



FILE NO: A14/0003901

COMPLAINANT: [REDACTED]

LICENSED PREMISES: In Situ, Manly – LIQO624008953

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, Anthony Keon, Director Compliance & Enforcement, Office of Liquor Gaming & Racing as a delegate of the Secretary, Department of Justice have in relation to the complaint decided to impose the following conditions on the liquor licence of In Situ, Manly:

Effective from 20 August 2015

1. LA10 Noise Condition

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz – 8kHz inclusive) by more than 5dB between 7.00 am and 12 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 Centre Frequency (31.5Hz – 8kHz inclusive) between 12 midnight and 7.00 am at the boundary of any affected residence.*

** Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12 midnight and 7.00 am.*

2. Closure of the bi-fold doors

The licensee must ensure that the rear bi-folding doors leading to the outdoor area of the restaurant are closed:

- *from 10.00pm on any trading night, and/or*
- *at any time live or amplified music is provided.*

3. Closure of the outdoor area

The licensee must ensure that members of the public or restaurant patrons are not permitted in the rear outdoor area from 10.00pm on any trading day.

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 resident and is authorised in writing by two or more other such 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.

- 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 1 May 2014, [REDACTED] (the Complainant) submitted a disturbance complaint under section 79 of the *Liquor Act 2007* (the Act) concerning In Situ, Manly (the licensed premises). The complainant alleged peak undue disturbance on a weekly basis but particularly on Friday and Saturday nights from amplified music vibration, noise from patrons using the outdoor courtyard area, and anti-social behaviour in the common areas in the near vicinity of the licensed premises. The complainant lodged the complaint as a resident and was authorised by two other residents.

Material before the Secretary

6. The material before the Secretary in making this decision comprises:
 - a. Section 79 Disturbance Complaint lodged by [REDACTED] on 1 May 2014.
 - b. Submission from Mr Sam Johns, a business owner, dated 11 June 2014 providing an acoustic report prepared by Acoustic Dynamics Pty Ltd dated 6 June 2014.
 - c. Submission from Superintendent Dave Darcy, Northern Beaches Local Area Command dated 26 June 2014.
 - d. Submission from Ms Anita Ugarkovic, Manager Regulatory Services, Manly Council dated 3 July 2014 and 18 September 2014.
 - e. Email submission from the Licensee dated 19 September 2014 enclosing a further acoustic report dated 16 September 2014 and letters of support from several residents.
 - f. OLGR inspector file notes of attendance and observations made both at and in the near vicinity of the licensed premises dated 9 January 2015, and 10 June 2015.
 - g. Email correspondence from the complainant dated 2 June 2015 enclosing a copy of a licence agreement between the owners of strata plan 61139 and D & M Sashar Pty Ltd who is referred to in the licence agreement as the licensee and the owner of Lot 1 in Strata Plan 61679.

Background

7. The licensed premises is a restaurant operating under a liquor licence with a primary service authorisation and commenced operation at its current location on 23 April 2001. The trading hours of the licensed premises are regulated under a prevailing DA consent and are less than the standard trading hours which are permitted under the Act. Reduced trading is due in part to the close proximity of residential apartments, which overlook the commercial and open public area on the ground floor street level where the licensed premises and other businesses are located. A number of other restaurants and cafes located in close proximity to the licensed premises utilise seating in an open courtyard area which is part of the Pacific Waves Complex. The complainant and the authorising residents to the complaint all reside in residential apartments above the licensed premises and other commercial premises.
8. On 1 May 2014, the complainant, on behalf of two other residents, lodged a disturbance complaint under section 79(3)(a) of the Act asserting that they are affected by undue disturbance from the licensed premises. The complainants allege they are being affected by loud amplified music and vibration and patron noise from the outdoor area and anti-social behaviour from patrons leaving the licensed premises.
9. On 11 June 2014 a submission was provided by Mr Sam Johns, an owner of the licensed premises, advising that Acoustic Dynamics Pty Ltd had been engaged to conduct acoustic monitoring, and that noise emissions from the licensed premises complies with the LA10 noise criteria. He further advised that the rear bi-fold doors are now closed before the commencement of live or amplified music. Mr Johns also submitted an acoustic report prepared by Acoustic Dynamics dated 6 June 2014, which advised the following:
 - a. A noise limiter was previously installed and calibrated by PKA Acoustic Consulting following the issue of a Preventative Notice by the Council on 6 March 2014. Amplified music that is played within the licensed premises is neither tonal nor impulsive as the loud speaker system does not include a subwoofer for producing low frequency noise.
 - b. Acoustic monitoring undertaken on Friday 16 May 2014 by Acoustic Dynamics found noise emissions to be non-compliant at receivers located above the restaurant and across the courtyard during live or amplified music with the bi-fold doors in the open position.

- c. Such testing also found that compliance with the LA10 noise criteria can be achieved at the sensitive receiver locations if the following recommendations are implemented:
- The rear bi-folding doors are closed at all times during the provision of live or amplified music.
 - A double swinging door enabling ingress and egress between the indoor and external area for patrons and wait staff be installed.
 - The rear outdoor area of the licensed premises should continue to be monitored by a community liaison officer and be closed after 10 pm.
10. On 26 June 2014 a submission was provided by Superintendent Darcy, Northern Beaches Local Area Command, advising that NSW Police had conducted a number of business inspections at the licensed premises that noted venue patrons were not located within the outdoor area after 10.00 pm, and a security guard was stationed at the rear gate monitoring the courtyard and public areas. The submission also advised that the guard is required to prevent persons from causing disturbance, preventing patrons from removing alcoholic beverages from the licensed premises courtyard areas, and to monitor the shared public amenities and courtyard to deter anti-social issues from occurring.
11. The submission also advised that adjoining the licensed premises are three other licensed venues, Ground Zero Restaurant, Harlem on Central and Cafe Jah Bar. All of these venues have separate outdoor areas but share access to the public amenities. The outdoor areas of the venues lead to a large open courtyard that permits public use and is a thoroughfare between Central Avenue and Henrietta Lane. Police observations did not link any issues of undue disturbance with the operation of the licensed premises.
12. On 3 July 2014 a submission was provided by Ms Anita Ugarkovic, Manager Regulatory Services, Manly Council advising that since January 2014 the council had received a number of noise complaints relating to amplified/live music and noise from patrons in the courtyard area of the licensed premises. On 22 January and 26 February 2014, in response to the complaints, council officers carried out late night inspections and witnessed excessive music noise emanating from the licensed premises. Following these observations, the council issued a Prevention Notice under the *Protection of the Environment Operations Act 1997* requiring the business to cease offensive noise, engage an acoustic consultant to assess the venue's noise levels, install a noise limiter to the amplification system and provide an acoustic report to the council.

13. In response to the Prevention Notice, the business owner provided the council with an acoustic report prepared by Acoustic Dynamics Pty Ltd, dated 6 June 2014. The acoustic report asserted that noise levels at the licensed premises were non-compliant with the LA10 noise criteria. Notwithstanding, the report also advised that compliance with the noise criteria could be achieved at the licensed premises by closure of the bi-fold doors that separate the internal and external areas during the provision of live or amplified entertainment. The report also recommended additional noise mitigation strategies that include the installation of a double swinging entry and exit door providing access and egress to provide access to the courtyard, closure of the outdoor area from 10.00 pm and continued use of a community liaison officer to monitor patron noise in the outdoor courtyard and public areas.
14. In an email to OLGR case officers on 10 September 2014 the complainant confirmed his agreement with the information provided in the council submission. The complainant also suggested that the licensed premises be required to undertake further acoustic monitoring during peak summer trading as additional complaints of music noise vibration from the licensed premises had been reported to the Body Corporate by residents residing on the Sydney Road side of the building, and above the principle entrance of the licensed premises. The complainant reiterated that residents are concerned that the licensed premises changed its business operation from that of a restaurant to a nightclub. Notwithstanding, the complainant advanced that the operation of restaurants within the Pacific Waves building is beneficial to the complex as a whole however requested that the amenity of the residents must not be compromised.
15. In a further email to OLGR case officers on 18 September 2014 Ms Anita Ugarkovic, Manager, Regulatory Services, Manly Council submitted that following the recommendations in the acoustic report the licensed premises had decided to close the bi-fold doors to contain noise levels. However the council viewed these as temporary measures and long term solutions to containing noise emissions should be implemented. The submission also advised that the council will be undertaking further inspections to determine compliance with the consent provisions and also the *Protection of the Environment Operations Act 1997*, in relation to offensive noise.
16. On 19 September 2014 in an email to OLGR case officers the licensee provided a submission in respect to the issues raised in the disturbance complaint and made the following comments in respect to the complainant's submission:
 - a. In respect to acoustic monitoring undertaken at the licensed premises, the acoustic consultant took noise readings from several balconies on the first floor level that

are nearest to the courtyard of the licensed premises by a microphone attached to an extension pole that is held level with the balcony railing during the monitoring period. This method alleviated the requirement for the consultant to enter individual residences to undertake such monitoring.

- b. The bi-fold doors are now closed at all times when amplified entertainment is conducted.
 - c. A security guard is employed to monitor patron behaviour in the internal area, outdoor courtyard and public area.
 - d. The licensee has offered to fund the construction of a covered walkway to contain noise and to direct venue patrons to and from the public conveniences. This proposal was initially rejected by the Body Corporate.
 - e. Rejected the complainant's view that the restaurant has changed into a nightclub advising that the premises is operating in accordance with its liquor licence.
 - f. Provided a number of supporting statements from residents residing within the Pacific Waves complex which supports the conduct and operation of the licensed premises.
 - g. Advised NSW Police regularly conduct walk through inspections and they have not reported any alleged breaches concerning the operation of the licensed premises.
17. At 8.45 pm on 21 December 2014 OLGR inspectors conducted external observations at the licensed premises from a public area near the rear courtyard. During the observations the inspectors contacted the complainant who advised that the licensed premises had been quiet, however on busy nights the principle issues of disturbance that were set out in the disturbance complaint remain. At 9.00 pm inspectors entered the licensed premises and estimated that approximately 50 persons were in attendance, acoustic background music was playing from an in house music system and patrons were both sitting and standing engaged in conversation, consuming beverages and partaking of meals and snacks. The inspectors also noted that patrons were not talking loudly and the music volume levels not excessive. The rear doors leading to the courtyard were closed. On completion of their observations, the inspectors identified themselves to an on duty manager and confirmed their observations.
18. Between the period 21 December 2014 and 1 June 2015 OLGR case officers maintained contact with the complainant to monitor the conduct of the licensed premises. The complainant advised that the licensed premises were not causing issues of disturbance and there was no requirement for OLGR inspectors to conduct on-site observations.

19. On 2 June 2015 the complainant in an email to an OLGR case officer advised a licence agreement between the Owners Corporation Strata Plan 61679 and the owner of Lot 1 in Strata Plan 61679 (the licensed premises) was entered. The agreement sets out the operation and use of the property and provides a range of penalties and fees that the licensee is required to pay for non-compliance with the terms described in the agreement.
20. At 9:25 pm on 9 June 2015 OLGR inspectors conducted external observations at the front of the licensed premises on the Sydney Road side where five persons were seated at two covered outdoor tables engaged in conversation. The outdoor tables are located in close proximity to the principle entrance of the licensed premises where a security guard was standing checking persons entering and ensuring that the front door was not left open. The inspectors also noted a considerable number of patrons inside of the licensed premises were congregating near the entrance.
21. The inspectors then returned to the rear of the premises noting that amplified music, whilst audible, was not considered loud or undue. At 9.40 pm the inspectors returned to the front of the licensed premises and upon entry one was asked for ID. Amplified entertainment was being provided by a single performer playing an amplified guitar. The licensee was engaged by the inspectors who advised that he had signed a licence agreement with the Strata. He also advised that the Strata had given approval for the building a covered walkway and an application for its construction had been made to Manly Council. The licensee also confirmed that a static guard is jointly funded in co-operation with adjoining licensed premises to check patron noise levels in the rear courtyard, ensuring the rear gate leading to the public area is locked, deter issues of anti-social behaviour and promote the safety of patrons and members of the public when using the public conveniences which are located near the licensed premises. The licensee also commented that since implementing the measures and signing an agreement with the Strata he has not been aware of any further complaints.

Statutory Considerations of section 81(3) of the Act

22. The Act requires that in certain cases the Secretary have regard to three statutory considerations being the order of occupancy between the licensed premises and the complainant; any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises; and, any changes in the activities conducted on the licensed premises over a period of time.

23. *The order of occupancy between the licensed premises and the complainant* – The licensed premises commenced operation at its present site on 24 April 2001 and pre-dates the complainant's arrival who claims to have occupied his residence for 12 months at the time of making the complaint. This fact is not in dispute and I consider that the order of occupancy consideration is in favour of the licensed premises.
24. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – The complainant advised that the licensed premises in recent years constructed an external awning to contain noise levels. No changes have been made to the complainant's residence.
25. *Any changes in the activities conducted on the licensed premises over a period of time* – The complainant alleged that the licensed premises changed its business model from a restaurant to a nightclub type operation with entertainment which has generated significant noise disturbance.

Summary and conclusion

26. I have considered the submissions of the complainant, the licensee, NSW Police, and the local council. While there is no doubt that the licensed premises causes' disturbance to some residents the question I must come to is a finding on whether that disturbance is undue. In considering this issue I have had regard to the particular context in which the licensed premises operates (including statutory considerations mentioned above) and I have considered what a reasonable person might consider to be undue in this particular context.
27. I am satisfied that on balance, the material before me provides a proper basis to make a finding that the licensed premises at times, causes undue disturbance to the neighbourhood. I have balanced the submissions of the licensed premises (including the letters of support from residents), acoustic reports prepared by Acoustic Dynamics Pty Ltd, and the material supplied by Manly Council, NSW Police and OLGR inspectors. I have placed significant weight on the observations of the council officers who provided details of observations on 22 January 2014 and 26 February 2014 which identified excessive music noise levels being played at the licensed premises, and the preventative actions of the council who issued a Prevention Notice under the *Protection of the Environment Operations Act 1997*.
28. These observations demonstrate that, to varying degrees, loud amplified music and patron noise emanating from the licensed premises has disturbed the neighbourhood. To test compliance with the LA10 noise criteria the licensee engaged Acoustic Dynamics Pty Ltd who conducted acoustic monitoring and asserted that noise

emissions from amplified entertainment exceeded the relevant assessment criteria when the bi-fold doors separating the internal and external areas were in the open position. The acoustic report also advised that compliance with the relevant LA10 noise criteria can be achieved at the licensed premises by the closure of the bi-fold doors at all times during the provision of live or amplified music.

29. The acoustic report also recommended two additional preventative measures to prevent noise escape from the licensed premises that include the closure of the rear bi-folding doors to the outdoor area from 10.00 pm and for the continued monitoring of the outdoor area by a security guard and closure of this area after 10.00 pm.
30. In order to consider appropriate safeguards, I consider the imposition of the LA10 noise condition as an acceptable industry standard and the preferred benchmark of OLGR for assessing undue disturbance at the licensed premises. I consider the imposition of this condition as an appropriate response to the issues presented in the complaint which does not place undue burden on the operation of the licensed premises.
31. As a further safeguard, I have decided that the two additional recommendations set out in the acoustic report relating to closure of the rear bi-folding doors from 10.00 pm and at all times during the provision of music (live or amplified) and the closure of the rear outdoor area from 10.00 pm be imposed as conditions on the liquor licence.
32. I believe the nominated time is reasonable and provides a balance to allow patrons to enjoy the amenity of the licensed premises and its outdoor facility and ensure that the amenity to the nearby residents is restored. I am of the view that by closure of the outdoor area from 10.00 pm will significantly reduce issues of undue noise disturbance from this area.
33. I have determined that the conditions should become effective 14 days from the date of this decision in order to provide sufficient time to ensure business readiness and compliance with the new requirements.

Date of decision: 6 August 2015



Anthony Keon
Director Compliance & Enforcement
Office of Liquor, Gaming & Racing
Delegate of the Secretary, Department of Justice

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 21 days of the date of this decision, that is, by no later than 27/08/2015. A \$500 application fee applies. Further information can be obtained from Authority Guideline No. 2 published at www.ilga.nsw.gov.au

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