

DOC16/140386

FILE NO: A16/0007307

COMPLAINANT: [REDACTED]

LICENSED PREMISES: Newport Arms Hotel – LIQH400104170

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

LEGISLATION: *Liquor Act 2007*

SECTION 81 DECISION

Under Section 81 of the *Liquor Act 2007* (the Act) I, Sean Goodchild, Director Compliance Operations, Liquor & Gaming NSW (L&GNSW), a delegate of the Secretary, Department of Justice, in relation to the disturbance complaint made against the Newport Arms Hotel (the hotel), have decided to impose two conditions on the liquor licence relating to the following:

1. LA10 noise condition.
2. Installation and use of a noise limiter to control all amplified entertainment at the licensed premises. The noise limiter must be set by a qualified acoustic engineer in order to ensure compliance with the LA10 noise criteria.

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 make a complaint 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 a licensed premises is conducted, or because of the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).
2. For the purpose of section 79 of the Act, a person who has standing to make a complaint includes a person who is a resident in the neighbourhood of the licensed premises and is authorised in writing by two or more other residents.
3. Section 80 of the Act enables the Secretary to deal with a complaint by way of written submissions from the licensee and any other person the Secretary considers appropriate. After dealing with the complaint, section 81 of the Act provides that the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no action.
4. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and must have particular 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 20 April 2016, [REDACTED], the complainant, of [REDACTED], lodged a complaint in relation to the hotel, alleging undue disturbance from amplified music coming from the hotel. The complainant asserts the disturbance occurs every weekend, with clearly audible music beginning early Friday afternoon until 12:00 midnight. This is repeated on Saturday from mid-morning to 12:00 midnight and again on Sunday from

mid-morning to 11.00pm. The complainant lodged the complaint as a resident of the neighbourhood authorised by 15 residents.

6. Between April 2016 and October 2016, 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.

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

7. The Act requires that the Secretary have regard to the following statutory considerations.
8. *The order of occupancy between the licensed premises and the complainant* – the complainant has lived at his residence for three years. The current liquor licence for the premises was issued in 1956, and the licensee indicates the venue has been in operation for 130 years. While the site operated as the Newport Arms Hotel for a number of years, the Merivale Group purchased the hotel in May 2015. Since that time, the hotel has operated as The Newport. This fact is not in dispute and while it is true the complainant has resided at his home prior to the hotel reopening as The Newport, I consider the order of occupancy is in favour of the hotel.
9. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – the licensee submits that after purchasing the hotel in 2015, they undertook a number of renovations and structural changes to the premises. In particular, the lower ground floor dining areas increased, the beer garden was converted into a dining area, and the floors and bar areas were upgraded. The complainant submits that a new sound system has been installed and the positioning of the speakers has changed, resulting in a significant increase in music emanating from the hotel. The licensee agrees a new sound system has been installed, however submits this has decreased the noise escaping the hotel. There is no evidence before me that there have been changes to the complainant's residence.
10. *Any changes in the activities conducted on the licensed premises over a period of time* – the complainant and licensee disagree regarding recent changes in the activities and business model at the hotel. While the complainant submits that the operation of the hotel has changed dramatically since reopening as the Newport in March 2016, the licensee indicates the business model remains largely the same as it was prior to the change in ownership. The complainant states the hotel now has multiple hours of live entertainment every Friday, Saturday and Sunday, which is a significant change from the past operation, which saw only occasional live bands.

Consideration of *undue* disturbance

11. I have considered the submissions of the complainant, licensee, secondary complainants, and NSW Police. I have also had regard to the particular context in which the hotel operates (including statutory considerations mentioned above).
12. I am satisfied that on the material before me there is sufficient evidence to support a finding that the hotel caused undue disturbance to the neighbourhood and there remains a risk for future undue disturbance.
13. A person may complain to the Secretary that the quiet and good order of the neighbourhood of licensed premises are being *unduly* disturbed because of:
- a. the manner in which the business of the licensed premises is conducted, or
 - b. the behaviour of persons after they leave the licenced premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).
14. This test implies that there is a certain level of disturbance that is expected from the operation of a licensed premises but it is only when that disturbance is *undue* there are grounds to prove a complaint. In other words, there is a threshold test that must be met under the legislation that the level of disturbance must be *undue* for action to be taken under the disturbance provisions of the Act.
15. Considering what amounts to undue disturbance necessarily involves consideration of a broad range of factors including the nature and environs of the neighbourhood and the nature of the subject premises. The hotel is situated on the shores of Pittwater in a largely residential neighbourhood and is the only hotel of its kind in the vicinity. It is located on Kalinya Street and extends to the south-west with a large outdoor beer garden terrace overlooking Pittwater directly. The surrounding area is commercial and residential, comprised primarily of residences as well as retail premises, car parks, and one function centre. The complainant's home is located on the opposite side of the bay in a fully residential area. The hotel is authorised to trade from 5:00am to 12:00 midnight Monday to Saturday, and 7:00am to 11:00pm on Sunday. The complainant alleges the disturbance relates to amplified music on the beer garden terrace occurring every Friday, Saturday and Sunday.

16. There are several key pieces of information which are persuasive in informing my view there is undue disturbance, including the submissions from NSW Police, submissions from the licensee, two acoustic reports, submissions from the primary and secondary complainants, and observations of Liquor & Gaming NSW Inspectors.

Police Submission

17. A submission was received from local Police which describes Police attending the hotel to make observations on three separate occasions after this complaint was lodged. On Saturday 14 May 2016 at approximately 10:30pm, Police could clearly hear lyrics and bass music coming from the hotel when located near the complainant's residence. However, on the other two nights, the music was not considered loud or excessive. Police have not received any other complaints about the hotel since it was purchased by the Merivale Group.

Licensee Submissions

18. The licensee submits that the operation of the hotel has not changed significantly since being purchased by the Merivale Group and emphasises that the management of the hotel is focused on community engagement and partnership. Further, the licensee indicates the bands chosen to perform live at the hotel play primarily "background lounge music" and are selected so as to contribute to and not detract from the family friendly atmosphere of the hotel. The updated sound system is designed to provide high quality sound at decreased volume to minimise the risk of disturbance. The licensee acknowledges that there remains a problem of noise disturbance for a number of nearby residents and indicates the hotel is committed to monitoring and correcting problematic sound emissions. The licensee further incorporates the acoustic reports prepared by The Acoustic Group.

Acoustic Reports

19. The licensee engaged with Acoustic Consultant Steven Cooper of the Acoustic Group to conduct acoustic testing at the hotel and advise on steps to be undertaken to address the noise disturbance. The Acoustic Group conducted inspections of the hotel in June 2016 and October 2016 to determine whether the hotel complied with the standard LA10 noise criteria. Mr Cooper made an assessment of the hotel prior to undergoing the first round of testing and made a number of recommendations to alter the external sound system as well as the fold back speakers on the outdoor stage area in the beer garden. Mr Cooper also oversaw reorientation of the main sound system as well as noise limiters in order to reduce and control the level of noise escaping the venue.

20. Mr Cooper conducted testing on 11 June 2016. As provided in the acoustic report, live amplified music from the band varied and at times did exceed the standard noise LA10 noise criteria. Mr Cooper associated these violations with percussion instruments as well as mid and low frequency of vocals and guitars. By contrast, music produced by the DJ was found to be in compliance.
21. Based upon this, Mr Cooper recommended a number of changes to reduce the amplified music escaping the hotel. Mr Cooper undertook additional testing approximately four months later on 8 October 2016 and 9 October 2016. On Saturday, 8 October 2016 the acoustic testing revealed the hotel continued to exceed the LA10 noise criteria. As contained in the acoustic report, this exceedance was caused by music coming from the live band, not music generated by the DJ. Mr Cooper noted in his report that, despite the fact that a sound limiter was installed for the outdoor sound system, the band's bass guitar was operating via a separate amplifier on the stage which was a source of the persistent low-frequency noise heard during the testing.
22. The additional testing undertaken on Sunday 9 October 2016 found both the DJ and the live band were compliant with the standard noise criteria. Mr Cooper concludes that the adjustment of the sound limiter at his direction after the Saturday testing and before the Sunday testing accounted for the compliance observed on Sunday. I have considered these findings in the context of what Mr Cooper described as adverse and inappropriate weather conditions which he states affected the outcome of the testing.

Complainant Submissions

23. The complainant's home is located across the bay approximately 300 metres from the hotel. The complainant reports he can hear amplified music from the beer garden of the hotel inside his residence. He submits there is live music for approximately 30 hours a week beginning Friday and ending on Sunday and that he is disturbed by the music when inside his home, even when he has all doors and windows closed.
24. The primary complainant has been authorised by 15 fellow residents of the neighbourhood. One of these residents, [REDACTED], provided their own written submission. This submission states that the music from the hotel occurs every Friday, Saturday and Sunday from midday until closing. The music from the hotel is particularly undue and disruptive given that the neighbourhood is residential and is designed around the natural features of the Pittwater area.

Observations by L&G NSW Inspectors

25. On 28 August 2016, inspectors from L&GNSW attended the hotel and made a number of observations. The inspectors were present on a Sunday afternoon and observed the hotel was near capacity. A six piece band was playing live music in the north-west corner of the beer garden and inspectors noted a large band of speakers adjacent to the stage area. Inspectors found that when standing in the beer garden area the band music was loud and they had to raise their voices in order to carry on a conversation.
26. After approximately one hour, the inspectors attended the home of the principal complainant, where they noted the band music was clearly audible until approximately 4:00pm. At 4:30pm, a DJ began performing and inspectors could no longer hear music from the hotel while present at the complainant's residence. They returned to the hotel and were able to converse normally without raising their voices while the DJ was performing.
27. I acknowledge Mr Cooper's point that the observations made by L&GNSW inspectors are not wholly determinative of whether undue disturbance exists, and that they did not conduct a technical acoustic test to measure whether there was exceedance of the LA10 noise criteria at the boundary of the affected residence. However, I do find the observations relevant when taken together with all other submissions.

Action taken to mitigate disturbance

28. Upon the recommendations of Mr Cooper, the hotel has undertaken a number of measures to mitigate disturbance, including: rearranging the layout of the stage in the beer garden, adjusting the location and angle of speakers, installing an acoustic screen in front of the drums, and providing a limiter on the sound system used for live bands. It is clear from the submissions that the licensee has undertaken significant measures to ensure amplified music at the hotel does not disturb the quiet and good order of the neighbourhood. Despite this, given the submissions from the complainant, both acoustic testing reports, and the observations made by L&GNSW inspectors, I am of the view that the hotel has caused undue disturbance in the past and there exists risk that it will occur again in the future.

Findings and conclusion

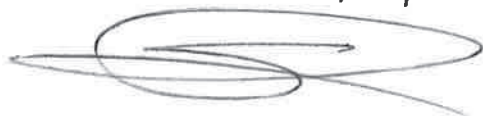
29. I have considered the submissions of the complainant, Police, the secondary complainants, and the licensee. In order to ensure appropriate controls are in place for the future operation of the hotel, I have decided to impose a LA10 noise condition, as

well as a condition requiring the installation and calibration of a noise limiter in accordance with the LA10 criteria. I find that these two conditions will ensure a level of regulatory certainty against future instances of undue disturbance.

30. I have considered the acoustic report prepared following testing on Sunday 9 October 2016 which describes compliance with the standard LA10 noise criteria. While the hotel was able to obtain compliance by the date of this test, I note the amount of time that passed between the first acoustic test in June 2016 and the second set of testing in October 2016. The licensee had ample opportunity to make necessary changes and to monitor and mitigate the risk of instances of undue disturbance, however, it was not until the third acoustic test was conducted that the hotel was able to gain compliance. I find this to be particularly relevant when considering the need for regulatory certainty moving forward to minimise the risk of further undue disturbance by the hotel.

31. In order to provide regulatory certainty and to ensure appropriate safeguards are in place to prevent undue disturbance arising from the future operation of the hotel, I consider the imposition of these conditions to be an appropriate evidence based regulatory response.

Date of decision: 2/2/17



Sean Goodchild
Director Compliance Operations
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 28 days of the date of this decision, that is, by no later than 2 March 2017. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at www.liquorandgaming.justice.nsw.gov.au.

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

Annexure 1

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:

Newport Arms Hotel – LIQH400104170

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 07:00am and 12:00 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 (31.5Hz-8kHz inclusive) between 12:00 midnight and 07:00am 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 12:00 midnight and 07:00am.

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

Date condition effective: 16 February 2017

Noise limiter

The licensee must ensure a noise limiter is installed to control all amplified entertainment at the licensed premises. All amplifiers or noise generating equipment must be under the control of the noise limiter that has been calibrated by a qualified acoustic consultant to ensure compliance with the LA10 noise criteria. The noise limiter controller must be contained within a locked container or secure area and is to be only accessible by venue management and qualified acoustic consultants.

Date condition effective: 16 February 2017

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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] received 20 April 2016.
2. Police submission dated 25 May 2016.
3. Licensee submission dated 26 June 2016.
4. The Acoustic Group Compliance Testing Report dated 21 June 2016.
5. L&GNSW Inspectors observations file note dated 28 August 2016.
6. Complainant response to licensee submission received 15 September 2016.
7. Complaint lodged by [REDACTED] dated 30 July 2016.
8. Licensee final submission dated 21 October 2016.
9. The Acoustic Group Compliance Testing Report dated 20 October 2016.