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9 June 2017

Dear Sir

**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 –
The Oriental Tavern Hotel, Mudgee**

On 2 March 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 Phillip Matchett (Review Applicant) seeking the variation of a decision dated 3 February 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 (Delegate) of the (then) Secretary of the NSW Department of Justice. At the time of this decision the responsible Department is now the NSW Department of Industry.

The Reviewable Decision concerns a disturbance complaint (Complaint) made by Mr Phillip Matchett (Complainant) under section 79 of the *Liquor Act 2007* (Liquor Act). The Complaint was made in relation to a hotel licensed premises trading as the "Oriental Tavern Hotel", Mudgee. The hotel holds licence number LIQH400116187 and the hotel premises are located at 6 Lewis Street, Mudgee, 2850 (Premises).

Pursuant to section 81 of the Liquor Act, the Delegate decided to impose two new conditions upon the licence. The first condition requires the licensee to engage a uniformed licensed security guard:

On Fridays and Saturdays from 9:00pm a uniformed licensed security guard is to patrol the immediate vicinity of the licensed premises every twenty minutes and direct patrons to not

linger or loiter in the area and cause nuisance or annoyance to the neighbourhood. The patrols are to continue until the last patron has left the premises and its immediate vicinity.

The second condition requires the closure of bi-fold doors and windows on the hotel premises as follows:

From 10:00pm until cease of trade, all bi-fold doors and all external windows of the licensed premises are to remain closed.

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 on 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, which is 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 hotel 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 2007*.

The Authority is satisfied that remedial action be taken under section 81 of the *Liquor Act 2007* 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 two conditions imposed by the Delegate shall be maintained as conditions of the licence.

Furthermore, the Authority has decided to impose the following additional conditions upon the licence, pursuant to section 81(1)(a) of the Liquor Act:

LA10 Noise Emission Condition

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz-8kHz inclusive) by more than 5db between 07:00am and 12:00 midnight at the boundary of any affected residence.

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Frequency (31.5Hz-8kHz inclusive) between 12:00 midnight and 07:00am at the boundary of any affected residence.

Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 07:00am.

Plan of Management Condition

The licensee must file with the Authority, by 23 June 2017, a new draft plan of management for the Oriental Tavern Hotel. The licensee must provide by that date copies of the same to Mr Phillip Matchett of 76 Mortimer Street, Mudgee, the Local Area Commander of Mudgee Police and the Deputy Secretary, Department of Industry via the Compliance Section of Liquor and Gaming NSW (LGNSW), inviting written comment within 14 days.

The licensee must prepare and file with the Authority a final plan of management by 14 July 2017. The final plan will commence effect 7 days after the Authority communicates in writing its approval of this plan to the licensee. Once in effect, the licensee must ensure that the premises are operated at all times in accordance with the plan until such time as the plan is varied, after consultation with the Local Area Commander of NSW Police.

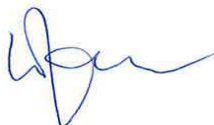
The new Plan of Management Condition will commence effect from the date of this letter, while the LA10 Noise Emission Condition will commence effect in 28 days after the date of this letter on 7 July 2017.

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.

At the conclusion of the statement of reasons, the Authority also gives notice to the licensee, pursuant to section 53(4) of the Liquor Act, that it is minded (subject to consideration of any final submissions) to impose a new condition upon the licence, under section 53(2)(b), of the Authority's own initiative. This proposed licence condition would partially restrict the hotel's sale or supply of liquor for consumption off the Premises. The Authority invites submissions from the licensee only in response to that proposal, within 14 days after the date of this letter.

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

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Philip Crawford', written in a cursive style.

Philip Crawford

Chairperson

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

STATEMENT OF REASONS

INTRODUCTION

1. On 2 March 2017, the Independent Liquor and Gaming Authority (Authority) received an application for review (Review Application) lodged by Mr Don McDougall, a lawyer acting for Mr Phillip Matchett. Mr Matchett is a local resident who operates the on-licensed accommodation business known as the "Ningana Motel" located at 76 Mortimer St, Mudgee (Motel).
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 3 February 2017 (Reviewable Decision) made by Mr Sean Goodchild, Director Compliance Operations, Liquor and Gaming NSW (LGNSW) in his capacity as delegate (Delegate) of the then Secretary, NSW Department of Justice. On 1 April 2017 the Department responsible for liquor and gaming became the NSW Department of Industry.
3. On 29 October 2015, pursuant to section 79 of the *Liquor Act 2007* (Liquor Act), Mr Matchett (Complainant) had lodged a disturbance complaint (Complaint) with LGNSW against the licensed premises trading as the "Oriental Tavern Hotel", Mudgee (liquor licence number LIQH400116187) located at 6 Lewis Street, Mudgee (Premises). The Complaint alleges that the operation of the hotel 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 Hotel and New Development

4. During the course of the review the Authority obtained a copy of the *OneGov* licence record for the Premises as at 17 May 2017. The Authority also reviewed images of the hotel property on the hotel's website at www.orientalhotel.com.au and considered the submissions and evidence provided by the parties about the hotel's operations.
5. The *OneGov* record of the liquor licence as at 17 May 2017 indicates that the hotel is authorised to sell or supply liquor for consumption *on* the Premises (that is, on the Hotel Licensed Area) from 5:00am until 12:00 midnight on Monday through Saturday and from 10:00am to 10:00pm on Sunday. The hotel is also licensed to sell liquor for consumption *off* the Premises from 5:00am until 11:00pm on Monday through Saturday and from 10:00am to 10:00pm on Sunday. The hotel currently has 13 gaming machine entitlements.
6. LGNSW licensing records indicate that on 26 March 2015 the licensee, Ms Emma Kennedy, made an application to the Authority through Hatzis Cusack solicitors under section 94 of the Liquor Act (Boundary Application) seeking to extend the boundary of the hotel licence.
7. The Boundary Application had included a copy of a licensed area plan dated 9 October 2006 that the licensee advises was approved by the Local Court at Mudgee on 17 January 2007. This licensed area incorporated the ground floor level of the hotel, including the public bar, dining, gaming, bottle shop and beer garden areas. This is the last apparent record of any determination fixing the licensed boundary in respect of this licence (2007 Licensed Area).
8. The Boundary Application describes redevelopment that was then underway on the hotel property - including renovations to areas which formed part of the 2007 Licensed Area and "an additional building structure, to be connected to the existing hotel by a covered walkway with a spined roof" (New Structure).

9. Following submissions from the Mid-Western Regional Council (Council), several local submitters (including the Review Applicant) and requisitions to the Boundary Applicant from licensing staff, the Boundary Application was withdrawn without further explanation on 7 October 2015.
10. The Boundary Application included a copy of development consent DA0164/2015 which would be subsequently amended by DA0054/2016. Information provided by the Complainant and the licensee discussed below indicates that construction of the New Structure was completed during early 2016. Completion is also apparent from the images of the hotel property published on the hotel website.
11. In submissions made through his solicitor dated 4 August 2016 and in a statutory declaration dated 12 April 2017 the Complainant has taken issue with whether the New Structure, which the Complainant observes is being utilised by hotel patrons, falls within the licensed area of the Premises and whether this aspect of the hotel's operations may also give rise to undue disturbance.

The Review Application in Brief

12. When making the Reviewable Decision, the Delegate was satisfied that the Complainant had established that the manner in which the business of the hotel was conducted and the behaviour of persons leaving 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. The Delegate decided, pursuant to section 81 of the Liquor Act, to impose two new conditions upon the licence to remedy this disturbance.
13. The first (Security Guard Condition) states:

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

From 10:00pm until cease of trade, all bi-fold doors and all external windows of the licensed premises are to remain closed.
15. The Review Applicant now seeks to vary the Reviewable Decision seeking the imposition of several additional conditions (discussed below) that he had proposed during the Complaint process. The Review Applicant contends that the Reviewable Decision as it stands is "inadequate" and "deficient in all the circumstances".
16. The Review Applicant further contends that when making the Reviewable Decision the Delegate failed to correctly or sufficiently identify the grounds advanced by the Complainant in support of the Complaint, failed to identify and consider some of the evidence provided by the Complainant and failed to give weight (or sufficient weight) to some of the evidence provided by the Complainant. The Review Applicant further contends that in making the Reviewable Decision, the Complainant was denied procedural fairness by the Delegate.

LEGISLATION

17. Section 79 of the Liquor Act makes provision for the making of undue disturbance complaints in writing to the Secretary of the Department of Industry.

18. 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.
19. 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.
20. 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.
21. 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.
22. 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.
23. When reviewing a decision made under the Liquor Act the Authority will have also 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

24. On 29 October 2015 LGNSW received the Complaint made pursuant to section 79 of the Liquor Act. The Complaint was in the prescribed form (Form) and is verified by a statutory declaration signed by the Complainant.
25. Briefly, the Complainant makes the following key contentions in the Complaint Form:

- There have been “many disturbing problems” that have been “very confronting” to the 110 occupants or residents of the Complainant’s motel when they are trying to sleep. These incidents occur in an area ranging from 5 to 45 metres away from the hotel.
- These incidents adversely affect the Complainant’s motel business, which has manifested in direct complaints to the motel and in social media complaints posted on booking.com’s *ReviewPro* website and *TripAdvisor* in relation to the motel. The Complainant contends that these complaints have influenced a reduction in repeat visits to the motel.
- There have been two recent reports made by the Complainant to Police dated 22 August 2015 and 30 August 2015 covering repetitive incidents that highlight the disturbance factor, including anti-social behaviour, excessive noise and fighting – all requiring “dedicated management input supervision and retention of security personnel”, both of which are absent at the hotel.
- It is a “matter of record” at Mid-Western Regional Council (Council) and with Mudgee Local Area Command (LAC) of NSW Police (Police) that noise impacts, unruly behaviour, lack of licensee cooperation and breaches of operating conditions have been consistent since mid-2005.
- “Not a week passes” without a problem arising from the hotel’s operations.
- Even on lower patronage nights (Sunday, Monday and Tuesday) the hotel still generates “a number of patrons” that create noise impact and unruly and anti-social behaviour in the neighbourhood. This includes “staggering around”, “garbage bins being pushed over”, and “beer glasses being thrown onto car roofs and into the rear gardens of the terrace houses”.
- There are “significant problems” with the hotel’s current 190 patron capacity but with the hotel’s proposed extension of the Premises, the patron capacity could increase to 495 patrons. This would “have a huge effect” on the level of noise emanating both from within the venue and from the surrounding streets as patrons come and go.
- A “current acoustic report” [the Authority notes that the Complainant neither specifies nor attaches this report to the Complaint Form] indicates that the obvious noise impacts and that of the hotel’s music would “highly exceed” the relevant LGNSW criteria.
- Greater problems are experienced by the Complainant on Friday and Saturday nights with patron arrivals to the hotel and departures occurring between 10:00pm and 12:00 midnight.
- Problems are also generated by patron migration from the hotel after 9:30pm when patrons move to “another late-night venue down the road”.
- The Complainant contends that when making complaints to the hotel he does not receive any courteous recognition or indications of any “swift, positive and caring action” from the hotel.
- The Complainant proposes that a number of conditions (discussed below) be considered by the Secretary to address the Complaint.

Supporting Material Accompanying the Complaint

26. Attached to the Complaint Form lodged by the Complainant on 29 October 2015 was the following material:

- Letter dated 21 October 2015 from Mr Jeffery and Ms Barbara Churchill, two neighbourhood property owners who own four properties close to the hotel. In this one-page letter the Churchills contend that “a week would not go past” whereby they do not receive complaints from their tenants regarding noise and anti-social behaviour from the hotel. They submit that the imposition of conditions upon a liquor licence or a development consent “end up meaning nothing” if enforcement of such conditions cannot be guaranteed. They further contend that the owner of the hotel is also the Mayor of Mudgee and that his daughter is the licensee. They make the general allegation that there are “conflicts of interest, a lack of procedural fairness, arrogance and double standards” arising from the operation of the hotel and the specific allegation that a “blind eye” has been turned to the erection of (what they describe as) an “unlawful” marquee on the hotel’s property, housing up to 85 people, which the Chuchills claim has added to the excessive noise levels that are “penetrating” nearby houses.
- Two-page document provided by the Complainant and Joan M Matchett, detailing disturbances allegedly occurring on Saturday 22 August 2015 at 10:35pm and Sunday 30 August 2015 at 9:30pm resulting in two Police Computer Aided Dispatch (CAD) incident numbers 944529 and 987694 being recorded for those events.
- Statutory Declaration by the Complainant dated 7 May 2015, discussing the alterations proposed for the hotel property that are the subject of an application for development approval number DA0164/2015 (DA), which the Complainant submits would lead to a patron capacity of 495 [the Authority notes that the DA was granted by Council on 23 February 2015]. The statutory declaration sets out the Complainant’s experience of anti-social behaviour (including intoxication, urinating, fighting, foul language and throwing of items) and noise which the Complainant says has emanated from the hotel. The Complainant also contends that there is a lack of policing to curb these problems and that the conduct is causing detriment to the Complainant’s business (the *Ningana Motel*) through a loss of patronage. The Complainant alleges that the hotel has failed to act on his complaints and has failed to respect noise conditions and guidelines. The Complainant contends that the hotel allows its patronage to “swell” while Police are unable to provide a quick response to witness and deal with noise impacts, fighting and other anti-social behaviour when it occurs. The Complainant provides details of “reported, repetitive incidents” that allegedly occurred on 12 December 2014, 21 February 2015 and 2 May 2015.
- Email from the Complainant to Council dated 17 April 2015 alleging that the hotel has been in “continual breach” of its “current” development approval permitting use of the hotel property. The Complainant makes contentions about the problems caused to the Complainant’s motel business and contends that during a Council meeting to approve DA0164/2015 for the substantial new extensions to the hotel property, erroneous comments were made by Council to the effect that its *Industrial Noise Policy* is the same as the noise requirements imposed by the (then) Office of Liquor, Gaming and Racing (OLGR) - now LGNSW. The Complainant requests a meeting with Council about this and he attaches a transcript of an audio recording on Council’s webcam for a meeting to approve DA0164/2015, which concerns “commercial alterations and two storey additions” to the hotel property. The Complainant also discusses a letter dated 24 March 2015 from Mr Peter Knowland of PKA Acoustic Consulting to the Complainant, in which Mr Knowland states that the comment made by the Director of Planning during Council’s meeting to approve

the DA to the effect that the Industrial Noise Policy is the same as the noise requirements of the (then) OLGR is “totally wrong” in that the OLGR noise restrictions are “far stricter”.

- Two photographs taken by the Complainant (undated), one featuring a marquee that the Complainant contends was set up by the hotel on its property and the other showing the new two storey addition to the hotel, situated immediately adjacent to the existing hotel building.
- Letter from Mr Gary Bruce, Manager Statutory Planning of Council dated 9 April 2015 advising that Council’s position on the issue of any amendment of the liquor licence is that a security guard should be employed on the hotel Premises.
- A list of conditions that the Complainant requests be imposed by the Secretary upon the hotel’s liquor licence to remedy the undue disturbance alleged in this Complaint. Briefly, these conditions would mandate the engagement of at least one uniformed security guard; require the hotel’s compliance with the LA10 noise requirements; restrict the provision of entertainment or live music on the Premises and require approval by Council and Mudgee Police of a new *Plan of Management* for the Premises by no later than 30 June 2015.

Police Submission to LGNSW on the Complaint

27. A submission to the (then) OLGR from Superintendent Anthony Joice of the Mudgee Local Area Command (LAC) of NSW Police dated 10 November 2015 comprises the following material:

- Five-page submission letter signed by Licensing Senior Constable Jason Turnbull of Police on 5 November 2015; Sergeant Green, Crime Coordinator on 5 November 2015; Detective Inspector Whiteside, Crime Manager on 10 November 2015 and Superintendent Joice, Commander on 10 November 2015. Police discuss, *inter alia*: the recommendations made by Police in response to development application DA0164/2015 for the proposed expansion of the hotel; the amendments made by Council to the DA as a result of Mr Matchett’s original objection to the DA; comments that Police made in response to a change of licensed boundaries application in respect of the hotel (application number APP1-3100135378) that was lodged with the Authority during May 2015; a Police conversation in May 2015 with the current owners of the *Lauralla Guesthouse* in Lewis Street, Mudgee who informed Police that they had “never” received complaints from any lodgers during their stay at that premises; Police CAD records revealing that in the five months prior to May 2015 there was only **one** noise complaint made to Police by Mr Matchett; a Police note on further complaints made by Mr Matchett to Police during December 2014, August 2015, September 2015, February 2015 and May 2015; Police records indicating a current “low” risk rating assigned to the hotel by the NSW Alcohol Related Crime Information Exchange (ARCIE) database; records of Police recorded incidents at the Premises during July 2015 and September 2015; information about damage to a rented terrace house that was allegedly caused by hotel patrons on or about 8 August 2015; records of people loitering at the *Ningana Motel* on 26 November 2014 and records of people fighting outside the motel on 23 November 2014.
- Police observe that between January 2007 and November 2014 no incidents of trespassing, vandalism, urinating or anti-social behaviour were recorded, suggesting that there are “no ongoing frequent issues”. Police submit that they cannot see any breach of the hotel’s current DA conditions and that on each complaint made by Mr Matchett to Police, Police have looked at the allegations and found the complaints to have “no foundation”. Police advise that they have “no concerns” in

relation to the currently approved DA and have found “no substance” in the allegations made by Mr Matchett regarding noise or anti-social behaviour emanating from the hotel.

- 2-page Police comment (undated) on Development Application DA0164/2015 outlining a number of concerns with the proposed expansion of the hotel, including the adequacy of CCTV coverage of the property and the potential for anti-social behaviour, noise and amenity impacts to arise from the expanded area of the hotel.
- 3-page Police comment dated 5 May 2015 on the application for change of licensed boundaries application number APP1-3100135378 made by the licensee of the hotel under section 94 of the Liquor Act. Police state that they have no objections to the application and submit that the issues identified by the Complainant have been addressed by Council in DA0164/2015. Further, Police are of the opinion that there are no “ongoing issues” at the Premises and it would be “difficult” to support the imposition of any further conditions on the licence of the hotel.
- Police provide the following records of the following Police attendances at the hotel:
 - o CAD 944529 regarding a report made by the Complainant of excessive noise coming from the hotel on 22 August 2015;
 - o CAD 987694 regarding a report made by the Complainant of a large group of intoxicated patrons making excessive noise on 30 August 2015;
 - o CAD 569491 and the associated Computerised Operational Policing System (COPS) Event E59354886 regarding a report made by the Complainant of patrons of the hotel making excessive noise on 12 December 2014;
 - o CAD 003802 and the associated COPS Event E57104104 regarding a report made by the Complainant of a brawl occurring outside the Oriental Tavern Hotel on 21 February 2015;
 - o CAD 360216 regarding a report made by the Complainant of loud music being played at the hotel while the windows were open, projecting the noise toward the motel on 2 May 2015;
 - o CAD 867182 and the associated COPS Event E59125577 regarding a report made by the Complainant of damage to one of his properties in Mortimer Street on 8 August 2015;
 - o CAD 470842 and the associated COPS Event E56356147 regarding a report made by motel staff of two males who were loitering in the grounds of the motel on 26 November 2014; and
 - o CAD 488306 and the associated COPS Event E56141105 regarding a report made by Police of two males fighting outside the hotel on 23 November 2014.
- NSW Police ARCIE Report: *Licensed Premises Summary* for the hotel between June 2014 and August 2015 disclosing that the risk rating for the Premises was recorded as “low” for the duration of that period; and
- ARCIE *Total Incident Breakdown Report* for the hotel between April 2015 and September 2015, disclosing that there was one fire and one incident of assault occurring within the Premises during that period.

Council Submission on the Complaint

- 28.** Letter from Mr Lindsay Dunstan, Manager Statutory Planning of Mid-Western Regional Council dated 23 November 2015 referring to a table outlining the nature of recent complaints or correspondence received by Council with regard to the Oriental Tavern Hotel and an indication of the response by Council to each submission.

29. Briefly, this Table discloses 25 matters recorded by Council between 27 November 2014 and 30 October 2015, the majority of which concerned claims by the Complainant and other local residents of excessive noise from the hotel, maximum patron capacity of the hotel and parking issues.
30. Council advises its consent to DA0164/2015 for proposed alterations to the Premises and the corresponding assessment report determined by Council on 18 February 2015 and a later development application DA0054/2016 consenting to further minor alterations and additions dated 16 September 2015.

Licensee's First Submission to LGNSW

31. A 4-page submission dated 24 December 2015 from Mr Tony Hatzis of *Hatzis Cusack Lawyers* on behalf of Miss Emma Kennedy, licensee of the hotel, discusses, *inter alia*, the Police submission dated 10 November 2015 and acoustic treatment works that have recently performed on the Premises (including redevelopment of the existing hotel building, cover over outdoor areas, the provision of more all-weather areas, and more covered-in patron space).
32. The licensee submits that the appropriate action that the Secretary should take is to dismiss the Complaint on the basis that the Complainant's assertions are either "lacking in foundation" or are "greatly exaggerated".
33. Attached to this submission is an acoustic report prepared by the hotel's acoustic consultant, Day Design Pty Ltd dated 7 May 2015 concluding that so long as the noise controls provided in the DA are satisfactorily implemented, the level of noise emitted by people using the decks facing Mortimer Street in the "new" hotel structure (the New Unlicensed Area) with the bi-fold doors closed will be able to meet the conditions of the development consent specified by Council.

Second Submission from the Complainant to LGNSW

34. In an email from the Complainant to the former OLGR dated 13 January 2016 the Complainant attaches a 3-page document in which the Complainant provides information about further noise complaints and other disturbances which allegedly occurred on the hotel Premises and/or were attributable to hotel patrons on 17 December 2015, 19 December 2015, 23 December 2015 and 9 January 2016.
35. A further email from the Complainant to the now LGNSW dated 10 February 2016 attaches the following further material in support of the Complaint:
 - First, an (undated) email from the Complainant to LGNSW officer Ms Karen Wilkinson identifying what the Complainant describes as "incorrect" assertions made by Police that have been "incorrectly echoed" by the hotel's solicitor. The Complainant submits that contrary to the Police submissions, Police records actually *do* indicate that the Complainant's motel and its guests *have* been disturbed on a number of occasions by music and patron noise emanating from the hotel.
 - Second, a letter from the Complainant to LGNSW dated 10 February 2016 reiterating key points made in the initial Complaint - alleging frequent undue disturbance by the hotel to guests of his motel. The Complainant refers to PKA Acoustic Consulting's observations that the amenity of residents of the motel would have been compromised by the current operation of the hotel and its creation of unacceptable noise levels.

- Third, an email submission made by the Complainant through his solicitor Mr Don McDougall, to OLGR dated 10 February 2016. Attached to this document was a letter sent by the Complainant's solicitor to an LGNSW compliance officer Mr Rogerson dated 10 February 2016. In an 11-page submission letter, the Complainant replies to the responses provided by Police, Council and the Licensee to the Complaint. The Complainant submits that the findings of the hotel's acoustic report from Day Design Pty Ltd dated 7 May 2015 constitute a "concession" by the hotel that the conduct of the business has frequently and unduly disturbed the neighbourhood and that there have been numerous occasions of unacceptable exceedances of noise standards. The Complainant refers to the acoustic report from PKA Acoustic Consulting dated 20 January 2016 and contends that that acoustic evidence highlights the inadequacies of the hotel's acoustic performance to date. The Complainant submits that there has been a breach of "all applicable acoustic standards" through the operation of the beer garden area of the Premises. The Complainant proposes that the following 7 conditions should be imposed by the Secretary upon the hotel's liquor licence, to remedy the alleged undue disturbance:
 1. *A uniformed security guard to be employed from 6:00pm each trading day until at least 1 hour after the last patron has left the premises. An additional security guard to be employed when the number of patrons is greater than 200.*
 2. *The security guard, or at least one guard (if two guards are required by condition 1) to be stationed at the Mortimer Street exit from the premises to monitor and control patron behaviour on leaving the premises, and to patrol along both sides of Mortimer Street to a distance of 50m beyond the western boundary of the hotel property to monitor and control patron behaviour.*
 3. *All acoustically treated bi-fold doors and all other external windows to be closed by 10pm each evening along with the locking of the external gate to the rear carpark also by 10pm each evening.*
 4. *Noise abatement and limitation of impacts – 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 midnight at the boundary of any affected residence.*
 5. *No entertainment, amplified or live music to be conducted nor transmitted by the installation of speakers or Jukeboxes in the licensed premises.*
 6. *The licensee must prepare and have approved by Council, the Police and the Complainant Mr Phillip Matchett, no later than [insert a date 2 months after the resolution of the Complaint], the Plan of Management required by the development consents applicable to the premises, and that the plan so approved be imposed as a condition on the hotel licence.*
 7. *The Plan of Management referred to in the condition 6 above must include a limitation on the numbers of patrons permitted in the newly constructed area, in accordance with an acoustic report to be obtained by the licensee no later than [insert a date 1 month after the resolution of the Complaint].*
- The following material is attached to Mr McDougall's submission: photographs which the Complainant contends were taken on 30 January 2016 and indicate the completion of extensions to the hotel (which the Complainant describes via his 10 February 2016 solicitor's submission as now "operational"); statutory declaration made by the Complainant on 2 February 2016 regarding a conversation with Senior Constable Turnbull of Mudgee Licensing Police in 2013; *Witness statement in the matter of Waratah Hotel* made by the Complainant on 2 August 2013; statement of the Complainant dated 2 August 2013 in relation to the *Waratah Hotel*; letter from the Complainant to Council dated 2 May 2013 attaching a prior letter from Council dated

25 June 2013 regarding the *Waratah Hotel*; email to the Complainant from Mr Stuart Horrex (previous owner of *Lauralla Guesthouse* in Lewis Street, Mudgee) dated 19 January 2016 in relation to the noise experienced from September 2006 to September 2008 arising from the operation of the hotel; statutory declaration by Ms Anna Papworth (who currently runs *Lauralla Guesthouse* in Lewis Street, Mudgee) dated 8 February 2016 attesting to observations of anti-social behaviour, loud music, patron noise, rubbish and disturbance from the hotel; letter dated 10 November 2015 from Superintendent Anthony Joice to the Complainant regarding attending a number of incidents at the Premises; 9 photographs depicting events from 5:05pm until 7:00pm on Saturday 21 February 2015; report by the Complainant's consultant Mr Peter Knowland of PKA Acoustic Consulting dated 20 January 2016; and a letter from Council dated 9 April 2015 following approval of the 2015 DA in relation to the hotel.

Second Submission from the Licensee to LGNSW

36. In a letter from the hotel's solicitor Mr Hatzis to LGNSW dated 29 April 2016, the licensee makes the general submission that the Complainant's allegations "lack foundation". Mr Desmond Kennedy nevertheless provides a *voluntary* undertaking to use security guards on the Premises, in the following terms:

On and from Friday 6 May 2016, the licensee will employ or retain at least one security guard at the hotel between the hours of 9:00pm and 12:00 midnight. Whilst on duty, the security guard is to undertake occasional patrols of the footpath areas adjacent to the hotel.

Further LGNSW File Material

37. This includes a file note from LGNSW staff signed on 9 May 2016 detailing conversations with the Complainant and Hatzis Cusack Lawyers on 27 April 2016 and an email from LGNSW Compliance Operations Unit to the Complainant dated 20 July 2016 providing an update of the Complaint.

Third Submission from the Complainant to LGNSW

38. In an email from the Complainant to LGNSW dated 25 July 2016, the Complainant advises his satisfaction with the hotel's undertaking to use a security guard but reiterates concerns regarding continuing noise from the hotel and alleges that further disturbances occurred on 23 July 2016.
39. In an email submission from the Complainant made through his solicitor Mr McDougall dated 4 August 2016 the Complainant makes the following key contentions:
- LGNSW have failed to keep the Complainant's solicitor apprised of the progress of the Complaint;
 - A "mere undertaking" regarding security staff would not be acceptable, but the imposition of a licence condition would;
 - Only the first two conditions as proposed in the Complainant's submission to LGNSW dated 10 February 2016 concern security guards. The Complainant's other proposals are still pressed by the Complainant;
 - The Complainant did not agree to end the Complaint;
 - Although bi-fold doors have been installed at the hotel, the Complainant's proposal of 10 February 2016 would require closure of windows and use of an external gate;
 - The Complainant's proposed licence condition regarding noise abatement is still required;

- Condition 44 in DA0164/2015 requires the preparation of a new *Plan of Management* for the Premises, the closure of all bi-fold doors and external windows at 10:00pm every evening, the locking of the external gate to the car park at 10:00pm every evening and the directing of patrons to exit the hotel through the Mortimer Street exit after 10:00pm every evening.

40. The Complainant contends that a LGNSW staff member has failed to contact him about this Complaint and questions whether any further correspondence had been received by LGNSW from Hatzis Cusack Lawyers since the Complainant's submission dated 10 February 2016 of which the Complainant is not aware.

41. The Complainant submits that no clarification has been provided by the hotel regarding its use of *large areas of the hotel property that are currently unlicensed*, nor has the licensee provided any clarification as to why the licensee's application to change the licensed boundaries of the Premises was "withdrawn without explanation" during 2015.

Third Submission from the Complainant to LGNSW

42. An email from Mr McDougall to LGNSW dated 8 September 2016 attaches a further 9-page submission letter from the Complainant dated 8 September 2016. This document provides a chronology of events since 10 February 2016, notes the licensee's submissions made through Hatzis Cusack and notes the Complainant's submissions in reply and his allegations of continuing disturbance from the hotel. The following further material is attached:

- Email correspondence between LGNSW staff and the Complainant's representative between 10 February 2016 and 22 March 2016.
- Letter from Mr Gary Bruce, Council's Manager Statutory Planning dated 9 April 2015 advising that Council's position with regard to any amendment to the liquor licence is that a security guard should be employed on the Premises. Minutes of the Council's February 2015 meeting regarding the approval of DA0164/2015 for proposed alterations and additions to the hotel property are attached.
- Letter from the Complainant's representative Mr McDougall to the Authority dated 7 May 2015 in response to the hotel's application to change the licensed boundaries of the Premises. This document sets out concerns as to the impact of extending the licensed area such as excessive noise, other disturbances and patron management; and calls for further regulation of the licence by way of the imposition of six proposed conditions requiring security guards on the Premises, the closure of all bi-fold doors after 10:00pm every evening, noise abatement conditions, the prohibition of live entertainment and the preparation of a *Plan of Management* in consultation with Council and Police.
- An extract of Regulation 31.37 of the *Uniform Civil Procedure Rules 2005* relating to the selection and engagement of experts [the Complainant provides this extract in support of his request that a further acoustic report be prepared by an independent consultant, jointly appointed by the parties, as is provided for in the attached Regulation].
- Extract of *OneGov* liquor licence record for the Oriental Tavern Hotel (undated).
- Land and Property Information NSW Title Search dated 23 August 2016 [apparently in respect of the Premises].

- Australian Business Register Australian Business Number Lookup search for “Oriental Tavern Hotel Mudgee” displaying a result for “Oriental Hotel Mudgee Pty Ltd” as at 23 August 2016.
- Australian Securities and Investments Commission (ASIC) Current Organisation Extract and credit report for Oriental Hotel Mudgee Pty Ltd as at 23 August 2016.
- Complaint posted on online social media on booking.com’s *ReviewPro* website by a guest of the *Ningana Motel* dated 19 July 2016 and a written complaint direct to the motel concerning noise from the hotel dated 7 August 2016.

Third Submission from the Licensee to LGNSW

43. On 14 October 2016, the licensee provided an 8-page legal submission through Mr Hatzis. The submission discusses the nature and concept of “undue” disturbance; the background of the Complaint and the object of the section 79 process. Mr Hatzis submits that the allegations of disturbance referred to in Mr McDougall’s letter of 8 September 2016 are “unsupported” and “entirely without foundation”.
44. With regard to the disturbance alleged by the Complainant on 23 July 2016, the licensee contends that the local rugby football team organised a team bus trip from Cowra, which arrived at the hotel at 10:15pm. When some of these members were adjudged to be showing signs of intoxication, security staff from the hotel asked this group to leave the hotel Premises immediately. Police also attended and the group dispersed.
45. With regard to the disturbance alleged by the Complainant on 30 July 2016, the licensee contends that the same local rugby football team was returning from an away-game in Forbes. They were intending to enter the hotel, but were displaying raucous behaviour and were adjudged to be mildly intoxicated. They were refused entry into the hotel and all players left the hotel Premises immediately.
46. Attached to the licensee’s submission is the following further material:
 - Planning Circular No. PS09-028 issued by the NSW Department of Planning on 26 October 2009. This document is provided to support the licensee’s proposition that the provision of entertainment (including live entertainment) is an *ancillary* use to the conduct of a hotel business and forms part of the “normal activity” of a hotel;
 - Hatzis Cusack letter to the (then) OLGR dated 24 December 2015 in response to this Complaint;
 - Hatzis Cusack letter to LGNSW dated 29 April 2016 which submits that the Complainant’s allegations “lack foundation”. Mr Desmond Kennedy nevertheless provides a voluntary undertaking to use security guards on the Premises in this letter;
 - Copies of the last 30 published reviews of the *Ningana Motel* from the *TripAdvisor* website, which date back to late 2014. The licensee submits that these entries “contradict” the Complainant’s claims that members of the public are being unduly disturbed by the operations of the hotel or that noise from the hotel is the cause of online complaints from guests.

Fourth Submission from the Complainant to LGNSW

47. Letter from the Complainant to LGNSW dated 18 November 2016 contending that throughout the months of September, October and up to mid-November 2016 there have been “continual direct complaints” made by guests of the Complainant’s motel to motel staff about “intrusive noise levels” created by the band or entertainment at the hotel and

there have been a number of separate complaints posted on an almost weekly basis with negative reviews on social media.

48. The Complainant contends that during a conversation with a musician who performed at the hotel on Saturday 17 September 2016, the musician stated that the band was allowed to play without any conditions as to volume levels and there was no installation of noise limiters and/or noise trafficators.
49. The Complainant provides eleven negative reviews posted on booking.com's *ReviewPro* website from internal guests of the *Ningana Motel* relating to the noise generated from the Premises over the period from March to December 2016, along with three photographs of the street view of the exterior of the Premises, apparently taken by the Complainant.

SUMMARY OF THE REVIEWABLE DECISION

50. Briefly, in the Reviewable Decision the Delegate discusses relevant legislation, including sections 3, 79, 80 and 81 of the Liquor Act, before outlining the allegations made by the Complainant in eight paragraphs.
51. The Delegate provided his analysis of the three statutory considerations set out in section 81(3) of the Liquor Act. For the purposes of section 81(3)(a) of that Act, the Delegate found that the order of occupancy favoured the hotel, which had been established on the Premises since 23 March 1961, compared to the Complainant's occupation of the motel since 2003.
52. For the purposes of section 81(3)(b) of the Liquor Act the Delegate found that relevant structural changes had taken place on the Premises since the lodgement of the Complaint, involving construction works to redevelop the existing hotel building and the outdoor beer garden into a two storey extension, including two enclosable outdoor decks.
53. For the purposes of section 81(3)(c) of the Liquor Act the Delegate found that there was no significant shift in the *activities* conducted at the hotel over the relevant period of the Complaint.
54. On analysis of the available evidence and material, the Delegate was satisfied, for the purposes of section 79 of the Liquor Act, that the Complainant had established that the hotel had "at times" caused undue disturbance to the neighbourhood arising from *both* noise emanating from the operation of the hotel's beer garden and decks (particularly when the hotel's doors and windows are not closed) and the behaviour of hotel patrons after leaving the Premises.
55. In reaching this conclusion the Delegate considered the acoustic report from the hotel's consultant, Day Design Pty Ltd dated May 2015 and the report from the Complainant's consultant, PKA Acoustic Consulting dated January 2016. The Delegate also considered and accepted the Complainant's general contentions as to the nature and extent of disturbance caused by patrons leaving the hotel (including swearing, yelling and urinating), and the Complainant's more specific allegations on the behaviour of patrons on 12 December 2014, 21 February 2015, 19 December 2015 and 9 January 2016. The Delegate also had regard to the evidence or information provided by Police, Council, the licensee and local residents.
56. Although the Delegate found only "limited independent verification" on the particular instances of disturbance alleged by the Complainant arising from the information provided from Police, Council or other third parties, the Delegate was nevertheless satisfied that the Complainant's reports were supported "in a general manner" by Mr and Ms Churchill,

Mr Horrex, Ms Papworth and the observations of disturbance that were recorded in guest complaints to the motel.

57. In determining that the level of disturbance is undue, the Delegate had regard to the 55 years' operation of the hotel and the proximity of the Premises to other accommodation businesses and residential dwellings. The Delegate acknowledged the range of voluntary measures that had been implemented by the hotel to mitigate disturbance.
58. After discussing the impact of the imposition of conditions requiring use of security guards and mandating closure of the bi-fold doors and external windows after 10:00pm every evening, the Delegate noted that he was satisfied that there is no need for imposing a further noise abatement condition [the LA10 noise condition] sought by the Complainant as neither of the acoustic reports before the Delegate tested the hotel's compliance with the LA10 noise criteria and suggested that provided that the acoustic controls, such as closure of the bi-fold doors, are complied with there is unlikely to be undue disturbance from amplified music or patron noise emanating from the hotel.
59. Further, the Delegate did not consider that a condition requiring the preparation of a *Plan of Management* in consultation with Police and Council was necessary as there was, in the Delegate's view, no evidence to substantiate failures in the management system of the hotel sufficient to warrant the imposition of additional licence conditions.
60. The Delegate determined to impose the Security Guard Condition and Window Closure Condition and considers these measures to constitute a "balanced" and "proportionate" response to the issues raised by the Complainant. The Delegate observed that these conditions will provide regulatory certainty and ensure that safeguards are in place to prevent undue disturbance arising from the future operation of the hotel while not unduly burdening the licensee.
61. The Delegate noted that these requirements will make mandatory against the liquor licence measures that are either already implemented by the licensee on a voluntary basis, or are required to be observed pursuant to local planning laws.

REVIEW APPLICATION MATERIAL

62. On 2 March 2017, the Authority received an email from the Review Applicant's solicitor, Mr McDougall, attaching the Review Application Form signed by the Review Applicant on 28 February 2017.
63. Annexure A to the Review Application is a five-page submission. The Review Applicant contends that he is aggrieved by the Reviewable Decision as the Complainant has been denied procedural fairness in coming to the Delegate's decision. The Review Applicant further contends that the Reviewable Decision:
 - Fails to correctly identify, or sufficiently identify, the grounds of the Complaint;
 - Fails to identify and consider some of the evidence provided by the Complainant;
 - Fails to give weight, or sufficient weight, to some of the evidence which it does identify as forming part of the Complaint;
 - Is not supported by the evidence which the Delegate considers; and
 - Is "inadequate" and "deficient" in all the circumstances.
64. The Review Applicant (Complainant) submits that the Complaint is based on undue disturbance arising from (a) the manner in which the business of the licensed premises is conducted AND (b) the behaviour of persons after they have left the licensed premises. The Review Applicant provides submissions on the documents attached to the Complaint

regarding incidents that allegedly occurred on or near the hotel Premises on 22 August 2015, 30 August 2015, 12 December 2014, 21 February 2015 and 2 May 2015.

65. The Complainant alleges that the open-air beer garden and the new two-storey addition to the hotel that are depicted in photographs before the Delegate are generating noise disturbance and/or contributing to the scope for patron disturbance from the Premises. The Complainant attaches three photographs of the street view of the Premises and makes the following submissions by reference to specific sections of the Reviewable Decision:
66. On the broad allegations of undue disturbance advanced in the Complaint, the Complainant submits that only one reference is made by the Delegate to the *behaviour of hotel patrons after leaving the Premises* and there is no recognition by the Delegate of the number of people sleeping in accommodation premises located within proximity ranging from between 5 and 45 metres away from the Premises.
67. On the Complainant's specific allegations as to noise disturbance arising from the hotel, the Complainant submits that the Delegate makes no reference to the "significant disturbance" the Complainant says is generated from [unspecified] "external sources".
68. On the issue of patron migration from the hotel, the Complainant submits that the Delegate fails to refer to disturbance caused by migration of patrons towards other venues.
69. On relevant legislative provisions, the Complainant argues that the statutory considerations in section 81 of the Liquor Act must be read in the context of the purpose and process of sections 79 and 80 of that Act, and a decision maker must take into account all relevant considerations arising from those sections, and weigh them against the statutory considerations.
70. The Complainant submits that the Reviewable Decision fails to correctly apply the statutory considerations in section 81(3) of the Liquor Act and for this reason the decision is deficient.
71. On the section 81(3)(a) order of occupancy statutory consideration, the Complainant submits that no reference was made by the Delegate to the fact that other residential accommodation in the vicinity of the hotel, apart from the Complainant's motel, has also been in existence for the same period as, and is as old as, the hotel Premises.
72. On the section 81(3)(b) statutory consideration as to whether any structural changes have been made to the licensed premises, the Complainant submits that the Delegate has failed to acknowledge the nature and extent of building works undertaken at the hotel Premises and also failed to express any opinion that the statutory consideration regarding the conduct of such "works" favours the Complainant.
73. The Complainant also submits that the Delegate fails to recognise that a major portion of the hotel's business operation has been carried out in the adjacent "unlicensed" two-storey addition to the Premises.
74. On the section 81(3)(c) statutory consideration regarding any changes in the activities taking place on the licensed premises, the Complainant submits that the Delegate's conclusion that there has been no significant shift in activities, notwithstanding that the patron capacity of the hotel Premises has more than tripled with the recent extension, is against the weight of evidence.
75. The Complainant contends that the expanded hotel has now increased its potential patron capacity to 495 patrons, or an increase of 330%. There has been a recent notice from

Council of a further development application made in respect of the hotel, which the Complainant contends “still further intensifies the hotel’s activity and usage”.

- 76.** On the Delegate’s findings the evidence or material is sufficient to support a conclusion that the hotel has, at times, caused undue disturbance – primarily noise from the operation of the beer garden and decks and anti-social behaviour as patrons leave the Premises.
- 77.** The Complainant submits that the two conditions imposed in the Reviewable Decision “do not reflect or address the concerns raised by the evidence”. The Complainant submits that the Security Guard Condition is “vague and undirected”.
- 78.** The Complainant submits that no reason was given by the Delegate why the Complainant’s proposed conditions requiring the engagement of uniformed security guards to patrol the Premises from 6:00pm were not imposed. The Review Applicant contends that disturbance from migrating patrons departing the Premises to other later trading premises in Mudgee “continues unchanged as a result of the imposition of the two conditions”.
- 79.** With regard to the Window Closure Condition, the Complainant submits that the Delegate fails to mention the Complainant’s proposal that the licensee be required to lock the external gate of the hotel at the rear carpark (an additional condition of the development consent condition which Council saw as working in tandem with the Window Closure Condition) and no reason was given by the Delegate why this condition was not imposed upon the licence in the terms sought by the Complainant.
- 80.** The Complainant submits that the Delegate failed to impose any licence condition regarding noise abatement, and failed to recognise that noise caused by bands and amplified music originated from (and still originates from) the “old” section of the Premises, which has not had the benefit of any acoustic treatments described by the licensee in its submissions. The Complainant contends that Council has been “reliant upon and expectant of” the Authority imposing an appropriate LA10 noise restriction on the liquor licence, yet this has not occurred.
- 81.** On the available acoustic reports, the Complainant submits that while the Delegate has found that neither expert tested for the hotel’s compliance with the LA10 noise criteria, the hotel’s own acoustic report did in fact test for compliance with the LA10 requirements and found that, on occasion, there was non-compliance with that standard.
- 82.** The Complainant submits that the Delegate failed to impose any condition requiring a Plan of Management, notwithstanding that this is described by the Complainant as a common device for the resolution of disturbance complaints under the Liquor Act and also a requirement imposed by Council with respect to the development consent for the Premises.
- 83.** The Complainant concludes that the Reviewable Decision fails to give weight, or sufficient weight, to some of the evidence provided by the Complainant or is not supported by the available evidence and is deficient.
- 84.** The Complainant further claims that he was denied natural justice during the primary decision-making process, in that:

 - Between the date of lodging the Complaint and the date the decision was made, the Complainant brought to the attention of OLGR further incidents associated with the operation of the hotel, which were not referenced in the Reviewable Decision.

- The Complainant received representations on several occasions during 2016, including from OLGR officer Mr Owen Rogerson on 26 April 2016 to the effect that representatives from OLGR would visit Mudgee on 24 May 2016 to inspect the operation of the hotel Premises, the behaviour of patrons and their effect upon the motel, but this did not occur.
- In mid-2016 OLGR received email correspondence from the hotel's solicitor which was not brought to the attention of the Complainant or the Complainant's legal representative until several months later, thereby putting the Complainant at a disadvantage in relation to his conduct of the Complaint.
- In mid-2016 OLGR represented to the Complainant that a verbal proposal had been put by the hotel's legal representative. OLGR requested the Complainant to respond to this proposal without knowledge of the email correspondence referred to above, putting the Complainant at a disadvantage.
- During the "lengthy period" that this Complaint was under consideration, the Complainant's business was subject to "frequent" negative reviews from guests of the motel. These reviews were brought to the attention of OLGR but do not appear to have been referenced in the Reviewable Decision.
- Further incidents of disturbance arising from the hotel were brought to the attention of LGNSW in a letter dated 18 November 2016 which were not referenced in the Reviewable Decision. These further incidents were not brought to the attention of Police because of the Complainant's loss of confidence after "previous inaction".

85. Attachment A to the Review Application is a copy of a letter dated 18 November 2016 from the Complainant to LGNSW (discussed above).
86. The Review Applicant also provides copies of eleven negative reviews posted on booking.com's *ReviewPro* website from internal guests of the *Ningana Motel* relating to noise generated from the hotel during the period from March to December 2016.

CONSULTATION ON REVIEW

87. On 23 March 2017, the Authority Secretariat sent via email to the Review Applicant, a copy of the material before the Delegate provided by LGNSW to the Authority. A complete copy of the material before the Delegate and the Review Application material was sent to the three active participants in the Complaint at first instance – Mudgee Police, Council and the licensee via her legal representative, Mr Tony Hatzis.
88. The Authority Secretariat invited those parties to provide any written submissions or evidence (in the form of a statutory declaration) to the Authority within two weeks from that date, while advising that the Review Applicant would have a further 7 days to make submissions or evidence in reply.

No Submissions from Police and Council

89. No submissions on the Review Application were received by the Authority from Police or Council.

Further Submission from the Review Applicant/Complainant dated 13 April 2017

90. On 13 April 2017 the Complainant through his solicitor Mr McDougall provided a final submission in the form of a 4-page statutory declaration dated 12 April 2017.

91. Briefly, the Complainant declares that he has been the owner of the *Ningana Motel* located directly opposite the hotel since 2003 and has had interests in the accommodation business conducted at 63-69 Mortimer Street immediately adjacent to the hotel since 2005. He has had the ability to directly observe the hotel, the operation of the hotel business and the hotel's patronage from this time. He submits that the sound of the music generated by the band playing at the hotel has "apparently increased" since earlier in 2017.
92. The Complainant declares that on Saturday 8 April 2017 he was in the office of the *Ningana Motel* and that the volume of the music from the hotel was "clearly audible". The Complainant believes that the music on this night was louder than the music played at the hotel in recent weeks, and was "certainly louder" than the music played at the hotel which gave rise to the original section 79 Complaint. The music continued unabated until approximately 11:45pm, with no decrease in the level of sound. The windows of the new section of the hotel were apparently closed at 10:00pm.
93. The Complainant declares that he observed one security guard stationed at the entry/exit point in the "long corridor" formed between the "older" section and the "newer" section of the hotel. However, this guard appeared to be "largely static" and although the Complainant observed the guard patrolling the corner of Lewis and Mortimer Streets, he did not go around the corner along Lewis Street to speak to noisy patrons there.
94. The Complainant declares that the recent completion of additions to the hotel has formed a long corridor between the "older" and the "newer" sections of the hotel. The Complainant contends that this corridor has created an "echo chamber effect" which amplifies music and patron noise emanating from the hotel. The music noise is further amplified via the grate located in the wall of the hotel facing Mortimer Street.
95. The Complainant contends that this "new" section is an operational part of the hotel business *yet not part of the defined licensed area of the hotel* under the Liquor Act. The Complainant declares that that on 25 February 2015 and 27 February 2015 he had two separate telephone conversations with Mr Tim O'Riley, Manager Health and Building and Mr Gary Bruce, Manager Statutory Planning and Development, both of the Mid-Western Regional Council, who advised him that the patron capacity of the hotel could increase to "about 495" patrons after completion of the additions foreshadowed in development application number DA0164/2015.
96. The Complainant declares that on "numerous occasions" and throughout the weeknights he has been disturbed by anti-social behaviour and noise that emanates from the hotel and that this occurs "without any apparent policing controls being applied or attempts to curb problems in response to complaints".
97. The Complainant declares that his motel business has been detrimentally affected, as his guests have become "distressed" and he has "lost repeat patronage" as a result of the noise from the hotel, which is not allowing guests to experience "the good order of the community".
98. The Complainant declares that anti-social behaviour including intoxication, urination, fighting, foul language and throwing of items on car roofs "regularly occurs" from 9:30pm when some patrons leave the hotel Premises. The Complainant declares that he has previously made "numerous" complaints to Police about this behaviour and contends that hotel management staff "will not act on complaints and they will not respect or adhere to noise conditions and guidelines". The Complainant declares that motel guests and other nearby residents have been advised that Police "do not have the manpower" to promptly respond to and deal with noise impacts, fighting and other anti-social behaviour.

99. The Complainant declares that as a result of the current operation of the hotel these issues will not be fully and properly addressed if the only conditions imposed on the licence for the Premises are those imposed by the Delegate. The Complainant contends that these problems will be “increased” if an application for change of boundaries for the hotel is made and granted in the future.

Late Submission from the Licensee dated 16 May 2017

100. A final (unsolicited) submission emailed to the Authority by Mr Hatzis on behalf of the licensee on 16 May 2017 states as follows:

In this matter, the Authority will be reviewing the decision of the Secretary.

The respondent, Ms Kennedy, relies upon the submissions filed on her behalf before the Secretary. In particular, Ms Kennedy relies upon the submission made by Police to the Secretary.

I am further instructed that, should the Authority so direct, Ms Kennedy is prepared to appoint a suitably qualified acoustic consultant to determine whether the operations of the Hotel comply with the LA10 noise criteria and other criteria set out under the terms of the development consent applicable to the Hotel.

Final Submission from the Review Applicant dated 17 May 2017

101. A final submission in reply emailed to the Authority by the Review Applicant’s solicitor at 2:00pm on 17 May 2017 states as follows:

My client observed the timetable imposed by the Authority.

My client refrained from making fresh complaint about further activities at the hotel during the month of April and early into this month.

The licensee failed to observe the Authority’s timetable, and I am instructed to submit that this attitude is indicative of the licensee’s compliance with her obligations.

It is only at a very late stage that the licensee has made this concession.

It is analogous to a defendant in a criminal matter changing her plea from not guilty to guilty at a very late stage.

I am instructed to submit that the Authority should make an adverse inference against the licensee on this basis.

If the Authority notes the submission by Hatzis Cusack Lawyers made on 16 May 2017, then I request that the Authority also takes in consideration that the concession has been made in these circumstances.

DECISION ON REVIEW AND REASONS

Undue Disturbance

102. The Authority has considered the Review Application and all of the submissions, evidence or other material before it pertaining to the Review Application.
103. The Authority is satisfied that the Complaint has been validly made pursuant to the requirements of section 79 of the Liquor Act. Although the licensee has questioned whether the Churchills qualify as persons residing in the neighbourhood of the hotel, as distinct from merely neighbouring property owners, the Authority agrees with the Delegate’s finding on the Complainant’s standing. The Authority is satisfied that the

Complainant is a person whose financial interests in the conduct of his motel are adversely affected by the undue disturbance to which this Complaint relates, for the purposes of section 79(3)(d) of the Act.

104. The Authority is satisfied, largely on the basis of the information provided in the initial Complaint verified by statutory declaration and the information provided by the Churchills, that the manner in which the business of the Oriental Tavern Hotel is conducted and 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) has occasionally caused undue disturbance to the quiet and good order of the neighbourhood.
105. The Authority has also reached this conclusion having regard to the recent statutory declaration sworn by the Complainant dated 12 April 2017. While the initial Complaint Material suffers from some degree of generalisation, the Authority accepts that noise generated from the operation of the hotel and the behaviour of its departing patrons has been sufficient to disturb, with reasonable regularity, the Complainant's guests inside their accommodation at his motel.
106. The alcohol related conduct engaged in by hotel patrons primarily takes the form of departing patrons staggering around, engaging in occasional anti-social conduct in the form of pushing over garbage bins, throwing beer glasses onto the roofs of nearby cars and making noise in the street outside the Complainant's premises and outside the premises owned by the Churchills.
107. The Authority notes that this hotel does not trade during extended licensed hours. The Liquor Act does not require the elimination of all forms of disturbance but the prevention of *undue disturbance* arising from licensed premises and their departing patrons. Neighbours living within a town centre may expect to encounter some noise from licensed businesses and patrons migrating through the streets to and from places of entertainment at reasonable hours of the evening, particularly on weekends.
108. Nevertheless the Authority is satisfied, on the balance of probabilities, that disturbance is occurring and is audible by persons inside the Complainant's accommodation and inside the premises owned by the Churchills. The disturbance is of a character that may be reasonably characterised as undue.
109. The Authority is satisfied that this undue disturbance occurs primarily in the evenings, after around 9:30pm, across various days of the week. The conduct is anti-social in nature, with the noise sufficient to disturb the quiet enjoyment of neighbouring property. The Complainant, his guests and persons occupying the properties owned by the Churchills are in very close proximity to the hotel and the Authority finds that they have provided generally credible accounts of noise from departing patrons causing noise and engaging in disturbance.
110. The Authority notes that there is only limited Police corroboration of disturbance. While Police cannot be expected to attend and address conduct immediately when it occurs and incidents of disturbance may range in duration, the Authority cannot dismiss the sworn evidence given by the Complainant and the information provided by the Churchills and finds that the COPS Reports and CAD Reports provided by the Review Applicant and Police at least establish a pattern of complaints being made to Police over a prolonged period. That is, the conduct has been disturbing enough to warrant calling the Police to the site of the hotel on numerous occasions.
111. On the balance of probabilities, and giving weight to the sworn evidence provided by the Review Applicant in his statutory declarations, the claims of undue disturbance have been

most clearly substantiated on 23 November 2014, 12 December 2014, 21 February 2015, 22 August 2015, 30 August 2015, 19 December 2015 and 9 January 2016.

112. Some corroboration to the Complainant's position is also provided by the statements made in some of the reviews posted on *TripAdvisor* and *ReviewPro* by guests of the motel, to the effect that noise disturbance from patrons migrating from the hotel on the corner of Lewis and Mortimer Streets were of concern to them.
113. The Authority also notes that an acoustic report prepared by the hotel's acoustic consultant, Day Design Pty Ltd dated 7 May 2015 concludes that so long as the noise controls provided in DA0164/2015 are satisfactorily implemented, the level of noise emitted by people using the decks facing Mortimer Street in the "new" hotel structure (the New Unlicensed Area) with the bi-fold doors closed will be able to meet the conditions of the development consent specified by Council.
114. The Authority further notes that an acoustic report obtained by the Complainant from PKA Acoustic Consulting dated 20 January 2016 concludes that the hotel's acoustic performance to date has been inadequate, and that there has been a breach of "all applicable acoustic standards" through the operation of the beer garden area of the Premises. This consultant observes that the amenity of residents of the motel would have been compromised by the current operation of the hotel and its creation of unacceptable noise levels.
115. Although no actual measurements of live entertainment performances have been undertaken, the Authority is satisfied, accepting PKA's expert opinion, that there is a reasonable prospect that live entertainment and patrons will generate noise that is capable of being heard within neighbouring residences, if unconstrained.
116. It is implicit in the hotel's own report that the risk of disturbance will need to be managed through compliance with the DA, including the closure of certain windows on the new hotel structure, on the New Unlicensed Area that is operating in association with the hotel.
117. The Authority further accepts the Complainant's information, provided in a submission letter to OLGR dated 18 November 2016 (Attachment A to the Review Application Material), that bands are able to perform at the hotel without any noise limiters – a claim that has not been rebutted by the licensee. This factor further increases the likelihood of entertainment induced disturbance.

Action Required to Remedy Undue Disturbance

118. On the whole, the Authority finds the Reviewable Decision to be a measured and considered approach to resolving the Complaint.
119. The Authority agrees with the Delegate's finding that the hotel has operated on the site since 23 March 1961 and the Complainant has occupied the motel since 2003. These facts are not in dispute on review.
120. The order of occupancy clearly favours the hotel for the purposes of section 81(3)(a) of the Liquor Act. However the Authority is satisfied, on the basis of the Complainant's submissions throughout the review, that a substantial recent development in relation to the hotel Premises post-dates the arrival of the Complainant and the Churchills. This recent development should be taken into account for the purposes of section 81(3)(b) of the Liquor Act.

121. The Authority has considered all of the conditions proposed by the Complainant but agrees with and confirms the two conditions imposed by the Delegate as appropriate and reasonable measures designed to reduce the scope for undue disturbance.
122. The Window Closure Condition, which requires the closure of all bi-fold doors *on the hotel Premises* after 10:00pm, is a reasonable and appropriate measure to prevent the escape of noise emissions from the Premises later at night. This measure is consistent with a proposal made by the Licensee's acoustic consultant, Day Design Pty Ltd.
123. While the Delegate has appropriately framed the condition by reference to the hotel Premises, it appears that the bi-fold doors referred to by Day Design are situated on the New Structure. They do not fall within the licensed area of the hotel licence but on a separate building that is immediately adjacent to the historical hotel building. An issue may arise as to whether this condition is effective to regulate all relevant bi-fold doors if they do not fall within the defined licensed Premises and the Authority proposes further regulatory action in relation to the New Structure, discussed below.
124. The Security Guard Condition is another reasonable measure that will likely serve to deter or reduce the risk of patrons affected by liquor to varying extents departing the hotel Premises from behaving in a manner that will adversely affect local amenity and cause undue disturbance on Lewis and Mortimer Streets. As the Delegate has observed, the condition is consistent with a voluntary measure proposed by the licensee, only the measure will now be enforceable against the licence. The Authority considers an enforceable condition to be a preferable response in that it will provide greater assurance to the Complainant, the Churchills and the neighbourhood that the guard will be consistently provided.
125. However, the Authority considers that some further action is appropriate, to supplement the measures imposed by the Delegate and provide a more durable resolution of the disturbance issues raised by the Complainant/Review Applicant.
126. The Authority is satisfied that there is sufficient evidence of a risk of undue disturbance arising from the conduct of live entertainment and/or patron noise to warrant the imposition of the "LA10" noise restrictions as a condition upon the licence. The Authority does not accept the Complainant's proposal that a condition prohibit any live entertainment, or amplified music on the Premises. That is an ordinary incident of the operation of a licensed hotel and provided that appropriate controls are in place, it need not give rise to undue disturbance.
127. Imposing the LA10 requirements, which were devised by the former Liquor Administration Board specifically for the regulation of licensed venues, is a well-established regulatory measure applied by the Secretary and the Authority for the purpose of controlling noise emissions from licensed premises that cause undue disturbance.
128. The imposition of these enforceable objective controls will better ensure that the licensee and her staff conduct the hotel operations in a manner that does not give rise to undue disturbance to the occupants of neighbouring properties.
129. Furthermore, the Authority considers it appropriate, given the recent expansion of the hotel's operations and the allegations made in this Complaint, that there should be a new plan of management devised for the operation of the hotel. This will serve to better regulate the Premises and the supply of liquor pursuant to the licence. It will serve to reduce the scope for undue disturbance arising from the hotel's operations or its departing patrons.

130. A plan of management is a commonly utilised regulatory device that will focus the licensee and her staff upon practical measures for reducing intoxication levels and adverse amenity impacts that may rise to the level of undue disturbance. Once finalised and approved by the Authority, compliance with the plan will become enforceable as a condition of the licence.
131. While the final terms of this plan should be at the discretion of the licensee, the plan will benefit from a brief period of consultation with local Police, LGNSW and the Complainant. Noting that both the licensee and Complainant have legal representation, a plan that is drafted with reasonable precision should better address, to the extent practicable, the management of the hotel in a manner that will reduce the future scope for undue disturbance and better serve the statutory objects and considerations provided by section 3 of the Liquor Act.
132. In conclusion, the Authority has decided to **vary** the Reviewable Decision under section 36A(4) of the *Gaming and Liquor Administration Act 2007* so that:
- (a) The Security Guard Condition is confirmed;
 - (b) The Window Closure Condition is confirmed;
 - (c) Pursuant to section 81(1)(a) of the *Liquor Act 2007* the following additional condition will be imposed upon the licence for the Premises:

LA10 Noise Emission Condition

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz-8kHz inclusive) by more than 5db between 07:00am and 12:00 midnight at the boundary of any affected residence.

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Frequency (31.5Hz-8kHz inclusive) between 12:00 midnight and 07:00am at the boundary of any affected residence.

Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 07:00am.

- (d) Pursuant to section 81(1)(a) of the *Liquor Act 2007* the following additional condition will be imposed upon the licence for the Premises:

Plan of Management Condition

The licensee must file with the Authority, by 23 June 2017, a new draft plan of management for the Oriental Tavern Hotel. The licensee must provide by that date copies of the same to Mr Phillip Matchett of 76 Mortimer Street, Mudgee, the Local Area Commander of Mudgee Police and the Deputy Secretary, Department of Industry via the Compliance Section of Liquor and Gaming NSW (LGNSW), inviting written comment within 14 days.

The licensee must prepare and file with the Authority a final plan of management by 14 July 2017. The final plan will commence effect 7 days after the Authority communicates in writing its approval of this plan to the licensee. Once in effect, the licensee must ensure that the premises are operated at all times in accordance with the plan until such time as the plan is varied, after consultation with the Local Area Commander of NSW Police.

133. The Plan of Management Condition will commence effect from the date of this letter, while the LA10 Noise Emission Condition will commence effect in 28 days after the date of this letter on 7 July 2017.

Notice of Proposed Administrative Action under Section 53(2)(b) of the Liquor Act

134. The licensee has not, during the course of the Complaint or Review, addressed to any great extent the Complainant's explicit concerns regarding the status of the New Structure in connection with the hotel business.
135. As the Authority has noted at the commencement of this decision, the New Structure does not appear to fall within the currently defined licensed boundary of the hotel licence. The Authority is satisfied, on the basis of LGNSW licensing records, the evidence or information provided by the Complainant and the images on the hotel website, that the New Structure is in fact operational and utilised by hotel patrons as a place to consume liquor.
136. On the information before it and subject to consideration of the licensee's submissions in reply, the Authority considers that it is in the public interest to impose a new condition upon the hotel's licence, pursuant to section 53(2)(b) of the Liquor Act as follows:

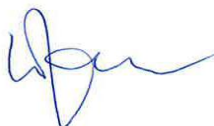
Off Premises Liquor Condition

The licensee will not:

- (i) *permit any persons to take liquor that is sold or supplied pursuant to the licence, off the area defined by the Authority (or its predecessors) as falling within the licensed boundary of the licence, for consumption on any part of the property at 6 Lewis Street, Mudgee that falls outside of that licence boundary (the Unlicensed Area)*
- (ii) *sell or supply liquor for consumption in the Unlicensed Area.*

137. This proposal is not intended to prevent all off-premises liquor sales (for example, sales to patrons who are taking liquor home with them) but to better regulate the sale and supply of liquor as it may be consumed in this immediately adjoining area. The licensee is invited to make submissions on this proposed condition within 14 days of the date of this letter.
138. In determining this review (and when contemplating the supplementary administrative action under section 53 of the Liquor Act), the Authority has had regard to all of the statutory objects prescribed by section 3(1) of the Liquor Act and all of the considerations to which it must have regard under section 3(2) of that Act – including (a) the need to minimise harm associated with 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; and (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.
139. If you have any enquiries about this decision please contact the case manager via email to ilga.secretariat@justice.nsw.gov.au.

Date of Decision: 9 June 2017



Philip Crawford
Chairperson