

Our Ref: L 190
Your Ref:

2 July 2010

The Resident Complainant
[name and address withheld from publication]
POTTS POINT 2011

By email

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**Application for Review under section 153 of the *Liquor Act 2007*
Noise Disturbance Complaint regarding numerous venues in Kings Cross**

Dear Sir

1. I refer to your application for review ("**Application**") under section 153 of the *Liquor Act 2007* ("**Act**") regarding a decision dated 19 October 2009 made under section 81 of the Act by a delegate of the Director-General of Communities NSW ("**Delegate**"). The Decision followed a conference that was convened by the Delegate on 9 October 2009 ("**Conference**") with representatives of the Sugarmill Hotel, the Piccadilly Hotel and the Elk Bar ("the **Conference Premises**") in response to a complaint made by you ("the **Resident Complainant**") that the quiet and good order of the neighbourhood of numerous premises in Kings Cross is being unduly disturbed ("**Complaint**"). In the Decision, the Delegate determined to take no action against the Conference Premises.

SUMMARY OF DECISION

2. The Authority confirms the Decision under review.

THE COMPLAINT

3. The initiating documents comprising the Complaint, filed under section 79 of the Act, were received by the Office of Liquor Gaming and Racing ("**OLGR**") on 2 July 2009. The Resident Complainant's cover letter dated 19 May 2009 identified the following thirteen licensed premises:

- Empire Hotel
- Elk Bar
- Sugarmill Hotel
- Madam DeBiers (now The Bank Hotel)
- Trademark Hotel/Piano Room
- Moulin Rouge
- Bourbon Hotel
- Vegas Hotel
- Piccadilly Hotel
- Crest Hotel

- Sapphire Suite
- Soho Nightclub
- Dragonfly Nightclub

(the "**Complaint Premises**").

4. Section 79 of the Act states, *inter alia*:

- (1) A person may complain to the Director-General that the quiet and good order of the neighbourhood of licensed premises are being unduly disturbed because of:
- (a) the manner in which the business of the licensed premises is conducted, or
 - (b) the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

5. The Complaint was duly authorised, for the purposes of section 79 (3) (a) of the Act, by two other residents of Potts Point in the same neighbourhood as the Resident Complainant.

6. Briefly, the Resident Complainant makes the following submissions:

- (i) He concurs with the recommendations contained in the City of Sydney ("the **Council**")'s May 2009 *Late Night Trading Research Report*.
- (ii) He has lived in his apartment building, located near Springfield Mall in Potts Point, since 1998. It is a multiple storey residential building that was constructed in the 1920s.
- (iii) Over the 11+ years of his residence, the Springfield Mall area of Kings Cross has gone from having only one nearby legal late trading establishment (a smaller version of what is now The Bourbon) to over 25 late trading establishments.
- (iv) He has filed objections with Council to several of the more recent late trading premises.
- (v) Many of the more recent development applications were initially refused by Council but those decisions were overturned on appeal to the NSW Land and Environment Court.
- (vi) The Land and Environment Court does not accept the view held by Council and NSW Police that the Kings Cross precinct has reached "saturation" point for licensed premises.
- (vii) In recent years, several other businesses have been converted into licensed premises. The New Zealand Ice Cream bar became the Empire Hotel; Hungry Jacks became the Elk Bar; Westpac Bank became Sugarmill Hotel; Commonwealth Bank became Madam De Biers; the Millenium (accommodation) Hotel became the Trademark Hotel/Piano Room bar and a sex toy shop became the premises now known as Moulin Rouge. All of these venues have become "large all night drinking barns."
- (viii) Furthermore, several previously established licensed premises have expanded the scope of their operations – including The Bourbon Hotel, Vegas Hotel, Piccadilly Hotel and Crest Hotel.
- (ix) These late trading premises have persons congregating loudly outside their premises – queuing or smoking.
- (x) Some of these premises have outdoor areas or balconies for smoking and drinking that face toward residential buildings. The ban on indoor smoking has lead to "a concerted push to develop outdoor drinking areas and a trend to patrons smoking in the street outside drinking establishments."

- (xi) The existing development application ("**DA**") process for the Kings Cross precinct is "flawed" because it "totally ignores the cumulative adverse impacts of clustering over time which has been allowed to occur in Kings Cross."
 - (xii) A noise criterion for the approval of each successive development requires that a development not contribute a greater than 5dB (decibels) increase on prevailing background noise levels, from 7 am to midnight and not contribute greater than a 0dB increase on prevailing background noise from midnight to 7 am.
 - (xiii) However, the cumulative impact of each venue means that the benchmark against which each new individual venue is assessed permits the business it to operate within this framework, yet the actual overall increase in background noise, caused by the conduct of their combined patrons on the streets, may be substantial.
 - (xiv) Compared to 11 years ago, the volume of intoxicated patrons moving through the area between midnight and 7 am has effectively "shattered" the 0 dB noise criterion, with every licensed premises in the precinct jointly responsible for breaching that (planning) criterion.
7. The Resident Complainant states that the "aim" of the Complaint is to address:
- "the ongoing problems faced by residents who have been living here much longer than the relatively recent phenomenon of extended and 24 hour trading. It is not the case that we moved here knowing the problem already existed, but rather that the problem has been forced upon us by successive planning failures. The ongoing problems include noise and disturbance created all through the night variously by drunk, drugged and boisterous people fighting, smashing glass and street drinking in declared alcohol free areas, shouting at each other, swearing, shooting up drugs, singing badly off key, urinating in public, throwing up, using firearms and generally creating other nuisances for residents. The area resembles a war zone in the early morning before the council cleaners arrive. Of particular concern is the large number of broken beer bottles in the street which are evidence of street drinking despite the fact that this is a declared alcohol free area, mixed with the odd syringe here and there."
8. On intoxication levels among people in the precinct the Resident Complainant contends that :
- (i) If responsible service of alcohol ("**RSA**") procedures were being observed in all of these late trading establishments, "it is difficult to see how so many people could be so severely intoxicated" in such a concentrated area.
 - (ii) It is "highly likely" that almost every patron drinking between the hours of midnight and 6 am are "well and truly over the RSA limit".
 - (iii) Most patrons are "already intoxicated" before they arrive in the area, having been "drinking elsewhere until other establishments have sensibly closed at midnight".
 - (iv) Police and Sydney City Council Rangers "seem powerless to do anything about the problem, despite several repeated complaints being made".
 - (v) The volume of patrons attract buskers who perform at all hours of the night and create additional needs for early morning garbage and glass collection and street cleaning which, in themselves, create a significant noise problem.
9. On his dealings with local law enforcement agencies, the Resident Complainant advises that he has called Police about the noise. They have been "prompt and sympathetic" but advise him that it is "a Council or OLGR problem". He advises that Council Rangers "usually take 2+ hours to turn up" and

when they arrive the problem may have temporarily subsided. After they leave, the fluctuating noise problem continues throughout the night.

10. On the wider public health issues, the Resident Complainant submits that overcrowding, especially on Friday and Saturday evenings between 11pm and 4am, "is a serious and potentially fatal issue". He advises that it is not possible to walk the footpaths of Darlington Road on some nights without being forced onto the roadway to get around crowds waiting to enter premises or congregating outside to smoke. The "key offenders" in this regard are the Sapphire Suite, Vegas Hotel, Madam DeBiers, Moulin Rouge, Sugarmill Hotel, Elk Bar, Empire Hotel and Bourbon Hotel. The Resident Complainant submits photographs of people crowding the footpath to illustrate this point.
 - (i) Traffic is often "gridlocked" on Darlington Road, with the only entrances blocked by cars and people. The Resident Complainant submits that "an accident, fire, riot, drug overdose, or other incident may result in disaster".
 - (i) Local and State planning has "failed to consider the public health and safety issues which have been allowed to evolve in Kings Cross, let alone the loss of residential amenity". Police LAC and St Vincent's Hospital have "publicly expressed similar views".
 - (ii) The Resident Complainant refers to the precedent of compensating victims of aircraft noise. Sound proofing (double glazing and insulation) and mechanical ventilation and cooling and other forms of compensation should be considered, "even though this will detract from the heritage factor of most buildings affected". However, he argues that a more effective alternative would be to "prescribe a midnight lockout for all licensed premises in the Kings Cross Area".
 - (iii) The Resident Complainant concludes that Kings Cross has become an "out of control and dangerous adult amusement park for the benefit of all non-residents but to the detriment of the residents" and "a planning disaster area, bowing to the needs of hotel and nightclub owners at the considerable expense of long term residents".

RESIDENT COMPLAINANT'S FURTHER SUBMISSIONS TO DELEGATE

11. The Resident Complainant filed a further submission entitled "Late Night Trading Licensed Premise Noise Issues Affecting Kings Cross Residential Premises" which appears undated on the OLGR file but was apparently filed prior to the Delegate's Decision ("**Complainant's Further Submission**").
12. The Resident Complainant makes the following further points:
 - (ii) The Springfield Mall area of Kings Cross was previously settled by drug dealers and prostitutes who "mainly operate quietly and did not make excessive noise at night".
 - (iii) Because of its age, the Resident Complainant's building relies upon natural ventilation at night to cool down during the warmer months. Timber sash windows are not very sound proof, but regardless, the building requires windows to be open at night for ventilation and to expel the heat built up during the day. High ceilings and solid construction aid the environmental efficiency of the building.
 - (iv) In addition to the conversion of non-licensed businesses into licensed businesses and the expansion of existing licensed businesses to become larger licensed businesses, there has been a "massive increase" in patronage and late trading at the Trademark Hotel/Piano Room; the creation of a Darlington Rd entrance to the Sapphire Suite; expansion of the Piccadilly Hotel with late trading; expansion of the Swans Club with late trading and numerous other smaller late trading nightclubs in the vicinity.

- (v) This expansion of commercial activity has occurred “directly in the middle of the most densely populated square km and one of the longest established residential areas in Australia”.
- (vi) 24 hour trading in Kings Cross has recently been “dominated by clustering of bars and nightclubs to the exclusion of all other businesses and business types. There is no longer any variety.”
- (vii) Late night visitor population and capacity to accommodate them has “correspondingly exploded by a huge amount”.
- (viii) Mr John Duncan, proprietor of the Sugarmill Hotel, publicly estimates that “up to 30, 000 non residents enter Kings Cross on busier nights”.
- (ix) The 2 July 2007 ban on indoor smoking in bars and clubs throughout NSW was the culmination of a gradual increase in smoking outside venues. The footpaths of Kings Cross are “frequently not trafficable” as a result of persons smoking outside venues.
- (x) Warmer nights are much busier than cooler nights.
- (xi) Long weekends and big local events such as the Randwick races, concerts in the Domain and Centennial Park, sports matches at the SCG/SFS (all involving drinking through the day into night) guarantee a larger than normal crowd in Kings Cross.
- (xii) "New Years Eve type crowds" are now being achieved at least 3 nights a week every week, although much more so in warmer months than colder wet nights.
- (xiii) Queues for late night licensed premises stretch back into Springfield Mall between 11pm and 4am with corresponding patron noise and rowdy behaviour.
- (xiv) Two beer gardens were established at the entrance to Springfield Avenue (Sugarmill Hotel and Elk Bar) directly in front of many residential buildings in late 2008. These initially traded until midnight seven days a week that are now restricted by Council until 9pm on a trial basis which has “helped ease this part of the problem”.
- (xv) Springfield Mall is an alcohol free zone, but partly full alcohol containers "line the mall" in the mornings along with bottles.
- (xvi) Patrons are often standing around drinking in outdoor beer gardens that were “intended strictly for seated dining”.
- (xvii) Springfield Mall is “canyon like” with tall buildings on both sides, causing an echo of the noise from below.
- (xviii) Noise is clearly audible from the Resident Complainant’s bedroom window when closed, and audible from the windows of his neighbours. This problem has been "getting progressively worse".
- (xix) Piccadilly Hotel on Victoria Street has a first floor balcony for smokers and is used into the early hours of the morning. The Resident Complainant notes that “noise may have been resolved with acoustic screens now fitted”.
- (xx) There is noise and antisocial behaviour from all hours of the night. As a result, the noise is coming from both sides of the Carinthia building - although patron numbers are less on the Victoria Street side of the building.

- (xxi) It is "unlikely to be effective to target just a few venues without including all of them". The Resident Complainant submits an aerial map indicating the location and expansion of late night licensed premises from 1998 to 2009.
- (xxii) On the question of whether there is an "undue" disturbance, the Resident Complainant cites the impulsive and intermittent nature of the noise (shouting or breaking glass) that wakes a neighbour from sleep. This problem is caused by the flow of persons arriving into the area after midnight, after leaving other premises "although many are intoxicated when they arrive and should be refused entry everywhere".
- (xxiii) The Resident Complainant "does not dispute the right of any establishment to trade 24 hours in Kings Cross in accordance with the zoning". However, he submits that the neighbourhood is now being unduly disturbed by "the relatively recent increase in the sheer numbers of persons being attracted to the area by the increased number of licensed premises, the rowdy behaviour after they leave those premises and the frequency with which this is now occurring".
- (xxiv) The Resident Complainant submits that "unduly" means "excessively or immoderately".
- (xxv) Residences that were "once quite acceptable in terms of occasional late night noise" when there were fewer premises are now "practically uninhabitable" due to the disturbance being created by the clustering of late night premises being 25 + premises in an area 1/10th of 1 square km. This is a density of licensed premises that is "unprecedented anywhere in Australia and possibly even the world".
- (xxvi) It is a "myth" that the precinct was always like this. Rather, it is the recent proliferation of late trading licensed premises that has caused this situation.
- (xxvii) Queues form outside most places, patrons stand outside to smoke and persons congregate after being turned out for being too intoxicated and there are no late night transport options. These persons linger in surrounding streets, shouting, singing, smashing glass, whistling, making other loud noises, committing acts of vandalism and fighting. Springfield Mall has become "party central".
- (xxviii) The Resident Complainant refers to one Development Application for a Kings Cross premises on ambient noise levels, as of September 2006 (before the smoking ban commenced and before the Elk Bar and Sugarmill Hotel commenced trading) that confirms that peak noise in Kings Cross was "already reaching over 80dB on business nights between 12.00 and 7.00 am".
- (xxix) The Resident Complainant contends that the situation has become much worse since then, and at times during the night ambient noise "approaches 100dB... in spikes... equivalent to a rock concert".
- (xxx) Decibels are measured on a scale that means "70 dB is twice as loud as 60dB", yet each new premises is permitted to add 5dB to the ambient noise levels when seeking development approval. This methodology is flawed in that it does not consider the clustering effect that has been allowed to occur in Kings Cross.
- (xxxi) There is "no question" that there is an increase in noise in the neighbourhood amounting to an undue disturbance. It is patrons who intend to visit and who have left licensed premises who are causing this undue disturbance.
- (xxxii) Because of the noise, it is not possible for the Resident Complainant to sleep with his bedroom windows open and "regular random disruptions to sleep" occur when the windows are closed.

These noises are caused by intoxicated persons "arriving, queuing, smoking outdoors and lingering in the vicinity of licensed premises after departing".

- (xxxiii) According to the Resident Complainant the "main problem is not necessarily the noise from the licensed premises themselves, it is the noise from their many patrons being outside and have been allowed to become intoxicated". The Resident Complainant refers to two video files that he has recorded on Saturday night/Sunday morning on 23 August 2009 at 1.48 am and 2.10 am.

13. The Resident Complainant submits the following illustrations of the extent of noise disturbance in the area:

- Monday 14 September 2009 2am rendition of "Happy Birthday" in Springfield Mall by approximately 15 obviously drunk patrons and lingering noise for the next 1 hour.
- The daily flow on effect of Council being required to clean up the mess each morning causes noise from street sweepers, high pressure hoses, garbage trucks, broken glass being swept up from 5am.
- On 26 September 2009 he was advised by two residents in Elizabeth Bay Road (opposite the former Sebel Hotel) that they "often go away on weekends to avoid being kept awake by the noise".

14. On the issue of "anti social behaviour" the Resident Complainant observes that:

- (i) Frequent scuffles and loud exchanges of abuse occur throughout most nights by heavily intoxicated persons.
- (ii) Urination on the street and private property takes place due to lack of facilities (area is not equipped to cope with the influx of people).
- (iii) Drunken people are sleeping on the front doorstep of apartments.
- (iv) Vomit and human faeces are regularly apparent on the streets of a morning.
- (v) The Resident Complainant has witnessed "trails of vomit on footpath from the top of William Street all the way to Hyde Park on Monday mornings".
- (vi) A Kings Cross Police Report detailing alcohol related assaults from July 2004 to June 2006 shows that 90% of assaults in Kings Cross are occurring in the 12 hours between 7pm and 7am and 62% take place from midnight and 5am (289 of 468). 56% of offences occur on Friday and Saturday nights.
- (vii) According to the NSW Bureau of Crime Statistics and Research ("BOCSAR") the Kings Cross area, including Darlinghurst and Woolloomooloo, has had the most dramatic jump in alcohol-related assaults, increasing 43.6% from March 2005 to March 2008 (which coincides with the timing of increased numbers of establishments). The Resident Complainant states that "NSW Police confirm that it is out of control and unsustainable".

15. On compliance by late trading premises with section 73 of the Act, the Resident Complainant contends that:

- (i) Breaches of the Act, particularly the section 73 offence of permitting intoxication on premises, are "not being enforced."
- (ii) RSA procedures and the Act are "not preventing excessive alcoholism in Kings Cross".

- (iii) Venues are allowing already intoxicated persons to still enter and be served alcohol after midnight when they have been drinking elsewhere and should be refused entry.
 - (iv) The majority of late patrons "[a]re already intoxicated and by the end of the night they are mostly severely intoxicated (evidenced by drunks asleep in the street, public urination, throwing up, violence, damaging property, rowdiness, etc)".
 - (v) Patrons continue to come to Kings Cross after midnight in large numbers even when they are already intoxicated "because they know there is a fair chance they will be allowed to enter and continue drinking" – a "honey pot" effect.
16. On the recording of complaints by residents against licensed premises, the Resident Complainant submits that:
- (i) The true numbers of complaints made against Kings Cross venues are not being centrally monitored. There are too many agencies with whom complaints may be lodged (the venue itself, Police, OLGR, Council Rangers) and this creates a "false perception that few people are complaining about the current situation. In reality there is a lot of unrest about the over-developments in Kings Cross."
 - (ii) The Resident Complainant argues that there needs to be a centralized coordination of complaints so that authorities may inform their decisions upon the level of complaints received. The available means of recording complaints against licensed premises "are totally unreliable".
 - (iii) The Resident Complainant notes the submission made to OLGR by the Sugarmill Hotel to the effect that this complaint and two others are the only complaints about noise that have ever been made to that premises. The Resident Complainant argues that this submission "ignores the many and regular complaints made to Police and Council Rangers by myself and many others".
 - (iv) The Resident Complainant cites the Development Application processes for the Elk Bar and Sugarmill Hotel beer garden areas. The Sydney City Council admitted that noise complaints were not being centrally recorded by them and hence complaints made after hours were different in number and not being communicated and recorded.
17. On the enforcement of sections 76 and 77 of the Act, the Resident Complainant submits that:
- (i) The law creates an incentive against establishments recording alcohol related incidents at their venue, for fear of having conditions imposed upon their licenses, even though they are required to record such incidents under section 76 of the Act.
 - (ii) By way of example, a video file of a security guard scuffle with an intending patron who was quarrelsome and refused admission outside the Moulin Rouge premises on 23 August 2009 at 1.48 am is submitted. The Resident Complainant contends that "it is highly unlikely that this incident has been recorded in Moulin Rouge's incident register". The Resident Complainant submits that incidents like this are not being recorded or acted upon by premises in Kings Cross.
 - (iii) Section 77 (8) of the Act is not being enforced. [The Authority notes that section 77 of the Act empowers a licensee, employee or agent of a licensee or a police officer to refuse admission or turn out a person from any licensed premises who has become, inter alia intoxicated, violent quarrelsome or disorderly. Such persons must not remain within 50 metres of the licensed premises.]
 - (iv) Intoxicated persons are loitering in Springfield Mall at all hours. Persons who have been turned away from Madam DeBiers, Moulin Rouge, Sugarmill Hotel, the Elk Bar and the Empire Hotel should not be in that vicinity. The Resident Complainant contends that section 77 "is likely unwittingly broken

many times every night of the week” and questions how this provision may be enforced when a person who is turned away from one licensed premises in Kings Cross may gain access to another nearby.

18. The Complainant's Further Submission concludes with the following points:

- (i) Extended trading is a privilege, not a right.
- (ii) The quiet and good order of Kings Cross is being frequently unduly disturbed by extended trading premises, contrary to section 49 (8) (b) of the Act.
- (iii) "Many if not all" Kings Cross premises permit excessive intoxication on premises, on a daily basis, contrary to section 49 (8) (a) of the Act.
- (iv) The Resident Complainant and many other residents of Potts Point were present in their residential buildings long before the proliferation of late trading premises – with The Bourbon being the only exception. The order of occupation is a relevant consideration to which the Delegate is required to have regard when determining a noise complaint.
- (v) Most licensed premises in the area have more recently been expanded and opened up and many now have outdoor smoking areas. A change in the structure to a licensed premises is a relevant consideration to which the Delegate is required to have regard to when determining a noise complaint.
- (vi) Late trading licenses have been granted to a large number of venues in a concentrated area surrounded by densely populated residential buildings where licensed premises never previously existed. This is a consideration that the Delegate is required to have regard to when determining a noise complaint.
- (vii) The activities of all late night trading licensed premises have changed over the past 12 years to the detriment of the residents – which is a consideration that the Delegate is required to have regard when determining a noise complaint.
- (viii) Most noise and antisocial problems stem from patrons arriving, queuing and leaving late premises while intoxicated between 11pm and 7am – which the Resident Complainant cites is relevant to section 87 (2) regarding the Director's [now Director General's] power to issue late entry declarations.
- (ix) The Director [now Director-General] should impose conditions regarding noise abatement and restrict the hours of public access to Kings Cross licensed premises when determining this noise complaint.
- (x) A late entry declaration of 12 midnight should be imposed under section 87 of the Act by the Director [now Director-General], “consistently with most other similar densely populated long established residential areas such as Paddington, Glebe, Balmain and Kirribilli” to address the "honey pot" effect.
- (xi) This declaration should be made in respect of "all late night premises in Kings Cross" so that it is effective in resolving the problem – the Resident Complainant cites s 80 (3) (b) as empowering the Delegate to deal with multiple premises.
- (xii) The Director [now Director-General] and Police should implement "steps to ensure that section 73 of the Act is properly enforced to prevent excessive intoxication in Kings Cross", and steps to ensure that section 77 is enforced to prevent persons who are excluded or removed from premises remaining in the vicinity of that licensed premises.

(xiii) If the current law was properly enforced, the noise disturbance problem would not exist.

(xiv) Too many operators of licensed premises have tried to "squeeze maximum profits out of late trading in Kings Cross" and they should be made to scale back their unduly adverse impacts on the neighbourhood.

SUBMISSION TO DELEGATE BY SUGARMILL HOTEL

19. In submissions made to the Delegate during the primary decision making process, the Solicitor for the Sugarmill Hotel, Mr John Miller, contends that his client's premises complies with relevant building standards and all development consents that have been issued by the Council.
20. Mr Miller argues that much of the Resident Complainant's case concerns the wider Kings Cross precinct, and that much of the Complaint is expressed with such generality that it is difficult for the Sugarmill Hotel to respond.
21. However, on the issue of queuing outside the Sugarmill Hotel, Mr Miller submits that queuing is actually permitted along the frontage of the Hotel but not across neighbouring premises or into Springfield Plaza; that bollards are placed one metre out from the property to ensure compliance; that patrons are not permitted to queue into Springfield Avenue as they would block the entrance to the Hotel; that patrons are not permitted to queue in Darlinghurst Road beyond the Darlinghurst Road entrances to the Hotel and that Police actually encourage queuing as a means to screen intoxication, suitability and ID for entry. Mr Miller further submits that patrons of other premises further along Darlinghurst Road to the south queue across the Sugarmill Hotel's frontage and he annexes a photograph to demonstrate this. Finally, Mr Miller submits that Darlinghurst Road has been widened to accommodate additional pedestrian use and is five metres wide in front of the Hotel – a photograph demonstrating this is also provided.
22. On the issue of whether patron queuing at the Sugarmill creates undue noise, Mr Miller contends that "it would seem that if [the Resident Complainant] is in his residence, he is unlikely to hear patrons standing in the street in Darlinghurst Road, particularly over the high background noise levels of Kings Cross".
23. Mr Miller contends that the acoustic environment of Kings Cross is "not that of a typical Sydney suburban area". It is noisy with significant contributions to the environment from motor vehicles, alarms, sirens and the general "din" of the City and surrounding suburbs. It is an unusual environment in that Kings Cross remains noisy late into the early morning and frequently has the same acoustic characteristics at night as it does during the daytime.
24. On the issue of noise arising from external seating at the premises, Mr Miller advises that the external seating area has been reduced to one half of its size since the time when the Complaint was filed and that it "closes earlier to ensure that it is not the source of disturbance". He advises that Council has renewed the outdoor seating permission since the Resident Complainant filed the Complaint, albeit in a modified form – to enable 48 chairs until 9pm only.
25. The Sugarmill Hotel denies the Resident Complainant's submission that the premises is a "drinking barn" and submits that the premises has "exceptional fit out and decorations".
26. The Sugarmill contends that that the only specific complaints made to the hotel (at the time of this submission) were:

- a complaint made on 7 August 2009 that the telephone caller could hear bass music noise from the Hotel. The manager agreed with this complaint and noted that a speaker had been inadvertently moved. This was adjusted, correcting the problem.
 - a complaint made on 10 September 2009 that a steel ramp used for deliveries had been left out on the street and was noisy when walked upon. The ramp was taken inside in response to the complaint.
27. Mr Miller argues that the Delegate (and the Authority on review) should limit its enquiry to those issues raised by the Complainant that directly concern the Sugarmill Hotel. If issues of disturbance are raised in relation to other premises, or the neighbourhood generally, the Hotel cannot be expected to respond in a meaningful way to those matters.
28. Mr Miller submits that, even if the Director accepts each complaint that has been specifically directed towards the Sugarmill Hotel, these complaints cumulatively, in the circumstances, do not constitute an “undue” disturbance.
29. Mr Miller adds that, in determining whether a disturbance or disturbances is or are excessive or disproportionate, a critical issue is the nature of the neighbourhood surrounding the Hotel. A disturbance may be “undue” in a quiet suburban neighbourhood. That same disturbance may not be undue in Kings Cross because of the nature of the area; its acoustic profile; the numbers of people attracted to it, its zoning and therefore the uses permitted in it, the numbers of late night trading venues (licensed and otherwise), traffic and other noise, as well as its location close to the City of Sydney.

SUBMISSION TO DELEGATE BY PICCADILLY HOTEL

30. Prior to the Conference Mr Andrew Lazarus from the Eastern Hotels Group (owner of the Piccadilly Hotel) submitted emails to the Delegate, detailing his communications with the Resident Complainant since he first made contact following notification of the Complaint. In an email dated 24 September 2009 Mr Lazarus asks the Resident Complainant about his position on patron noise from the Piccadilly first floor balcony following the hotel’s installation of acoustic blinds. The Resident Complainant advises: “We are just now coming into the warmer months (i.e. typically more crowds) but I have had no problems from Piccadilly level 1 balcony for the past few months. I will let you know by email if we do in the future.”

THE CONFERENCE

31. The Conference was convened by the Delegate on 9 October 2009. In attendance were Mr John Miller representing the Sugarmill Hotel; Mr John Duncan, proprietor of the Sugarmill Hotel; Mr Ben Pearce, Licensee of the Sugarmill Hotel, Mr Anthony Prior from the Sugarmill Hotel; Mr Dan Singer from the Elk Bar; Mr Drew Bulmer, Licensed Premises Coordinator for Kings Cross from Sydney City Council; Mr Andrew Lazarus from the Piccadilly Hotel and the Resident Complainant.
32. At the Conference the Resident Complainant elaborated upon many of the points made in his written submissions to the Delegate. He commented that the street where he lives was "very quiet" when he moved in. Unlike Bayswater Road, where there were a number of nightclubs, Darlinghurst Road had only one late trading licensed premises "of any stature" – the premises formerly known as the Bourbon and Beefsteak Hotel, now The Bourbon.
33. The Resident Complainant states that there were formerly 24 hour brothels, unlicensed strip club, sex shops, some 24 hour cafes and restaurants, banks, fast food stores and a Woolworths variety store. The Vegas Hotel and Goldfishbowl were the only other two late trading licensed establishments on Darlinghurst Road and they were smaller in scale. The Resident Complainant describes how the various

diverse businesses have come to be replaced by new licensed premises, as detailed in his written submissions, with many small cafes and restaurants converted into nightclubs over the past ten years. He advised the Conference that, as noted by the proprietor of the Sugarmill Hotel, there are some 30,000 people moving through Kings Cross on busier nights.

34. The Resident Complainant states that some of these people can be seen drinking out of glasses on the street, which the Resident Complainant contends were likely obtained from licensed premises.
35. The Resident Complainant goes on to describe the canyon like effect created by the residential buildings, with hotel patrons and persons who have been drinking in hotels echoing throughout Springfield Mall. He comments that his complaint “relates to more than just three premises that are represented here tonight. It’s related to the cumulative effect of granting late night licenses in the Kings Cross area or late night licensed premises which have displaced other types of 24 hour trading premises which did not create noise late at night.” He submits: “So we’re not talking about the general din of Kings Cross. A constant hum is something you can sleep through because it’s always there. What were talking about is people shouting, screaming, whistling, fighting, smashing glass in respect of noise. And then in respect of anti-social behaviour we’re talking about urinating all over the place, defecating in the street, vomiting, vandalism, etcetera.”
36. The Resident Complainant makes further specific submissions regarding noise levels, by reference to noise charts that were attached to Sugarmill Hotel’s development application. The Resident Complainant comments that between midnight and 9am “quite often the noise peaks over 90 decibels and in one case approaches 100 decibels. But throughout the peak noise is always over 80 decibels. even on a Monday morning when people – most people living in all these residential places are trying to go to work, the peak noise approaches 90 at 2am and even at 5am its approaching 90 decibels”.
37. Mr Dan Singer from the Elk Bar interjected to argue that these noise charts record “background noise”, whereas the Resident Complainant maintains that this is noise caused by people on the streets. By way of comparison, the Resident Complainant tenders noise charts for the Hard Rock Café in nearby Crown Street, Darlinghurst and comments that this location:

“is a similar sort of area, with one exception, they don’t have any late trading premises. You can see there, it’s for the equivalent sort of time periods ... the equivalent charts there is a peak of 75 and then the noise rapidly drops away to 65 and, in fact, even under 60 for the rest of the night. Monday morning, which is the bottom of those two charts, you’ll see the noise is constantly 60 or below.

38. The Resident Complainant adds:

“I’ve got to say I personally don’t have any problems with people once they are inside the licensed premises. There is no noise coming from Sugarmill to my apartment. There is no noise coming from Elk to my apartment when they’ve got the windows closed. The problem is patrons entering or leaving.”
39. The Resident Complainant submits by comparison that “worst case” scenarios, when studies were conducted for the proposed airport at Badgery’s Creek, involved noise at 60 decibels.
40. The Resident Complainant submits that trains from Kings Cross stop at 1am on Friday and Saturday evenings, that there are no buses at that time and that taxis refuse to go into Kings Cross because they believe that patrons are so intoxicated that they will vomit in their vehicles. He compares the licence conditions that have been imposed upon other licensed venues to provide courtesy bus services and questions why the 25 late trading premises in Kings Cross do not have similar obligations.
41. The Resident Complainant elaborates upon the problems of overcrowding on the streets and antisocial conduct described in his written submissions. He reiterates his contention that the numbers of complaints being made to Council regarding licensed premises is not being properly recorded.

42. The Resident Complainant compares Kings Cross to Paddington, which he contends has an equivalent number of licensed premises yet just about every licensed premises closes at midnight. He comments that: "there's a reason for that. It's in the middle of a densely populated, long established residential area and those residents are entitled to quiet- peace and quiet".
43. The Resident Complainant proposes a 12 midnight lockout for licensed premises in Kings Cross to stop patrons migrating there from other licensed venues.
44. On behalf of Council, Mr Drew Bulmer notes that the City of Sydney inherited a lot of premises that were granted development consent from the former South Sydney Council. There are different consent conditions operating at different premises, with some premises permitted to have queuing and some not. Council was now taking a more strategic approach to development consents.
45. With regard to queuing at the Sugarmill Hotel, he notes that this premises has a condition that permits queuing out the front of the premise, and this has been amended to allow only 20 persons.
46. Mr Bulmer rejects the claim that the Council is not recording noise complaints made by residents against licensed premises in the precinct. He notes that the Council does receive other noise complaints and they are logged on the Council's "CSN" system. He states that a lot of complaints are investigated. Some of them are vexatious and some cannot be progressed for other reasons. Mr Bulmer provides an example of one local resident who makes frequent noise complaints but will not cooperate with Council to enable noise measurements to be taken from his premises.
47. Mr Bulmer notes that conditions requiring security guards are imposed by Council when development consent is granted on the basis of recommendations made by Police, but that Council Rangers do not have the powers of Police to move people on if they are loitering in the vicinity of licensed premises. The Council relies upon Police to exercise those powers.
48. Mr Bulmer describes how the security managers of some premises, such as Sugarmill and Moulin Rouge, have engaged guards out the front of those premises who work together to try to manage people, but these guards do not have police powers. He comments that security guards can do their best to move people on but some young people will simply stand there and say "no, this is a public place and I'm not moving". He notes that the Council has been in consultation with Police in Liquor Accord meetings and seeks more Police on the beat but there is a "political" question of whether more Police in Kings Cross means less Police available elsewhere in the City, with the result that "other people will suffer".
49. Mr Bulmer comments that, without taking either side of the argument, from a Council perspective there is a "cumulative impact" caused by an influx of persons into Kings Cross for the various entertainment venues and this has an impact upon inner city residential areas. In his experience "a lot of people come to the area and have over many years just to hang around the area and linger". A lot of them may not have come from licensed premises within the area, but they are already intoxicated when they arrive at the precinct and the problem is exacerbated by them trying to get into licensed premises. If denied entry by security guards, a fight may break out and Police are then called in to intervene. Mr Bulmer says that Springfield Mall is an area with an "accumulation of undesirable people".
50. Mr Bulmer contrasts the time when he was younger, living in the Sutherland Shire, when young people in that area may go out to venues in Cronulla. He observes:

"That's all changed. See, the entertainment precinct or entertainment venues in the outer suburbs, a lot of them died off, they are more family [friendly] for bistros, that type of thing. They come into the city, whether it be Kings Cross or any other areas, that's where they go."

51. Mr Bulmer adds that when he first went to Kings Cross there may be two or three backpacker hostels and there are now about 20 such premises. So it is not just a matter of people coming into the City to go out for the night, but people staying in the area on a short term basis.
52. Mr Bulmer observes that, while it does not solve the problem for local residents, the licensees and managers of the premises are generally “very cooperative” with the Council. He notes that a few premises (not any of the Conference Premises) had an “old style” bouncer at the door who would not communicate with patrons but they have been “weeded out”.
53. Mr Bulmer notes that a freeze has now been imposed upon the grant of new liquor licenses in the precinct. He further notes that there were problems with traffic flow and transport in the precinct and that these were matters the Mayor was trying to address through the Council’s Safe City initiative. He noted that transport issues were a matter for the State Government.
54. During the Conference Mr Miller for the Sugarmill Hotel elaborated upon the points made in his written submissions. He suggested that the Residential Complainant had exaggerated the degree of change that had occurred to the area while accepting that the area has “intensified” over the relevant period.
55. Mr Miller denies that patrons from the Sugarmill are allowed to leave the premises with a glass in their hand and comments that “this a major issue for the industry”. Mr Miller observes to the Resident Complainant that:
- “Your chief complaint in your written document at least, was the cumulative effect of many licensed premises and that is something that we can’t really address. We can’t assist you with that problem. All we can do, I think is deal with the operation of our premises and our patrons.”
56. Mr Miller argues that Kings Cross has a unique acoustic environment that collects noise from the City into the late morning hours. He rejects the comparison to Paddington, which, aside from five hotels located on Oxford Street, contains hotels that are located right next to rows of terrace houses and within Council zones that are classified as entirely residential. These hotels could not trade late whether they wanted to or not. Kings Cross, by comparison, is zoned for mixed use and has its own late night trading Development Control Plan. It is a unique area from a planning perspective.
57. Mr Miller notes that the Sugarmill is visited by Police “at least three times per week, including every Friday and Saturday” and that intoxicated persons on premises are “the last thing they want”. He submits that denying entry to intoxicated persons is a major source of problems for the industry generally and that queuing is “essential” in Kings Cross to redress this.
58. Mr Miller quotes from an email sent by the Resident Complainant to Mr Duncan on the Sugarmill’s consultation with him. The email includes the comments: “Hi John. I appreciate the work you guys are doing” and “I do not think that anyone could dispute the Sugarmill is generally a very well managed place. The fit out is a spectacular improvement to the Kings Cross area.” Mr Miller says that this communication highlights that the Resident Complainant’s issue is “not necessarily with our hotel”.
59. The Conference concluded with some discussion between the Delegate and the Resident Complainant, including the Delegate’s observation that, according to advice from Council, there will probably not be any more late night trading venue development approvals in the foreseeable future. The Delegate advised the Resident Complainant that, on the evidence before him, “there’s not much I can do, other than to take no action”.

APPLICATION FOR REVIEW

60. In the Application to the Authority, the Resident Complainant reiterates the submissions that he made during the primary decision phase and makes the following arguments with regard to the Decision under review:

- (i) That the various points made by him in submissions to the Delegate prior to and during the Conference were not taken into consideration by the Delegate.
- (i) That the Conference only included a limited number of those premises identified by the Resident Complainant who are collectively contributing to the disturbances. The Conference should have included all premises named by the Resident Complainant in the Complaint as contributing to the disturbance, as imposing conditions upon a few premises without taking action against the other premises would not have achieved a resolution of the disturbances. The Resident Complainant wrote to the Delegate on 25 August 2009 and 25 September 2009 requesting that the Conference extend to all relevant premises identified in the Complaint.
- (ii) That that the Delegate was "required to make a decision on the spot" in the presence of lawyers and "numerous high powered representatives of some large licensed establishments" and was unable to impartially and properly consider the information presented by the Resident Complainant.
- (iii) The decision to take no action "has possibly been made for political expediency and not in accordance with the requirements of the Act."
- (iv) That "Irrespective of the fact that Kings Cross is designated as a 24 hour trading zone, the Act does not permit the operations of late night trading licensed premises to introduce frequent and undue disturbances in a residential area that clearly preceded the licensed premises concerned".

PROCEDURAL FAIRNESS

- 61. On 11 December 2009 the Authority released to the Conference Premises copies of the Application and all material that was provided by OLGR to the Authority comprising the material before the Delegate (some two lever arch folders of OLGR file documents). The Resident Complainant provide discs of audio visual material provided to the Conference. The Authority had also obtained a transcript of the Conference and this was also distributed to the Conference Premises. The Resident Complainant was also provided with a complete copy of the material before the Authority. All parties were invited to make written submissions. Copies were also provided to the Council and the Local Area Commander of NSW Police. Police made no response and Council advised that it could not provide any further submissions on this matter.
- 62. On 23 December 2009 Mr Andrew Lazarus made further brief submissions on behalf of the Piccadilly Hotel including that:
 - (i) He found it "bizarre" that, while the Complaint concerns the combined impact of Kings Cross as a late night precinct, the Delegate chose only the three premises to participate in the Conference.
 - (ii) The first he heard of the Resident Complainant was when he was notified by OLGR of the Complaint. He then contacted the Resident Complainant to ask whether the Piccadilly Hotel's first floor balcony (noted in the initiating Complaint) was still an issue and the Resident Complainant advised him that it was not.
 - (iii) The Resident Complainant confirmed during the Conference, as recorded in the transcript, that the issue of balcony noise from the Piccadilly Hotel has been resolved.
 - (iv) The Piccadilly Hotel should be "removed" from the complaint process.
- 63. On 31 December 2009 Mr David Kingston, Director of Rifon 2 Pty Ltd (landlord of the building in which the Elk Bar is located) made the following brief submissions:

- (i) The Elk is a substantially "softer" venue than many other Kings Cross venues in that it is limited to 280 persons, closes at 3am and has lower internal noise.
 - (ii) Its outdoor seating has been cut back by Council to 9pm and it has no dance floor.
 - (ii) The venue has been subject to review by various authorities and found compliant.
 - (iii) The venue has contributed "positively to cleaning up a very seedy Springfield Plaza which previously was a hangout for various unsavoury persons".
 - (iv) Due to "various restrictions imposed upon the venue by Council" the Elk Bar would cease trading that evening, 31 December 2009.
 - (v) The landlord intends "a different style of operation or subdividing the Elk into 4 smaller shops/operations".
64. On 4 January 2010 the Resident Complainant made a further brief submission agreeing that, while the Piccadilly Hotel's installation of acoustic screens has helped resolve the first floor balcony noise, his main concern is noisy and intoxicated patrons departing the Piccadilly and other late trading venues.
65. He states that he has been awoken from sleep by persons attending "nearby late venues" every night from Boxing Day 2009 to 4 January 2010 and on most nights during the two weeks that proceeded Christmas 2009.
66. He adds that "there is a particularly intrusive burst of activity from 4.45am, presumably when some bars are closing". He comments that this is was "definitely not the situation a few years ago" and notes that under section 81 the Director-General is required to have regard to the order of occupancy between the licensed premises and the complainant when determining a noise disturbance complaint.
67. On 14 January 2010 Mr Miller filed a further submission on behalf of the Sugarmill Hotel which reiterates the points made to the Delegate during the primary decision phase and provides the following legal arguments:
- (i) The Resident Complainant complains about Kings Cross generally and the contribution made to noise disturbance by numerous activities, some identified and many not specifically identified.
 - (ii) Section 79 of the Act enables a person to complain that the quiet and good order of the neighbourhood of licensed premises is being unduly disturbed because of the manner in which the business of the premise is conducted or by the behaviour of patrons of the business.
 - (iii) Section 81 enables the Director-General to extend a complaint to other licensed premises, but only those premises for which, on the evidence, the Director-General determines has unduly disturbed the quiet and good order of its neighbourhood by reason of the manner of the conduct of its business or the behaviour of departing patrons.
 - (iv) Each complaint, whether a sole complaint, a complaint that relates to more than one licensed premises, or a complaint joined with another complaint, must satisfy the requirements of section 79 (1) in identifying the relevant premises and the Director-General must determine that the complaint established undue disturbance in the neighbourhood of each licensed premises.
 - (v) In the view of the Sugarmill Hotel, the Resident Complainant did not and does not complain that the Sugarmill Hotel unduly disturbs the neighbourhood of its premises. A disturbance must be "undue" – that is, excessive or disproportionate. To determine whether a disturbance is excessive, one must take into account a range of factors including:

- the nature of the disturbance
 - its frequency
 - when it occurs (what time of day or night)
 - where the disturbance occurs
 - whether the disturbance is reasonable or not.
- (vi) On the issues of queuing and external seating raised by the Resident Complainant with regard to the Sugarmill Hotel, the Hotel reiterates its submissions to the Delegate dated 6 October 2009.
- (vii) The Sugarmill Hotel rejects the characterisation of this premises as a "drinking barn" in that the premises has an "exceptional fit out and decorations and does not constitute a barn". The Sugarmill Hotel notes that the only noise complaints made to it were those referred to in the Sugarmill's letter to the Delegate of 6 October 2009.
- (viii) Mr Miller notes that the Resident Complainant complains about the changing face of Kings Cross in his Application letter to the Authority. Kings Cross is a unique area and is subject to specific zoning which dictated permitted activity. Like many other licensed premises in Kings Cross, Sugarmill is zoned "mixed use" under the South Sydney Local Area Plan (1998).
- (ix) Mr Miller submits that there is no assertion that the Sugarmill does not comply with its planning requirements. The Council and Police both support the use of Springfield Plaza for eating and drinking "and consider the area much safer now than it was before the Hotel opened".
- (x) Mr Miller disagrees with the Resident Complainant's submission that the Delegate was "required to make a decision on the spot" and that he was under pressure to do so. He states that most representatives at the Conference were hoteliers or staff and "do not possess the Delegate's qualifications".

68. On 4 February 2010 the Resident Complaint made a further submission, the key points of which were:

- (i) The Authority's review needs to be extended to all properties named in the initial Complaint letter filed with OLGR. It is "envisaged" by section 80 of the Act that the Director-General should extend a conference in circumstances where action against any one premises would be ineffective unless similar action is taken against all the others.
- (ii) The premises that should now be invited to participate in the Authority's review are: the Empire Hotel, Plantation Nightclub, Moulin Rouge, The Bank (formerly Madam DeBiers), The Bourbon, Cross Nightclub, Showgirls, Vegas Hotel, Mandalay Room, Dragonfly Nightclub, Melt Nightclub, Sapphire Suite Nightclub, Crest Sports Bar, Goldfishbowl, Favella bar and nightclub, Lady Lux nightclub, Swans club. Trademark Piano Room, Mansions Hotel, Kings Cross Hotel, World Bar, Hugo's Lounge and Candy's Apartment.
- (iii) In response to Mr Miller's submission that the Complaint lacks specificity, the Resident Complainant states that the Complaint is not about the *operation* of the named premises, but the *conduct of their patrons leaving those premises*, and that the Act foreshadows that the Complaint may be made against more than one premises.
- (iv) The Resident Complainant notes the following observations made by the Delegate from the transcript of the Conference:

"Do I think there is probably undue disturbance? Yeah, look I would have to agree I think there probably is ... I can reasonably accept that some of these are coming from the hotels that are causing the disturbance."

(v) In response to Mr Miller's submission that there is no specific evidence to prove that anti social behaviour is coming from the patrons of any specific venue, the Resident Complainant contends that "given the high concentration of venues in the very small area that comprises Kings Cross, it is incredulous to claim that none of the disturbance is coming from patrons (whether putative or actual) of Kings Cross Venues".

(vi) The Resident Complainant refers the Authority to the decision of the NSW Land and Environment Court in *Borg Architects Pty Ltd v Council of the City of Sydney* [2009] NSWLEC 1305 whereby the Court considered complaints of antisocial conduct in the neighbourhood that did not specifically identify The Gaff Nightclub, a premises in Darlinghurst that was the subject of those proceedings. In its judgment, the Court regarded the evidence of general complaints as:

"relevant as establishing that there is presently an unacceptable level of antisocial street behaviour in this locality ... I also consider that it is reasonable, given the very high level of uncontradicted evidence about unacceptable antisocial behaviour in the locality that an unquantifiable amount ... must inevitably come from patrons of The Gaff."

(vii) The Resident Complainant identifies several other decisions of that Court and argues that decisions granting development consent subject to conditions requiring Plans of Management and other security measures aimed at minimising disruption to local residents are "not working". He contends that security patrols and the like are not preventing the type of conduct by patrons leaving late night premises that has been identified in this Complaint.

(viii) The Resident Complainant notes the regulatory action taken by the former Liquor Administration Board in Newcastle during 2008 to reduce the trading hours of premises in the Newcastle CBD and argues that it would "behave the CLGCA" to restore the balance in Kings Cross in favour of residential amenity.

69. On 5 February 2010 Mr Andrew Lazarus made the following further points on behalf of the Piccadilly Hotel:

- (i) the Resident Complainant's issues with the first floor balcony have been resolved.
- (ii) the Piccadilly Hotel goes well beyond its obligations to the quiet and good order of the neighbourhood, conducting security patrols that extend well beyond the Hotel "where we often assist residents and other businesses in providing a safer environment"
- (iii) as to the order of occupancy, the corporate owner of the Piccadilly Hotel purchased those premises in January 1996 and the Hotel's 24 hour licence was one of the first granted in Sydney. It is not correct to say that the only 24 hour venue trading at the time that the Resident Complainant first moved to Potts Point was The Bourbon.

70. On 5 February 2010 Mr Miller updated the Authority with the following complaints made to the Hotel over recent months and the Hotel's response:

- (i) On 24 November 2009 a complaint was made about bass noise. CCTV revealed that the Hotel's front doors had been left ajar by a security guard and another guard has subsequently been posted to that position.

- (ii) On 3 December 2009 a complaint was made in person to a security guard outside in Springfield Plaza at 7.15 pm about windows of the premises being opened while entertainment was provided at the venue. The Hotel immediately closed the windows.
 - (iii) On 23 December 2009 a complaint was made about keg delivery to the venue at 8.40 am.
 - (iv) On 4 January 2010 a complaint was made about bass noise audible from the complainant's residence. Amplifiers were turned down with no further issues.
 - (v) On 21 January 2010 a complaint was made about steam cleaning in the early hours of the morning. CCTV showed that Council had pressure washed the Springfield Plaza area at 6.30 am.
71. On 3 March 2010 the Resident Complainant made the following further submissions:
- (i) In response to Mr Lazarus' submissions regarding the Piccadilly Hotel, the size and permitted patronage of that hotel has "increased significantly since renovations and extensions were done subsequent to his acquisition of the premises in 1996" and the Authority is entitled to take account of that information.
 - (ii) The Resident Complainant draws the Authority's attention to the following further commentary from the Land and Environment Court in the Borg Architects case:

"if there is already an unacceptable impact on the amenity of residents in the locality outside any rational area of influence of the management of The Gaff, it would require a decision maker of considerable gullibility or incredulity to be prepared to accept that a 255 increase in the number of permitted patrons would not lead, inevitably and irresistibly, to the conclusion that there would be at least some increase, no matter how small it might be, in the level of antisocial behaviour that would be visited on those already unacceptably impacted by such behaviour."
72. On 16 February 2010 the Authority delivered by courier to the licensees and business owners of the ten Complaint Premises that were that were not included in the Conference convened by the Delegate (the "**Non-Conference Premises**") copies of all material then before the Authority.
73. The Authority invited the Non-Conference Premises to make submissions as to whether it was lawful or appropriate for the Authority to extend its review to their premises and, if so, their submissions in response to the Complaint.
74. Of the Non-Conference Premises, only the First Empire Hotel and the Crest Hotel replied to the Authority. The licensee of Moulin Rouge foreshadowed making submissions, but ultimately did not.
75. In submissions dated 15 March 2010 the Crest Hotel's lawyers, Colin Biggers and Paisley, argued that the Delegate had excluded the Crest Hotel from the Conference by reason that (in the words of OLGR staff advising the Delegate) "the conference should be limited to the premises which directly affect the amenity of the complaint and the authorising residents".
76. They further submitted that the Crest Hotel is 200 metres from the Resident Complainant's premises and "very remote" from his apartment given that Kings Cross is a densely populated area; that the Decision does not relate to the Crest Hotel and there is no need to make any submission on review; but that if the Authority was minded to extend the review to the Crest Hotel it should be provided with the opportunity to make further, substantive submissions that may include advice from an acoustic engineer.
77. Colin Biggers and Paisley enclosed separate submissions from the Hotel's licensee, Mr Steven Harband, dated 8 March 2010, which argued that escalating the Complaint on review would be "excessive and

unfair to venues when there is no history of complaints of this nature"; that the Resident Complainant's concern about new venues causing a disturbance "can only be relevant to new venues which have opened in close proximity to his own residence" – primarily the Elk and Sugarmill; that the Crest Hotel, Kings Cross Hotel, Hampton Court, Mansions, Vegas Hotel and The Bourbon all had late trading licenses and were trading seven nights a week when Mr Harband moved to the area in 1999; that venues in Kings Cross have always been subject to covert and overt surveillance by OLGR, Council and Police and his Hotel devotes considerable time to ensuring that its procedures are sufficient to minimise the risk of alcohol related incidents. Mr Harband enclosed the Crest Hotel's Safety Plan, which he advises has been implemented for the past 5 years.

78. On 15 March 2010 Mr David Kingston, director of the Palace Leisure Group, made the following brief submission on behalf of the First Empire Hotel:
- (i) The Empire and its predecessors have operated as licensed premises on that site for a "very long period of time". The building has always traded on a late night licence under various names – the Carousel, Les Girls, Palladium and about 10 years ago it became The Empire Hotel.
 - (ii) The Review by the Authority should be directed to those licensed premises that are newly created or are operating pursuant to trial development consents from Council. The Liquor Act specifically recognises the principle of order of occupancy.

DETERMINATION

79. The Authority has considered all the submissions made by the parties to the Delegate, the Conference transcript, the documents on the OLGR files that were before the Delegate, and the documentary and audio visual material filed by the Resident Complainant and all parties that participated in the Review. The Authority has also considered sections 79 to 81 of the Act regarding noise disturbance complaints and sections 76 and 153 of the Act regarding the Authority's powers of review. The Authority has also had regard to the statutory objects and considerations prescribed by section 3 of the Act.
80. The Authority is satisfied that the Resident Complainant adequately identified and made a valid complaint against all thirteen of the Complaint Premises.
81. However, no valid complaint was made against those premises that were not named in the initiating Complaint but named in the Resident Complainant's submissions on review dated 5 February 2010. That is, no valid complaint was made against the Plantation Nightclub, Cross Nightclub, Showgirls, Mandalay Room, Melt Nightclub, Favella Bar, Swans Club, Mansions Hotel, Kings Cross Hotel, World Bar, Hugo's Lounge and Candy's Apartment. The Authority cannot, on review, consider a complaint against premises that were not properly identified as the subject of the complaint at first instance.
82. Notwithstanding that a valid complaint was made against thirteen Complaint Premises, the Delegate decided to confine the Conference to three premises and hence the Decision under review relates to only the three Conference Premises. The OLGR file indicates that this preliminary decision was made by the Delegate on 2 August 2009 in response to a recommendation by an OLGR officer that:
- "on the basis of the information provided in the Complaint the only specific evidence to support the complainant ... relates to issues of noise intrusion from the Piccadilly Hotel. Similarly noise from the Sugarmill Hotel and the Elk Bar's outdoor areas may be intrusive as they are approximately of similar distance from the complainant's residence as is the Piccadilly Hotel."
83. It is apparent from the OLGR file that the Delegate was satisfied that, on the information before him, the Conference should be limited to the three Conference Premises and that no further action would be taken against the ten other Complaint Premises.

84. The Authority may have adopted a different approach to that taken by the Delegate if it had been conducting the Conference. For example, it may have consulted more widely with other premises named in the Complaint. But once that threshold decision was made by the Delegate under section 80 (1) of the Act, the other premises were thereafter excluded from the scope of the Conference and hence excluded from the scope of the final and operative Decision that is now under review.

85. The Authority does not have a general jurisdiction to review all decisions made by the Director-General or her delegates under the Act. The Authority may only review those categories of decisions that are specified by section 153 of the Act, which relevantly includes, in subsection s153 (1) (c) :

(c) a decision under section **81** (Decision by Director in relation to complaint). [emphasis added]

86. Section 80 of the Act makes clear that the Director-General should not consider taking regulatory action against a licensed premises without first either inviting that premises to participate in a conference (if a conference is to be convened) or giving that licensed premises a reasonable opportunity to make submissions on a complaint (if no conference is to be convened).

87. Consultation with a licensed premises is a condition precedent to the Director General or her delegate making a valid decision under section 81 with regard to those premises.

88. In this case, the Delegate decided to convene a conference and simultaneously decided, under section 80 (1) of the Act, to take no further action against ten of the premises that were named in the initiating Complaint material.

89. The Authority considers that it does not have the power to “look behind” the final and operative decision made under section 81 of the Act and revisit the Delegate's preliminary decision, made under section 80 (1) of the Act, to take no further action with regard to ten of the thirteen premises that were named in the initiating Complaint.

90. Accordingly, this review focuses upon the merits of the Delegate's decision with regard to the three Conference Premises.

91. However, if the Authority is wrong in its interpretation of its jurisdiction under subsection 153 (1) (c) of the Act, the Authority observes that it would have been unlikely to have taken adverse action against the Non-Conference Premises by reason that the initiating Complaint and the Complainant's subsequent submissions do not disclose a sufficient case of undue disturbance against any one of the thirteen Complaint Premises.

92. The Resident Complainant refers to the Council's *Late Night Trading Research Project*. In the Council's Executive Summary dated 4 May 2009, the Council states:

“There are economic, social and cultural benefits to late night trading premises. People that live and work in the City, as well as tourists, are attracted to the diversity and vitality of late night precincts. However, alcohol consumption has associated costs to both individuals and communities. The challenge is to achieve and maintain an appropriate balance between the harms and benefits of alcohol consumption in late night trading premises.

Two separate studies were commissions by the City. Firstly, the *Late Night Trading: Community Perceptions* research was commissioned to develop a broader understanding of both the positive and negative perceptions of residents towards their locality in general and night trading premises specifically. This survey of Kings Cross and Darlinghurst residents showed that the vibrancy and mix of land uses created a unique character and constituted the main reason for their enjoyment of living there. However, the community largely attributes the increase of negative impacts to the proliferation of bars and pubs in their neighbourhoods

Secondly, the City commissioned the National Drug and Alcohol Research Centre (NDARC) to undertake research into the cumulative impact of night trading premises in defined areas of the Local Government Area (LGA). Key findings of the research include that:

- increasing the number of alcohol outlets, increasing the hours of operation of alcohol outlets and/or increasing the density of alcohol outlets in a defined area, all of which increase the net availability of alcohol in a defined area, will increase rates of alcohol related crime and other harms;
- in attempting to explain high rates of alcohol related harm in different local areas, it should be recognised that the specific combination of factors is a crucial determinant. These factors include: number of outlets, their density; their type and size; and their trading hours; and
- the majority of alcohol related harm is associated with a minority of premise. For example, Manly and Coogee have higher rates of alcohol related harm despite lower rates of licensed premises per 1000 population. This would indicate that the determining factor is the large hotels that are consistently associated with high rates of alcohol related harm in both areas.”

93. The Authority is satisfied that the increase in the number of late trading licensed premises throughout the Kings Cross precinct over the past eleven years is likely, as contended by the Resident Complainant, to have given rise to a net increase in the number of incidents of disturbance to local residents caused by patrons leaving those premises.
94. During the Conference the Council’s representative Mr Bulmer presented his opinion that the overall influx of people into Kings Cross is affecting residential amenity. Further, the Council’s research notes a widespread perception among other local residents of a link between the density of alcohol outlets and alcohol related crime that is generally supported by the Council’s above mentioned research. The kinds of disturbances complained of by the Resident Complainant caused by people on the streets cannot, in the Authority’s view, simply be dismissed as “background noise”.
95. Indeed, Parliament has seen fit to amend the Act during the course of 2009 to impose a freeze upon the granting of new liquor licenses to premises located within precincts defined in Schedule 5 to the Act, including the Southern Sydney CBD, Oxford Street Darlinghurst and Kings Cross.
96. However, the Authority is an administrative decision maker that must make its decisions in accordance with the Act and general principles of administrative law. A finding that the operation of a premises or the conduct of its departing patrons is causing an undue disturbance to the neighbourhood must be supported by sufficient evidence or other material capable of satisfying a reasonable decision maker of that finding.
97. The Complaint before the Authority is ambitious in its scope – utilising the noise disturbance complaint provisions contained in sections 79-81 of the Act to request the Director-General (and now the Authority on review) to take precinct wide regulatory action against all late trading premises in Kings Cross.
98. The Complaint provides an overview of the changing character of the Kings Cross precinct over the last 11 years from the perspective of the Resident Complainant.
99. However, the Resident Complainant’s submissions do not, in the Authority’s view, disclose a sufficient case of "undue disturbance" against any one of the Conference Premises nor any other specific premises that were named in the initiating Complaint.

100. Much of the Resident Complainant's case is made by way of general observations about the conduct of persons on the streets. Allegations of patron intoxication, offensive conduct and unruly behaviour are levelled at patrons departing late trading premises generally, not the patrons of any specific premises.
101. There were some specific complaints levelled against the conduct of patrons at the Piccadilly Hotel and the outdoor patrons of the Elk Bar and Sugarmill Hotels. The Authority accepts that a degree of disturbance was caused by the patrons of those premises when queuing, smoking and/or taking advantage of outdoor seating areas or balconies but it is not satisfied, on the material before it and having regard to the response of those premises that this conduct gives rise to an ongoing "undue" disturbance to this neighbourhood. In the case of the Elk Bar, that premises has ceased trading since the Complaint was filed.
102. The Residential Complainant may reasonably suspect that some patrons causing late night disturbance on the streets had left one of the nearby Conference Premises, but there is insufficient evidence or other material before the Authority to enable the Authority to reasonably attribute patron intoxication or other unruly conduct to patrons of any Conference Premises. The Authority observes that the Resident Complainant has not provided a particular case against any one of the Complaint Premises arising from the conduct of its patrons.
103. The Authority notes that OLGR inspectors have conducted inspections of the Conference Premises and that the Delegate also sought information from the Council as to the numbers of complaints made against the Conference Premises. There is little adverse information on the OLGR file that discloses recent adverse OLGR compliance action or recommendations against those premises. There is little evidence of complaints to Council or adverse action taken by Council against the Conference Premises.
104. The Authority sympathises with the Resident Complainant's situation. It accepts the general proposition that an expansion of late trading in Kings Cross over the past decade has contributed to a net increase in instances of disturbances to that neighbourhood. There may be other factors that have contributed to an adverse impact upon residential amenity over the past 11 years – such as the overall growth in the City of Sydney's population; increased local traffic; the trend towards residential living in inner city areas located close to the precinct; the expansion of other late night business activity; and a trend towards young people patronising entertainment areas within the City in preference to suburban venues.
105. However, the Authority is satisfied that the Delegate was correct to take no action against the Conference Premises on the basis of the material before him. No sufficient case has been established during the review that identifies a particular licensed business or the patrons of a particular licensed business as causing an "undue" disturbance to this neighbourhood.
106. Accordingly, the Authority **confirms** the Decision.
107. A local resident who makes a noise disturbance complaint against one or more licensed premises located within a busy 24 hour entertainment precinct like Kings Cross faces an onerous task. It would require a complainant of some diligence to compile a case, using contemporaneous diary notes, records of complaints to individual premises and the authorities, photographs and other audio visual evidence that demonstrates a sufficient degree of disturbance arising from the operation of particular premises or patrons who can be identified as having left particular premises.
108. Police or consent authorities may be better placed to mount a complaint in those circumstances, as those agencies collect and maintain records of compliance action or other activity that is linked to particular premises. The NSW Police, for example, maintain Computerised Operational Policing System ("COPS") reports recording Police attendances in response to alleged assaults, intoxicated persons offensive conduct and other incidents. These reports may identify whether a victim or person of interest was affected by alcohol and, if so, where that person last drank. The Authority did not have access to this kind of evidence in relation to this Complaint.

109. It is apparent that the Resident Complainant has cast this Complaint at a broader level by reason that he seeks to address what he regards as "precinct wide" problems arising from the late night supply of liquor.

110. The Authority notes that, effective from 15 June 2010, the *Liquor Legislation Amendment Act 2010* introduced new amendments to the Act empowering the Director-General to approve a Precinct Liquor Accord for a designated precinct, as part of the Government's "Hassle Free Nights" policy initiative.

111. It would be open to the Resident Complainant or any other stakeholders to make submissions to the Director-General with regard the potential application of those new powers to the Kings Cross precinct.

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Sidoti". The signature is fluid and cursive, with a small flourish at the end.

Chris Sidoti
Chairman