

DOC16/076692

**FILE NO:** A15/0006444

**COMPLAINANT** [REDACTED]

**LICENSEE:** Emma Jane Kennedy

**LICENSED PREMISES:** Oriental Tavern Hotel, Mudgee – LIQH400116187

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

**LEGISLATION:** *Liquor Act 2007*

## SECTION 81 DECISION

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

The conditions imposed on the liquor licence relate to the following:

1. Deployment of security staff at the hotel to monitor and control disturbance caused by patrons leaving the premises.
2. All bi-fold doors and all external windows of the licensed premises to be closed from 10pm.

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

## 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 in the complaint. The delegate of the Secretary has accepted the complaint on that basis.
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 29 October 2015, [REDACTED], of [REDACTED] lodged a disturbance complaint under section 79 of the Act concerning 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. The complainant asserts that disturbance from the hotel has adversely affected the motel business through an increase in complaints from motel customers and a reduction in repeat visitors.
6. The complainant has operated the Ningana Motel, a motel business located at 76 Mortimer St, Mudgee since 2003 and alleges undue disturbance from the hotel predominately on Friday and Saturday nights from excessive music, singing, patron noise and anti-social behaviour. The complainant submits the operation of the outdoor beer garden and the hotel's inadequate patron management has also contributed to the undue disturbance including instances of patron altercations occurring on the street. The complainant asserts this has adversely affected the motel business through an increase in complaints from motel customers and a reduction in repeat visitors.

7. The complainant also has an interest in an accommodation business conducted from four terrace houses adjoining the hotel at 63-69 Mortimer St. In a letter dated 21 October 2015, the proprietors of the four terrace houses, [REDACTED] support the complainant's allegations of undue disturbance. In particular they state that not a week would go by where they and the motel opposite do not receive a number of complaints from their respective tenants about noise and anti-social behaviour from the hotel. They do not however provide specific examples.
8. The complainant submits he engaged with hotel staff and NSW Police on numerous occasions prior to lodging the complaint to address issues of disturbance. The complainant also alleges he reported complaints and concerns back in August 2005 and October 2006.
9. The complainant also submits that the then proposed construction works for an outdoor deck extension at the hotel would result in increased patron capacity and, taken together with the hotel's ineffective patron management, would further contribute to undue disturbance. These construction works were completed during the complaint process. The complainant asserts in later submissions that undue disturbance still occurs, mainly from anti-social behaviour and noise emanating from the new extension.
10. The complainant seeks an outcome including the imposition of six conditions on the licence of the hotel relating to security, noise mitigation and plan of management. In a later submission from the complainant's solicitor dated 10 February 2016 it is proposed that seven conditions be imposed on the licence. The first six are essentially the same as those proposed in the application with minor variations. The seventh goes a step further, proposing that the plan of management condition must include a limitation on the number of patrons permitted in the newly constructed area, in accordance with an acoustic report to be obtained by the licensee no later than a date one month after the resolution of the complaint. The final submission from the complainant's solicitor dated 8 September 2016 reaffirms the proposed conditions stated in the submission dated 10 February 2016.
11. In the submission dated 10 February 2016 the complainant provides further support for his position by way of a statutory declaration from a [REDACTED] who is the daughter of the owners of Lauralla Guesthouse situated at 25 Lewis St, Mudgee. [REDACTED] notes that her parents have owned the Guesthouse since 2009 and she has lived with and assisted her parents run the business. She is currently the only person staffing the Guesthouse. She goes on to describe regular anti-social behaviour from patrons of the Oriental Hotel, which is directly across the street, including shouting, vomiting and fighting late into the night. Guests have complained regularly about loud music and patron noise. She also describes instances of patrons throwing rubbish into the Guesthouse garden and

where patrons of the hotel have slept in the garden and on the verandah. She also notes that when the hotel closes its doors and windows the noise is greatly reduced and on recent nights when there is a security presence at the hotel doors there is less noise from patrons. In the same submission an email dated 19 January 2016 to the complainant from [REDACTED] [REDACTED], a previous owner of the Guesthouse, is provided. This refers to issues relating to noise, anti-social behaviour emanating from the hotel and guest complaints resulting in full or partial refunds for the period 2005 to September 2006.

12. Between 12 November 2015 and 14 October 2016, various submissions were lodged by the parties. A list of the material that is before the delegate of the Secretary is set out in Annexure B.

### **Statutory Considerations**

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

13. 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 hotel 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.
14. *The order of occupancy between the licensed premises and the complainant* – The hotel has operated under the current licence at its present site since 23 March 1961. A hotel has been on the site much longer, according to the licensee it a hotel has been on the site since 1878. The present licensee commenced operation at the hotel on 26 August 2011. The complainant has operated his motel business from 2003 and his interest in the accommodation business from the four residential terrace houses since 2005. These facts are not in dispute and I consider that the order of occupancy consideration is in favour of the hotel.
15. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – Since the complaint was lodged the hotel has undergone construction works to redevelop the existing building and outdoor beer garden into a two storey extension incorporating two enclosable outdoor decks, resulting in increased capacity. There is no evidence before me that there have been any changes to the motel or terrace houses.
16. *Any changes in the activities conducted on the licensed premises over a period of time* – The complainant asserts increased patron capacity through the operation of the extension has increased undue disturbance from patron noise and anti-social behaviour. On the

available material there does not appear to be any significant shift in the activities conducted at the hotel which are focussed on a traditional pub style offering of food and beverage accompanied by entertainment on busier trading nights.

### **Other Considerations**

17. A person may complain to the Secretary that the quiet and good order of the neighbourhood of licenses premises are being *unduly* disturbed because of:

- a) the manner in which the business of the licensed premises is conducted; or
- b) the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

The test implies there is a certain level of disturbance expected from the operation of a licensed premises, but, only when that disturbance is *undue* are there grounds to prove a complaint.

18. I have balanced the submissions made on behalf of the hotel, the complainant, NSW Police and the Council. Whilst I have considered all the material relevant to the complaint, these written reasons focus on the material that is key to the decision.

#### *Undue disturbance*

19. I am satisfied the material before me is sufficient to support a finding that the hotel has, at times, caused undue disturbance to the neighbourhood. The disturbance has been caused primarily by noise from the operation of the hotel's beer garden/decks and anti-social behaviour as patrons leave the premises.

20. I have considered the two acoustic reports before me. One prepared on behalf of the licensee in May 2015, the other on behalf of the complainant in January 2016. These reports conflict, both in the criteria used to measure disturbance and their outcomes. Neither report specifically tests the hotel's compliance with the LA10 noise criteria which is an accepted benchmark for noise from licensed premises. Neither report adequately demonstrated the hotel's compliance or non-compliance with the LA10 noise criteria.

21. However, irrespective of the technical criteria applied or methodology used, the information provided in the reports provides a basis to establish more generally that noise from the hotel was excessive and did cause undue disturbance. The licensee's own acoustic report, in reference to the previous beer garden, stated that "calculations show that the existing level of noise from the outdoor beer garden is in excess of the acceptable noise criteria". It is noted that part of the reason to construct the new building with two decks incorporating bi-fold doors was in part to reduce noise emissions. Further, in relation to the new building it

is noted that the licensee's acoustic report implies that in the absence of controls (such as closing bi-folds at 10pm) the new building is likely to exceed the "acceptable" level of noise emissions.

22. The material suggests that in the absence of appropriate controls and adherence to those controls, noise from amplified entertainment and patron noise escaping from the decking areas is likely to be undue.
23. On the issue of disturbance caused by patrons leaving the venue, I have considered the complainant's general assertions of frequent undue disturbance from the behaviour of patrons leaving the premises yelling, swearing and urinating etc, as well as more specific complaints including:
  - Patrons leaving the beer garden urinating on fences, three men running down the street carrying schooners and running into pedestrians (12 December 2014).
  - Patrons urinating on fences, breaking glass and fighting. Foul language and shouting from the beer garden (21 February 2015).
  - Loud noise evident at 10.30pm as windows had not been closed (19 December 2015)
  - Loud noise from patrons and entertainer. Louvre windows and main entry doors open (Saturday 9 January 2016).
24. Whilst there is limited independent verification of particular instances of disturbance raised by the complainant from Police or Council or other third parties, I am inclined to give the complainant's reports some weight. I note that they are supported in a general manner by [REDACTED], [REDACTED] and [REDACTED], who all describe a general pattern of disturbance from the hotel in the past.. There is also some further support for observations of disturbance via motel guest complaints. I note the licensee has essentially refuted that undue disturbance has occurred and I acknowledge that the evidence is not overwhelming. However I consider it sufficient to find that, at times, the hotel causes undue disturbance due to both noise emanating from the hotel, particularly when doors and windows are not closed, and by the behaviour of patrons leaving the hotel.

## **Conclusion**

25. In determining that the disturbance is undue, I have considered the hotel has operated for over 55 years under its current licence, and it is reasonable to expect some noise will be generated by its ongoing operation. However, I am mindful of its position in the



neighbourhood including its proximity to accommodations businesses and residential dwellings.

26. I acknowledge the licensee has implemented a range of measures to mitigate disturbance caused by the operation of the hotel, including construction works and voluntary action. I am satisfied that the undue disturbance caused by the outdoor beer garden has been mitigated to some degree by the construction of the extension. I note the bi-fold doors and windows have been installed and steps have been taken to keep them closed from 10:00pm to 7:00am. Such positive voluntary steps can be sufficient to reduce the need for regulatory intervention in some matters. However, I am of the view such measures are not sufficient to ensure no undue disturbance will occur in the future at the hotel.
27. A condition which requires security guards at higher risk trading times such as Friday and Saturday nights, reduces the risk of undue disturbance due to patrons leaving as well as providing a means for monitoring noise from patrons and amplified music from the street at peak trading times.
28. Similarly, the requirement to close bi-fold doors and external windows ensures that noise escape from the venue will be limited and will provide certainty and reduce the frequency of complaints from the motel operator or his guests.
29. I note the complainant's request that noise abatement conditions be imposed on the liquor licence of the hotel. I am not persuaded that there is a need for regulatory intervention by way of imposing a LA10 noise condition and a condition restricting all amplified entertainment on the liquor licence. Neither acoustic report tested the hotel's compliance with the LA10 noise criteria and their material suggest that provided that the acoustic controls, such as the closure of the bi-folds, are complied with there is unlikely to be undue disturbance from amplified music or patron noise emanating from the hotel.
30. Further, I do not consider the imposition of the management plan condition as warranted. There is no evidence to substantiate that there are failures in the management system sufficient to warrant the imposition of conditions, and I do not consider it necessary to impose a plan of management condition.
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 conditions imposed to be appropriate. These conditions do not unduly burden the licensee and largely mandate what is already in place either voluntarily or under local planning laws. Imposing these measures as licence conditions means they can be enforced by L&GNSW

inspectors and NSW Police should the need arise. I consider this to be a balanced and proportionate response to the issues raised in the complaint

Date of decision: 3 February 2017



**Sean Goodchild**  
Director Compliance Operations  
Liquor & Gaming NSW  
Delegate of the Secretary, NSW Department of Justice

**IMPORTANT NOTES**

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor and Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 3 March 2017. A \$500 application fee applies. Further information can be obtained from Authority Guideline No 2 published at [www.liquorandgaming.justice.nsw.gov.au](http://www.liquorandgaming.justice.nsw.gov.au). Please ensure you also send a copy of your application to [review.lgnsw@justice.nsw.gov.au](mailto:review.lgnsw@justice.nsw.gov.au)

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





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

**Oriental Tavern Hotel, Mudgee – LIQH400116187**

**Patron management**

On Fridays and Saturdays from 9:00pm a uniformed licensed security guard is to patrol the immediate vicinity of the licensed premises every twenty minutes and direct patrons to not linger or loiter in the area and cause nuisance or annoyance to the neighbourhood. The patrols are to continue until the last patron has left the premises and its immediate vicinity.

**Date condition effective: 10 February 2017**

**Closure of doors and windows**

From 10pm until cease of trade, all bi-fold doors and all external windows of the licensed premises are to remain closed.

**Date condition effective: 10 February 2017**

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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] on 29 October 2015.
2. Submission from Senior Constable Jason Turnbull, Licensing Mudgee Local Area Command dated 12 November 2015.
3. Submission from Mr Lindsay Dustan, Manager Statutory Planning, Mid-Western Regional Council dated 27 November 2015.
4. Submission from Mr Tony Hatzis of Hatzis Cusack Lawyers, on behalf of Miss Emma Jane Kennedy, licensee, dated 24 December 2015 and attached acoustic report prepared by Day Design Pty Ltd dated 7 May 2015.
5. Email from complainant re further disturbances dated 13 January 2016.
6. Emails from Mr Don McDougall, on behalf of for the complainant, re licensee's submission dated 10 February 2016 enclosing an acoustic report by PKA Acoustic consulting dated 20 January 2016 and a Statutory declaration by [REDACTED], on-site manager of Lauralla Guest House dated 8 February 2016.
7. Email from Mr Hatzis dated 2 May 2016.
8. File note from L&GNSW staff of conversations with complainant and Hatzis Cusack Lawyers dated 9 May 2016.
9. Submissions from Mr Don McDougall dated 4 August 2016 and 8 September 2016.
10. Submission from Mr Tony Hatzis dated 14 October 2016.