

DOC16/021498

FILE NO: A15/0005565

COMPLAINANT: [name withheld]

LICENSED PREMISES: Red Baron's, Newcastle – LIQS220000012

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 and Racing (OLGR) a delegate of the Secretary, Department of Justice, in relation to the complaint made in respect to Red Baron's 31 King Street, Newcastle (the small bar) have decided to impose two conditions on the liquor licence.

1. A requirement to comply with the LA10 noise criteria.
2. A requirement for the entrance doors and windows to be kept closed from 10.00 pm on any trading night.

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

REASONS FOR DECISION

Legislation

1. Section 79 of the Act provides that a prescribed person may 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 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 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 5 June 2015 [name withheld] a resident of apartment [address withheld] Street, Newcastle (the complainant) lodged a disturbance complaint under section 79 of the Act concerning the small bar. The complainant alleged undue disturbance on a weekly basis but particularly on Friday and Saturday nights between 7.00 pm and midnight from excessive music and patron noise. The complainant lodged the complaint as a person residing in the neighbourhood who is authorised by three other residents who are affected by the disturbance detailed in the complaint.

6. The complainant stated that he engaged with then licensee Mr Gordon Weiss on a number of occasions about the issues of disturbance and secured the licensee's agreement to prevent disturbance by closing the bar's front door and windows after 10.00 pm and to encourage patrons at closing time to move on quickly. The complainant also alleged that the bar has consistently failed to comply with this agreement and due to on-going issues of disturbance he had lodged the complaint. The complainant also attached a list of phone calls to the licensee and NSW Police and a log of text messages sent to the licensee reporting incidents of disturbance.
7. Between 29 July 2015 and 9 March 2016 various submissions were lodged by all affected parties. A list of the material that is before the delegate of the Secretary is set out in Annexure 2. A summary of the 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:

8. 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.
9. *The order of occupancy between the licensed premises and the complainant –*
The small bar has operated at its present site since 28 May 2014. The complainant at the time of making the complaint advised of residing at his current address for two years and prior to the opening of the small bar. The complainant noted that the building in which the small bar is located was previously a vacant office building. This fact is not in dispute and I consider that the order of occupancy consideration is in favour of the complainant.
10. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises –*
The complainant advised of repairing and sealing his apartment windows, installing new blinds and obtained quotations to install 'magnetite' to his apartment's windows to reduce noise intrusion.
11. *Any changes in the activities conducted on the licensed premises over a period of time –*
The complainant alleged there has been no change in activities conducted at the licensed premises. Noise intrusion from amplified entertainment and persons exiting the

licensed premises and from persons smoking outside on the footpath has occurred since the small bar commenced trading.

Summary and conclusion

12. I have considered the submissions of the complainant, licensee, NSW Police and the local council. I have also had regard to the particular context in which the small bar operates (including the statutory considerations mentioned above).
13. I am satisfied the material before me is sufficient to support a finding that the small bar has on occasions caused undue disturbance to the neighbourhood. I have balanced the submissions on behalf of the hotel, the complainant, NSW Police and the council.
14. On 29 July 2015 NSW Police in a submission advised that a review of the COPS system in relation to the small bar noted there are no issues or events relating to undue disturbance. The submission also detailed that police officers responded to complaints of music noise disturbance on 7 July 2014 and 30 May 2015. The complaint on 7 July 2014 alleged disturbance from amplified music noise in the vicinity of Bolton Street, Newcastle which the attending officers noted was not evident. On 30 May 2015 officer's responded to a noise complaint at the small bar that was deemed as 'not offensive'.
15. On 14 July 2015 an email submission was received from Mr Chris Speek, A/Team Coordinator (Planning), City of Newcastle advising a Development Approval was issued on 10 March 2014 concerning the small bar and that conditions relevant to controlling trading hours, anti-social behaviour and music noise were imposed. The submission advised council records do not show that a final occupation certificate has been issued. The council wrote to the premises owner on 20 October 2014 to notify that the annual fire safety statement was not adequate.
16. The submission also advised that a noise complaint was made to the council on 31 March 2015 and in this respect the complainant was referred to the Office of Liquor, Gaming and Racing. The submission confirmed no other pending development applications however it did not advise if further action was being considered under the relevant legislation in respect to the small bar operating contrary to aspects of the Development Application.
17. On 24 June 2015 in an email submission Mr Gordon Weiss (then licensee) advised of engaging with the complainant in respect to the issues raised in the complaint. Although not totally in agreement with those issues, Mr Weiss agreed to take remedial action which included keeping the front door closed after 10.00 pm; directing staff to ensure the

closure of the front doors after patrons enter or leave; keep windows closed where possible; and, asking patrons to respect neighbours as they leave.

18. Mr Weiss also advised that the entrance door has a self-closing mechanism but patrons tend to push it back causing it to jam in the open position. The two complaints that he received on 27 May 2015 were caused by Mr Weiss playing music whilst cleaning the bar after closing. Mr Weiss stated that on receiving the complaints he responded by calling the complainants and apologising for the inadvertent noise. Mr Weiss disputes the complainant's primary claim "that any noise has generally also occurred on working week nights or Sundays". He described the nights of Wednesday, Thursday and Sunday as extremely quiet trading times for small bars in Newcastle and although on those nights the venue is required to close at 10.00 pm it is usually closed by 9.30 pm if not earlier.
19. On 31 July 2015 in an email to an OLGR case officer Mr Weiss advised that he had sought a quotation for acoustic monitoring and preparation of a report. The testing was not undertaken due to the cost which the business could not afford. Mr Weiss advised a sound system is installed at the venue and only jazz vocal and instrumental music from the period 1920 to 1960 is played. The small bar caters to an older demographic clientele although on occasions a much younger clientele attends the venue. Notwithstanding, music volume levels are never above the level that interrupts conversation.
20. On 21 September 2015 an OLGR case officer contacted the complainant to ascertain the current status of the issues raised in the disturbance complaint. The complainant on 22 September 2015 responded, *"Overall we have been reasonably happy with how things are going. A new manager was appointed who contacted us and was quite understanding of the issues. During the colder months the door and windows are closed and fewer persons are about and we are concerned the issues will return with the warmer weather"*.
21. On 1 December 2015 an OLGR case officer contacted the complainant again to seek an update of the issues raised in the complaint. On 3 December 2015 the complainant responded, *'Whilst resident dealings with the small bar have been amicable as the warmer months are approaching there are concerns with more people frequenting the bar that the noise will become greater'*. The complainant also advised of *"Spending approximately \$2,000.00 installing new blinds, rubber seals on windows and running a noise generator application while we sleep. Last night in particular there was considerable noise between 10.00 pm and 11.00 pm from people exiting the venue. We understand that this sort of thing is difficult to manage at times and we do tolerate it as"*

best we can but we do feel the venue could be doing more to meet us". A further email was sent to the complainant by an OLGR case officer on 18 January 2016 seeking an update of disturbance issues however, a response was not received.

22. At 12.05 am on 13 December 2015 OLGR inspectors conducted brief covert observations at the small bar during the process of closing. At this time, inspectors noted that low level background music was audible with about 20-25 patrons in the venue. There were also several patrons exiting who were engaged in conversation, whilst three patrons remained on King Street waiting for a taxi. The inspectors remained at the site for a further 30 minutes during which the premises closed and all remaining patrons had moved from the area.
23. On 9 March 2016 an OLGR case officer contacted the complainant by telephone to ascertain the status of the disturbance issues from the small bar. The complainant advised that whilst the issues are now much better all he is seeking is some certainty that the entrance doors and windows are kept closed later at night as per the original agreement with the venue proprietor.
24. Between 10.45 pm and 11.15 pm on 18 March 2016 OLGR inspectors conducted observations at the small bar noting that patron noise was clearly audible from public areas on King Street as the front entrance doors and windows were open. Inspectors then engaged with the venue manager requesting that the doors and windows be closed. The inspectors and venue manager then made further observations and noted that with the doors and windows in the closed position noise from the venue was not audible.
25. In determination of this complaint, I have considered the submissions provided by the former licensee, NSW Police and the City of Newcastle Council. Whilst the submissions from NSW Police do not support the allegations raised in the complaint no further comment has been made in respect to the alleged telephone calls reporting issues of noise disturbance to City of Newcastle LAC at 10.19 pm and 11.08 pm on 3 April 2015 and 11.19 pm on 29 May 2015.
26. I consider the initial remedial actions of the former licensee to prevent noise escape by closing the entrance doors and windows as positive measures that go towards mitigating the issues in the complaint. However, these pro-active measures to reduce noise transmission from the small bar clearly have not been maintained as noted by the complainant's submissions and supported by the observations of OLGR inspectors on 18 March 2016.

27. Further, I am extremely concerned by the council's advice that an occupation certificate has not been issued, and that the Council informed the premises owner on 20 October 2014 that the fire safety statement for the venue was not adequate. To date, this remains an outstanding matter and needs to be the subject of further inquiries outside of this disturbance complaint process.
28. In order to ensure appropriate safeguards are in place for the future operation of the small bar I consider it appropriate to impose the LA10 noise condition, and a requirement for the entrance door and windows to be closed from 10.00 pm on any trading night.
29. I am of the view that the imposition of the proposed conditions does not place undue burden on the small bar's operation and will ensure regulatory certainty against future instances of disturbance.

Date of decision: 24 March 2016



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 **14/04/2016**. 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 and Gaming NSW website at www.liquorandgaming.justice.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:

Red Baron's – Newcastle (LIQS220000012)

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 Centre 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 purposes of this condition, the *LA10 can be taken as the average maximum deflection of the noise emission from the licensed premises.*

Date condition effective: 31 March 2016

Closure of front door and windows

From 10.00 pm on any trading night the licensee must ensure;

1. the front entrance doors are kept closed except to allow for immediate entry or exit to the venue.
2. the front windows are kept closed.

Date condition effective: 31 March 2016

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

1. Section 79 Noise Disturbance Complaint lodged by [name withheld] on 5 June 2015 and associated emails dated 22 September 2015 and 3 December 2015.
2. Submission by Newcastle City LAC dated 29 July 2015.
3. Email response by Mr Chris Speek Acting Team Coordinator (Development) Newcastle City Council dated 14 July 2015.
4. Email responses by Mr Gordon Weiss former licensee dated 24 June 2015, 31 July 2015, 18 October 2015.
5. Email response from Mr Alwyn Karpin Solicitor from Roderick Storie Solicitors dated 11 March 2016 in respect to small bar Red Baron's Newcastle, and requirement for an Occupation Certificate.
6. File note of a conversation with the complainant 9 March 2016 regarding the current status of disturbance from the small bar.
7. File note of OLGR inspector observations at the small bar on 18 March 2016.

Annexure 3

Summary of key submissions

Submission from Newcastle City Local Area Command dated 29 July 2015

NSW Police submitted after reviewing the COPS system in relation to the small bar there was no evidence that would assist in relation to the disturbance complaint. Newcastle LAC officers responded to noise complaints on 7 July 2014 and 30 May 2015. The only complaint relating to the Red Baron's small bar related to a noise complaint on 30 May 2015 at which police determined the noise from the venue was not offensive.

Submission from Mr Chris Speek, Wyong Shire Council dated 23 June 2015.

On 14 July 2015 an email submission was received from Mr Chris Speek, A/Team Coordinator (Planning) City of Newcastle that advised the council had issued a development approval on 10 March 2014 for a change of use to a small bar that contained a number of conditions relevant to controlling trading hours, anti-social behaviour and noise. The submission also advised that council records do not show a final occupation certificate has been issued. A letter was sent to the premises owner on 20 October 2014 notifying that the annual fire safety statement was not adequate. The submission also advised that a noise complaint was received by the council on 31 March 2015 and the complainant was subsequently referred to the Office of Liquor, Gaming and Racing. The submission also advised of no other pending development applications.

Submissions from former licensee Mr Gordon Weiss

A number of separate submissions were received from the then licensee Gordon Weiss that advised the following:

- On 24 June 2015 Mr Gordon Weiss, the then licensee advised of engaging with the complainant. Although not totally in agreement with the issues raised in the complaint, Mr Weiss agreed to take remedial action which included keeping the front door closed after 10.00 pm; directing staff to close the door after patrons enter or leave; keep windows closed where possible; and, asking patrons to respect neighbours as they leave.
- Mr Weiss also advised that the entrance door has a self-closing mechanism but patrons tend to push it back and causing it jam in the open position. The two complaints received on 27 May 2015 relate to Mr Weiss playing music whilst cleaning the bar after closing. Mr Weiss further stated that upon receiving the complaints he responded by calling the complainants and apologising for the inadvertent noise. Mr Weiss disputed the complainant's primary claim "that any noise has generally also occurred on working week nights or Sundays" describing the nights of Wednesday, Thursday and Sunday as

extremely quiet for small bars in Newcastle and although on those nights the venue is required to close at 10.00 pm it is usually closed by 9.30 pm if not earlier.

- On 31 July 2015 in an email to a Liquor and Gaming NSW case officer Mr Weiss advised that he had sought a quotation for acoustic monitoring and preparation of a report. The testing was not undertaken on the basis of cost which the business could not afford. Mr Weiss advised although a sound system is installed in the venue only jazz vocal and instrumental music from the period 1920 to 1960 is played as the small bar caters to an older demographic clientele although on occasions a much younger clientele attends the venue. Notwithstanding music volume levels are never above the level that interrupts conversation.

File notes of conversation with an OLGR case officer and the Complainant concerning the status of the complaint.

- On 22 September 2015 the complainant responded, *“Overall we have been reasonably happy with how things are going. A new manager was appointed who contacted us and was quite understanding of the issues. However during the colder months the door and windows are closed and fewer persons are about and we are concerned the issues will return with the warmer weather”*.
- On 3 December 2016 the complainant responded that whilst resident dealings with the small bar have been amicable as the warmer months are approaching there are concerns with more people frequenting the bar that the noise will become greater. The complainant also advised of *“spending approximately \$2,000.00 installing new blinds, rubber seals on windows and running a noise generator application while we sleep. “Last night in particular there was considerable noise between 10.00 pm and 11.00 pm from people exiting the venue. We understand that this sort of thing is difficult to manage at times and we do tolerate it as best we can but we do feel the venue could be doing more to meet us”*.
- On 9 March 2016 an OLGR case officer contacted the complainant by telephone to ascertain the status of the complaint. The complainant advised that whilst the issues are now much better all he is seeking is some certainty that the entrance doors and windows are kept closed later at night as per the original agreement with the venue proprietor.

File note of covert observations at the small bar by OLGR inspectors

At 12.05 am on 13 December 2015 OLGR inspectors conducted brief covert observations at the small bar during the process of closing. At this time, inspectors noted that low level background music was audible with about 20-25 patrons in the venue. There were also several patrons exiting who were engaged in conversation, three patrons remained on King Street waiting for a taxi. The inspectors remained at the site for a further 30 minutes during which the premises closed and all remaining patrons had moved from the area.

Between 10.45 pm and 11.15 pm on 18 March 2016 OLGR inspectors whilst conducting observations in respect of the disturbance complaint noted that patron noise was clearly audible from outside of the small bar on King Street, Newcastle as the front entrance doors and windows were open. Inspectors then engaged with the manager of the venue requesting the doors and windows be closed. The inspectors then made a further assessment in the

company of the venue manager who agreed that with the doors and windows in the closed position noise was not audible.