

Licensee Eltham Hotel	A/Executive Director Regulatory Operations & Enforcement Liquor & Gaming NSW
Hatzis Cusack Lawyers Representative for the Eltham Hotel	JDK Legal Representative for the complainants
Richmond Police District NSW Police	Lismore City Council

9 December 2024

Dear Sir/Madam

Reference No.	DOC24/280434
Applicant	Mr Matterson Rabbidge
Application for	Review of a decision made under section 54 of the <i>Liquor Act 2007</i> by a delegate of the Secretary of the (then) NSW Department of Enterprise, Investment and Trade
Licence Name	Eltham Hotel
Premises	441 Eltham Road Eltham NSW 2480
Date of reviewable decision	10 November 2023
Legislation	Section 36A of the <i>Gaming and Liquor Administration Act 2007</i>

Decision on application to review a delegated decision of the Secretary
Eltham Hotel, Eltham (LIQH400114575)

Our decision

At a meeting held on 20 November 2024, we decided to

- **vary** the delegate’s decision in relation to the LA10 noise condition
- **confirm** the delegate’s decision in relation to noise limiter and enclosed beer garden conditions

made under section 81 of the *Liquor Act 2007* (the Act), for the Eltham Hotel (the venue) dated 10 November 2023.

We also decided to

- **impose** those other conditions (items 2-14) consented to by the applicant, as set out in the applicants’ Noise Management Plan (Attachment F of the applicant’s 3 April 2024 submission).

Background

On 8 December 2023, the Independent Liquor & Gaming Authority (the Authority) received an application, under section 36A of the *Gaming and Liquor Administration Act 2007* (the GALA Act), to review a decision made by Ms Jane Lin, Executive Director, Regulatory Operations and Enforcement, as a delegate of the Secretary of the Department of Enterprise, Investment and Trade (as the Department was then known) (the Secretary).

The delegate's decision, made on 10 November 2023, imposed three conditions on the licence of the Eltham Hotel (the venue) under section 81 of the *Liquor Act 2007* (the Act), in relation to LA10 noise criteria, noise limiter and enclosed beer garden.

The applicant contends that the imposition of the conditions is inappropriate and unduly burdensome for the conduct of a hotel with ancillary entertainment in this particular rural setting.

The applicant contends that, having regard to the order of occupying the rural surrounds, the history of the hotel, the importance of the hotel in providing music and entertainment opportunities for patrons and musicians in the broader community, the times at which entertainment is provided and the expectations of the public, the quiet and good order of the neighbourhood was not:

- unduly disturbed by the licensed premises; and not
- unreasonably and seriously disturbed by the licensed premises.

The applicant contends that they had to cancel a number of previously scheduled live music events at the hotel as a consequence of the delegate's decision.

The delegate's decision

The delegate investigated formal disturbance complaints made on behalf of local complainants and was satisfied that there was sufficient evidence to conclude that the hotel had unduly disturbed the quiet and good order of the neighbourhood. The delegate found that the hotel's expansion of the outdoor areas, which are open to the surrounding environment and include the provision of live amplified entertainment, coincided with the disturbance experienced by the complainants.

In making a finding of undue disturbance, the delegate placed substantial weight on three acoustic reports prepared by Ambiance Audio Services on behalf of the complainants. Each report found substantial exceedances of the LA10 noise criteria. The three reports were prepared over a year and show no reduction in noise from the hotel, but rather that the noise had increased.

The delegate acknowledged the noise mitigation measures the hotel said they had implemented under their Noise Management Plan (NMP). However, the delegate considered that all parties would benefit from action to ensure that the hotel would implement and abide by the measures that had agreed to (and were recommended within the Noise Management Plan) due to the ongoing issues and the absence of any fruitful outcomes from prior meetings between the parties.

The delegate found the imposition of licence conditions to be a reasonable measure in the circumstances.

Stay application

As part of the review application, the applicant also sought a stay of the delegate's decision.

On 22 December 2023, the Authority granted the stay on the basis that the hotel would implement 14 controls (under their Noise Management Plan) to mitigate noise issues pending determination of the review application.

The controls to be implemented were:

1. Whenever any live or amplified entertainment is provided within the enclosed beer garden, the sliding door to the south of the stage area is to be kept closed, along with all associated doors or windows within the beer garden area.
2. All 'Tier 2' live entertainment must occur within the undercover beer garden.
3. All live entertainment to run for no more than 3 hours total duration (including breaks between sets).
4. No more than two 'Tier 1' type live entertainment offerings per week. Tier 1 entertainment offerings include solo and duo artists, busker PAs and include the 'not quite folk' open microphone night, Irish folk jams, Wednesday night folk group. These sessions to be limited to the following windows:
 - Between 4.00 pm and 7.00 pm; or
 - Between 6.30 pm and 9.30 pm(Any sound checks preceding a performance time may only be undertaken during these times or in the 15 minutes immediately preceding these times)
5. No more than one 'Tier 2' type entertainment offerings per week. Tier 2 is to comprise all live entertainment other than 'Type 1' and includes ticketed shows.
6. House PA system to be used on all 'Tier 2' live entertainment.
7. All live music performance times are to be advertised on the Hotel's website at least 7 days prior to the relevant performance.
8. All live entertainment to cease by 9.30 pm.
9. The dining area to the south is to be closed during 'Tier 2' live entertainment.
10. During live entertainment there will always be a manager on duty.
11. The duty manager will ensure that patrons do not use the dining area to the south during live entertainment, to avoid patron noise impacting on neighbouring complainants.
12. A staff member will be on the door after the final event and on closure of the hotel to thank patrons for their business and politely request that they respect the neighbours and move on quietly when leaving.
13. A staff member will undertake a walk around the venue and across to the boundary of the neighbouring property to the south, after closing, to assess and note any potential noise impacts and to advise the duty manager.
14. Any external crowds or loitering patrons will be swiftly dealt with by door hosts or the management during regular walks around the premises. They will be asked if they need assistance with their journey home and requested politely to respect the neighbours and move on quietly.

Consultation and submissions

On 14 December 2023 the Office of ILGA invited submissions on this review matter and received responses from NSW Police, Lismore City Council, Liquor & Gaming NSW (L&GNSW), a local resident, and a legal representative for the complainants. The timetable was extended to 29 January 2024 at the request of the review applicant to allow them time to provide additional evidence in support of their application.

The hotel, as review applicant, was provided with copies of the submissions received and their legal representative provided the final submission in response on 3 April 2024.

Summary of key points raised in submissions

Submission on behalf of NSW Police, received 13 February 2024:

- noted they have little evidence to support or disprove complaints relating to offensive noise emitting from the hotel, and no evidence to support claims that the premises may be breaching conditions imposed.

Submission on behalf of Lismore City Council, received 29 February 2024:

- noted inconsistencies between the applicants' and council records in relation to timing of 'unauthorised' works at the hotel and that a development application had not been received by Council
- noted that a lack of a noise performance standard, such as the LA10, and the undertaking of compliance monitoring to demonstrate compliance with an adopted standard is not consistent with Council's regulatory standards.

Submission from a resident in support of the original complainant, received 1 March 2024:

- endorsed comments and sentiment raised in the original complaint regarding noise levels from the hotel
- noted 'frightening and abusive' comments on social media which the hotel had not addressed or removed.

Submission on behalf of complainants, received 13 March 2024:

- asserted that the hotel had encouraged online vilification of the complainants and caused significant distress
- considered that little weight should be given to the hotel's petitions and letters of support when determining whether the locally residing complainants had been unduly disturbed by the hotel's operations
- observed that the hotel did not dispute the acoustic evidence provided by the complainants' acoustic consultants, being that the noise from the hotel exceeded the LA10 condition by at least 15 dB
- maintained that the complainants had attempted to amicably resolve the complaints with the hotel's owners without success.

Submission on behalf of L&GNSW, received 14 March 2024:

- the LA10 noise criteria, considered by L&GNSW to be 'suitably objective', provides a technical benchmark against which noise from premises can be measured
- any claim that the complainants have 'exaggerated' the disturbance they experience is refuted by the acoustic assessments they obtained over the course of an extended period – this also outweighed the order of occupancy finding that favoured the hotel
- given the lack of any prior complaint history against the hotel, and that all parties to the complaint have resided in their current locations for at least 20 years, L&GNSW contend that it was not unreasonable to conclude that the hotel's new ownership and operation had increased the frequency of and/or noise level generated by 'Tier 2' events (larger scale ticketed shows)
- it is open for the Authority to amend the current LA10 condition imposed on the hotel's licence. Any variation should be limited to the relevant points of measurement within the standard condition, being 15 metres from the nearest affected residential dwelling, rather than the boundary of the nearest residence. This recognises the historical

connection the hotel has with live entertainment while maintaining a reasonable and objective standard against which the level of amplified entertainment can be tested

- the noise limiter condition remains necessary to ensure compliance with the LA10 criteria (or revised LA10 criteria) and will assist the hotel to comply with its Noise Management Plan (NMP)
- the enclosed beer garden condition remains a practical measure to help mitigate disturbance.

Submission on behalf of the review applicant, received 3 April 2024:

- denied allegations that the hotel had published or disclosed names of individual complainants or encouraged derisory comments about them
- contends that it would be inappropriate to apply unaltered LA10 noise criteria to this rural setting and circumstances
- noted the overwhelming community support for the continuation of live band performances at the hotel
- proposed a suite of conditions to limit and control noise from live performances, alongside an alternative LA10 condition
- disputed L&GNSW's conclusion that the frequency and/or noise levels generated by Tier 2 events had increased since the hotel's new owners commenced operations, citing evidence by former licensees to the contrary.

Additional information request to L&GNSW

Following the submissions process, the Office of ILGA sought additional information from L&GNSW to ensure all relevant material regarding this matter would be put to the Authority for consideration. More specifically, more information was needed in relation to the statement in the L&GNSW submission:

'A further compromise could be that a certain number of planned events per year are allowed to exceed the LA10 criteria by a certain level, and this would not be considered 'undue' (or otherwise) in the case of any future statutory disturbance complaints. If the Authority wished to go down this path, the applicant could be given the opportunity to formulate such a compromise. L&GNSW would appreciate a further opportunity to make a submission specifically on this'.

L&GNSW requested a copy of the review applicant's 3 April 2024 submission to inform their response, which was then submitted 22 July 2024.

Summary of key points - L&GNSW response to request for additional information

- L&GNSW's 14 March 2024 response to the invitation for submission noted their main concern being that the suite of conditions initially proposed by the applicant did not provide reference to a technical standard against which sound could be measured, or provide any assurance that the volume of amplified entertainment at the hotel would be contained to a reasonable level
- the applicant's revised proposal in response to the invitation for submissions did provide a varied LA10 conditions. L&GNSW considered that the proposed LA10 condition did provide a measurable standard against which compliance could be tested
- L&GNSW observed that the proposed 'evening limit' was at least 10dBA quieter than the noise levels referenced as 'intrusive' by the complainants' acoustic report of June 2023

- they considered that the additional consented conditions put forward by the applicant addressed concerns they had raised.

The L&GNSW response was provided to all relevant parties for comment on 8 August 2024.

At this stage it was observed by the complainants' legal representative that, in preparing the additional information, L&GNSW had not been provided with any submission or acoustic report prepared on behalf of the complainants.

In order to ensure procedural fairness a second stage submission process was undertaken to allow all relevant parties the opportunity to provide further submissions based on all relevant evidence.

Stage 2 submissions

On 1 October 2024 a second invitation was issued, with submissions received from L&GNSW, and JDK Legal (on behalf of the complainants). A final submission in response was provided by Hatzis Cusack on behalf of the Eltham Hotel on 7 November 2024.

Summary of key points raised in submissions

Submission on behalf of L&GNSW, received on 8 October 2024:

- L&GNSW rely on their previous submissions provided 14 March and 22 July 2024, noting no new information had been provided by the review applicant.

Submission on behalf of complainants, received on 17 October 2024:

- complainants reiterated that they do not wish for live music to stop at the hotel, rather have it at a level that does not negatively impact them in their homes
- they argue that the concept of balancing rights in the context of licensed premises is not an exercise in satisfying the needs, demands and expectations of the broader community. Rather, the balance is between the rights of the licensed premises to trade and provide entertainment, and the right of the complainants to the quiet enjoyment of their homes
- complainants seek to have the previously imposed LA10 noise criteria upheld arguing that uniform and consistent application of the LA10 standard is crucial for providing clarity and certainty to the licensed premises and their local communities
- they argue that the Authority should place little or no weight on the petition from the 'broader community' in proceedings concerning noise disturbances in the immediate vicinity of the hotel.

Submission on behalf of review applicant, received on 7 November 2024, in response to the L&GNSW and complainants' submissions:

- the LA10 is not a legislated standard, so the applicants' proposed variation should not be considered an exception to a uniform LA10 standard
- the concept of 'undue' in relation to undue disturbance is flexible depending upon circumstances (including history, nature and number of musical performances at the hotel) and the role of the hotel in meeting the expectations of the broader community
- the licensees are committed to reaching a reasonable middle ground between themselves and the complainants
- the licensees advise that styles of music and bands that are not appropriate for a rural setting have been phased out of their programming
- they also note a strong and positive ongoing engagement with local Police and the local Liquor Accord.

Our findings

After considering the material on which the delegate made their decision, the submissions received in response to the review application, further information provided by L&GNSW and submissions in response to that information, we agree with the delegate's view that there was sufficient evidence to make a finding that undue disturbance had occurred.

We consider that the hotel was initially slow to act in addressing the disturbances effectively. However, we note that the venue has since upgraded equipment and successfully applied for soundproofing grants under the program introduced as part of the NSW Government's vibrancy reforms. We acknowledge the measures proposed by the applicants in their Noise Management Plan to address noise issues.

In order to balance public demands and expectations required to maintain the hotel's ability to offer live band performances, the hotel needs to ensure that its operation contributes to, and does not detract from, the amenity of community life. As such, we consider that a fair and reasonable compromise is proposed by the following:

In accordance with the powers under section 36A(4) of the GALA Act, we

1. **Vary** the LA10 noise criteria condition imposed in the delegate's decision dated 10 November 2023 to be more context specific:
 - the LA 10 noise level emitted from the licensed premises shall not exceed the following levels, when measured at any point within a 15-metre radius of an affected residential building:
 - between 6.00pm and 10.00pm – 40dBA; and
 - at all other times – 45dBA.

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 10.00pm and 7.00 am on Sunday to Wednesday and between the hours of 12.00 midnight and 7.00 am on Thursday to Saturday.
2. **Confirm** the delegate's decision of 10 November 2023 in relation to imposition of the following conditions:
 - noise limiter condition
 - enclosed beer garden condition.
3. **Impose** those other conditions (items 2-14) consented to by the applicant, as set out in the applicants' Noise Management Plan.

Relevant legislation

We are satisfied that the decision under section 81 of the Liquor Act, to which the review application relates, is a reviewable decision for the purposes of section 36A(1) of the GALA Act and that the review applicant is able to lodge the review application in accordance with section 36A(2) and section 36A(2A) of the GALA Act.

We are satisfied that the decision to vary and to confirm the delegate's decisions has been made in accordance with the Authority's powers under section 36A(4) of the GALA Act.

The material we considered

In determining the review application, the following material was considered:

Material before the delegate:

- original material that was before the decision maker at the time of imposing the conditions under section 81, including submissions from NSW Police, Lismore City

Council, local residents (complainants) and the hotel

- liquor licence for Eltham Hotel, Eltham (LIQH400114575) dated 28 August 2023

Review application and submissions:

- review application dated 8 December 2023 and supporting documents
- further evidence and submissions received from the review applicant, dated 19 February 2024
- submission from NSW Police in response to the application for review, dated 13 February 2024
- submission from Lismore Council in response to the application for review, dated 29 February 2024
- submission from a resident in support of the complainants in response to the application for review, dated 1 March 2024
- submission from the complainants' representative in response to the application for review, dated 13 March 2024
- submission from L&GNSW in response to the application for review, dated 14 March 2024
- submission from the review applicants' representative in response to submissions, dated 3 April 2024
- submission from L&GNSW in response to the request for further information, dated 22 July 2024
- submission from the complainants' representative in response to further information from L&GNSW, dated 19 August 2024
- submission from L&GNSW in response to previous submissions from relevant parties, dated 8 October 2024
- submission from the complainants' representative in response to previous submissions from relevant parties, dated 17 October 2024
- submission from the review applicants' representative in response to submissions, dated 7 November 2024.

Decision to be published

This decision will be published on the ILGA website.

If you have any questions

Please contact the Office of ILGA at office@ilga.nsw.gov.au if you have any questions.

Yours sincerely



Chris Honey
Deputy Chairperson
Independent Liquor & Gaming Authority