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FILE NO: A15/0005324

COMPLAINANT: [REDACTED]

LICENSED PREMISES: The Butler Potts Point Pty Ltd – LICO624003608

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 Butler Potts Point Pty Ltd (the restaurant), have decided to impose three 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 13 April 2015, [REDACTED] of [REDACTED] [REDACTED] lodged a disturbance complaint under section 79 of the Act concerning the restaurant. The complainant alleged they were being unduly disturbed because of the manner in which the business is conducted and due to the behaviour of patrons leaving the premises. More specifically, they asserted that amplified music, patron voices, patrons smoking on Victoria Street and machinery noise from the restaurant caused undue disturbance.

6. The complainants stated they had spoken with former licensee [REDACTED] on numerous occasions over the six months preceding the complaint. The licensee made some initial modifications but talks subsequently stalled and disturbance continued. The complainants lodged the complaint as residents authorised by ten other residents.

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 licensed premises has operated at its present site for 25 years and predates the complainant's occupation of the residence. The restaurant predates the complainants who have lived at their residence since July 2012. This fact is not in dispute and I consider the order of occupancy is in favour of the restaurant.
9. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – Council advised that the restaurant opened at the beginning of December 2014. Prior to the current restaurant, another restaurant occupied the premises before closing in April 2014. The premises were refurbished by the licensee before reopening in December. 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 restaurant was previously a long-established Italian fine dining restaurant, which the complainants submit caused little to no disturbance. The restaurant changed operator in late 2014 and the complainants allege that the focus of the restaurant shifted from a food focus to a bar and liquor focus, accompanied by elevated music levels and a constant stream of disturbance caused by loud music and patron noise every weeknight and from lunch time through late at night on weekends.

Other considerations

Undue disturbance

11. I am satisfied the material before me is sufficient to support a finding that the restaurant has, at times, caused undue disturbance to the neighbourhood caused primarily by amplified music and patron noise at the premises. In making this finding, I have balanced the submissions made by the licensee, the complainant, NSW Police and the Council.
12. The restaurant shares an adjoining wall with the complainant and is situated in close proximity to a number of other residential dwellings.

13. Council advised that since the current restaurant opened in December 2014, five complaints had been made to Council regarding patron noise, music, faulty electrical equipment, patrons smoking on the street and illegal building works.
14. Council officers inspected the complainant's property on 21 February 2015, and detected noise that the officers deemed offensive. On 8 April 2015, Council issued a warning letter to the owner of the restaurant and requested they engage an acoustic consultant to assess the noise and make recommendations for improvement.
15. The licensee submitted they had undertaken community consultation prior to the refurbishment of the restaurant and had addressed concerns raised during the renovation period. The licensee also engaged an acoustic consultant, The Acoustic Group Pty Ltd, to provide advice in relation to noise management as part of the refurbishment.
16. The licensee advised that before the restaurant opened, their acoustic consultant assessed the premises and indicated the restaurant could operate in compliance with the relevant acoustic standard. The consultant also recommended a number of additional measures to manage disturbance. These measures were implemented, including installation of acoustic battening, mounting and directing speakers in a particular way and installing heavy duty PVC blinds.
17. The licensee also submitted they had implemented a Plan of Management to address identified concerns and had maintained an open dialogue with residents since opening.
18. The complainant disputed the licensee's claim that community consultation had taken place, questioned the impartiality of the acoustic consultant engaged by the licensee and claimed the Plan of Management is not compliant with Council requirements.
19. NSW Police advised they had not received any complaints about the restaurant.

Action taken to mitigate disturbance

20. The licensee advised that after receiving the warning notice from Council, they engaged their acoustic consultant, The Acoustic Group Pty Ltd, to conduct an acoustic test. The test was carried out on 17 April 2015, in the presence of two council officers.
21. The restaurant's compliance with the Australian Standard AS1055 as well as noise penalties specified in the NSW Industrial Noise Policy was measured. It appears compliance with the LA10 criteria was not specifically tested, rather results of the test against the above criteria were used as an indicator to predict compliance with the LA10.
22. The resulting acoustic report questioned the reliability of council officers' observations that led to the warning notice, finding the restaurant was compliant with 'standard

licensed premises noise conditions' and no 'offensive noise' was present. The report recommended installation of a noise limiter, which was subsequently done.

23. A copy of the acoustic report was provided to all parties for comment. In response, Council disputed the consultant's view that the council officer's observations were incorrect. The complainant also questioned the veracity and objectivity of the findings.
24. The complainant subsequently engaged their own acoustic consultant to conduct an acoustic test. The test was carried out by Acoustic Directions Pty Ltd over a weekend in August 2015 and a 12 hour period in February 2016, with the final report provided to L&GNSW on 19 May 2016.
25. The acoustic test measured the restaurant's compliance with a combination of criteria used by the City of Sydney Council and the Australian Standard AS1055 as well as noise penalties specified in the NSW Industrial Noise Policy. Again, compliance with the LA10 was not specifically tested, as the consultant determined the LA10 to be similar to the Council criteria. Council's criteria were preferred as they contained additional requirements relating to indoor noise levels at residences.
26. The test found disturbance from the restaurant exceeded the relevant criteria in relation to patron noise, patron movement and music.
27. On 13 October 2015, L&GNSW Inspectors met with the licensee, who advised the following:
 - a) The terrace blinds are closed by 9.30 pm and the front shutters close by around 9.00 pm. The side shutters that face towards the complainant's residence are mostly closed during evening or peak trade.
 - b) Glass doors leading to the terrace are closed by 9.30 pm, with the exception of the two middle doors that remain open up until 10.30 pm.
 - c) Rubber acoustic panelled matting has been installed on the roof of the outdoor terrace and northern terrace wall.
 - d) A noise limiter has been installed and can only be accessed by the installer and only when their software is plugged into the limiter.
 - e) Shade blinds have been installed in the terrace.
 - f) Fan in the plant room has been replaced.
28. On Saturday 12 December 2015, L&GNSW Inspectors attended the complainant's residence to make first-hand observations of the disturbance. Inspectors noted that noise from the restaurant could be heard through an adjoining wall. The noise consisted of patron voices and dining noises but they did not consider it to be undue.

29. Inspectors monitored Victoria Street outside the restaurant and noted that music could be heard from the street but was inaudible inside the complainant's premises.
30. On 17 March 2016, L&GNSW Inspectors again attended one of the complainant's residences to discuss the complaint and were advised that disturbance continued.

Findings and conclusion

31. I have considered the submissions of the complainant, licensee, Police and the Council. I have also had regard to the particular context in which the restaurant operates (including statutory considerations mentioned above). In deciding whether to impose conditions on the licence relating to disturbance, I have considered the following points.
32. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the restaurant. However, I note there has been a change in the way the restaurant operates and subsequent increase in patron traffic at the venue.
33. I have considered the two acoustic reports before me. One prepared on behalf of the licensee in April 2015, the other on behalf of the complainant prepared in April 2016. These reports conflict both in the criteria used to measure disturbance and their outcomes. Neither report specifically tests the restaurant's compliance with LA10 criteria, which is the most relevant consideration for this office. I am not satisfied either report adequately demonstrates the restaurant's compliance or non-compliance with the LA10 noise criteria.
34. In determining whether the disturbance is undue, I have considered that the restaurant has operated in one form or another for over 20 years, and it is reasonable to expect that some noise will be generated by its ongoing operation. However, I am mindful of the proximity of the restaurant to residential dwellings.
35. I accept the licensee has implemented a range of measures since the complaint was made to manage disturbance at the restaurant. I also acknowledge the complainant's concern that regardless of the changes made, disturbance continues.
36. In order to ensure appropriate controls are in place for the future operation of the restaurant, I have decided to impose a LA10 noise condition, and a condition requiring the installation and calibration of a noise limiter in accordance with the LA10 criteria. I consider that these two conditions do not place an undue burden on the restaurant's operation and will ensure a level of regulatory certainty against future instances of disturbance.
37. Finally, I am of the view that patron noise is a major contributor to disturbance and is augmented significantly by the use of amplified music at the restaurant. Accordingly, use of amplified entertainment at the venue must be tightly controlled and monitored.

Date of decision: 21 October 2016.



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 **18/11/2016**. 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 & 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:

The Butler Potts Point Pty Ltd, Potts Point (LIQO624003608)

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: 4 November 2016

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: 4 November 2016

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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] on 13 April 2015.
2. Submission from [REDACTED] principle with Gwynn Thompson solicitors, on behalf of the licensee on 25 May 2015.
3. Submission from City of Sydney Council. 19 May 2015
4. Email from complainants in response to the licensee's submission dated 10 November 2015.
5. Submission from Police Licensing, Kings Cross dated 27 May 2015.
6. Acoustic test report on behalf of the licensee dated April 2015 conducted by The Acoustic Group [REDACTED]
7. Acoustic test report on behalf of the complainant dated April 2016 conducted by Acoustic Directions [REDACTED]
8. L&GNSW inspection file note of observations at the restaurant conducted on 12 December 2015.