

FILE NO: A21/0019116

COMPLAINANT: [REDACTED]

LICENSED PREMISES: The Landing, Newcastle – LIQO624013754

ISSUES: Whether the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed.

LEGISLATION: *Liquor Act 2007*

SECTION 81 DECISION

Under Section 81 of the *Liquor Act 2007* (the Act) I, Dimitri Argeres, Director Compliance & Enforcement, a delegate of the Secretary, Department of Enterprise, Investment and Trade, in relation to the complaint made in respect to The Landing (the venue) have decided to **issue a warning** to the licensee in the following terms:

‘Under section 81(1)(d) of the Liquor Act 2007 I, Dimitri Argeres, Director Compliance & Enforcement, a delegate of the Secretary of the Department of Enterprise, Investment & Trade, warn Cater Group Pty Ltd, licensee of The Landing, that it must ensure no future undue disturbance is caused by the provision of amplified or other entertainment’

REASONS FOR DECISION

Legislative framework

1. Section 79 of the Act provides that a prescribed person may complain to the Secretary, that the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed because of the manner in which the business of the licensed premises is conducted, or the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

2. For the purpose of section 79 of the Act, a person who has standing to make a complaint includes a person who is a resident in the neighbourhood of the licensed premises and is authorised in writing by two or more other residents.
3. Section 80 of the Act enables the Secretary to deal with a complaint by way of written submissions from the licensee and any other person the Secretary considers appropriate. After dealing with the complaint, section 81 of the Act provides that the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no action.
4. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and must have regard to the matters set out in section 3(2) which are:
 - a) the need to minimise harm associated with the misuse and abuse of liquor;
 - b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, 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, and;
 - d) the need to support employment and other opportunities in the live music industry and arts, tourism, community and cultural sectors.

The complaint and background information

The complaint

5. On 8 June 2021, [REDACTED] (the complainant) of [REDACTED] Newcastle lodged a complaint with Liquor & Gaming NSW (L&GNSW) alleging undue disturbance from the operation of the venue. The complainant lodged the complaint as a resident authorised by ten other residents.
6. The complainant provides context of the venue's surroundings, advising 1-3A Honeysuckle Drive, Newcastle is referred to as 'The Boardwalk' and is a complex of three buildings inclusive of seven licensed retail premises and residential apartments. The venue is located on the ground level in the East building, with the complainant owning the apartment [REDACTED]. This has been the structural design configuration of the building since it was constructed in 2003-2004.
7. The complainant states that noise disturbances from the venue emanate predominantly from amplified music including live music and DJ's, which causes undue disturbance to the neighbourhood. The complainant describes the noise as disturbingly loud with the bass vibration being most intrusive. They allege following internal layout reconfiguration

in 2008 and 2012, the venue now operates at times as a bar or nightclub, contrary to their licence. The complainant submits that the venue is also not operating according to the NSW Department of Infrastructure, Planning and Natural Resources Development Approval (2003) or the Strata by-laws governing both the venue and residential apartments.

8. The complainant states the undue disturbance from the venue has increased since January 2019 under the management of Cater Group Pty Ltd (the licensee). The complainant states that since April 2021, the venue has commenced a “DJ Nights” program on Friday night between 8:00pm and 11:30pm. The complainant submits that these sessions create noise vibration which is clearly audible in their apartment and also in other resident’s apartments. Disturbances also occur on Saturday afternoons and evenings, as well as on Sunday afternoons.
9. The complainant submits that repeated complaints made to venue management and the licensee by many residents over several years, have resulted in no lasting change to the operation of the venue. The complainant details several incidents between January and May 2021 where the venue created excessive noise from amplified music and resulted in complaints being made to the building Strata management. Additionally, the complaint advises there are over 30 documented instances of complaint by residents to the venue or to the building Strata since 2008.
10. The complainant submits that when a complaint is made, the venue first denies responsibility before a period of consultation takes place which results in venue management assuring a change will be made. The venue then adheres to their assurances for about six to eight weeks before the resumption of the noise occurs. Five formal written complaints were made to Strata management, two relating to the DJ Nights program, and the licensee’s response through the Strata manager either denied the problem, said it was exaggerated, claimed the complaints were a ‘restraint of trade’, claimed harassment or threatened to apply for a change in the noise consent orders.
11. The complainant states that individual residents of The Boardwalk, the Residential Owners Corporation and Lake Group Strata managers have attempted without success for over ten years, to work through informal and formal negotiation with venue management. The complainant submits that they have always accepted that seasonal events such as New Year’s Eve, Australia Day, Melbourne Cup Day, as well as specific Honeysuckle local events will generate noise levels above those permitted in the consent thresholds and retail Strata by-laws. No part of the complainant’s submission concerns these events.

12. The complainant submits that they have made four online complaints regarding 2021 incidents to the City of Newcastle Council. The complaints have all been acknowledged as received, but only one has been replied to. The Council response was that “the resolution of noise disputes between Strata owners within a building should be resolved via appropriate involvement of the Strata manager in accordance with the relevant by-laws. Additionally, Police should be contacted to investigate and undertake necessary enforcement action in respect to alleged excessive noise incidents when occurring”. The complainant submits the Council has disowned responsibility despite the events occurring on property leased from the City of Newcastle adjacent to Harbour Square, Honeysuckle, involving drunken behaviour, occurring after 10:00pm at night, and occurring in a ‘2020 Licensing Trial’ venue, an initiative supported by the City of Newcastle Council and for which Council is listed as a notifier of such incidents.
13. To support the complaint, the complainant provides supporting material including a copy of by-laws for the commercial and retail stratum for the boardwalk, extracts of Development Approval 358-07-2003 containing noise related conditions, decibel readings and screenshots taken from the venue’s social media websites.
14. The complainant states that ultimately all means of action they have taken to mediate the noise disturbance issue with the venue have failed. Therefore, the complainant has lodged the complaint seeking a Noise Limiter be fitted to the venue sound system to ensure compliance with noise limits set by development consent orders and to prevent undue disturbance.
15. The complainant also requests the venue work in open consultation and in cooperation with residents and the Strata management, that the venue operates according to The Boardwalk Retail and Commercial Strata By-laws, and that the venue ceases operating sessions in any part of the venue which place an emphasis on a bar or night club culture. The complainant requests the venue establishes a proper program of noise mitigation for inclusion in the venue Operational Management Statement, including staff training and the use of a Complaints Register for all parties that records action taken by the venue.

The venue, licence details, compliance history

16. The venue is located on the ground floor at 1 Honeysuckle Drive, Newcastle and Cater Group Pty Ltd has been the licensee since 4 February 2019. The venue holds an on-premises liquor licence (restaurant) and is permitted to sell liquor on premises between 5:00am and midnight, Monday to Saturday. On Sundays, the venue is permitted to sell liquor on-premises between 10:00am and 10:00pm. The venue also holds a primary

service authorisation which allows the sale of alcohol without food, however the sale or supply of alcohol must not be the primary purpose of the business.

17. The venue previously operated as 'Terminal One', prior to mid-2008. The venue then operated as 'Isobar' and changed to 'The Landing' in May 2012.
18. Since 2012 until lodgement of the current noise disturbance complaint being considered, L&GNSW have received two complaints concerning noise from residents in 2019 and 2020. In December 2019, a complaint was received from a resident alleging noise disturbance from the venue most nights until after 11:30pm. In October 2020, a complaint was received from the same resident alleging noise disturbance from the venue after midnight and that the venue had been trading past their approved hours. Both complaints were dealt with by engagement with the venue licensee.

Submissions

19. Between 8 June 2021 and 1 September 2021, various material was received from parties to the complaint, NSW Police and the City of Newcastle (Council). The material that is before the delegate is set out in Annexure 1 and is summarised below.

Council

20. On 4 August 2021, Council advised they had received three complaints since December 2019, all of which relate to excessive noise from the venue. Council also supplied Development Application No. 358-7-2003- *Restaurant and Outdoor Eating* which was approved by the Department of Infrastructure, Planning and Natural Resources on 17 December 2003 (the Development Application). Council advised there are no current pending development applications in respect to the venue.

Police

21. A submission was received from the Newcastle City Police District on 21 June 2021. Police confirmed they attended a noise complaint at the venue on 23 May 2021. Police also advised they have completed numerous business inspections at the venue with nothing adverse to comment on.

Licensee response to complaint

22. In response to the complaint, the licensee engaged a solicitor, [REDACTED] from LWP Astley & Co. Pty Ltd, to provide a submission on their behalf. The submission was received on 2 July 2021, addressing the noise disturbance concerns.

23. The licensee acknowledges there has been a history of complaints made by the complainant concerning the venue. These complaints have occurred since 2008, over a thirteen-year period, many of which pre-date the current licensee's occupation of the venue. The licensee submits they seek to resolve the complaint once and for all, so that both parties can move forward, cease dwelling on prior complaints and co-exist in the harbourside location of Honeysuckle.
24. The licensee argues the complaint does not meet the statutory threshold of Section 79. The venue is located in the Honeysuckle precinct, in the heart of the City of Newcastle and the complainant is not living in a quiet suburban area. A significant number of visitors, tourists and residents living in the greater Newcastle area visit Honeysuckle each weekend to experience the multitude of hospitality and event offerings. The licensee submits that in this context, it is objectively reasonable that residents should expect to hear noise.
25. The licensee submits they have at their own cost, and with a view towards appeasing the complainant, arranged and obtained an Entertainment Noise Impact Report from Global Acoustics Pty Ltd, dated 17 March 2021 (the Report). The report assessed noise from the venue against the G10 Noise Emissions condition contained in the Development Application. The licensee states the Report concludes "where noise levels measured at the reference location in the main bar (R1) were greater than 80db(A) entertainment noise was clearly measurable in the adjoining apartment and exceeded internal criteria provided by Cater Group". The licensee submits this statement shows the testing relied on in the Report is relevant, reliable, independent, and objective.
26. The licensee also raises the Report discloses that "the ambient industrial noise measured during the background measurement exceeded criteria for the majority of octave bands, even with no entertainment present". The licensee submits this suggests the level of ambient background noise and/or urban hum experienced within the local neighbourhood is already at elevated levels compared to other neighbourhoods. Accordingly, the licensee submits it is unreasonable to expect the residents of Honeysuckle will not experience some form of ongoing disturbance as a result of the combination of noises generated from a diverse and vibrant inner-city precinct.
27. The licensee submits as a result of the outcomes identified in the Report, the venue developed and implemented a Noise Control Policy. A copy of this, along with examples of completed sound recordings taken at the venue are attached in Annexure 2. The licensee submits the implementation of this policy has been effective because there has been a diminishing level of complaints since the Noise Control Policy was implemented.

The licensee also submits the Noise Control Policy has been updated because of the complainant's feedback. The licensee also requests statements relating to decibel levels provided by the complainant be disregarded as the complainant is neither independent nor appropriately qualified.

28. The licensee submits with respect to section 81(3)(a) of the Act, the order of occupancy is in favour of the venue as the licensed premises was established in 2005. The complainant did not move into their apartment until January 2008, as evidenced by their own submission.
29. The licensee submits the provisions of section 81(3)(b) of the Act are also in favour of the venue. The licensee submits the complainant is seeking to rely upon the venue undergoing structural changes in 2008 and 2012, to support the validity of their complaint. The licensee submits that no weight should be placed on these changes because:
 - The structural change made in 2008 is irrelevant as it predates the complainant's occupation of their residence and occurred some thirteen years ago.
 - The changes made in 2012 are also irrelevant because they were not structural, and related to the positioning of furniture, the general décor of the venue and occurred some nine years ago.
30. The licensee submits the provisions of section 81(3)(c) of the Act are also in favour of the venue. The licensee submits the complainant alleges since as early as 2009 the venue (previously called Isobar) has operated as a nightclub and/or bar. Further the complainant has alleged a consistent pattern of noise disturbance on Friday nights, Saturday afternoons, Saturday evenings and Sunday afternoons over the space of the past ten years. Accordingly, by the complainant's own admission, there has been no change to the venue's activities. The licensee submits the venue (as both Isobar and The Landing) has always provided musical entertainment, as supported by the complainant's assertion.
31. The licensee submits while the complainant has made various allegations pertaining to the venue's non-compliance with the building's Strata by-laws, these claims are irrelevant as the Act does not provide the Secretary with jurisdiction to enforce, uphold or otherwise deal with Strata by-laws. The licensee submits this is a matter for the Strata committee and/or Strata Manager. The licensee submits therefore, that any correspondence provided as part of the complaint between various parties and the building's Strata Manager should be disregarded.
32. The licensee submits the complainant has made various allegations pertaining to the venue's alleged non-compliance with the conditions of the development consent. The licensee denies these allegations and submits that by their own admission, the

complainant has indicated they have raised the issue with Newcastle City Council on numerous occasions. Newcastle City Council has declined to take any action regarding the development consent.

33. The licensee denies the allegation the venue operates at times as a bar or nightclub. The licensee submits the primary purpose of the venue is, and has always been, the sale of food as a licensed restaurant and the provision of liquor and musical entertainment is ancillary. Further, the venue does not have an extended trading authorisation and does not trade beyond midnight Monday to Saturday or beyond 10pm on Sunday.
34. In response to the issue raised regarding an increase in the number of speakers, the licensee submits that the technology and performance of speakers has greatly increased between 2008 and 2021. The installation of additional speakers is not commensurate with an increase in sound. Instead, the licensee submits that the increased number of speakers actually provides clearer and better directed sound. In essence, each speaker is operated at a lower volume as it provides greater concentration of sound to the intended audience. The licensee submits this prevents sound leakage and negates the need to have speakers on higher volumes. This avoids a situation whereby a small number of speakers are attempting to provide sound coverage across a large area.
35. The licensee submits the financial viability of the venue is based on its' ability to provide musical entertainment to patrons. The licensee submits most of the surrounding venues all provide musical entertainment on Friday, Saturday and Sundays. The licensee submits in the event the venue was prohibited or otherwise restricted in its' ability to provide musical entertainment, it would suffer a financially devastating competitive disadvantage. The licensee submits the ability to offer musical entertainment assists the venue to enjoy more consistent and reliable revenue. Given the recent impact of COVID-19, the licensee submits the imposition of liquor licence conditions and/or costs for unnecessary and duplicated acoustic reports would further erode the financial wellbeing of the venue.
36. In response to the complainant's request for a noise limiter to be fitted to the venue sound system, the licensee submits this will be cost prohibitive and unnecessary due to the venue having already obtained an independent acoustic report.
37. In response to the complainant's desired outcomes, the licensee agrees residents should not have to shut doors and windows to prevent undue noise disturbance, the venue will work in open consultation and cooperation with residents and Strata, and continue to operate in a lawful and respectful manner in accordance with the relevant Strata by-laws. Additionally, the licensee submits the venue already has a Noise Control Policy in place

which it has updated with a complaint register in order to facilitate further transparency and collaboration.

Premises owner response to complaint

38. In response to the complaint, [REDACTED] (the premises owner) provided a submission which was received on 25 June 2021, addressing the noise disturbance concerns.
39. The premises owner submits he has owned the premises since 2012 and was the business owner from 2012 to 2019, at which time the premises and business were leased to the current licensee.
40. The premises owner submits the Development Application that was originally provided for the premise (DA 358-072003) was approved by the NSW Department of Planning who provided the appropriate provisions for the premises. That particular Development Application and its provisions have since lapsed, and according to Newcastle City Council there are no specific provisions applying to the premises relating to the use of entertainment. Notwithstanding, any form of public entertainment must adhere to all laws relating to noise emissions.
41. The premises owner submits that when [REDACTED] purchased the premises in 2012, it was known as 'Isobar' and had an internal fit out more relevant to a bar or nightclub. The premises owner submits that in 2012, [REDACTED] converted the fit out to be more restaurant focused. The fit out did not require any change to the Development Application conditions, or any approvals from either Council or Strata as it was consistent with the premises' current use and did not involve structural changes. The premises owner states the fit out undertaken in 2012 is still the current fit out.
42. The premises owner submits the PSA requirements for the provision of food and alcohol have always been adhered to, both when he owned the business and in all inspections of the premises since it was leased to the Cater Group.
43. The premises owner submits that during the time [REDACTED] owned the business, [REDACTED] received four noise complaints: two from the complainant, one from [REDACTED] concerning cleaning noises at night, and one from an unknown complainant. Since the premises has been leased to Cater Group, they have received three noise complaints, making a total of seven complaints over a nine-year period. Four complaints from the complainant, one from [REDACTED], and two from unknown sources. The premises owner submits [REDACTED] has not received any form of noise complaint from The Boardwalk Residential Owners Corporation Executive Committee.

44. The premises owner denies the allegation he has resisted residents' complaints regarding noise as well as other issues such as crowd behaviour and smoking. The premises owner submits an email dated February 2018 from the complainant, thanking the premises owner for changes made to address noise issues from the venue. The premises owner submits the email from the complainant states "we have had no undue noise intrusion for the past 15 weeks". The premises owner also submits an email dated October 2019 from the building Strata manager, thanking the premises owner for resolving the noise complaint without the need for formal mediation. The email states "no further complaints were made once procedures had been put in place to address the source of the noise complaint".
45. The premises owner states on every occasion a noise complaint has been submitted, [REDACTED] has tried to understand the nature of the complaint and made attempts to ensure the complaint is rectified. The premises owner submits the current licensee has had acoustic testing completed and adopted a Noise Control Policy. The premises owner submits the complainant has not provided any evidence to support his claims.
46. The premises owner submits the potential for noise issues arises because the Honeysuckle precinct has been zoned to include a mix of residential and entertainment venues. The premises owner submits the venue has always been sympathetic to its neighbours' needs, however this needs to be balanced with the needs of the business.
47. The premises owner submits that given the size and scope of the building, it is impossible for some of the building residents to be disturbed by any noise coming from the venue, yet they have been included as complainants. The premises owner submits they have been coerced into signing the paperwork by the complainant. The premises owner submits that the complainant's continual harassment of the venue is a display of [REDACTED] frustration at living in a precinct that includes entertainment, and the venue is unfortunate to have him as a neighbour.

Complainant final submission and further complaint material

48. The complainant provided all the material for their final submission by 10 August 2021. The complainant does not dispute there will be noise experienced from the retail venues and their complaint is not in relation to local noise or ambient noise of the area. Rather the complaint is made in regard to undue disturbance from amplified noise that exceeds the regulatory consents, guidelines and by-laws governing the venue. The complainant submits they have now approached L&GNSW as a last resort, in circumstances where the problem has become worse, and the licensee's response to resident complaints

through the Strata management have escalated to written threats of consequences and intimidatory name calling of residents.

49. The complainant submits that if the order of occupancy means 'who was there first as an occupant', the complainant's occupancy predates the current licensee by eleven years (2008 vs 2019). However, if the order of occupancy means the order of approved use of each premises, the residential and mixed-use retail were established at the same time in 2003. The complainant submits there is no priority arguable for either the residential lots or the retail lots. If the licensee's interpretation is correct, it is the complainant's contention the manner of use of the occupancy of the venue has changed since mid-2008, accentuated by further configuration changes in 2012. The complainant submits this change in the manner of operation has increased under the management of the current licensee.
50. The complainant submits the structural changes made to the venue in 2008 took place in September, eight months after the occupation of their apartment in January 2008. The complainant submits the changes made in 2012 took place over approximately eight weeks, with the venue's Facebook page showing alterations far beyond the repositioning of furniture and general décor. The complainant submits that in the period between 2008 and 2013, the concrete floor slab of the building was penetrated by boring holes to support the reconfiguration of the venue. The complainant submits these penetrations were substantial structural alterations used to create multiple beer lines and other service lines directly to the advertised bar area. The complainant submits these alterations were not approved by the Strata Body Corporate, by Council or any regulatory authority and are contrary to fire regulations. The complainant submits these penetrations are now part of a rectification action by The Boardwalk Body Corporate following a survey of the installations.
51. The complainant regards the attempt by the licensee and premises owner to dismiss these alterations on the grounds they occurred nine years ago, as an attempt to avoid scrutiny of the change in configuration of the venue which in turn has led to its change of use at times. The complainant submits the changes to the venue's configuration have been augmented over the past nine years by further temporary installations such as a tape deck, mirror ball and a lighting bar. The complainant contends that under the management of the current licensee, use of the venue as a bar or nightclub has increased.
52. The complainant submits the venue currently has 14 speakers internally and externally where there used to be six prior to 2012. The complainant states a further two external speakers [REDACTED] were removed in November 2020 as part of

building cladding rectifications. The complainant submits the licensee's and owner's requests to re-install these two speakers were refused by the Strata management. The complainant submits there are now eight internal speakers visible in the upper bar area where there used to be three. The complainant submits that when the venue has live music and DJ sessions these 'house' systems are usually supported by considerable power amplification speakers provided by the performers.

53. The complainant submits that despite a primary contention of the licensee being the efficacy of particular speaker technology and performance, the licensee's submission does not produce: confirmation of the venue speakers specifications; a statement regarding which speakers (internal or external) they are referring to; validation of why eight speakers are necessary in the upper 'bar' area (noting that the licensee and owner maintain this is not a bar but a restaurant); or an explanation of why the speakers in this area are steeply angled toward the floor, which since the carpet was removed in 2012, is now a solid surface which increases the reverberation and echo effect of the amplified sound.
54. The complainant submits that according to the Report, the complaints made by residents about excessive noise from the venue are valid. The complainant submits Section 2.1 of the Report quotes the noise conditions which are clause G10 (noise emissions) of the Development Application for the venue. The Report states that where noise from the site is measurable in an adjoining apartment, it is likely to cause an exceedance. The complainant submits the licensee delayed providing the Report to residents and Strata, despite multiple requests. The complainant submits the Report was provided by the licensee some 22 weeks after the testing was conducted, and then only at the request of L&GNSW.
55. The complainant submits that the Report is labelled as 'Draft' despite being completed in February 2021. It is not known whether the report has been finalised as the final report has not been provided by the licensee. The complainant submits the Report presents measurements of background noise at the time the tests were carried out, which was in the daytime afternoon between 1:45pm and 2:00pm. These measurements of background noise are not representative of noise levels in the evening or night. The complainant submits the night exceedances identified in the Report may be much higher if compared against background levels recorded at night, when background noise is much lower than daytime levels based on nearby development assessment reports.
56. The complainant submits table 4.5 of the Report confirms the night criteria is exceeded by entertainment from the venue arising from some of the test cases. Some of the

exceedances are up to 10dBA. Exceedance of the criteria were also evident when the sliding doors were closed. The complainant submits that this conclusion in the Report provides direct evidence from the licensee's own independent expert that live music at the venue has been in serious breach of the night noise conditions in the development consent and has been otherwise causing undue disturbance to the complainant. The complainant submits while the Report suggests music is not audible in their apartment at levels between 72-76dBA at measuring point R1 in the venue, this does not seem consistent with the noise readings in Tables 4.5 and 4.6 and in their experience in hearing undue noise since the Noise Control Policy has been adopted. The complainant submits the conclusion in the Report and the data in Tables 4.5 and 4.6 supports the submission there should be no music permitted in the venue between 10:00pm and 12:00am.

57. The complainant submits the venue's Noise Control Policy has been prepared by the licensee and there is no evidence it has been endorsed by Global Acoustics or alternatively is based on their recommendations. The complainant's experience since the adoption of the Noise Control Policy is that music is still clearly audible at the adopted noise settings. The complainant submits after the introduction of the Noise Control Policy in April 2021, the amplified noise from the venue has become worse, and yet the licensee maintains that the noise levels are validated by readings from the Report. On this basis, the complainant contends the settings adopted by the licensee in the Noise Control Policy are not adequate to resolve the undue noise disturbance in the complainant's apartment.
58. The complainant submits that on 29 June 2021, he made a formal complaint to the Strata Manager for each of the calendar weekends in June. This complaint was made based on the fact the noise disturbance continued and with increased frequency and noise level after the introduction of a venue Noise Control Policy in April 2021. The complainant submits that in July 2021, the DJ and "Sunday Arvo Sessions" have ceased, coinciding with COVID restrictions being imposed on hospitality venues by the NSW Government. The complainant submits that after the cessation of these live events, the undue disturbance has diminished, but has not disappeared. The complainant submits that reverberation through the fabric of the building continues to be a problem, in particular on Friday and some Saturday nights.
59. The complainant submits that the licensee's claim that the majority of the other seven venues located in the same apartment complex provide musical entertainment is incorrect. The complainant states that a search of social media for each of the eight retail venues in The Boardwalk shows that in the first six months of 2021, the venue advertised 21 events promoting live music. The Harbour Bar advertised zero live music events and one "Sportsman's Luncheon" which resulted in complaints from The Boardwalk residents.

The complainant submits that none of the other venues have advertised or promoted live music in 2021. The complainant states that their submission is not that the venue have no music at all, but that the music provided should be in accordance with the various consents and regulatory provisions.

60. The complainant submits that a condition be imposed by L&GNSW on the venue liquor licence that any music which is audible in the residential lots of The Boardwalk be regarded as a breach of licence conditions. The complainant submits the audibility criteria should apply on all days of the week and at all times and should also include vibration and/or reverberation through the fabric of the building.
61. The complainant also requests that action be taken by L&GNSW to prevent any part of the venue being used as a nightclub or bar in contravention of its PSA. The complainant submits that since noise complaints regarding the venue have frequently been caused by live music, including DJs, that action be taken by L&GNSW to prevent the venue from hosting such events.
62. The complainant submits they recognise the necessity of the retail establishments within The Boardwalk to be financially viable, and they have supported this necessity over the past thirteen years in their sequential roles on the representative Strata management committees. The complainant submits this cannot be at the expense of their quality of life and the 'peaceful enjoyment' of the home they love so much. The complainant submits the entire process has had a cumulative negative impact on their physical and mental well-being as a result of the distress and frustration of being unable to solve the problem in spite of every effort on their part to do so with two different licensees over a long period of time.

Licensee final submission

63. On 8 September 2021 the licensee provided their final comments on the matter. These comments were prepared by [REDACTED] from LWP Astley & Co. Pty Ltd, on the licensee's behalf.
64. The licensee submits the issue of penetrations made to the concrete floor slab of the Strata complex falls outside the jurisdiction of the complaint.
65. The licensee submits the venue lawfully provides musical entertainment. The licensee submits the complainant has made reference to clause G9 of a 2003 consent document that dealt with the provision of entertainment. The licensee submits that it was never the intention of this consent condition to prohibit entertainment, but rather to ensure that any entertainment was provided within the legislative framework of that time. The legislative

framework relating to the provision of entertainment has been vastly amended since 2003. Most prevalently, this has included the abolition of the 'Place of Public Entertainment' (POPE) licence regime in or around 2008. Accordingly, the licensee submits that any reference to the 2003 consent documents is irrelevant.

66. The licensee submits both Council and Police submissions infer they have no issue with the venue's provision of musical entertainment.
67. The licensee denies they are operating a bar or nightclub and submits the provision of live music including DJ's, soloists and duo's is a regular fixture at many restaurants. The licensee states they have tables and chairs available for all their patrons, and they do not trade beyond midnight. The licensee submits advertising and promotions simply express that the restaurant is both contemporary and casual. The advertising reflects the restaurant is not a formal fine dining venue, but rather a casual harbourside dining destination. Further, the licensee submits the venue does not charge an admission price or offer ticketed events, as one could expect to see at a nightclub.
68. The licensee submits an understanding and appreciation of the complainant's desire to enjoy a high quality of life and peaceful enjoyment of their home. The licensee submits no desire whatsoever to cause any undue disturbance to the complainants or anyone else in the neighbourhood. However, the licensee continues to assert:
 - a. The venue does not create any undue disturbance to the local neighbourhood.
 - b. The ongoing financial viability of the venue is contingent on the ability to offer live music and DJ entertainment.
 - c. It is essential that residents and commercial hospitality businesses can harmoniously co-exist, particularly considering the mixed use of the harbourside location.
 - d. The licensee is willing to collaboratively and co-operatively work with the complainant to establish a noise testing regime that provides both parties with an objective base with which to determine the appropriate volume of music. This is supported by the licensee obtaining an independent acoustic report, implementing and updating a Noise Control Policy.
69. The licensee denies the assertion the Noise Control Policy provided as part of their submission is inadequate. The licensee submits the Noise Control Policy was amended as a result of the complaint, with a view of reaching a harmonious and peaceful co-existence with the complainant.

70. The licensee submits in response to the outcomes sought by the complainant:
- a. The venue does not have the benefit, nor would it be practical, to conduct acoustic testing in the complainant's residence on each occasion that musical entertainment takes place. This is why the Report was obtained and the findings utilised to implement a Noise Control Policy. The Noise Control Policy allows the licensee to measure and set the volume of music at the source, at a volume independently determined as being within acceptable ranges once the sound reaches the complainant's residence.
 - b. They are not aware of any vibration or reverberation in the fabric of the building caused by the venue. Instead, the licensee submits if this is occurring, then it could be the result of the alleged penetrations made to the concrete floor slab of the Strata complex. The licensee understands this is separately being investigated by the Strata committee.
 - c. There is no objective evidence the venue is operating as a nightclub or bar. The licensee welcomes the opportunity to provide any and all evidence to the Secretary as evidence of same. The licensee submits this will be an efficient and quick investigation as there is no doubt whatsoever the venue operates as a genuine restaurant.
 - d. It is not financially viable for the venue to continue to exist without the provision of entertainment. The licensee submits their venue has been devastated by recent COVID-19 restrictions.
71. The licensee respectfully requests that the Secretary make a finding that no further action is to be taken in accordance with section 81(1)(e) of the Act. If in the alternative, the Secretary does wish to take action, the licensee submits that such action should be limited to prescribing acoustic measurement dB volumes that can be included in the Noise Control Policy. This will enable both parties to have an objective benchmark to:
- a. Determine if the venue is causing undue disturbance to the neighbourhood and should immediately modify and correct its' noise levels, or
 - b. Provide everyone with assurance the venue is operating in accordance with objectively reasonable standards.

Inspection by L&GNSW

72. On 18 June 2022 at 10:10pm L&GNSW Inspectors attended the venue. On approach to the venue along Honeysuckle Drive, Inspectors observed there to be minimal noise coming from other bars and restaurants located on the same block as the venue. Inspectors did not hear any noise coming from the venue until they were directly outside

it. Inspectors noted the general area to be very quiet, with the loudest noise coming from other bars and restaurants in the area.

73. At 10.15pm Inspectors entered the upper level of the venue and observed an outdoor area which contained tables and chairs, however no patrons were located there. Inspectors then proceeded to enter the venue and observed approximately 25 patrons in total across the upper and lower levels. Inspectors observed approximately 16 patrons in the upper level, with the largest group consisting of 12 female patrons. Inspectors noted patrons generally appeared to be drinking alcoholic drinks, with no food visible. Inspectors observed that tables were no longer set up for dining
74. Inspectors then approached the bar area where there were two bar staff working. Bar staff advised the cocktail section and kitchen section were both closed. Inspectors ordered two soft drinks and sat down at a high table near the entrance which had a view to the bar area. Inspectors observed the music in the venue to be bass music, however Inspectors could easily converse without raised voices. Inspectors did not feel any bass vibrations from the music.
75. Inspectors observed various alcoholic drink and food promotions posted around the venue. There was also a microphone stand and music lectern set up at the far end of the upper level. Whilst seated, Inspectors did not view any patrons purchase food, only alcohol. Inspectors then located a 'late night menu' on the venue's website. Inspectors took photos of the bar area, where they noticed small buckets containing dining utensils such as knives and forks.
76. At 10.40pm, Inspectors approached the most senior staff member to discuss the venue's liquor licence as they were advised the Manager had left at 9.00pm. The staff member confirmed he understood the venue operates as an on-premises restaurant with a PSA. The staff member then confirmed that although the kitchen was closed, food was still available on the late-night menu, including pizza, pasta and tapas. The staff member confirmed the kitchen closed at 9.30pm and it had been a quiet night in general at the venue. Inspectors informed the staff member that food still needs to be made available to patrons.
77. Inspectors asked the staff member about entertainment at the venue. The staff member confirmed the venue had employed a soloist that evening, who finished at 10.00pm. The staff member also advised they had noise issues with residents above in relation to music, and the venue no longer uses DJ's because of these issues.
78. Inspectors then departed the venue at 11.00pm.

Statutory considerations of section 81(3) of the Act:

79. The Act requires that the Secretary have regard to the following statutory considerations:

The order of occupancy between the licensed premises and the complainant-

80. The licensed premises has operated under the current liquor licence since 27 September 2005 and Cater Group have been the licensee since 4 February 2019. The complainant purchased the apartment [REDACTED] in October 2007. Whilst the current licensee commenced in February 2019, I consider the order of occupancy in their favour as the liquor licence for the venue has been operational at this location since September 2005.

Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises-

81. The original configuration of the venue was that of a restaurant. In 2008 the venue was reconfigured internally to create a bar area facing the harbour. In 2012 the venue was reconfigured again with further internal alterations and the dining area was concentrated on the lower section of the venue facing Harbour Square. This left the upper level and in particular the open area facing Harbour Square on the north-eastern corner of the property, for bar and special event use. The complainant's apartment [REDACTED]. There have been no changes made to the apartment occupied by the complainant.

82. In 2008, the venue had three internal speakers on the upper level facing the harbour. In 2021, there are now eight internal speakers visible in the upper area. In 2008, the venue had one external speaker on the upper level facing the harbour, and two external speakers on the lower level facing Harbour Square. In 2021, there are now three external speakers in the upper area, and three external speakers in the lower area. Two further external speakers were removed in October 2020 as part of the external cladding removal. The additional internal and external speakers were installed in 2015 under the management of the current premises owner.

Any changes in the activities conducted on the licensed premises over a period of time-

83. I note the complainant raises the manner of operation of the venue is at times a nightclub or bar, and this operation has increased under the current licensee. The complainant alleges since early 2009 the venue (previously called Isobar) has operated as a nightclub and/or bar, then there has been no detrimental change to the venue's activities. It is

evident the venue has a strong focus on live entertainment and music, although the complaint alleges this to have increased under the current licensee.

Findings and Decision

Undue disturbance

84. In deciding whether the venue has unduly disturbed the quiet and good order of neighbourhood, I have balanced the submissions made by the complainant, the licensee, the premises owner, NSW Police and the City of Newcastle Council.
85. A level of disturbance from the normal operation of the venue is to be expected, including noise from live entertainment, patrons and pedestrian traffic generated by the venue and other nearby venues. I do not regard this type of disturbance as undue in a general sense, considering the nature of the local environment and associated traffic noise. I am satisfied however, that there is sufficient evidence before me to reasonably conclude that the venue has, at times, unduly disturbed the quiet and good order of the neighbourhood.
86. While there is a lack of detailed objective evidence from other enforcement agencies, I have placed weight on the acoustic report, which demonstrates non-compliance with the noise criteria (G10 Noise Emissions) contained within the venue's Development Application. While the LA10 noise criteria was not used for this report, I consider it relevant when combined with the evidence provided by the complainant. This suggests that disturbance occurs at times and is exacerbated by the proximity of the venue to the complainant's residence and there appears to be little control over the level of amplified sound at the venue.

Regulatory Outcome

87. In deciding the appropriate regulatory outcome is in this instance, I have considered the statutory considerations, the material set out in Annexure 2, and the above finding of undue disturbance. I have also had regard to the particular context in which the venue operates, noting that it operates on the ground floor of the building the complainant and authorising residents reside in, and I am aware of the complexities in addressing noise concerns.
88. I note the venue has several speakers from which music is played. In this context, it is reasonable to expect significant responsibility lies with the venue to ensure it does not disturb the quiet and good order of the neighbourhood, particularly residents of the building. While it is noted the complainant purchased [REDACTED] property in 2007 and the venue

has order of occupancy in their favour, this does not relieve the venue of the obligation to minimise noise and disturbance.

89. A point of contention centres on whether the venue trades as a bar or nightclub and possibly in contravention of its liquor licence. It is evident the venue has been providing live entertainment including DJs and operates under a PSA, posing a heightened risk the venue may operate beyond what is permitted by that authorisation and its licence type. I note the disturbance complaint provisions are specific to dealing with and addressing issues of disturbance and it is outside the scope of this complaint to provide a view on the general level of compliance in the venue's operation. I am unable to conclude the venue trades in manner contrary to its licence as raised by the complainant, however I warn the licensee the primary purpose of the business must at all times be that of a restaurant, being the preparation and service of food.
90. I acknowledge the acoustic assessment provides evidence amplified entertainment hosted at the venue has resulted in exceedances of noise criteria. The acoustic assessment concluded entertainment noise was clearly measurable in the adjoining apartment and exceeded internal dB(A) criteria provided by the licensee. I note the results of the acoustic assessment indicate that where noise from the venue is measurable in an adjoining apartment, it is likely to cause an exceedance.
91. I am encouraged by attempts made by the venue to resolve the noise disturbance concerns, in particular the acoustic assessment of 19 February 2021 and use of an internal Noise Control Policy to manage and address noise issues. I have considered the material provided by the licensee that demonstrates the venue has voluntarily taken further action to address and mitigate disturbance. However, no evidence has been provided that confirms the venue's ongoing compliance with noise criteria provided in the Development Application.
92. Having regard to the above, I consider the issuing of a warning to be an appropriate regulatory response to address the finding of undue disturbance. I consider this to be an appropriate response primarily as it will provide the licensee an opportunity to continue to develop and employ strategies to minimise undue disturbance, and to engage with neighbouring residents in good faith and with a view to shaping the venue's operations to address residents' concerns.
93. In this respect I strongly encourage the licensee to be proactive in addressing disturbance. I also encourage the venue to commit to a cohesive business practice of engaging in a positive and meaningful manner with its neighbours to minimise complaints.

94. Should further undue disturbance be reported this matter may be revisited, and will likely result in regulatory intervention. I also note that Liquor & Gaming NSW inspectors will continue to monitor the venue's compliance with its manner of operation, which I reiterate must at all times be that of a restaurant.
95. Finally, I am satisfied that this decision is a proportionate regulatory response to the disturbance identified in the complaint.

Decision Date: 31 August 2022



Dimitri Argeres
Director, Compliance & Enforcement

Liquor & Gaming NSW

Delegate of the Secretary of the Department of Enterprise, Investment and Trade

Application for review:

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 28 September 2022. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at

In accordance with section 36C of the Gaming and Liquor Administration Act 2007 this decision will be published on the Liquor & Gaming NSW website at www.liquorandgamingnsw.nsw.gov.au



Annexure 1

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

1. Section 79 Disturbance Complaint lodged by the complainant on 8 June 2021.
2. Copy of the liquor licence for The Landing dated 20 May 2022.
3. Submission from NSW Police received on 21 June 2021.
4. Submission from the premises owner received on 25 June 2021.
5. Submission from the licensee's solicitor in response to complaint, received on 1 July 2021.
6. Copy of an Entertainment Noise Impact Assessment for Cater Group by Global Acoustics dated 17 March 2021, provided by the licensee's solicitor on 15 July 2021.
7. Material received from City of Newcastle Council on 4 August 2021.
8. Copy of Development Application No. 358-7-2003 – Notice of Determination from Department of Infrastructure, Planning and Natural Resources dated 17 December 2003, provided by City of Newcastle Council on 4 August 2021.
9. (a-k) Final submissions from complainant received on 26 July 2021, 3 August 2021 and 10 August 2021.
10. Final submission from the licensee's solicitor received on 8 September 2021. The Landing Menu 2021, provided by the licensee's solicitor on 8 September 2021.