



Mr Tony Blackman [private address not published]	Mr Ryan Watts Solicitor Slater & Elias Lawyers Suite 408, Level 4 147 King Street SYDNEY NSW 2000 <a href="mailto:ryan.watts@slaterandelias.com.au">ryan.watts@slaterandelias.com.au</a>	Mr Sean Goodchild Director, Compliance Operations Liquor & Gaming NSW Level 6 323 Castlereagh Street HAYMARKET NSW 2000 <a href="mailto:sean.goodchild@justice.nsw.gov.au">sean.goodchild@justice.nsw.gov.au</a>
Senior Constable Jamie Zahra Licensing Supervisor Rose Bay Police 1 Wunulla Road Point Piper NSW 2027 <a href="mailto:Zahr1jam@police.nsw.gov.au">Zahr1jam@police.nsw.gov.au</a>	Ms Michelle Easton Compliance Officer Woollahra Municipal Council PO Box 61 Double Bay NSW 1360 <a href="mailto:michelle.easton@woollahra.nsw.gov.au">michelle.easton@woollahra.nsw.gov.au</a>	

30 August 2017

Dear Sir/Madam

**Review of a Decision on Disturbance Complaint under Section 81 of the  
*Liquor Act 2007* by a Delegate of Secretary of the NSW Department of Industry –  
Dunbar House, Watsons Bay**

On 9 June 2017 the Independent Liquor and Gaming Authority (Authority) received an application for review (Review Application) pursuant to section 36A of the *Gaming and Liquor Administration Act 2007* (GALA Act) from Mr Tony Howard Blackman (Review Applicant) seeking the variation of a decision dated 12 May 2017 (Reviewable Decision).

The Reviewable Decision was made by Mr Sean Goodchild, Director Compliance Operations, Liquor and Gaming NSW (LGNSW) in his capacity as delegate of the Secretary of the NSW Department of Industry (Delegate).

The Reviewable Decision concerns a disturbance complaint dated 17 October 2016 (Complaint) made by Mr Tony Blackman (Complainant) under section 79 of the *Liquor Act 2007* (Liquor Act). The Complaint was made in relation to an on-premises (restaurant) licensed premises trading as "Dunbar House", Watsons Bay. The premises holds licence number LIQO600461026 and is located at 9 Marine Parade, Watsons Bay NSW 2030 (Premises).

Pursuant to section 81 of the Liquor Act, the Delegate decided to impose the standard "LA10" noise control requirement as a condition of the licence.

The Authority has considered the Review Application and revisited the Complaint with the benefit of all material that was before the Delegate and the further evidence and submissions provided during the review.

The Authority has considered the powers conferred upon the Secretary to determine disturbance complaints under sections 79 to 81 of the Liquor Act and the public interest in respect of the Liquor Act, informed by the statutory objects and considerations prescribed by section 3 of that Act.

On review, the Authority is satisfied that the operation of the venue and the behaviour of its patrons after leaving the Premises has caused undue disturbance to the quiet and good order of the neighbourhood within the meaning of section 79 of the Liquor Act.

The Authority is satisfied that remedial action should be taken under section 81 of the Liquor Act to reduce the scope for such disturbance.

Pursuant to section 36A(4) of the *Gaming and Liquor Administration Act 2007*, the Authority has decided to **vary** the Reviewable Decision. The Authority has determined that the LA10 noise condition imposed by the Delegate shall be maintained as a condition of the licence.

The Authority has also decided to impose the following additional condition upon the licence, pursuant to section 81(1)(a) of the Liquor Act, to commence effect from Friday 8 September 2017:

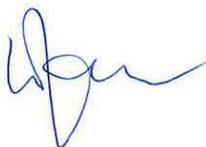
***Licensed Security Guard***

*On any evening when the venue hosts a function that will extend beyond 10pm the licensee must engage, from 9pm until the last patron has left the patrol area, one licensed uniformed security guard who will be required to regularly patrol the patrol area to ensure that patrons do not disturb the quiet and good order of the neighbourhood. The patrol area is measured from any exit point of the premises for a distance of 50 metres in all directions.*

Under section 36C of the GALA Act, the Authority is required to publish statements of reasons with respect to those types of decisions prescribed by clause 8 of the *Gaming and Liquor Administration Regulation 2016*. The statement of reasons has been prepared in the context of a high-volume liquor jurisdiction that requires the publication of statements of reasons as soon as practicable.

Please contact the Authority Secretariat via email to [ilga.secretariat@justice.nsw.gov.au](mailto:ilga.secretariat@justice.nsw.gov.au) if you have any advice or enquiries about this letter.

Yours faithfully



Philip Crawford  
**Chairperson**  
For and on behalf of the **Independent Liquor & Gaming Authority**

## STATEMENT OF REASONS

### INTRODUCTION

1. On 9 June 2017, the Independent Liquor and Gaming Authority (Authority) received an application for review (Review Application) lodged by Mr Tony Howard Blackman. Mr Blackman is a resident of Robertson Place, Watsons Bay, which is located opposite a restaurant and function venue, Dunbar House, located at 9 Marine Parade, Watsons Bay (the Premises).
2. The Review Application is made pursuant to section 36A of the *Gaming and Liquor Administration Act 2007* (GALA Act) in respect of a decision dated 12 May 2017 (Reviewable Decision) made by Mr Sean Goodchild, Director Compliance Operations, Liquor and Gaming NSW (LGNSW) in his capacity as delegate (Delegate) of the Secretary of the NSW Department of Industry (Secretary).
3. On 17 October 2016, pursuant to section 79 of the *Liquor Act 2007* (Liquor Act), Mr Blackman (Complainant) lodged a disturbance complaint (Complaint) with LGNSW in relation to the Premises, which operates with the benefit of an on premises liquor licence number LIQO600461026.
4. The website for the business operating on the Premises at [www.dunbarhouse.com.au](http://www.dunbarhouse.com.au), describes the venue as a “chic daytime café for alfresco a la carte breakfast and lunch on Sundays, as well as an exclusive venue for private celebrations and corporate events Monday – Sunday.” The business operates in a historic building, in a waterfront location close to Robertson Park.
5. The *OneGov* record of the liquor licence for the Premises as at 15 August 2017 indicates that the designated primary purpose of the on-premises licensed business is “restaurant”. The Premises is licensed to sell or supply liquor for consumption on the Premises from 5:00am until 12:00 midnight on Monday through Saturday and from 10:00am to 10:00pm on Sunday.
6. Briefly, the Complaint alleges that the operation of the Premises and the behaviour of persons after they leave the Premises is unduly disturbing the quiet and good order of the neighbourhood of the Premises. The undue disturbance is attributed to noise from music within the venue, movement of rubbish bins after 10pm, noise from glass disposal on the Premises, noise from patrons within the venue and noise from patrons leaving the venue.

### The Review Application in Brief

7. When making the Reviewable Decision, the Delegate was satisfied that the Complainant had established that the manner in which the business of the Premises was conducted, particularly with regard to amplified music and patron noise at the Premises, had “at times” caused undue disturbance to the quiet and good order of the neighbourhood within the meaning of section 79(1) of the Liquor Act.
8. The Delegate decided, pursuant to section 81 of the Liquor Act, to impose a new condition on the liquor licence mandating compliance with the “LA10” noise control standard, to better ensure that controls are in place to remedy disturbance from the Premises.
9. The LA10 noise condition, which commenced effect on 19 May 2017 states:

#### **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.*

10. The Review Applicant now seeks to vary the Reviewable Decision, claiming that “insufficient emphasis” was placed on noise disturbance caused by patrons of the venue. The Review Applicant contends that the Reviewable Decision as it stands is “inadequate” and “deficient in all the circumstances”. The Review Applicant argues that the Delegate failed to correctly or sufficiently identify the grounds of Complaint that had been advanced, failed to identify and consider some of the evidence provided, failed to give weight (or sufficient weight) to some of the evidence provided by the Review Applicant during the course of the Complaint and the decision is not supported by the evidence which it does consider.

## **LEGISLATION**

11. Section 79 of the Liquor Act makes provision for the making of undue disturbance complaints in writing to the Secretary. In practice, complaints are administered by the responsible agency, Liquor and Gaming New South Wales (LGNSW).
12. Section 80 of the Liquor Act prescribes the process by which the Secretary may deal with an undue disturbance complaint and section 81(1) of that Act confers powers upon the Secretary to take certain administrative actions (including to take no action) in response to a complaint.
13. Relevantly, section 81(1)(a) of the Liquor Act empowers the Secretary to impose conditions upon the licence of the premises that is the subject of a complaint. Such action may only be taken after a decision maker has regard to the express considerations prescribed by section 81(3) of the Liquor Act.
14. Section 81(2) of the Liquor Act provides that the conditions that may be imposed by a decision maker include - but are not limited to - noise abatement, restrictions on the sale and supply of liquor and the access of patrons to the licensed premises.
15. A decision made by the Secretary under section 81 of the Liquor Act is a category of “reviewable decision” that is subject to merits review by the Authority pursuant to section 36A(1)(a)(iv) of the GALA Act.
16. When determining an application for review under section 36A of the GALA Act, the Authority has the power to confirm, vary or revoke a reviewable decision under section 36A(4) of that Act.
17. When reviewing a decision made under the Liquor Act the Authority will also have regard to the broader statutory objects and considerations provided by section 3 of that Act, which states:

### **3 Objects of Act**

- (1) *The objects of this Act are as follows:*

- (a) *to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,*
  - (b) *to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,*
  - (c) *to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.*
- (2) *In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:*
- (a) *the need to minimise the harm associated with the misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),*
  - (b) *the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,*
  - (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.*

## **MATERIAL BEFORE THE DELEGATE**

### **The Complaint in Brief**

18. On 17 October 2016 LGNSW received the Complaint made pursuant to section 79 of the Liquor Act. The Complaint was in the prescribed form (Form) and is authorised by two other residents of the local neighbourhood who both live in Robertson Place, Mr Garth Porter and Mrs Wendy Doyle (Authorising Residents). The information provided in the Form is verified by a statutory declaration.
19. Briefly, the Complainant contends that the specific causes of disturbance to the quiet and good order of the neighbourhood are as follows:
- noise from music from within the Premises when doors and/or windows are left open
  - movement of rubbish bins on the Premises after 10:00pm
  - noise from the venue’s chosen method of glass disposal
  - noise from patrons on the Premises within the operating hours of the venue
  - noise and/or behaviour of patrons after they have left the Premises
  - the “methodology” of the Premises in ensuring patrons leave as noiselessly as possible.
20. The Complainant contends that these disturbances occur “throughout the week” with regard to rubbish disposal, but *patron noise* generally occurs from Thursday to Sunday nights between around 11:30pm and 12:45am. The Complainant contends that these disturbances may become more frequent as the weather warms.
21. In Part E of the Complaint Form (which invites the Complainant to report any action taken in respect of the Complaint to date) the Complainant makes the following further contentions:
- The Complainant and the Authorising Residents have tried speaking to staff at the Premises (Mr Mark Holmes, General Manager and Ms Tahli Stopford, Venue Manager) on 15 January 2016 when the Complainant was told to take his complaints to Council as they were not prepared to change “their behaviour”.
  - After complaining to Council, the Complainant and the Authorising Residents met with the Group’s proprietor (Mr Manny Spinola) on 1 February 2016 who apologised for previous encounters with venue management and “made some changes” in an attempt to improve the situation.
  - Since then the matters complained of have become more frequent.
  - The Complainant first contacted a Council compliance officer, Ms Michelle Easton, raising specific disturbance complaints on 19 January 2016.

- The Complainant has since “attempted to work through issues directly” with the Business Owner, but has been unsuccessful.
- Local residents were exposed to “little disturbance” until late 2015 or early 2016.
- The Complainant has obtained a copy of the original development approval (DA) for use of the Premises and submits that “all we ask is that all aspects of the DA are complied with”.

22. Attached to the Complaint Form were four photographs of alleged disturbance from the Premises. The photographs were apparently taken by the Review Applicant and depict patrons standing on the external verandah of the Premises.

23. Also attached to the Complaint Form was a copy of an email from the Complainant to Council dated 16 October 2016 in which it is alleged that an incident of public urination occurred “approximately 10 metres” from the Complainant’s residence and “maybe 20 metres” from the front steps of Dunbar House, after midnight on Saturday 8 October 2016 which his wife captured on video taken on an iPhone. In an email to the Delegate on 27 January 2017, the Complainant’s solicitor states that this video footage will be provided to the Delegate by separate email. (That media is referred to in the Reviewable Decision).

#### **Further submissions and material**

24. During the conduct of the Complaint LGNSW received a submission letter dated 1 December 2016 to LGNSW from Mr Ryan Watts of Slater & Elias Lawyers, who act for the licensee Mr Mark Holmes (Licensee) and the business owner operating on the Premises, The Tea Room Pty Ltd, part of the Grand Pacific Group (Business Owner). Attached to this letter is the following material:

- Dunbar House *Staff Handbook*, which contains a Noise Plan of Management and responsible service of alcohol (RSA) Plan for the Premises.
- Prevention of Intoxication on Licensed Premises Guidelines published by LGNSW dated March 2015.
- Liquor Promotion Guidelines published by the (then) Office of Liquor, Gaming and Racing, now LGNSW, dated July 2013.
- Prevention of Intoxication on Licensed Premises Guidelines published by LGNSW.
- A document apparently prepared by Dunbar House with photographs showing that a Plan of Management is displayed at three different locations on the Premises, and indicating where various other signs concerning smoking, noise, bins and bollards are displayed on the Premises.
- Dunbar House Event *Terms and Conditions* for Grand Pacific Group t/a Dunbar House.
- Copies of Acoustic Reports from 2011, 2013 and 2016 for Dunbar House prepared by Acoustic Logic Consultancy, engaged by the Business Owner.

25. Council also made a submission to LGNSW dated 23 November 2016, advising that 9 complaint emails had been received by Council from the Complainant (now Review Applicant) in relation to Dunbar House between 5 January 2016 and 21 November 2016 and Council outlines the contents of these emails. Attached to this submission is:

- Copy of a letter dated 13 July 2010 from Council to Cerno Management advising that DA 21/2010/1 is granted, and a copy of the Notice of Determination of Development Consent No. 21/2010 dated 12 July 2010.
- Plan of Management for Dunbar House.
- Copy of Acoustic Report prepared by Acoustic Logic Consultancy for Dunbar House dated 24 February 2010.
- Extracts from registered lease document AK761517L stamped as relodged on 22 September 2016 for the property on which Dunbar House is located, from Council to The Tearoom Pty Limited for a term of 7 years from 1 July 2016.

- Letter from Council to Mr Manuel Spinola dated 3 February 2016 advising breaches of noise and operating hours lease conditions in respect of Dunbar House.
- 26.** A submission was made to LGNSW by Senior Constable Jamie Zahra, Rose Bay Police (Police) dated 20 December 2016. Attached to this submission are copies of the sound recordings conducted by venue staff for September, October and November 2016 in respect of the venue.
- 27.** In a letter from Mr Don McDougall, solicitor, dated 27 January 2017, the Complainant responds to an email from LGNSW dated 19 December 2016 with attachments including the Business Owner's solicitor's letter of 1 December 2016. Attached are copies of email correspondence dated February 2016 between the Complainant and Mr Spinola, on behalf of the Business Owner.
- 28.** The Business Owner replied to this letter through their solicitors, Slater and Elias, in a submission to LGNSW dated 8 March 2017, reaffirming the submissions made in the letter dated 1 December 2016 and responding to the submissions received by LGNSW. Enclosed was the following evidence or material:
- Undated letter from Showtime Promotions & Productions addressed "to whom it may concern", outlining noise reduction measures it has taken at Dunbar House in response to the Complaint.
- 29.** Finally, a further letter from Slater & Elias Lawyers on behalf of the Business Owner dated 8 March 2017 provided LGNSW with an email received from a local resident dated 8 March 2017 making submissions in support of the venue.

## **SUMMARY OF THE REVIEWABLE DECISION**

- 30.** Briefly, in the Reviewable Decision the Delegate discusses relevant legislation, including sections 3, 79, 80 and 81 of the Liquor Act. The Delegate summarises the Complaint as involving allegations that the Complainant is being unduly disturbed by the manner in which the business is conducted and the behaviour of patrons, with noise caused by music within the venue, glass disposal by the business, patrons within the venue, patrons leaving the venue, and the movement of rubbish bins by staff after 10:30pm.
- 31.** The Delegate provided an analysis of the three statutory considerations set out in section 81(3) of the Liquor Act. For the purposes of section 81(3)(a), the Delegate found that the order of occupancy favoured the venue, which had been established on the Premises for 7 years while the Complainant has only lived at his residence since March 2014. For the purposes of section 81(3)(b), the Delegate found that the venue was refurbished extensively by the current licensee in 2010 and has since operated in its current form, and that there was no evidence to demonstrate that there have been changes to the Complainant's residence during the relevant time. For the purposes of section 81(3)(c), the Delegate found that the operations of the venue have remained constant since 2010 and that the venue operates as a café for breakfast, followed by lunch trade and then as a function venue at night.
- 32.** On the evidence and material before him, the Delegate was satisfied, for the purposes of section 79 of the Act, that the venue has "at times" caused undue disturbance to the neighbourhood caused primarily by amplified music and patron noise on the Premises. The Delegate made this finding on the basis of information provided in the submissions from the Licensee, Complainant, Police and Council. The Delegate found that the venue is located in a "unique area" comprising mostly of residential properties while also being a popular tourist destination.
- 33.** While the Delegate observed that Police did not detect any non-compliance at the venue on 9 December 2016 or 17 December 2016 when they attended to conduct observations, the

Delegate found, on the basis of the venue's own acoustic reports from Acoustic Logic Consultancy (engaged by the Business Owner), particularly the report completed in November 2016, that there had been "some" non-compliance with the LA10 standard.

34. In determining whether the disturbance alleged in the Complaint is "undue", the Delegate took into account the venue's long history of operations and its geographical location, close to residential properties, a beach and open parkland. Nevertheless, the Delegate was satisfied that the venue has a responsibility to ensure that disturbance to the neighbourhood is minimised. The Licensee had taken steps and continues to take steps to address disturbance from music, waste disposal and patrons who are on and departing the Premises and on this basis, the Delegate did not find it necessary to impose a condition specific to regulating disturbance from patrons leaving the venue.
35. The Delegate did consider it necessary to impose a condition requiring compliance with the LA10 noise standard, to ensure that appropriate controls are in place to limit disturbance to the neighbourhood from music noise and patron noise from *within* the venue.

### **REVIEW APPLICATION MATERIAL**

36. In the Review Application filed on 9 June 2017 the Review Applicant submits that the Delegate's findings do not address what he describes as the "uncontrolled" noise disturbance from patrons leaving the venue, which is a "substantial cause" of concern. The Review Applicant submits that there has been "no substantive plan of action" to date to mitigate this kind of disturbance.
37. The Review Applicant further contends that the Licensee's requirement that venue staff request its guests to have transport ready to collect them from the site is "grossly inadequate" to mitigate the potential for disruptive noise to occur from patrons departing the Premises.
38. The Review Applicant contends that the letter in support of the business was provided by a local resident who lives "up an embankment" and further away from the Premises than the Review Applicant. The Review Applicant submits that factors such as the location of the venue, near a beach and parkland, require "even greater diligence" on the part of the Licensee to ensure that patrons are moved on as quickly as possible to reduce disturbance to the neighbourhood.
39. The Review Applicant provides a copy of a submission made from Council to LGNSW dated 23 November 2016 in response to this Complaint with copies of photographs taken by the Review Applicant from outside the venue, provided during the Complaint process, as noted above.

### **CONSULTATION ON REVIEW**

40. On 30 June 2017, the Authority Secretariat sent an email to the representatives for the Licensee Mr Mark Holmes and the Business Owner, Council and Police, inviting submissions on the Review Application.
41. No further submission was received from Police.

### **Submission from Council dated 12 July 2017**

42. In this 3-page letter addressed to the Authority, Council outlines the history of numerous complaints received by Council from the Review Applicant in relation to the venue between January 2016 and November 2016.

43. Council concludes that, based on its review of “detailed diary notes and video footage” provided by the Review Applicant together with information from other sources, the venue has operated in contravention of condition I.7 (limiting hours of use to between 10:00am-12:00am Monday to Saturday) and condition I.8 (prescribing a patron capacity of 120 persons) of development approval DA 21/2010/1 (DA) for the Premises.
44. Council refers to its Notice of Intention to Give an Order (Council Notice) issued to the Lessee, The Tearoom Pty Ltd, on 16 December 2016 requiring compliance with the Plan of Management and the DA approved by Council on 12 July 2010. In response to this Notice, Council received an application pursuant to section 96 of the *Environment Planning and Assessment Act 1979* seeking modification of condition I.7 of the DA to specify hours of operation from 7:00am-12:00am Monday to Saturday. It is apparent from the Referral Response – Environmental Health Report attached to Council’s submission that this application was submitted to Council by the Business Owner. Council advises that this application is currently under consideration.
45. Council further advises that on 17 December 2016, its Environmental Health Officer attended the venue and surrounds at 11:25pm to observe a function in the upstairs rooms, as well as guests leaving the venue at around 12:15am. No issues of non-compliance with the DA were observed on that occasion.
46. Council submits that the Authority consider imposing a condition upon the liquor licence requiring licensed security to monitor the behaviour of patrons arriving and departing the Premises from a specified time up to one hour after trading ceases, as well as a requirement that the licensed security continuously patrol the Premises during functions within a defined area encompassing Robertson Place and Robertson Park.
47. Council submits that this measure may discourage the type of behaviour that was described by the Review Applicant in an email to Council regarding a party that was held on the Premises on (Wednesday) 5 July 2017 - which reported patrons loudly leaving the Premises between 11:00pm and 1:00am and remaining in Robertson Park, yelling and singing until after 1:30am.
48. Accompanying Council’s submission is a copy of the Council Notice dated 16 December 2016, an Affidavit of Service for the Notice signed, witnessed and dated 21 December 2016 and a copy of a Referral Response – Environmental Health Report completed by a Council officer in respect of a proposed change in operating hours for Dunbar House dated 11 July 2017.

#### **Further Submission from Licensee and Business Owner dated 19 July 2017**

49. In this 4-page letter to the Authority from Slater & Elias, who act for the Licensee and Business Owner, the Licensee submits that the Delegate gave adequate consideration to the Complaint, submissions and evidence before him when making the Reviewable Decision, but “additional weight” should now be given by the Authority to the venue’s “extensive” Noise Plan of Management and the statutory considerations in section 81(3) of the Liquor Act, which favour the Licensee and the venue.
50. The Licensee contends that the Business Owner has constantly operated the venue for the past 7 years while the Complainant has occupied his residence for the past 3 years, that there have been no structural or other changes to either property during that period, and that the venue has been operated as an “iconic” restaurant and function centre for over 60 years.
51. The Licensee submits that the Complainant has not provided any “independent evidence” to support his complaints of disturbance, that the video footage provided to the Delegate was of “poor quality” and does not evidence that any guest of the venue urinated outside the Complainant’s residence as alleged.

52. The Licensee contends that despite the “responsiveness” of the Licensee and Business Owner since the date of the Reviewable Decision, the Complainant has become “increasingly hostile” and has “trivialised” the “extensive efforts” made by the venue to address his concerns.
53. The Licensee submits that the only independent third party who has observed the venue during late-night operations is NSW Police, who found the venue to be compliant both with noise conditions and the Noise Plan of Management during overt and covert investigations - save for one occasion on which “slight” noise was found by Police to emanate from the venue, prior to the installation of the sound limiting system during December 2016.
54. The Licensee contends that the Authority should “draw an inference” from the fact that the only references to complaints being made against the venue identified in the submissions from Council and Police were complaints made by the Review Applicant, with no other noise complaints apparent from other neighbouring residents, many of whom would be similarly exposed to noise from the venue.
55. The Licensee submits that the venue’s Noise Plan of Management has been “drafted to reflect the unique location and context” in which the venue operates, which includes its geographical location and the temporary accommodation for guests onsite after the cessation of events, and that other high capacity venues are located within close proximity to Dunbar House, including Watsons Bay Hotel, Doyle’s on the Wharf, Doyle’s on the Beach, Vaucluse Yacht Club and Nautica Restaurant.
56. The Licensee notes that a supporting signature provided with the Complaint was provided by a person associated with the ownership of one of those other venues. The Licensee further submits that while the Review Applicant has argued that a resident who provided a letter of support for the venue lives further away from the Premises, that resident would still be equally or possibly more exposed to noise from guests *departing* the venue, which is now the Review Applicant’s main concern. The Licensee contends that the response from the supportive resident is “indicative of the relationship the Venue has worked hard to develop with the local community over the past 7 years”.
57. The Licensee submits that in addition to the noise mitigation measures in place at the time of the Reviewable Decision, the Business Owner has now also limited its use of the second-floor terrace to 9:00pm daily, despite the more generous trading hours permitted by the DA. Acoustic testing will be continued to ensure constant compliance with the LA10 standard.
58. The Licensee submits that the Delegate adequately balanced the interests of all parties in reaching his conclusion in the Reviewable Decision.

#### **Further Submission from Review Applicant dated 26 July 2017**

59. In this 5-page letter addressed to the Authority, the Review Applicant states, inter alia, that the Licensee was incorrect to state that the venue has been operating for 60 years, as Dunbar House’s website makes clear that evening functions have only been held during the past 7 years.
60. The Review Applicant submits that prior to the occupation of his residence it was occupied by renters who are “far less likely to take action” than “owners” and disputes the contentions that the Licensee has a good relationship with the prior owner of his residence and that the Authority can infer that no noise complaints in relation to the venue have been made by other residents.
61. The Review Applicant reiterates his previous submissions in relation to the resident who is supportive of the Licensee being less affected by noise disturbance from the venue, that the

policies and measures to mitigate noise from patrons leaving the venue are insufficient, and disputes the Licensee's contention that his behaviour towards venue management is hostile.

## **DECISION ON REVIEW AND REASONS**

### **Findings on Undue Disturbance**

- 62.** The Authority has considered the Review Application and all of the submissions, evidence or other material before it pertaining to the Review Application, including the material that was before the Delegate.
- 63.** The Authority is satisfied that the Complaint has been validly made pursuant to the requirements of section 79(3) of the Liquor Act. The Complaint is made by a resident of the neighbourhood of the Premises and is authorised by two other residents of the neighbourhood.
- 64.** The Authority accepts that a noise limiter system was installed at the venue in December 2016, on the basis of the letter from Showtime Promotions & Productions attached to the Business Owner's submission dated 8 March 2017. The Authority accepts that this will assist in preventing noise from amplified music or announcements from the public-address system exceeding the LA10 standard. The Authority accepts that the venue's Noise Plan of Management requires staff to conduct regular acoustic testing.
- 65.** The Authority further accepts the information provided by the Business Owner in the submission dated 19 July 2017 that, in addition to the mitigation measures that were in place at the time of the Reviewable Decision, the Business Owner has also now limited the use of the second-floor terrace to 9:00pm daily, despite the scope for later use in the DA. The venue has also changed its practices so that waste disposal and external cleaning is conducted the morning after a function rather than late at night.
- 66.** The Authority accepts that there are reasonably extensive measures contained within the Business Owner's Plan of Management for the venue to mitigate the risk of noise from patrons entering and departing the Premises causing undue disturbance to the neighbourhood and that the Business Owner has taken steps to communicate with the Review Applicant to address his concerns directly.
- 67.** Nevertheless, the Authority is satisfied that one significant likely driver of the undue disturbance established in this Complaint arises from the conduct of patrons departing the venue in the evening or lingering in the vicinity after midnight.
- 68.** Patron conduct is likely to play an ongoing role in generating undue disturbance, having regard to the patron capacity of the venue, the nature of the business as a function centre and the licensed trading hours of the Premises which extend until midnight on Monday-Saturday.
- 69.** The Authority is satisfied that departing patrons have been a cause of undue disturbance on the basis of the information provided in the initial Complaint, verified by statutory declaration, and that noise from departing patrons is causing significant disturbance audible from the Complainant's residence particularly on Thursday to Saturday until after midnight.
- 70.** The Authority further accepts that previous contemporaneous complaints have been made by the Review Applicant to Council which provide credible accounts of the type of disturbance that may be expected to be associated with functions and events. They were documented in emails to Council dated from 15 January and 21 November 2016 and are referred to in Council's submission. This tends to reinforce the Review Applicant's case that patron noise occurring after midnight is occasionally unduly disturbing the quiet and good order of the neighbourhood. On the balance of probabilities, and regardless of whether the

video evidence is conclusive, the Authority accepts the Review Applicant's information that a departing patron has engaged in an act of public urination in the vicinity of the Review Applicant's home on one occasion late on 8 October 2016. This is a regrettably common experience for persons living nearby licensed venues that trade later into the evening.

### **Remedial Action**

- 71.** The Authority agrees with the findings made by the Delegate on the section 81(3) considerations. With regard to section 81(3)(a), the order of occupancy favours the venue. The Complaint Form dated 15 October 2016 indicates that the Review Applicant has lived at his residence since around March 2014 while the Business Owner's submission dated 1 December 2016 specifies that the business has operated on the Premises since 2009.
- 72.** For the purposes of section 81(3)(b), the Authority is satisfied, on the basis of the information provided in the Business Owner's submissions dated 1 December 2016 and 19 July 2017 that the venue was refurbished extensively by the current licensee in 2010. There is no evidence before the Authority that there have been any changes to the Complainant's residence at relevant times.
- 73.** For the purposes of section 81(3)(c), the Business Owner's submissions of 1 December 2016 and 19 July 2017 and information on the website for the venue satisfies the Authority that the operations of the business have remained constant since 2010 and that the Premises currently operates as a café for breakfast and lunch on Sunday and a function venue from Monday-Sunday.
- 74.** The Authority notes that the venue is licensed until midnight Monday through Saturday and until 10:00pm on Sunday. The maximum capacity permitted by DA 21/2010/1 for the venue is 120 persons. A venue that specialises in functions, with live entertainment, is likely to generate high spirited patrons departing the Premises while affected by liquor to various degrees, at various times.
- 75.** The Authority accepts that noise disturbance of the kind described in the Complaint by way of groups of patrons speaking loudly, yelling and singing and lingering in the vicinity, has been occurring and is likely to continue given the nature of this enterprise.
- 76.** The Authority is mindful that this is an instance of a complainant moving into the neighbourhood of a longstanding licensed function venue. The scope for disturbance from a function venue should have been apparent to the Complainant (or any other person) moving into this neighbourhood. The Authority has given detailed consideration to and carefully balanced the fact of prior occupancy against the nature of the ongoing concerns of disturbance and has exercised some caution when considering what, if any, regulatory impost is appropriate in circumstances when the section 81(3) factors favour the Licensee.
- 77.** The Business Owner has correctly identified that the Review Applicant is the source of previous complaints to Police and Council, but this Complaint has been supported by the Authorising Residents as required by section 79 of the Act, so it cannot be dismissed as the grievances of one individual.
- 78.** A venue of this character provides significant social benefits to the community that it serves, hosting functions and events of considerable cultural importance to its patrons. The venue substantially advances the objects of section 3 of the Liquor Act - section 3(1)(a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community, section 3(1)(b) to facilitate the balanced development, in the public interest, of the liquor industry, and also section 3(1)(c) in respect of the responsible development of the related hospitality, music and tourism industries - by providing a quality functions and events centre in a historic location which is also popular with tourists.

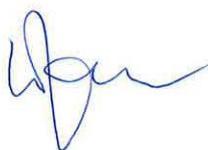
79. However, having regard to the statutory consideration of section 3(2)(c) of the Act, which requires consideration of the need to ensure that the sale, supply and consumption of liquor contributes to, rather than detracts from, the amenity of community life, and the purpose of section 79, which is to remedy *undue* disturbance, the Authority is satisfied that it is in the public interest to impose a further licence condition specifically directed to deterring noise and anti-social conduct from departing patrons.
80. This action will better serve the venue by reducing the scope for noise complaints and better serve the Complainant and other nearby residents. It is not unreasonable to expect some noise from well-wishers at a function. That conduct becomes less reasonable the later it occurs, particularly on evenings that proceed weekdays. The venue should make substantially greater efforts to prevent disturbance from patrons after midnight.
81. The Authority does not expect that all forms of disturbance from departing patrons will be eliminated. Some allowance must be made for the order of occupancy, which plainly favours the venue. The venue is located in a popular tourist area with other hospitality venues located nearby.
82. When considering what action may be appropriate, the Authority notes the opinion of Council, which recommended the engagement of licensed security staff to deter patron misconduct in the vicinity of the Premises. The Authority, as is often its finding in disturbance matters such as this, has independently determined that such an approach is required here.
83. The Authority considers that a licensed, uniformed security guard, is likely to deter some and perhaps most patrons from acting in an unruly manner or lingering in the vicinity longer than necessary in a manner that unduly disturbs the quiet and good order of the neighbourhood.
84. There are limits to what private security staff may do, as they do not have the law enforcement powers of Police or Council rangers, but a professional security presence will serve as a signal to patrons to leave the venue in an orderly manner.
85. The Authority has decided to **vary** the Reviewable Decision under section 36A(4) of the *Gaming and Liquor Administration Act 2007* so that the LA10 condition imposed by the Delegate is maintained but the following new condition shall be imposed upon the licence, with effect from Friday 8 September 2017.

### ***Licensed Security Guard***

*On any evening when the venue hosts a function that will extend beyond 10pm the licensee must engage, from 9pm until the last patron has left the patrol area, one licensed uniformed security guard who will be required to regularly patrol the patrol area to ensure that patrons do not disturb the quiet and good order of the neighbourhood. The patrol area is measured from any exit point of the premises for a distance of 50 metres in all directions.*

86. If you have any enquiries about this decision please contact the case manager via email to [ilga.secretariat@justice.nsw.gov.au](mailto:ilga.secretariat@justice.nsw.gov.au).

Date of Decision: 30 August 2017



Philip Crawford  
**Chairperson**