

FILE NO: A15/0005177

COMPLAINANT: [REDACTED] representative of The Westin Sydney

LICENSED PREMISES: Ivy – LIQH400102283

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 (OLGR), a delegate of the Secretary, Department of Justice, in relation to the complaint made against Ivy 320 George Street, Sydney (the hotel) have decided to impose two conditions on the liquor licence relating to the following:

1. A noise limiter must be operated at the hotel in accordance with the advice provided in the Acoustic Report dated 14 May 2015.
2. A requirement for the licensee to conduct annual acoustic testing.

The details of the conditions, including the dates in which they become effective, are outlined in Annexure 1.

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 satisfies the Secretary that their interests (financial or otherwise) are adversely affected by the disturbance detailed within the complaint.
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 13 February 2015 [REDACTED] of The Westin Sydney, 1 Martin Place Sydney, (the complainant) lodged a disturbance complaint under section 79 of the Act concerning the hotel. The complainant alleged peak undue disturbance on a weekly basis, particularly on Friday and Saturday nights, from amplified entertainment conducted in the open-air nightclub that is located on the roof area of the hotel. The complainant lodged the complaint as a person who satisfies the Secretary that their

interests (financial or otherwise) are adversely affected by the disturbance detailed in the complaint.

6. The licensed premises is a hotel operating from 320-346 George Street Sydney, which commenced trading in September 2007. The hotel has an extended trading authorisation from 5.00am to 5.00am Monday to Sunday, and a minors area authorisation. The current licensee, Mr Daniel Cadwallader, was appointed to the position on 1 May 2015. The hotel is described as:

'...a leading dining, entertainment and retail destination in the heart of Sydney CBD, home to award winning restaurants, Sydney's only rooftop pool bar, numerous event spaces and leading fashion and lifestyle retailers. The hotel includes Palings Kitchen & Bar, Ast St. Cellar, Felix, Uccello, Pool Club, Changeroom, The Royal George; beautiful, unique events spaces include: ivy ballroom, ivy sunroom, ivy penthouse, The Den and The Terrace...'¹.

7. On Saturday nights nightclub style entertainment is operated at the hotel via 'Pacha' which is marketed as 'Australia's No.1 Nightclub'² encompassing 10 bars over 4 floors. 'Pacha' was established in 2012 as a 'super club' and plays host to an array of international and domestic DJ's and events. The hotel also regularly conducts DJ events and parties in the open-air Pool Bar, which is located on the roof of the hotel.
8. On 16 March 2015, after a review of the material contained in the complaint, this Office wrote to the then licensee Mr Nicholas Ivanov advising of the complaint. Mr Ivanov was informed of a proposed decision to vary the standard LA10 noise condition imposed on the hotel's liquor licence so that it can apply to accommodation rooms within the accommodation premises. The LA10 currently applies to noise received at residential premises and the proposed decision was to provide clarity on its application to accommodation rooms. The letter also requested the licensee to engage an acoustic consultant and provide an acoustic report addressing the issues raised in the complaint and invited submissions on the proposal to vary the LA10 condition.
9. Between 8 April 2015 and 15 June 2015, 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 2. A summary of key information obtained during the submission period is set out in Annexure 3.

¹ Sourced from <http://merivale.com.au/ivy>

² Sourced from <http://pachasydney.com/news/item/announcing-pachas-2015-programme>

Considerations and findings

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

10. 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.
11. *The order of occupancy between the licensed premises and the complainant* – The licensed premises has operated at its present site since 2007. The complainant's premises has operated from its current site since 1999 and predates the occupation of the hotel. This fact is not in dispute and I consider that the order of occupancy consideration is in favour of the complainant.
12. *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 structural changes to either the complainant's premises or the hotel.
13. *Any changes in the activities conducted on the licensed premises over a period of time* – The complaint sets out music noise intrusion from the operation of amplified entertainment from the hotel's open roof and open-air Pool Bar which commenced in 2008.

Summary and conclusion

14. I have considered submissions from the complainant, the licensee, NSW Police and City of Sydney council. I have had regard to the particular context in which the hotel operates (including statutory considerations mentioned above).
15. I am satisfied the material before me is sufficient to support a finding that the hotel has caused undue disturbance to the neighbourhood. I have balanced the submissions on behalf of the hotel, acoustic reports, submissions made on behalf of the complainant, material supplied by City of Sydney council, and file notes of OLGR inspectors.
16. In considering the matter I have had particular regard to the following observations of City of Sydney council officers and OLGR inspectors in investigating the complaint.
17. In response to a noise complaint at the complainant's premises on 1 March 2015 Council officers conducted observations from within suite 2209 and, at 1.30am, the

officers reported a spike in the volume levels from the music emanating from the hotel. The officers reported that music was clearly audible from within the suite.

18. In response to a further noise complaint on 15 March 2015, council officers attended the complainant's premises and conducted observations from suite 3008. Between 1.00am and 1.25am the officers heard music from the hotel in the suite which appeared to increase in volume. In response, a council officer attended the hotel and, whilst communicating with the other officer who remained in the suite, reduced the hotel's sound levels to an acceptable level. Resulting from these actions, the hotel was issued with a verbal warning.
19. At 12.10 am on 18 April 2015 OLGR inspectors attended suite 2406 to conduct a noise assessment. During the assessment the inspectors clearly heard music from the hotel, although it had no audible bass noise. The on-duty manager of the complainant's premises, who was present in the suite during the assessment, advised that bass noise is usually present and was the basis of complaints from their guests. The inspectors later attended the hotel and confirmed that the source of the intrusive music was from the hotel's open-air Pool Bar.
20. I have also considered an Affidavit signed by the licensee at the time of the removal application of the licence to the current site. The Affidavit only identifies DJ entertainment as being utilised in the area which is now known as the Change Room. There is no mention of DJ entertainment or a nightclub style environment in any other part of the hotel. Notably, the Affidavit states:

“9.2 The proposed premises will be sound-proofed to accommodate the entertainment provided”
21. The information contained in the Affidavit appears at odds with the hotel's current model of operation which hosts 'Australia's Number 1 Nightclub' Pacha every Saturday throughout the hotel, including in open-air areas.
22. I note during the processing of the removal application, the licensee submitted an acoustic report dated December 2004 by PKA Acoustic Consulting that provided the initial results of an assessment of the likely noise impact of the hotel's proposed development. The report described the various levels of the proposed development, including the 4th floor level which the consultant detailed would contain a private office and reception area, a private deck and lap pool, outdoor landscaped courtyard and mechanical services plant rooms.

23. The 4th floor area now houses the popular open-air Pool Bar which hosts large scale dance party events late into the trading period. This appears to dramatically differ from what was described in the acoustic consultant's report of December 2004.
24. The acoustic report made a number of recommendations including the need to limit music noise within the development so that low frequency noise does not affect surrounding accommodation premises. Alternatively, it suggested that it would be necessary to design the façade so any required noise levels are satisfactorily contained within the building envelope.
25. I have no doubt the Affidavit and acoustic report submitted to the former NSW Licensing Court gave some comfort that all noise emissions from amplified entertainment would be contained, or kept to a level to prevent noise disturbance to neighbouring properties. It is also clear that the hotel's current operation is significantly different to that described in the affidavit and acoustic report and which was subsequently granted by the Court.
26. I am further of the view that the present operation of an open-aired Pool Bar, where amplified entertainment is regularly provided into the early hours of the morning, was not an issue that was considered by the Court when the removal application was approved. Accordingly, I have considered this change in the hotel's activities in this decision.
27. Further, I do not consider the case law relied upon by the hotel's current acoustic consultant, Mr Steven Cooper, to be relevant or his representations about the quality of the complainant's premises to be of assistance in the determination of this matter, and only serve to distract from trying to resolve the material issue at hand.
28. The disturbance provisions of the Act, particularly section 81 sets out the actions that I am able to take as a delegate of the Secretary after dealing with a complaint in accordance with section 80. Accordingly, I am not bound by development consent conditions that are issued by the local consent authority.
29. I note the hotel was initially resistant to dealing with the matters raised in this complaint and its original response centred on a technical argument that provided no information or commitment to resolving the substantive issue. The response failed to provide any assurances that the hotel intended on addressing the issues raised by the complainant nor provided any practical steps as to how the hotel intended to reduce noise levels affecting persons staying in the accommodation rooms of the Westin. The hotel also initially refused to undertake acoustic testing, and only did so when formally directed by this Office under section 75 of the Act to do so.

30. Since acoustic testing has now been conducted at the hotel and a number of measures have been implemented to reduce the level of disturbance, including redirecting speakers and recalibrating the noise limiters, this Office has not received any further complaints from the complainant. Notably, the acoustic testing conducted by Mr Cooper concluded the venue could comply with the LA10 residential criterion.
31. Having regard to the apparent effectiveness of the actions eventually taken by the hotel to address the issues of disturbance, I consider that the additional conditions requiring annual acoustic monitoring, the requirement for noise limiter/s and for the limiter levels to be checked by an acoustic consultant in accordance with The Acoustic Group report dated 14 May 2015 as appropriate safeguards to prevent issues of disturbance from occurring in the future.
32. In respect of the commencement of the conditions, I note that noise limiters are already in place so the hotel is able to immediately comply with this requirement. In addition, to avoid any confusion, I recognise that the venue has recently completed acoustic testing, so the relevant condition requires the next compliance testing to be conducted in 2016.
33. I also advise that in the event of further undue disturbance from amplified entertainment from the hotel, I will consider additional controls to be placed on the hotel's liquor licence which may include the prohibition of amplified entertainment in open-air areas of the hotel.

Date of decision: 27 October 2015.



Anthony Keon
Director Compliance & Enforcement
Delegate of the Secretary, 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 21 days of the date of this decision, that is, by no later than 17/11/2015. A \$500 application fee applies. Further information can be obtained from Authority Guideline 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.

Conditions imposed under section 81 of the *Liquor Act 2007*

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

Ivy, Sydney (LIQH400102283)

Noise Limiter

At any time amplified music is conducted at the hotel, all amplifiers or noise generating equipment must be under the control of a noise limiter/s. The noise limiter/s must:

- a. be set by an acoustic consultant in accordance with The Acoustic Group report dated 14 May 2015
- b. be secured within a locked container or in a secure area only accessible by hotel management
- c. only be varied by an acoustic consultant to achieve compliance with these requirements.

Date condition effective: 30 October 2015

Acoustic Testing

By November of each calendar year, the licensee must undertake acoustic compliance testing. The testing must:

- a. be undertaken by a suitably qualified acoustic consultant
- b. be undertaken during live amplified entertainment at the hotel
- c. include testing from within a room at The Westin Sydney, as determined by a representative of The Westin Sydney
- d. check the levels of the noise limiters
- e. be recorded in a report prepared by the acoustic consultant within 4 weeks of the completion of the testing. A copy of the report must be maintained at the premises and made available for immediate inspection by inspectors, NSW Police or council officers.

Date condition effective: 30 October 2015

Annexure 2

Material before the Director Compliance & Enforcement as delegate of the Secretary

The material before the Secretary in making this decision comprises:

- Section 79 Disturbance Complaint lodged by [REDACTED] on 13 February 2015 containing a complaint diary dated from 19 October 2008 to 26 February 2015.
- Email from the complainant dated 25 February 2015 to advise of a meeting with Mr Nicko Ivanov, former licensee of the licensed premises.
- Email from the complainant dated 3 March 2015 forwarding a City of Sydney council inspection report dated 1 March 2015 in response to a noise complaint reported to the council.
- File note of conversation between OLGR inspectors and the complainant dated 13 March 2015 concerning noise disturbance from the licensed premises.
- File notes of observations by OLGR inspectors on 28 February 2015, 8 and 15 March 2015 and 18 April 2015 to assess noise intrusion from within a number of affected executive suites within the complainant's premises that overlook the hotel.
- Letter dated 18 March 2015 from the Office to then licensee Mr Nicholas Ivanov inviting submissions in respect to a consideration to vary the existing LA10 noise condition (condition 480) under section 54(2) of the Act in response to noise intrusion from the licensed premises.
- Submission from Mr Josh Bradshaw, Area Manager – North, Health & Building, City of Sydney council dated 10 June 2015 providing details of disturbance complaints received by the council, a copy of three hotel Development Applications, and a Plan of Management issued 5 November 2014 in respect of the hotel.
- Submissions received from Mr Kim Stapleton, Partner, JDK Legal dated 8 April 2015, 11 May 2015 and 18 May 2015 with an attached acoustic report by The Acoustic Group dated 14 May 2015. Further submissions dated 28 May 2015 and 15 June 2015 which attached an acoustic report, supplementary correspondence from The Acoustic Group dated 10 June 2015, and peer review report by Air Noise Environment Pty Ltd dated 15 June 2015.

- Letters from Ms Maysaa Parrino, Partner, CBP Lawyers dated 20 April 2015 and 23 April 2015 on behalf of the complainant.
- Letter from the Office to JDK Legal dated 7 May 2015.
- Submission from Inspector David Richards, Sydney City Local Area Command dated 2 June 2015.
- Case law Amazonia Hotels Pty Ltd v Council of the City of Sydney [2014] NSWLEC 1247 before Commissioner Pearson.

Summary of submissions provided to the Office:

1. On 13 February 2015 the complainant lodged a disturbance complaint under section 79(3)(d) of the Act and asserted his employer, The Westin Sydney, is adversely affected by undue disturbance from the hotel. The complainant alleged disturbance occurs mostly on Friday and Saturday nights from amplified music noise from the open-air Pool Bar.

Emails received from the Complainant

2. On 25 February 2015 the complainant emailed an OLGR case officer advising the hotel's licensee, Mr Nicko Ivanov had advised the complainant of his intention to make changes to remove the hotel's impact upon the complainant's premises.
3. On 3 March 2015 the complainant emailed an OLGR case officer to advise that City of Sydney council officers attended suite 2209 at 1.15 am on Sunday 1 March 2015 and had detected a spike in the volume levels from the music emanating from the hotel. Music noise was clearly audible from within the suite. The complainant also provided a copy of the council officer's report that was provided to the complainant's staff at the time.
4. On 16 March 2015 the complainant emailed an OLGR case officer to advise that City of Sydney council officers attended suite 3008 on Sunday 15 March 2015, in response to a further noise complaint. Observations made by the council officer's between 1.00 am and 1.25 am evidenced music noise intrusion in the suite from the hotel which appeared to increase in volume. In response to the complaint, a council officer then attended the hotel, and whilst communicating with the other officer who remained within room 3008, the volume of the hotel's amplification system was reduced to an acceptable level. Resulting from these actions, the hotel was issued with a verbal warning.
5. Attached to the complainant's email was a copy of a report given to the complainant's representative by the council officers relating to their attendance. The report confirmed the observations by council officers from the 28th level on 15 March 2015. The report stated, "noise complaint from Ivy not offensive at time of inspection on 28th floor. Bursts of music not no bass heard. Contacted Nicko Ivanov from Ivy. Stated to busy to attend.

Duty Manager (██████████) stated Ivy noise much lower than normal on Sat night usually - windows double glazed are shaking. 1.30 am definite spike in bass. Contacted Ivanov who stated will turn bass down. To floor 22 room 2209 not offensive". The complainant further advised that (██████████) was the on-duty night manager (complainant's premises) and had diarised the actions of the council officers to reduce noise intrusion levels in room 3008 from the hotel to an acceptable level.

Letter from the Office to the hotel licensee

6. On 18 March 2015 Mr Nicholas Ivanov, licensee of the hotel was advised in a letter from the Office that a complaint had been received which alleged undue disturbance from loud and excessive amplified entertainment from the hotel's open-air pool bar and Pacha nightclub. The licensee was also advised that OLGR inspectors had attended the complainant's premises on three separate occasions, namely, 28 February 2015; 8 March 2015; and, 15 March 2015 to investigate the complaints of noise disturbance. On all three occasions inspectors noted the audibility of both music and bass noise whilst located in either the Executive Lounge (28th level) and in nominated accommodation rooms of the premises. Notably, two of the three inspections were undertaken after midnight and music noise was audible.
7. The letter also proposed the variation of the standard LA10 noise condition imposed on the hotel's liquor licence which in its current form applies to noise received at residential premises to specifically include accommodation rooms of the complainant's premises. The licensee was also requested to engage an acoustic consultant and provide an acoustic report addressing the issues in the complaint, and invited submissions on a proposal to amend the LA10 noise condition imposed on the hotel's liquor licence.

Letter from JDK Legal on behalf of the hotel

8. On 8 April 2015 a submission was received from Mr Kim Stapleton, Partner, JDK Legal on behalf of Hemmes Trading Pty Limited, business owner of the hotel responding to the proposal to vary the standard LA10 noise condition. Mr Stapleton advised that following recent section 96 applications in respect to the hotel, the council had approved extended trading until 10 February 2020. Mr Stapleton also stated that prior to granting such consent, his clients applications were subject to rigorous scrutiny by council officers that included compliance with development conditions; investigation of substantial complaints received by the council; and any views expressed by NSW Police. Having approved these applications, the council found the hotel to be well-managed and consistently complying with relevant consent conditions including conditions relating to noise emissions.

9. Mr Stapleton submitted the complainant's premises is not residential as defined in City of Sydney Local Environmental Plan (LEP) 2012 and under such planning laws cannot be considered as a residential premises. He further advised that noise limits applied to commercial premises are significantly higher than that applied to residential premises, and that the proposed unilateral re-definition of the complainant's premises as residential is unreasonable, and not consistent with planning approvals. He further stated the complaint has not been made out and should be dismissed.

Submission from CBP lawyers on behalf of the complainant

10. On 23 April 2015 a submission was received from Ms Maysaa Parrino, Partner, CBP lawyers on behalf of the complainant making reference to the submission by JDK Legal, and the 14 modification applications that were approved by City of Sydney council. Ms Parrino stated her client's particular concerns surround modification application D/2004/1759/M relating to amended condition 73 regarding noise from the use of the hotel.
11. Ms Parrino submits that originally condition 73 of the Consent set the threshold test for the transmission of vibration or indoor sound pressure levels to "any place of different occupancy". This threshold was subsequently changed to "the boundary of any affected residence", "any habitable room in any residential property" and "any affected commercial premises". This variation effectively permits the hotel to operate in a way that offensive noise is permitted, as there are no residential premises within the locality of the hotel.
12. Ms Parrino submits that condition 73 of the Consent was strategically replaced to narrow the extent to which noise pollution or offensive noise is created and has been in effect since 27 November 2012. In reference to the JDK Legal submission that provides "...The Western cannot be considered as a residential premises but can only be considered as a "commercial premises". Ms Parrino contends that the complainant's premises was initially classified as a "nearby residential/semi residential property" in the acoustic report of PKA Acoustic Consulting, and the council initially contended in its consent assessment report that the complainant's premises is within 100 metres of the hotel and may be classified as a "sensitive receptor".
13. Ms Parrino submits her client has received noise complaints from its resident guests since 19 October 2008 resulting from offensive noise from the ongoing use of the hotel which has resulted in undue disturbance upon her client's business operations, and to date, offensive noise continues to be emitted. Ms Parrino contends that the council

have not imposed well thought out and rigorous noise controls in relation to the development of the hotel and her client requests that liquor licence condition 480 be varied to include the accommodation rooms of the complainant's premises. A further condition should also be imposed requiring regular acoustic testing.

Response to JDK Legal from the Office

14. On 7 May 2015 the Office wrote to Mr Stapleton concerning a previous OLGR letter dated 18 March 2015, to the licensee, and subsequent response from Mr Stapleton dated 8 April 2015. The OLGR letter of 7 May 2015, advised Mr Stapleton that the hotel's submission did not contain any proposed actions that the hotel intends on taking to resolve the issues raised in the disturbance complaint, or of any practical steps as to how it intends to reduce noise levels affecting person staying in the accommodation rooms, or provide an acoustic report to demonstrate compliance with development consent.

15. The letter also advised that following ongoing reports of disturbance from amplified music from the hotel and interruptions during the dawn service on Anzac Day 25 April 2015 from the hotels amplified music on at least five occasions, and the lack of any practical solutions presented by the hotel to resolve noise disturbance to the complainant's premises, a determination was made for the complaint to be dealt with under the disturbance provisions of the Act. In addition, given the licensee's resistance to provide the Office with an acoustic report, a direction was given to the licensee under section 75 of the Act requiring that acoustic testing be carried out. The direction required the licensee to provide the Office with a report prepared by an acoustic consultant which tests the noise levels of the complainant's premises against the standard LA10 noise criteria during the conduct of at least two DJ events advertised as part of Pacha on a Saturday night. Such acoustic testing was to be conducted in a room determined by a representative of the complainant.

Response by JDK Legal to the Office

16. On 11 May 2015 Mr Stapleton confirmed his earlier response did not address in adequate detail all of the issues, and that a further formal reply providing such detail would be provided. He also advised that his client had engaged an acoustic consultant and noise monitoring had been conducted on Friday 20 and Saturday 21 March 2015. Following noise monitoring, noise limiter settings had been reviewed and an acoustic report will be provided. Mr Stapleton also advised that the hotel implemented the following:

- re-calibration of the hotel's noise limiters;
- changes to speaker positioning throughout the hotel to minimise noise leakage from the building; and,
- installed a "D" meter to monitor readings from the pool and courtyard. This meter contains a feedback monitor indicating current levels which are read on an hourly basis.

Further Response by JDK Legal

17. On 18 May 2015 in a further submission, Mr Stapleton stated that the council's noise criteria as they apply to the hotel are being observed. Mr Stapleton's submission also provided a copy of an acoustic report dated 14 May 2015 prepared by Mr Steven Cooper from The Acoustic Group.

Acoustic Report by The Acoustic Group

18. Mr Cooper stated there are no residential premises in the vicinity of the hotel. Noise monitoring was undertaken on the nights of Friday 20 and Saturday 21 March 2015 in room 2406 of the complainant's premises. The room has a clear line of sight to the open pool and entertainment area at the hotel, and DJ style entertainment was being conducted at the time. Mr Cooper reported that during the monitoring on 21 March 2015 music noise from another licensed venue on the eastern side of Pitt Street was significant and only reduced following the closure of doors to prevent noise escape. Mr Cooper suggested noise levels from this venue would be clearly detectable from inside suites on the eastern side of the complainant's premises and would be expected to exceed council consent conditions.

19. Mr Cooper also advised the hotel's sound system was inspected and adjustments were made to the angles of outdoor speakers serving the pool club. Changes were also made to time delays of speakers in the pool club, and to lower frequency levels of speakers in the hotel's system for the Saturday night operation to provide a better coverage for the audience at a lower output level.

20. Mr Cooper's report stated the original consent conditions for the hotel did not have any noise conditions pertaining to the complainant's premises until 2012 when the council imposed the commercial criterion. Mr Cooper also stated that the complainant is seeking an acoustic amenity for his premises which was never envisaged from the outset by way of the development consent conditions, and was seeking by way of a "back door" approach to now overcome the inadequacies of the complainant's building.

21. Mr Cooper also commented the “double window glazing” installed in the complainant’s premises is of a lower standard than that which should have been installed and, irrespective of the operations of the hotel, there is a reasonable degree of noise intrusion from the late-night activities of a bustling city that could give rise to disturbance of some of the occupants of the complainant’s premises. In a planning sense, by reference to the council’s development control plan and other documents, the complainant’s premises is not a residence and as such does not warrant the imposition of the residential amenity criterion as proposed to overcome the inadequacies of what they (the complainant’s) have built.

Further Response by JDK Legal

22. On 28 May 2015 in a further submission Mr Stapleton stated his client has taken significant steps since the complaint was lodged to reduce noise levels, and suggested that no further action is taken in respect to the complaint. This recommendation was based on the available acoustic evidence that there is no undue disturbance at the present time, the hotel is compliant with the noise criteria of the council and its development consent and the hotel’s operations have been modified to even further reduce its noise footprint, which is demonstrated in Mr Cooper’s report dated 14 May 2015.

Submission from City of Sydney council

23. On 10 June 2015 a submission was received from Mr Josh Bradshaw, Area Manager – North, Health & Building, City of Sydney council. Mr Bradshaw advised that the council had received 16 recorded music based disturbance complaints from residents and neighbouring businesses in relation to the hotel between the years 2009 and 2015. The majority of these complaints were not verified and no further action was taken. The submission also advised that a number of music noise complaints received from the complainant’s premises in respect to the hotel were verified during council inspections.
24. Mr Bradshaw advised that on 11 February 2015 a further noise complaint made to the council was verified following an investigation over several weeks that resulted in the issue of a further caution to the hotel. In respect to the 2015 ANZAC Day ceremony, a disturbance complaint was made to the council on 28 April 2015. This matter was verified by the hotel who advised unauthorised sound testing was conducted at 5.00am by a contractor. In respect to this matter, the council issuing a verbal warning. Mr Bradshaw stated that a complaint made to the council on 29 April 2015 concerning amplified music noise disturbance from the hotel that was reported by the complainant was subject of a current investigation by council officers and relates to an alleged

breach of a development consent condition by the hotel. On 22 October 2015, an OLGR case officer contacted Mr Bradshaw who advised that the investigation is continuing.

25. In respect to noise complaints against the hotel, Mr Bradshaw supplied officer notes and observations for dates commencing 9 May 2008 to 10 May 2015. A number of common statements within the summaries are “excessive noise from amplified music is clearly audible within the immediate location and up to 100 metres away from the hotel,” “amplified music was clearly audible over passing traffic including buses travelling along George Street, and can be heard externally surrounding the facility”.
26. Council officer notes in respect to attendance at the complainant’s premises concerning a noise complaint on 1 March 2015 stated, “officers met a duty officer at the complainant’s premises at 12.40am in respect to a noise complaint and requested the hotel licensee attend. The licensee advised he was very busy and was unable to attend. The licensee advised if music levels are loud he is to be contacted and he would turn the volume down”.
27. The officers noted during the noise assessment at 1.30am a definite spike in amplification levels which was then reported to the licensee who advised he would reduce the volume levels. Observations were conducted from suite 2209 on level 22 where music noise, although audible at the time, was not considered offensive. The on duty manager of the complainant’s premises advised the attending officers that he considered the volume levels to be lower than usual on Saturday nights.
28. There are currently nine development consents relating to the hotel and in respect to the current issues of music noise disturbance council officers are of the view that noise has reduced considerably and this view concurs with the findings of the acoustic report dated 14 May 2015. Further, the council is in the process of investigating and responding to correspondence submitted by CBP Lawyers on behalf of the complainant in respect to this matter.

Submission from NSW Police Force

29. On 12 June 2015 Inspector Richards from Sydney City Local Area Command in a response to the complaint advised that whilst NSW Police regularly carry out patrols and taskings at the hotel and NSW Police were not advised of or called upon to respond to disturbance complaints.

Submission from JDK Legal

30. On 15 June 2015 Mr Stapleton in correspondence to the Office submitted a further acoustic report prepared by Mr Cooper dated 10 June 2015, a peer review report prepared by Ms Claire Richardson BSc(Hons) MAAS from Air Noise Environment Pty Ltd dated 15 June 2015; and, supplementary correspondence from Mr Cooper dated 15 June 2015.

Further Acoustic Report and supplementary correspondence by The Acoustic Group submitted to the Office

31. Mr Cooper's report dated 10 June 2015 provided further detail in respect to the technical difficulties with the requirement to test noise levels against the standard LA10 noise criteria from within the complainant's premises. Mr Cooper stated that the standard L10 criteria is measured external to a residential boundary. The complainant's premises is a commercial property with fixed glazing, and conducting testing in a room that has fixed glazing cannot be measured against the standard L10 criteria. Mr Cooper also advised that in relation to noise from the hotel as determined from the Friday night monitoring, when standing immediately next to the double glazed windows some noise in the form of music at times was detected from the external environment, although before midnight the music noise appeared to be part of the Vivid Festival located in Martin Place and was not of the type of music generated by the hotel.
32. On both nights that noise surveys were conducted no measureable increase in any octave band could be detected from music issued from the hotel and for the majority of the time no music could be detected. The L10 method of assessment noted that the contribution of music from the hotel was below the background level on both nights.
33. Mr Cooper concluded that the OLGR required acoustic monitoring was carried out in room 2907 on Friday 5 June 2015 a non-Pascha night with the hotel and Pool Club operating which did not detect any music from the hotel. Further testing on Saturday 6 June 2015 whilst Pascha and the Pool Club were operating noted that in general, music from the hotel was inaudible at the reference location, but on occasions some music could be detected which did not generate any measureable increase above the background level. Mr Cooper concluded that under the OLGR L10 noise criteria when assessed inside the nominated suite, the contribution would be 10 dB or more below the background level and therefore well under the L10 criteria normally imposed by the OLGR for residential receivers.

34. Mr Cooper's supplementary submission dated 15 June 2015 reiterated that the residential inaudibility criteria is inappropriate as the complainant's premises is defined as commercial, and therefore, any potential noise conditions must be consistent with council consents, which in this case would have to be applied to each of the DA consents. Mr Cooper also stated that a similar proposed modification to change a noise condition was dismissed in proceedings before Commissioner Dixon in the Land & Environment Court in the matter of Amazonia Hotels Pty Ltd v City of Sydney Council concerning a modified condition that had been proposed by the council for the Empire Hotel, Kings Cross.

Peer Review Report by Air Noise Environment Pty Ltd

35. On 15 June 2015 an acoustic peer review report prepared by Ms Claire Richardson BSc(Hons) MAAS of Air Noise Environment Pty Ltd was submitted to OLGR on behalf of Merivale. The report states that Ms Richardson conducted a review of Mr Cooper's acoustic report dated 15 June 2015 and concluded that The Acoustic Group report has been prepared using appropriate monitoring and assessment methodologies, and confirms compliance of the current operations of the hotel with the existing development consent.
36. In considering the appropriate criteria, reference has been made to City of Sydney council planning controls for the locality and in particular the designation of the land use in the area for late night trading. On the basis of the relevant considerations Ms Richardson recommended an alternate liquor licence condition to the OLGR criteria be imposed on the hotel's liquor licence for the purpose of assessing compliance at the complainant's premises
37. Ms Richardson's report also stated that on 5 November 2014 a Plan of Management for the hotel was approved by City of Sydney that forms an approved document under the development consents. Clause (d) of the acoustic criteria in the document specifically relates to commercial developments, such as the complainant's premises. The criteria for commercial premises are more stringent than the residential criteria for daytime periods and less stringent after midnight. The City of Sydney criteria does not require inaudibility in the bedrooms of a hotel such as the complainant's premises and provides the following criteria:

"The LA10 noise level emitted from the use must not exceed the background noise level (LA90) in any Octave Band Centre Frequency (31.5Hz – 8kHz inclusive) by more than 3 dB when assessed indoors at any affected commercial premises".

Comments made to OLGR case officers

38. Since receiving the submissions OLGR case officers have maintained regular contact with the complainant, the last such contact being 7 October 2015 which advised that since the intervention by OLGR and recent acoustic testing there have been no further guest complaints reporting low frequency or music noise disturbance from the hotel's open roof top pool bar and nightclub area. Notwithstanding, the complainant advised that this may be due to the adjustment to the noise limiter levels, inclement and cold weather and lower patron numbers attending this particular area.