



FILE NO: A15/0004913

COMPLAINANT: [REDACTED]

LICENSED PREMISES: New Hampton Pty Ltd, Potts Point – LIQH400102909

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 in respect to the New Hampton Pty Ltd, 9-11 Bayswater Road, Potts Point (the hotel) have decided to impose two conditions on the liquor licence.

1. A requirement to comply with the LA10 noise criteria.
2. A requirement for all amplified entertainment to be under the control of a noise limiter.

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 14 January 2015 [REDACTED] (the complainant) lodged a disturbance complaint under section 79 the Act concerning the hotel. The complainant alleged peak undue disturbance on a weekly basis but particularly on Friday and Saturday nights from amplified live entertainment at 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.

Background

6. The licensed premises is a hotel operating from 9-11 Bayswater Road, Potts Point which commenced trading from this location in June 1960. The hotel has an extended trading authorisation 5.00 am to 5.00am Monday to Sunday, and a minors area authorisation. The current licensee, Mr Kieran Coleman was appointed to the position on 10 March 2014.

7. On 23 January 2015 after a review of the material contained in the complaint, this Office wrote to the licensee advising of the complaint and attaching a copy of the standard LA10 noise criteria, and inviting written submissions in response to the complaint. The letter also requested the licensee to engage an acoustic consultant to demonstrate compliance with the noise criteria and provide an acoustic report specifically addressing the issues raised in the complaint.
8. Between 10 February 2015 and 2 October 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.

Considerations and findings

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

9. The Act requires that in certain cases the Secretary have regard to three statutory considerations being:
 - a) the order of occupancy between the licensed premises and the complainant;
 - b) any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises; and,
 - c) any changes in the activities conducted on the licensed premises over a period of time.
10. *The order of occupancy between the licensed premises and the complainant* – The licensed premises has operated at its present site since 1960. Information provided by City of Sydney council in respect to the complaint advised that the hotel closed in 2010 to enable re-development of the site which was completed in March 2014 when the hotel re-opened for trading. The renovated building now comprises of 116 residential apartments on seven floors that are located above the hotel which occupies the ground floor level. The complainant's apartment is directly above the hotel and has been tenanted since its completion in 2013. This fact is not in dispute and I consider that the order of occupancy consideration is in favour of the hotel.
11. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – Since the re-development, no evidence has been provided in respect to any further structural changes to either the complainant's premises or the hotel.

12. *Any changes in the activities conducted on the licensed premises over a period of time –*
The complaint states that live amplified entertainment at the hotel commenced in July 2014.

Summary and conclusion

13. I have considered the submissions of the complainant, the licensee, NSW Police and the local council. I have had regard to the particular context in which the hotel operates (including statutory considerations mentioned above).
14. 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 submitted on behalf of the complainant and the licensee, and the material supplied by City of Sydney Council and NSW Police.
15. I note the findings of the acoustic report submitted by the complainant and prepared by PKA Acoustic Consulting dated 8 December 2014. The acoustic report advised noise monitoring was undertaken within the complainant's apartment over an eight day period between 10 November 2014 and 18 November 2014. On occasions over the monitoring period, noise intrusion from the hotel was found to exceed the LA10 noise criteria by up to 20dB in the mid frequencies during live amplified entertainment. Further analysis of noise logger data obtained between 1.00 am and 1.15 am on 15 November 2014 noted DJ recorded music from the hotel was audible within the complainant's apartment which exceeded the criterion by up to 10dB in the low frequencies.
16. I have also taken into consideration the report by Acoustic Logic Consultancy Pty Limited submitted by the hotel, dated 24 February 2015, following noise monitoring within the complainant's apartment. The acoustic report recommended that in order for the hotel to comply with the LA10 noise criteria mitigation strategies should be implemented. These strategies include the installation of vibration isolation pads to all speakers and tamper proof sound limiters in bar areas with sound pressure levels limited to 84 dB(A)L10 before midnight and 74 dB(A)L10 after midnight. The requirement for noise limiters and respective sound pressure levels was a recommendation of both acoustic consultants.
17. On 12 March 2015 Hatzis Cusack Lawyers representing the licensee submitted the complainant does not satisfy the requirements of section 79(3)(d) of the Act on the basis "that the subsection is apt to describe a person who has a commercial interest in a business which might otherwise be affected by disturbance emanating from a hotel, such

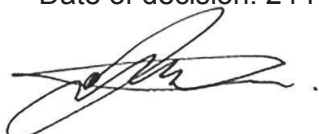
as a nearby business owner or competing business owner. The only person who complains about residential amenity from his client's hotel is the complainant". The submission further stated that the complaint fails the threshold test and should be dismissed for want of compliance with the requirements of section 79 (3)(a) of the Act.

18. The complaint was made under section 79(3)(d) of the Act on the basis that the complainant is a person who satisfies the Secretary that her financial interests are adversely affected by disturbance from the hotel. The complainant is the owner of an apartment located above the hotel which is leased through Village Property. To satisfy the requirements of the section the complainant submitted that her former tenants had terminated their lease due to ongoing issues of noise intrusion from amplified music from the hotel. The complainant further advised that the current tenants had reported similar issues of noise intrusion to her, and of their proposal to terminate the lease. In response, the complainant provided her tenants a rent free period during November 2014 as compensation for the inconvenience and lack of amenity caused by the operation of the hotel.
19. In support of the application, the complainant provided evidence of the costs associated with the loss of rental income, re-leasing the property, acoustic monitoring and provision of a report. After reviewing the material contained within the complaint, I am satisfied that the complainant meets the criteria of section 79(3)(d) of the Act, and is a person who satisfies the Secretary that the person's interests, financial or otherwise, are adversely affected by the disturbance detailed within the complaint.
20. I also note the submission of Hatzis Cusack Lawyers dated 12 March 2015 advised their client had obtained a report from Acoustic Logic Consultancy Pty Limited. The findings of this report recommended isolation material be fitted to all speakers and noise limiters be installed within the bar areas of the hotel to satisfy the requirements of the LA10 noise criteria. The submission further advised that such works were proposed to be completed by 31 March 2015.
21. I have also taken into consideration an email from the licensee dated 2 October 2015 in response to an OLGR case officer's inquiry about further acoustic testing. The email advised that all of the recommended amelioration works detailed in the acoustic report were carried out. The licensee also advised of a discussion with the complainant where he proposed that a further acoustic test be carried out from within the apartment to ensure there were no further issues of noise transmission from the hotel. He further advised that subsequent monitoring was not carried out due to the complainant's

concerns that further monitoring may unnecessarily warn the current tenants that there had been a problem.

22. Notwithstanding that further acoustic monitoring was not undertaken I take some comfort from the acoustic report recommendations that the noise amelioration measures to be implemented will ensure that the hotel's noise emissions from amplified entertainment will be contained, or kept to a level to prevent noise transmission to the neighbouring property.
23. It is expected that licensed premises will emit some level of noise whilst operating a business. Whether it is a restaurant, community club or neighbouring hotel, some level of noise will be associated with the type of business that is operated under a liquor licence. This is especially so when these businesses are located in high-traffic tourist/entertainment areas where larger groups of people are drawn to a particular location for an outing and socialisation. That is not to say that licensed premises can operate without due regard to their surrounding neighbourhoods and, as such, I consider the LA10 noise criteria to be an acceptable industry standard for assessing undue disturbance linked to licensed premises.
24. I acknowledge the proactive actions taken by the hotel in addressing this complaint. I consider that the conditions requiring the hotel to comply with the LA10 noise criteria and a requirement for all amplified entertainment to be played through a noise limiter to be appropriate safeguards to prevent future issues of disturbance.

Date of decision: 24 November 2015.



Anthony Keon
Director Compliance & Enforcement
Delegate of the Secretary, Department of Justice

NOTES

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 15/12/2015. 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.

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:

New Hampton Hotel – Potts Point (LIQH400102909)

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 5 dB between 7:00 am 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 midnight and 7:00 am 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 7:00 am.

** 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: 25 November 2015

Noise Limiter Condition

The hotel must install a noise limiter to control all amplified entertainment.

The noise limiter must be calibrated by a qualified acoustic consultant by 1 November of each calendar year to ensure that the following sound pressure levels are maintained.

- 84 dB(A)L10 before midnight and
- 74 dB(A)L10 after midnight.

Written confirmation that the hotel's sound limiting equipment meets the criteria that is set out in this condition must be kept at the hotel and be available on request by inspectors, NSW Police, and council officers.

Date condition effective: 25 November 2015

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

The material before the Secretary in making this decision comprises:

- a. Section 79 Disturbance Complaint lodged by () () () on 20 January 2015 containing a complaint diary dated from 18 July 2014 to 15 December 2015, and an Acoustic report by PKA Acoustic Consulting dated 8 December 2014.
- b. Email from the complainant dated 22 January 2015 providing additional information and invoices to satisfy the requirements of section 79(3)(d) of the Act.
- c. Letters from the Office dated 23 January 2015 to the Licensee, NSW Police and City of Sydney Council notifying of the complaint. Letter of acknowledgement dated 23 January 2015 sent to the Complainant.
- d. Submission by Mr Simon Anton, Late Night Compliance Officer, Health & Building, City of Sydney council.
- e. Email from Hatzis Cusack Lawyers dated 13 February 2015 advising of their engagement by the hotel in relation to the disturbance complaint, and that the hotel operators have engaged an acoustic consultant to undertake a noise assessment.
- f. Email from Senior Sergeant Donna Murphy, Licensing Supervisor, Kings Cross Local Area Command advising that NSW Police have no records concerning their attendance at the hotel responding to disturbance complaints.
- g. Submission by Hatzis Cusack Lawyers dated 12 March 2015 attaching an acoustic report by Acoustic Logic Consultancy Pty Limited.
- h. Email to the Complainant by an OLGR case officer dated 17 March 2015.
- i. Email from Hatzis Cusack Lawyers dated 9 April 2015 forwarding an email from their client attaching photographs of vibration isolation fitted to speakers and the sound limiting device and settings.
- j. OLGR inspector file note of an inspection at the hotel on 8 May 2015.
- k. Email to the complainant by an OLGR case officer dated 2 October 2015.
- l. Email from the licensee to an OLGR case officer dated 2 October 2015.
- m. File note of OLGR case officer inspection at the hotel on 17 November 2015.

Summary of submissions provided to the Office:

Disturbance complaint lodged by Complainant - 14 January 2014

1. The complainant lodged a disturbance complaint under section 79 the Act concerning the hotel. The complainant alleged peak undue disturbance on a weekly basis but particularly on Friday and Saturday nights from amplified live entertainment. 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.

Acoustic Report PKA Acoustic Consulting - 8 December 2014

2. The complainant provided an acoustic report prepared by PKA Acoustic Consulting which found that amplified entertainment at the hotel did not comply with the LA10 noise criteria, and exceeded the criteria up to 20 dB in the mid frequencies and up to 10 dB in the low frequencies.

Letter to licensee from the Office – 23 January 2015

3. The licensee was advised in a letter from this Office that a disturbance complaint had been received concerning the hotel. The licensee was asked to respond to the issues raised in the complaint, and was also requested to seek advice from an acoustic consultant to ensure the hotel complies with the LA10 noise criteria.

Submission from City of Sydney Council – 10 February 2015

4. Mr Simon Anton, Late Night Compliance Officer, Health & Building, City of Sydney council, in a submission, advised that seven noise complaints had been recorded on the council's complaints management system for the period 9 October to 29 November 2014. All of the complaints had originated from the complainant's premises. Mr Anton also advised that the building containing the hotel was renovated in 2013-14 using Complying Development Certificate CDC 1-063. The submission also advised there are no pending development applications or other matters that may be relevant to the issues in the complaint.
5. Job sheets provided with the submission provide summaries of attendance and actions by council officers responding to noise complaints concerning the hotel. In respect to one such attendance at 12.40 am on Saturday 29 November 2014 council officers noted that amplified music from the hotel was barely audible during observations within the complainant's residence. At 1.00 am one of the council officers entered the hotel and

spoke with the business. For the purpose of assessing noise intrusion levels within the complainant's premises the officer requested music levels be raised to maximum volume. At the time the officer noted that an iPad was used to turn the music to full volume and then reduce the volume levels using the iPad.

6. The assessing officer within the complainant's premises noted that when amplified music was played at the maximum level, it was clearly audible within the apartment and would constitute offensive noise as defined by the Protection of the Environment Operations Act 1997. However, at normal volume levels and although still audible the noise intrusion was not deemed to be offensive noise. The council submission did not indicate if the LA10 noise criteria is imposed as a condition on the hotel's development consent.
7. The notes in respect to council officer attendances in respect to noise complaints from the hotel reveal that compliance action was not considered as either the level of music noise intrusion was not at a high level to deemed to be offensive noise, or amplified music had ceased prior to the arrival of council officers.
8. Notwithstanding, the notes provided by the council identified that the hotel's amplification system was not under the control of a noise limiter or that amplified entertainment levels operated in compliance with the LA10 noise criteria.

Submission from Hatzis Cusack Lawyers –13 February 2015

9. An email was received from Hatzis Cusack Lawyers advising that the operators of the hotel had engaged an acoustic consultant and the complainant had been requested to provide access to the consultant. A request was also made for an extension of time until 13 March 2015 in order to respond to the issues.

Acoustic Report by Acoustic Logic Consultancy Pty Limited - 24 February 2015

10. An acoustic report by Acoustic Logic Consultancy Pty Limited was submitted by Hatzis Cusack Lawyers following noise monitoring that was conducted from within the complainant's premises and consultation with PKA Acoustic Consulting, the complainant's acoustic consultant. The report recommended the following:
 - Installation and calibration of tamper proof noise limiters within the hotel and limited to 84 dB(A) L10 before midnight and 74 dB(A)L10 after midnight; and,
 - Installation of vibration isolation pads to all speakers.

Submission from NSW Police – 27 February 2015

11. An email was received from Senior Sergeant Donna Murphy Licensing Supervisor Kings Cross Local Area Command advising that NSW Police do not have any record of police attending the hotel in relation to complaints of noise or disturbance to the local amenity.

Submission from Hatzis Cusack Lawyers - 12 March 2015

12. Hatzis Cusack Lawyers in a submission on behalf of the licensee responded that the complainant does not satisfy the requirements of section 79(3)(d) of the Act on the basis “that the subsection is apt to describe a person who has a commercial interest in a business which might otherwise be affected by disturbance emanating from a hotel, such as a nearby business owner or competing business owner. The only person who complains about residential amenity from his client’s hotel is the complainant”. The response also stated that the complaint fails the threshold test and should be dismissed for want of compliance with the requirements of section 79 (3)(a) of the Act.

OLGR case officer email to the Complainant – 17 March 2015

13. An OLGR case officer contacted the complainant advising of the submission received from Hatzis Cusack Lawyers and acoustic report prepared by Acoustic Logic Consultancy Pty Ltd and that a copy would be forwarded by email for her information and response.

Email attaching evidence of compliance with the acoustic consultant’s recommendations - 9 April 2015

14. Hatzis Cusack Lawyers forwarded an email from the licensee with a screen shot of the hotels audio system noise limiter and settings advising that the acoustic consultant’s recommendations have been implemented.

OLGR inspector file note 8 May 2015

15. At 11.30 pm on 8 May 2015 OLGR Inspectors conducted observations of the hotel from the corner of Kellett Street and Bayswater Road Potts Point. During the observation the inspectors noted that the only noise emanating in the vicinity was low frequency bass noise from two other licensed premises some 20 metres from their location. Compliance officers later entered the hotel and spoke to the business owner who advised that entertainment on Friday nights is usually jazz and a DJ plays from 10.00 pm on Friday and Saturday nights. Week day entertainment consists of general background music.

OLGR case officer email to the Complainant – 2 October 2015

16. An email was forwarded by an OLGR case officer to the complainant on 2 October 2015 seeking advice as to whether her tenants were satisfied with the measures implemented by the licensee to reduce noise intrusion. A reply was not received from the complainant.

OLGR case officer email to the licensee - 2 October 2015

17. An email was forwarded by an OLGR case officer to the licensee seeking information as to whether further acoustic monitoring had been carried out from within the complainant's premises.

Licensee email to OLGR case officer – 2 October 2015

18. The licensee emailed an OLGR case officer advising that all of the required work as required by the acoustic consultant had been carried out, though a second acoustic test was not undertaken. The licensee stated "I met with the complainant and showed her the measures put in place. She suggested not doing another test as she did not want the current tenants to know there had been an issue. I have asked the acoustic consultant to come back in and inspect the venue however he could not carry out the test in their apartment".
19. In support of the work undertaken at the hotel, the licensee attached a copy of a tax invoice prepared by Audio Visual Electrical for the supply of materials and electrical work in connection with the noise amelioration measures undertaken at the hotel. Also attached were photographs of speakers installed with insulation material, and an audio screenshot of the hotel's noise limiter.

OLGR Inspector file note of an inspection at the hotel 17 November 2015

20. At 12.10 pm on 17 November 2015 OLGR inspectors attended the hotel and in company of the licensee inspected all of the noise amelioration measures that were installed in accordance with the recommendations of the acoustic report. The inspection confirmed that the recommendations of the acoustic report have been complied with.