from Liquor & Gaming Specialists dated 21 December 2013.
8. Submission by Mr Matthew Jones dated 6 September 2016.
9. File note by L&GNSW staff from observations of the premises on 16 December 2016.
10. Submissions from Mr Mauro De Riso, Approved Manager dated 3 August 2017.
11. Submissions from the complainant dated 3 August 2017.
12. File note by L&GNSW staff of a phone conversation with the complainant on 3 August 2017.