



## Live music and the ‘agent of change’ principle

Sean MCARDLE<sup>1</sup>; Gillian LEE<sup>2</sup>; Elizabeth HUI<sup>3</sup>

1 Rigby Cooke Lawyers, Australia

2 Marshall Day Acoustics, Australia

3 Marshall Day Acoustics, Australia

### ABSTRACT

The gentrification of Melbourne’s inner suburbs since the late 90s has resulted in increasing tension between inner city residential development and well-established music venues. Fuelled by strong community support for live music, the Victorian government recently announced a suite of reforms to implement the ‘agent of change’ principle to protect live music venues from residential encroachment. In advance of pending law reform activities, this paper examines the key issues relevant to development of noise policy to complement the agent of change principle. The paper describes the current regulatory framework in Victoria for music noise, identifies risks associated with potential policy approaches and provides high level discussion concerning stakeholder viewpoints as relevant to the issue.

Keywords: Noise policy, music, residential encroachment. I-INCE Classification of Subjects Number: 68.7

### 1. INTRODUCTION

At the time of writing, the Victorian government is set to release a suite of reforms to implement the ‘agent of change’ principle to protect live music venues from residential encroachment (1). The agent of change principle places the responsibility for the costs of noise management on the party proposing a change in land use (2). For an existing music venue, the principle means that (3):

where a venue is currently compliant with relevant [noise limits] and its operation does not change, new residential or other noise sensitive development should not lead to new compliance costs for the venue operator. The onus of any remedial measures in this instance, falls upon the new resident, owner or developer – the agent of change.

The agent of change reforms are a whole of government commitment, spanning the planning, liquor licensing and environmental portfolios. Regarding noise and residential encroachment, the government’s ‘Live Music Action Agenda’(4) promises planning changes to allocate the responsibility for noise controls to the agent of change, and a review of relevant statutory noise standards that apply independently of the planning regime under the *Environment Protection Act 1970* (Vic).

While the decision to allocate responsibility for the costs of noise management to the agent of change is a straight forward idea, there has not been any detail released about how this is going to work in practice. The Victorian government has released a discussion paper seeking comment on, inter alia, what form statutory noise controls could take to allow the agent of change principle to be applied (5).

In advance of the pending reforms, this paper aims to consolidate and examine issues concerning the application of the agent of change principle. The paper outlines the current regulatory framework, discusses key issues relevant to the development of new statutory noise policy to accommodate the agent of change principle and identifies stakeholder objectives for the management of music noise.

---

<sup>1</sup> smcardle@rigbycooke.com.au

<sup>2</sup> glee@marshallday.com

<sup>3</sup> ehui@marshallday.com

## 2. REGULATORY FRAMEWORK

The regulatory framework for music noise in Victoria spans the planning, liquor licensing, law enforcement and environmental portfolios. The key elements of this framework, as relevant to the agent of change principle, are outlined below.

### 2.1 Environmental framework – State Environment Protection Policy No. N-2

The key instrument regulating music noise from public premises in Victoria is State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2). State Environment Protection Policies (SEPPs) are made under the *Environment Protection Act 1970* (Vic). They are a form of subordinate legislation and are ‘law’ like statutes or regulations.

SEPP N-2 is both a legal and technical document. Legally, SEPP N-2 places mandatory obligations on public premises owners and occupiers to meet prescribed noise limits. As a technical standard, SEPP N-2 provides procedures for calculating music noise limits, determines how, when and where limits apply and states the assessment procedures that must be followed to determine compliance with the noise limits.

SEPP N-2 applies to existing music venues and is required to be considered by planning decision makers, for example, when deciding whether to grant a planning permit (clause 13.04 of the Victorian Planning Provisions) (6).

### 2.2 SEPP N-2 noise limits and controls

The SEPP N-2 noise limits for indoor venues (like pubs and clubs) are set relative to the background noise level in a noise sensitive area (e.g. residential premises or other accommodation, such as a hotel or hospital). In nearly all cases, SEPP N-2 requires that noise is assessed external to noise sensitive buildings. There are limited exceptions to this, such as where the dominant noise transmission path is through a solid building element such as a floor, or wall without openable elements such as windows.

For indoor venues, the SEPP N-2 limit is 5dB ( $L_{Aeq}$ ) above the background level ( $L_{A90}$ ) during the day and evening periods. In the night period, the limit is 8dB ( $L_{OCT10}$ ) in octave bands above the background level ( $L_{OCT90}$ ).

For outdoor venues (i.e. open air events), SEPP N-2 sets a fixed noise limit of 65dB ( $L_{Aeq}$ ). Factors such as background noise or land use zoning are not taken into account. Musical entertainment from outdoor venues must not start before 12 pm and must end by 11 pm, or 10 pm if the duration of the concert is greater than five hours in total. In addition, an outdoor venue is not permitted to hold more than six concerts per year without authorisation from the Environment Protection Authority Victoria (7).

### 2.3 SEPP N-2 and the agent of the change principle

Currently under SEPP N-2, the obligation to comply with noise limits at sensitive buildings is always with music venue operators. Existing use rights (i.e. preservation of the status quo with respect to obligations) are not afforded under the Policy. However despite this, the agent of change principle can be accommodated pursuant to the current Policy, albeit with some difficulty. SEPP N-2 requires noise to be assessed outside noise sensitive buildings in the majority of cases. Therefore application of the agent of change principle pursuant to the current Policy necessarily involves a residential developer paying for noise controls at the music venue to ensure that the venue does not become non-compliant with SEPP N-2 as a result of its residential development. An issue with this approach is that a music venue operator is a third party to the planning process involving the proposed residential development. For noise controls to be applied at the venue, the venue operator must voluntarily consent to noise controls. Such agreements are negotiated on an ad hoc basis and the process presents significant practical issues. Legislative backing of this process, however, should help to alleviate some of the uncertainties and difficulties for stakeholders. For the reasons discussed in Section 3 of this paper, the authors believe residential developer funded noise controls at music venues should remain open as one of the design approaches available to implement the agent of change principle.

### 2.4 Planning framework

The agent of change principle is to be applied via planning consent processes when a residential development is proposed near an existing live music venue. Under the Victorian planning system, when planning permission is required to establish a proposed land use or development, the onus is on

the applicant to demonstrate to the decision maker that the proposal is ‘acceptable’ in terms of the relevant statutory provisions, decision guidelines and policies. Planning permits include ‘conditions’ which the permitted use is subject to in order to remain lawful after the permitted use/development commences. Presumably, application of the agent of change principle in planning would involve:

1. The permit applicant demonstrating noise outcomes for future residents will be ‘acceptable’ and will not impose additional noise compliance costs on any existing live music venue.
2. Permit conditions to ensure that the proposed outcomes are achieved after construction of the permitted dwellings (i.e. acceptable noise for residents and no additional compliance costs for designated venues). It is likely that the permit conditions would require the permit holder to undertake testing to demonstrate that these conditions have been met.

## **2.5 Relationship between planning consent (permit) and SEPP N-2**

A planning permit cannot vary the requirements of SEPP N-2 as SEPP N-2 sits higher than planning decisions in the legal hierarchy. Therefore solutions for ensuring acceptable noise outcomes developed through planning processes will also need to be legally consistent with SEPP N-2. Although SEPP N-2 is currently under review, the government has indicated in its discussion paper that amended policy will not be released until 2016, meaning that developments occurring during the next two years will be subject to the current provisions of SEPP N-2.

## **2.6 ‘Residual’ noise obligations not affected by ‘agent of change’ decisions**

There are several potential noise obligations for music venues that will remain in force despite planning interventions to implement the agent of change principle, or amendments to SEPP N-2. These obligations include:

- Music venue planning and liquor licences, which commonly include conditions that the venue not cause ‘undue detriment to the amenity of the surrounding area’.
- Police powers to abate unreasonable ‘entertainment’ noise under section 48AB of the *Environment Protection Act 1970* (Vic).
- Statutory nuisance provisions in the *Public Health and Wellbeing Act 2010* (Vic) (noise is expressly referenced as being capable of constituting a nuisance for the purposes of this Act).

Broadly, the above noise obligations rely on subjective tests concerning whether noise is ‘reasonable’ or ‘acceptable’. These obligations can be considered ‘residual’ in the context of the agent of change principle reforms as they will continue to apply despite agent of change interventions in planning decisions or amendments to SEPP N-2.

Of course if the noise outcomes in the new residential development are in fact ‘acceptable’, residual noise obligations will not be an issue for music venues. However the acceptability of the noise outcomes will remain open to be tested. Because of this, the agent of change principle applied through planning or an amended SEPP N-2 is not an absolute safeguard for music venues. For the agent of change principle to work effectively, it is imperative that the amenity outcomes for future residents are in fact ‘acceptable’. This heightens the importance of getting the acoustic standards and design measures right through agent of change planning processes as the planning process (including permits etc.) will not exculpate a live music venue from breaches of its residual noise obligations.

## **3. Policy considerations**

This section discusses some of the key policy issues that need to be addressed to develop a workable regulatory framework to accommodate the agent of change principle.

### **3.1 Outdoor and indoor assessment of noise**

Current statutory noise limits provided in SEPP N-2 require noise to be assessed external to sensitive buildings (like dwellings). Although there is merit in this approach as a general rule (see next section), this approach limits the design options available to manage noise issues as treatments to modify the noise environment within dwellings do not achieve compliance with SEPP N-2.

There are several practical reasons why environmental noise policies around the world typically require noise to be assessed outside sensitive buildings rather than inside (8). As outlined in Victorian government’s noise policy review discussion paper, some reasons are as follows (9):

- As a general rule, noise controls applied at the source of noise are more efficient than controls applied at receivers of noise, such as residential buildings. For example, a music venue may

need to upgrade 10-20 square metres of glazing to stop noise escaping, whereas an apartment that receives noise may have to upgrade hundreds of square metres of its facade to stop noise getting in. By setting a noise limit that applies outside a sensitive building, a noise policy encourages noise controls to be implemented at the noise source.

- In planning and design, it is simpler to predict noise levels external to sensitive buildings. In addition, external levels can be predicted more accurately.
- It is easier to monitor compliance outside sensitive buildings.
- External assessment points provide consistent obligations on businesses as noise limits are not dependent on the acoustic properties of buildings where noise is received.
- Soundproofing of residential buildings is ineffective if residents open their windows.
- The reduction of external noise intrusion as a result of soundproofing residential buildings can limit ‘masking’ inside the building, leading to a requirement to upgrade inter-tenancy partitions in apartments to reduce noise from neighbours.

### **3.2 Limiting music noise ‘audibility’ or ‘level’?**

In addition to the practical issues with indoor noise limits outlined above, there is also an issue concerning the *effectiveness* of indoor assessments of noise when the objective is to limit the audibility of the noise, rather than its absolute level. Limiting music noise audibility is the current objective of SEPP N-2 which sets noise limits relative to background noise levels in a noise sensitive area. The reasons for aiming to reduce audibility were explained in the 1984 explanatory notes to the draft SEPP N-2 policy (9). The report explained that:

unlike transportation or industrial noise, music has a structure or pattern which conveys information and human feeling to the listener. Consequently, music is often difficult to ignore and can readily induce antipathy in the listener when it is unwanted. There are strong indications that exposed people can become sensitized [sic] to the information content so that they automatically ‘tune in’ even when louder background noise is present.

The above description is persuasive and supports the objective of limiting audibility when it comes to reducing the impacts of music noise on residents. However, this objective is difficult to realise via controls at noise receiving buildings rather than treatments at the music venue.

For controls at noise receivers, the design approach that immediately comes to mind is to ‘soundproof’ the receiving building. However, soundproofing of receiving buildings reduces both background noise (masking) and music noise, and does not necessarily reduce music noise audibility. Therefore, even if a statutory noise policy allows noise to be assessed inside sensitive buildings, difficult issues remain. Should the noise limit be set relative to the background noise level *inside* the sensitive building? This would provide the surest way of limiting audibility, but how will designers assess this in practice? Presumably the designer would need to:

- (1) Predict the background noise level inside the receiving building. The background noise could be based on external ambient noise break-in or perhaps from mechanical services equipment in the building, if any.
- (2) Predict the music noise break-in to the relevant space.
- (3) Vary the treatments and controls applied to the sensitive building to reduce the margin of the music noise level above the internal background level.

It can be appreciated that where the dominant source of background noise inside the receiving building is external ambient noise coming through the same building element (e.g. a window) as the music noise, then the ability to reduce the margin of the music noise above the background noise will be limited. In this case, the only feasible approach is to reduce all noise to a level so low that it would not be considered annoying, despite it being audible. However, given the informational component of music noise, how quiet would the noise need to be to no longer be overly annoying, or limit a resident’s ability to fall asleep? The example of the quiet yet sleep-disrupting dripping tap or ticking clock comes to mind as a potential difficulty for setting appropriate internal noise limits.

If they are used, internal music noise criteria must consider low frequencies (31-125Hz) to properly account for audibility in internal spaces. Single-figure criteria, especially those that are A-weighted or normalised to Noise Rating (NR) curves can allow for relatively prominent low-frequency levels while still complying with the overall level.

### 3.3 Best practice

Based on the above discussion, it is clear that no single approach will work in all cases. Therefore, policy makers should have a best practice approach in mind when developing statutory noise policy to implement the agent of change reforms. Ideally, a statutory noise policy would support the following as a hierarchy of design responses:

- The agent of change to pay for noise controls at the music venue.
- If music noise cannot practicably be controlled at the source, then alternative design measures to reduce music noise audibility, including design changes in the proposed residential development. Design measures to reduce audibility could include:
  - Floor plan layout – e.g., putting bedrooms on the side of a building less exposed to music noise
  - Noise masking systems, either relying on heating, ventilation and air conditioning noise (HVAC), or by installing an electronic noise masking system.
  - Improvements to sound insulation of building elements on the music noise exposed side of a building (this approach would likely need to be considered in conjunction with the above points).
- If the above cannot be accommodated, then a reduction in music noise levels in absolute terms (ignoring audibility) at noise receiving buildings to a sufficiently low level to prevent disturbance.

## 4. Stakeholder issues

This section outlines some of the key stakeholder issues and objectives relevant to the agent of change principle and the management of music noise more generally.

### 4.1 Venue operators

Most venue operators would like to maintain the status quo in operations and also have the ability to expand operations in the future. ‘Expansion’ may include longer hours of operation, increased numbers of patrons and the provision of outdoor areas. There are many operational venues that are affected by the encroachment of residential dwellings.

Venues not constrained by the presence of nearby residential dwellings can allow queuing of patrons outside the venue, these venues do not need to provide a high level of sound insulation or include air lock ingress/egress points. Live music performers are free to bring in their own amplification equipment and are not restricted by noise limiters/monitors etc. Bump in and bump out (when bands set up and do sound checks) do not have to take place within limited times.

The effect on the venue operator is not just limited to ‘turning down the volume’; there are many operational/managerial procedures that need to be considered.

### 4.2 New residents – getting the balance right in different land use contexts

It is often the case that new residents move into a vibrant social area to enjoy the entertainment venues available and associated cultural milieu, only to find that such an area is noisy, especially at night. People who have moved in from quiet urban areas are particularly unimpressed by the higher noise levels experienced and often expect to enjoy the same noise environment experienced in quiet suburbs. When resident expectations of amenity differ from the actual amenity provided by a new living arrangement, complaints are more likely to occur.

There is no doubt that protection from excessive noise is important, especially during the night-time period, when residents are trying to sleep. However, it appears fair that noise amenity expectations of residents encroaching on zoning designated for commercial and industrial uses should be different to expectations for residential or similarly ‘quieter’ zones, particularly at night. This concept is reflected in the noise standards for industrial and commercial noise provided in Victoria’s statutory commercial and industrial noise policy, State Environment Protection Policy (Control Of Noise From Industry, Commerce And Trade) No. N-1 (SEPP N-1). The SEPP N-1 noise limits are based, in part, on land use zoning and provide higher noise limits in commercial, industrial and mixed use areas than wholly residential neighbourhoods. This concept of varying acceptability of noise based on land use zoning is not reflected in current music noise policy in Victoria (SEPP N-2), which sets the same music noise standard across for all areas of the State. This raises several value based questions for the review of music noise policy in Victoria. For example:

- What level of residential amenity is appropriate for areas predominantly zoned for commercial business use?
- Does the amenity appropriate to the area match with the expectations of the resident?
- Is it appropriate for a statutory noise policy to provide differing levels of protection from noise based on the type of neighbourhood where noise is received? Are there equity issues with this approach, given that poorer people generally live in lower amenity areas?
- How can a noise policy appropriately balance resident protection from noise, whilst supporting economic growth and Victoria's music industry?

In Victoria, music venues are located in myriad land use zones and urban contexts. There is no specific 'music venue' zoning in Victoria to clearly define the objectives of an area in relation to support for live music vis a vis residential uses. It is often the case that music venues are located in zones designated for commercial or industrial uses. Where a music venue is isolated from other late night venues and is surrounded by uses that operate during business hours only, background noise levels can be comparably low at night leading to stringent noise limits if residential encroachment occurs.

If noise mitigating treatment is directed at the residential development rather than the music venue, impacts on resident lifestyle may arise, such as the need to close windows, or not access external areas to achieve an appropriate level of internal amenity at night. Such impacts are not ideal, as discussed in earlier sections of this paper.

#### **4.3 Local government**

Local government plays the lead role in addressing local amenity concerns of residents in Victoria, such as responding to noise complaints. If the legislation regarding encroachment is clear, then the job of the local council should become easier especially in relation to dealing with noise complaints. Theoretically, if appropriate noise control measures are incorporated whenever residential encroachment occurs, then the number of complaints should be reduced.

#### **4.4 Acoustic consultant**

The consultant is generally requested to provide an assessment of noise and determine whether the regulatory noise limits are achieved. The consultant requires a clear and legally certain methodology for assessing noise. In general, the sampling procedure, measurement location, type of measurements and the choice of equipment should be in accordance with the objective of the measurements. There may be a number of objectives, such as investigation of complaints, assessing compliance with regulations or evaluation of remedial measures.

### **5. Acoustic design and assessment – implementing agent of change**

#### **5.1 Building design**

The two main options to address music noise issues when residential encroachment occurs are to treat the source (the music venue) or the receiver (new residential buildings). These options are outlined in Table 1.

Table 1 – options and issues for agent of change noise treatments

<b>Treat the source (venue)</b>	<b>Treat the receiver (residential)</b>
<ul style="list-style-type: none"> <li>• Improve building sound insulation <ul style="list-style-type: none"> <li>• Turn the music down</li> </ul> </li> <li>• Restrict activities at the venue (e.g. restrict trading hours and/or reduce music 'volume')</li> </ul>	<ul style="list-style-type: none"> <li>• Adequate sound insulation (reducing overall sound levels to internal spaces)</li> <li>• Modify spatial layout, internal and external areas to shield most sensitive spaces (e.g. bedrooms) <ul style="list-style-type: none"> <li>• Sound masking techniques (to reduce audibility)</li> </ul> </li> </ul>
<p><b>Issues</b></p> <ul style="list-style-type: none"> <li>• Will existing activities be unfairly restricted?</li> <li>• Current operational procedures may require radical change</li> </ul>	<p><b>Issues</b></p> <ul style="list-style-type: none"> <li>• Interim inconsistency with SEPP N-2, which sets compliance point external to noise sensitive buildings</li> <li>• Residents may need to close windows in order to achieve appropriate amenity</li> </ul>

Treating the source is generally the easiest and most economical solution. Adequate sound insulation and appropriate managerial practices can be used so that noise from a venue is reduced to appropriate levels. However such treatments may be prohibitively expensive in particular cases or not allowable if the venue is within a heritage building. In addition, management controls (such as limiting operating hours/music noise levels) may not be feasible for the venue from a business perspective.

New residential buildings such as apartments could be designed so that internal music noise levels are acceptable with windows closed (using the techniques discussed in Section 3.2 and in Table 1). In this instance, residents would need to be aware that music noise in outdoor areas may be intrusive as will music noise to indoor areas if windows are open.

## **5.2 Undertaking the assessment**

One important consideration will be the method by which the base music noise levels of the venue are determined. For example, if the developer organises noise measurements without the knowledge of the venue, it will not be known if the venue was operating at typical levels during measurement surveys. Conversely if the developer liaises with the venue operator, the operator may take the opportunity to turn the volume of music up to levels not generally experienced at the venue in order to secure a higher level of sound insulation.

## **6. CONCLUSIONS**

The Victorian government has recently announced a suite of reforms to implement the ‘agent of change’ principle to protect live music venues from residential encroachment. In advance of pending reforms, this paper provided an examination of key policy and stakeholder issues concerning the development of statutory music noise policy to accommodate the agent of change principle.

## **REFERENCES**

- 1 Guy, M (Minister for Planning), O'Donohue, E (Minister for Liquor and Gaming Regulation) & Smith, R (Minister for Environment and Climate Change). Live music rocks under Napthine Government. State Government Victoria Media Release. 4 August 2014. Viewed 8 August 2014. [http://www.premier.vic.gov.au/images/140804\\_Guy-O'Donohue-Smith\\_-\\_Live\\_music\\_rocks\\_under\\_Napthine\\_Government.pdf](http://www.premier.vic.gov.au/images/140804_Guy-O'Donohue-Smith_-_Live_music_rocks_under_Napthine_Government.pdf).
- 2 Department of Transport Planning and Local Infrastructure (Vic). Live Music Practice Guide. Viewed 8 August 2014. <http://www.dpcd.vic.gov.au/planning/publicationsandresearch/codes-and-guidelines/live-music-targetforce>.
- 3 Department of Transport Planning and Local Infrastructure (Vic). Live Music Practice Guide. Viewed 8 August 2014. <http://www.dpcd.vic.gov.au/planning/publicationsandresearch/codes-and-guidelines/live-music-targetforce>.
- 4 State Government Victoria. Live Music Action Agenda. August 2014. Viewed 12 August 2014. [http://www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0010/224983/Live-Music-Action-Agenda\\_August-2014.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0010/224983/Live-Music-Action-Agenda_August-2014.pdf).
- 5 Environment Protection Authority (EPA) Victoria. Review of Victoria's State Environment Protection Policies for Noise. EPA publication 1570. August 2014. Viewed 15 August 2014. <http://www.epa.vic.gov.au/our-work/publications/publication/2014/august/1570>.
- 6 Department of Transport, Planning and Local Infrastructure (DTPLI). Planning Schemes Online. <http://planningschemes.dpcd.vic.gov.au/schemes/vpps>.
- 8 International Institute of Noise Control Engineering (I-INCE). Survey of legislation, regulations, and guidelines for control of community noise. July 2009. <http://www.i-ince.org/data/iince091.pdf>.
- 9 EPA Victoria. Draft State Environment Protection Policy (DN2) with explanatory notes: control of entertainment noise. March 1984. Section 2.3.1 ‘Characteristics of Music Noise’.