



A review into the efficacy of Section 53.06 - Live Music Entertainment Noise of the Victoria Planning Provisions, known colloquially as the "Agent of Change" clause.

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3 December 2018

Cover photo: The Gasometer Hotel with adjoining residential development under construction featuring 'winter gardens' on the north face. Photo is taken from Alexander Parade which has extremely high levels of traffic noise or background sound as used in SEPP N-2 analysis.



1. Purpose

To provide a report on the overall effectiveness of the Agent of Change planning law in the State of Victoria since it was implemented in 2014 and to discuss pathways to a more effective delivery and analysis of key issues and examples from several case studies.

2. Definitions

For the reader's convenience, reference to the 'Agent of Change policy' means s53.06 of the Victorian Planning Provisions (VPP) and its explanatory Planning Practice Note 81. Reference to the 'Agent of Change clause' means s53.06 of the Victorian Planning Provisions (VPP) specifically.

Capitalisation of 'Live Music Venue' refers to alignment with the definition in s53.06 otherwise the meaning is generic.

Capitalisation of 'Designated area' refers to alignment with the definition defined by the VCGLR under the Liquor Control Reform Act 1998 SECTION 147 – ORDER DECLARING A DESIGNATED AREA

<https://www.vcglr.vic.gov.au/community-services/government-initiatives/designated-areas>

3. Summary of suggested policy improvements.

Suggested policy improvements to s53.06 of the VPP.

1. That the clause s53.06 be amended to reflect the wording in Planning Practice Note 81 for the purpose of clarity and accuracy. The suggested wording should be clarified by reference to "existing and likely future levels" instead of "unreasonable levels".

*"To ensure that noise sensitive residential uses are satisfactorily protected from **existing and likely future** levels of live music and entertainment noise."*

See Recommendation 1

2. That the definition of Live Music Venue contained in s53.06 be reviewed to tighten its meaning specifically addressing cultural and economic use and, frequency of use of live and-or amplified music.

See Recommendation 2.

3. The Victoria State Government consider amending s53.06 to include the use of Designated areas as a trigger for live music impact assessment to ensure that the Agent of Change policy is applied.

It is recommended that each of the relevant councils formally define the location of these Designated areas and reference these areas in their local policies to streamline and ensure that the Agent of Change policy is applied by adopting the practice of assuming that the Agent of Change policy is applicable if a planning application site is located in a Designated area.

This practice should also be reflected in an amendment of Practice Note 81.

See Recommendation 5.

4. That the definitions for *indoor* and *outdoor live music entertainment* venues in the Agent of Change policy be aligned with definitions of *indoor* and *outdoor* venues in SEPP N-2.

That the definitions in SEPP N-2 for *indoor* and *outdoor* venues clarify the use of music outside in non-concert and non-festival contexts.

See Recommendation 6.

5. That a Recording Studio should be considered to be a Live Music Venue although in reality, the use is far more benign. Sound emissions will be practically, minimal. As such it should be included in the Live Music Venue definition alongside rehearsal studios and referenced in Planning Practice Note 81.

See Recommendation 8.

Suggested improvements to Planning Practice Note 81. of the VPP.

6. Unless a council has the necessary qualified staff, and resources to robustly identify all potential noise sources and assess the noise attenuation work required to address any noise issues necessary to comply with State Environment Protection Policy (Control of Music Noise from Public Premises) No .2, then it should be best practice to have the relevant acoustic reports peer assessed by a suitably qualified and accredited acoustic consultant. The cost of which should be explicitly borne by the planning permit applicant.

Officer support for the issuing of a planning permit should not be given unless the acoustic reports concur. If necessary, s53.06 should be amended accordingly.

See Recommendation 3.

7. That a standard draft condition be added to Practice Note 81 that addresses the necessity of pre-occupancy acoustic testing and that an occupancy permit is not granted unless the sound attenuation performance criteria of the soundproofing solution is achieved and demonstrated. For example:

Prior to occupancy, a suitably qualified and accredited acoustical engineer test, verify and certify the acoustic performance of the building and that it meets the performance and design criteria articulated in the endorsed acoustic report, to the satisfaction of the responsible authority.

See Recommendation 7.

8. That Planning Practice note 81 be amended to cover the consequences of removing an existing building or structured that is effectively acting as an acoustic shield to existing residents proximate to a Live Music Venue. This should include draft planning permit conditions that address this scenario. For example:

If the responsible authority receives music related noise complaints from local residents then, at the developers cost, the developer erects a temporary structure, designed by a suitably qualified and accredited acoustic engineer, to act as acoustic shield to protect the affected residents.

See Recommendation 9.

9. That the wording for a standardised note be included on planning permits, that are subject to the Agent of Change policy, be drafted and included in Planning Practice Note 81. The Note would describe the nature of the neighbourhood soundscape and the type of amenity to be expected by the property owner.

See Recommendation 10.

10. The status and definition of Winter Gardens should be discussed in Planning Practice Note 81. in "ATTENUATING A NOISE SENSITIVE RESIDENTIAL USE" (p3) referencing the "Better Apartment Design Standards" and discussing the need for the SEPP N-2 measurement point for compliance purposes to be located in habitable rooms.

See Recommendation 14.

Suggested policy improvements to SEPP N-2 to be considered by the EPA as part of the current SEPP review process.

11. SEPP N-2 should be amended so the measurement point for compliance should be located in habitable rooms.

See Recommendation 14.

12. That the EPA consider guidelines for acoustic engineers to use standardised levels of background sound and recommended 'worst-case' sound levels of Live Music Sound within Live Music Venues, for the purpose of establishing SEPP N-2 design criteria for acoustic attenuation design solutions, in the context of the Agent of Change Policy.

See Recommendation 13.

13. That the purpose of SEPP N-2 be amended to emphasise that it is only used for enforcement purposes when based on a valid and verified noise complaint received by a responsible authority.

See Recommendation 16.

Other suggested policy improvements to achieve clearer and better policy outcomes.

14. That the Live Music Venue definition contained in s53.06 be either moved or added to s74 Land use terms, of the VPP and also addressed in the SFFP.

See Recommendation 2.

15. Notification of affected Live Music Venues should be automatically notified by adding an entry for s53.06 in s66.05 'Notice of permit applications under state standard provisions' of the VPP. Such a statutory requirement for notification would help overcome the situation where third-party appeal rights don't exist, such as in the Capital City Zone.

See Recommendation 4.

16. Music Victoria should consider whether it should adopt the role of the central industry receiver of planning referrals or notifications under section 66 of the VPP.

See Recommendation 4.

17. A 'Buyer's Beware' mechanism be inserted into section 32 (d) the Sale of Land Act 1962 requiring disclosure within the s32 of the Contract of Sale, of the nature of the neighbourhood soundscape to potential real-estate buyers of a proximate Live Music Venue.

See Recommendation 11.

18. That consideration be given to adding standardised glazing solutions, such as the Fortitude Valley Entertainment Precinct Design Standards, to the Building Code of Australia, if a precinct based method of applying the Agent of Change policy is contemplated by Government.

See Recommendation 12.

19. The status and definition of Winter Gardens should be discussed in "Better Apartment Design Standards" and addressed in Planning Practice note 81.

See Recommendation 14.

20. That the written opinion of the Chief Commissioner of Victoria Police be sought as to whether a Private Security License under the Private Security Act 2004, is required by parties other than the responsible authorities or the Live Music Venue and its consultants, to carry out acoustic surveillance for the purpose of third party SEPP N-2 compliance assessments.

See Recommendation 15.

21. That the Department of Environment, Land, Water and Planning fund information seminars in collaboration with Music Victoria and the Municipal Association of Victoria educate local council officers, acoustic consultants and live music operators on the proper legal application of the Agent of Change policy.

See Section 6.5 for more details.

22. The Live Music Roundtable should consider facilitating the convergence of the information resources discussed in this report into an online tool for the purpose of identifying Live Music Venues. This project should be funded by DELWP.

See Recommendation 17.

See the Recommendation in each section for further details

4. Background

In 2003, the then Victorian Planning Minister, The Honourable Mary Delahunty established the Live Music Taskforce. One of the outcomes from this process was to establish the principle of the 'Agent of Change'.

Principle 5: The onus of responsibility should be on the agent of change

Settlement trends over recent years have seen new residential development concentrating in and around activity centres, bringing residents closer to established entertainment precincts and live music venues. Inner urban neighbourhoods are becoming more 'mixed use' in character. This tends to increase the basis for conflict about music noise. This settlement and land use trend is provided for in Government policy and is expected to continue.

For both venue operators and residents, recognition should be accorded to the expectations generated by existing land uses.

For the resident, this implies a continued protection of amenity in the event of a change in venue

operation or the development of a new venue. For the venue operator, this implies that where a venue is currently compliant with relevant noise attenuation standards and its operation does not change, new residential or other noise sensitive development should not lead to new compliance costs.

The onus of responsibility for the cost of noise management (which may include attenuation measures) should fall upon the agent of change.

In all cases of land use change, anticipation of issues of noise detriment, and implementation of predicted solutions at the planning and design stage are preferable to the adoption of measures to resolve an actual noise disturbance.

An aspirational Planning Note was also published reflecting the Agent of Change principle but this had no legislative weight in law. Implementation was only on a voluntary basis and hence it was effectively ignored by council planners, planning consultants, acoustic engineers and developers.

In 2014, after advocacy from the music industry, the then Planning Minister, The Honourable Mathew Guy, implemented the Agent of Change principle in s53.06 of the Victorian Planning Provisions. The current planning Minister, The Honourable Planning Minister Richard Wynne, had Planning Practice Note 81 published in May 2016 that replaced the Department of Environment, Land, Water and Planning's (DELWP) earlier practice note containing a number of critical legal errors and published without consultation with the music industry.

The replaced Practice Note incorrectly articulated that a residential development could mitigate its attenuation

responsibility by only designing a solution effective to their own consultancy's assessment of the Live Music Venues compliance to SEPP N-2. This interpretation allowed for buildings that 'potentially' could be used as residential uses but were in fact commercial uses (ie. top of a shop) to determine the SEPP N-2 measurement point and therefore defining the compliance criteria in a manner financially favourable to the developer. This loop hole would have had the effect of building in defective planning outcomes in perpetuity (Mylonas v Darebin CC [2016] VCAT 1583). This flawed interpretation was contrary to the purpose of the Agent of Change clause which requires "that noise sensitive residential uses are satisfactorily protected from **unreasonable** levels of live music and entertainment noise". The current practice note now correctly states:

Clause 53.06 provides that a new residential use is to be satisfactorily protected from unreasonable levels of live music and entertainment noise. It is therefore unnecessary to consider whether existing noise emissions from a live music entertainment venue complies with SEPP N-2. This is a matter to be determined by a separate process through enforcement action or other proceeding.

An existing venue's compliance, or otherwise, with SEPP N-2 does not change a residential developer's obligation under Clause 53.06 to satisfactorily protect a new residential use from existing noise emissions. This is the case regardless of whether an existing noise sensitive residential use in the area has taken limited or no measures to protect themselves from noise emissions of an existing venue.

Any information supporting an application for a new residential use should address the existing noise impact on the proposed residential use.

This principle is in keeping with Clause 53.06 which seeks to provide for higher standards of acoustic protection in dwellings and venues and minimise the possibility for conflict between these land uses.

The Andrews Government's Minister for Consumer Affairs, Gaming and Liquor Regulation, the Honourable Jane Garrett, implemented the previous Napthine Government's commitment to fund a soundproofing grants program valued at \$250,000 (Live Music Attenuation Assistance Program) targeted at Live Music Venues that were affected by residential encroachment prior to s53.06 coming into law. A number of Live Music Venues took advantage of these grants including: Ding Dong Lounge, 1000 Pound Bend, The Bendigo Hotel, Bakehouse Studios and Revolver Upstairs.

In 2014, the Minister for Creative Industries, Martin Foley implemented the \$1.48 million Good Music Neighbours Program as part of the \$22.2 million Music Work package. This included further matched funding to Live Music Venue for grants of up to \$25,000 for soundproofing works, grants to pay for acoustic assessments conducted by acoustical engineers, and fund a series of industry seminars targeted at live music professions that covered managing live music sound and emissions.

Since being legislated, a number of residential developments have had to grapple with the Agent of Change policy to protect its future residents from existing live music venue sound emissions. Some of these venues include: Bakehouse Studios, Open Studio, The Reverence Hotel, The Gasometer Hotel, Audrey Studios, The

Tote Hotel, The Collingwood Arts Precinct (including Circus Oz and The Melba Spiegeltent) and Howler.

Several of these planning applications have proceeded to VCAT to be determined. The relevant VCAT matters are:

- Mylonas v Darebin CC [2016] VCAT 1583
- 466-482 Smith Street Collingwood Pty Ltd v Yarra CC [2015] VCAT 643 (12 May 2015)
- ARA Builders and Developers Pty Ltd v Moreland CC [2014] VCAT 1306 (17 October 2014)
- Gurner 23-33 Johnston Street Pty Ltd v Yarra CC [2018] VCAT 794 (23 May 2018)

This is not an extensive list. There are other VCAT matters that reference the Agent of Change Policy however they are not necessarily of substantive relevance to this report.

Overall, the Agent of Change policy has been effective in its intention of sharing the burden of the costs of acoustic attenuation between developers and Live Music Venues. As will be outlined in this report, half a dozen strategically important music businesses have been saved by the Agent of Change Policy.

In the five years between the Victorian Live Music census being conducted (2012 and 2017), the number of regular Melbourne Live Music Venues only decreased by two (from 555 to 553). This figure bucks global trends of traditionally vibrant music cities, such as London and Sydney, which have lost a slew of iconic live music venues. London City Council has sought advice from the Victorian music industry recently to introduce its own version of the clause to halt this decline.

"Thankfully the Agent of Change law existed. Although problematic, it was essential in obtaining an outcome even though it was not ideal. We would have been stuffed without it."

Brendan Brogan, Howler May 2018

Howler, Brunswick with nearest apartments in the background.



"The agent of change has really put Melbourne and Victoria on the global map as innovators in live music reform - I have spoken about it two global conferences in the UK and Canada. It will now be rolled out around the world. But all eyes are on us and we need to tighten it up and educate stakeholders so it's properly implemented."

Patrick Donovan, CEO Music Victoria, June 2018

5. Method

5.1. Interviews

A number of interviews were conducted with different stakeholders who were either directly affected by the Agent of Change policy or responsible for applying it. These groups were Council planning officers, Live Music Venue owner/operators, and acoustical consulting engineers. The list of interview subjects and notes from the interviews are in Appendix E.

Different strategies were adopted with the different groups. A set of pre-prepared questions were used when interviewing council planning officers. These were designed to stimulate discussions and are listed in Appendix B. With venue owner/operators, the strategy was to let them raise the issues and experiences they felt were relevant and important.

5.2 Caveat

Due to time constraints and recourses, this report is limited in its research.

The author was unable to secure interviews with all requested subjects including two of the desired Councils (Yarra and Moreland) and a property developer, nor was he able to fully review all source documentation used in all the planning applications of interest.

At the point of writing, none of the residential developments that have received planning approval have become occupied, so the content of this report is, by its nature, limited to planning processes and does not investigate the lived experience of any residents that should be protected by the Agent of Change policy.

Also, as far as the author is aware, no green-field Live Music Venues have been established since the Agent of Change policy came into effect. An interesting statistic in itself and worthy of separate

examination. Almost all Live Music Venues have historically been established in existing Hotel, Tavern or Food and Drink Premise uses as defined in s74 of the VPP because entertainment (live music) is an as-of-right use within these land-uses. As such s52.27 – Licensed Premises, of the VPP is used when the business operation (land-use) is varied. Effectively there has been no change to the impact of the Victorian Planning Scheme on Live Music Venues since the introduction of the Agent of Change Policy.

As such, further extensive research is desirable to further investigate this subject. This report should be considered as a review to garner further discussion and debate and, not as a complete and comprehensive evaluation.

This report was written prior to the recent passing of the Environment Protection Amendment Act 2018 by the Victorian Government. As such the text reflects the previous legal framework.

6. Review and recommendations for policy Improvement

6.1. The Victoria Planning Scheme

There is a debate in national music policy circles about whether the Agent of Change policy approach is better or worse in its protection of Live Music than its alternate policy: The Brisbane City Council's Live Music Precinct Policy. The adversarial context of this debate is based on an implausible premise that the policies are somehow interchangeable. Both policies evolved separately in response to their regulatory contexts and were implemented by different levels of Government (state and local government respectively). This report doesn't have the scope to explore the history of the two policy's developments, however, it is worth making a couple of contextual comments.

As discussed further on in this report, the weakness of the Agent of Change clause, as currently implemented, is in identifying both what a live Music Venue is and where they are located. Having the party responsible for paying for costly attenuation solutions also responsible for the identifying Live Music Venues, is a conflict of interest that has practically resulted in active avoidance of the Agent of Change policy by developers. It's like asking the fox to be responsible for the chook house fence.

The Brisbane City Council's Live Music Precinct based policy (Brisbane City Plan 2014 – 9. Guide for the noise impact assessment planning scheme policy. Appendix B - Residential design in the Fortitude Valley Special entertainment area) is an alternate standardised way of applying acoustic attenuation solutions to residential buildings located in proximity to clusters of live music venues whilst also managing live music sound emissions. The policy effectively constrains live music into designated entertainment areas. This

policy is philosophically similar to the UK's local government control "Planning Policy Guidance 24: Planning and Noise" but a live music focused distilled version of it.

The downside of this approach is that this actively discourages live music activity outside of these areas and risks ghettoisation of the art form. The advantage is that a precinct based approach better captures residential developments that require acoustic protection through the mandated application of policy. This means that acoustic attenuation is considered at the beginning of the building design process, which can avoid costly engineering interventions later in the planning process that can compromise the financial viability of a development. Post design planning permit conditions can't fix a flawed design.

A precinct based policy trigger avoids the current situation where Live Music Venues must continually intervene as objectors in proximate planning application processes for residential developments. The cost burden per objection on Live Music Venues is considerable in both time and money. Cost estimates garnered through the interview processes revealed the following:

Howler

- 300-400 hours
- \$70,000 based on settling VCAT case.
- If the matter went to VCAT, estimated to be \$150,000-\$200,000

Backhouse Studios

- Weeks
- \$60,000-\$90,000
- (on top of good Neighbours Grants)

Collingwood Arts Precinct

- 600 hours
- Several hundred thousand dollars

The Tote Hotel

- 60-70 hours
- Approximately \$10,000

A Live Music Venue can possibly absorb a single planning intervention but because of the momentum of land development in Victoria, this ongoing unpredictable financial liability threatens the viability of Live Music Venues and represents a serious strategic risk to the sector itself.

However, in the context of live music activity in Greater Melbourne and regional Victoria areas over an extended period, this as-of-right land-use activity has historically moved around and between local council areas. As an example, contemporary live music was well entrenched in St Kilda in the 80's but has slowly migrated to Fitzroy and is now growing in both High St, Northcote and Sydney Rd Brunswick within licensed premises that offer as-of-right use.

Melbourne is a very large city and it is naive to think that live music could be contained to just one or even several areas. It would be analogous to saying that parks or recreational sports grounds should only be located in one or a few precincts.

The Agent of Change policy serves the dynamic nature of cultural live music land-use state wide well. This doesn't mean that the policy can't be improved and that successful strategies learnt from other jurisdictions can't be added to enhance planning policy outcomes in Victoria.

6.1.1. What does "unreasonable" mean?

In the purpose of s53.06, it makes reference to the term 'unreasonable' when referring to music in a soundscape.

In Planning Practice Note 81 on page 4, the meaning of the term is clarified by the context of the nature of what is 'unreasonable' sound in relation to its purpose.

That is, "To satisfactorily protect a new residential use from *existing* noise emissions." Further on it states, it "should

address the *existing* noise impact on the proposed residential use."

However, what is reasonable now may also be unreasonable in the future. Soundscapes can and do change over time. The Gasometer Hotel is located on Alexander Parade. The calculations for the sound attenuation solution, installed on the directly adjacent residential development, were based on high background sound level measurements. This was due to the Gasometer Hotel's location on Alexander Parade in Collingwood. However, in the future a large proportion of the traffic volumes may end up in the proposed tunnel next time there is a change of government. This is a cause of conjecture as to whether this comes about but it was government policy in the past and may well be in the future. As such, it would have been judicious for background sound levels to be lowered when used in the design criteria of the sound attenuation solution to cover this possible scenario. The cost of retrofitting additional soundproofing would simply be prohibitive and not covered by the principle of the Agent of Change.

Traffic noise is likely to continue to decrease in the environment over time because of a number of factors:

- The electrification of vehicles with the effect of reducing the number of internal combustion engines in use.
- Improvement in vehicle design.
- Government policy designed to reduce traffic congestion and density in the inner city such as: a congestion tax, parking restrictions and controls, road tunnels, provision of improved public transport options, car sharing, etc.

From a policy perspective, the question should be asked if installed acoustic protections will be adequate in the future.

SEPP N-2 requires that existing background sound levels be used to determine if, in the worst case, sleep is protected in

habitual rooms. The Agent of Change clause references SEPP N-2 to provide the minimal design criteria to provide adequate acoustic protection for the sensitive use. However, as discussed above, these criteria were defined nearly 40 years ago when the built environment was relatively stable.

The term 'unreasonable', used in the purpose of s53.06, is a value judgement, not an aspirational description or a reference to an actual reality implied in the practice note by the use of the term 'existing'. As such, there is some ambiguity as to the meaning because of the possibility of interpretation.

Whether this issue of the appropriate choice of average background sound levels for the purposes of design is to be addressed in amending s53.06 or addressed in the current process of amending SEPP N-2 by the EPA, is beyond the scope of this report. However, it is recommended that it be discussed across government with the intent of future-proofing future planning decision and delivering robust planning outcomes by addressing this issue of appropriate background sound level criteria explicitly to be adopted in either regulatory policy framework. See also Section 6.4.1.1.

Recommendation 1

It is recommended that the clause s53.06 be amended to reflect the wording in Planning Practice Note 81 for the purpose of clarity and accuracy. The suggested wording should be clarified by reference to "existing and likely future levels" instead of "unreasonable levels".

"To ensure that noise sensitive residential uses are satisfactorily protected from existing and likely future levels of live music and entertainment noise."

6.1.2. Definition and Identification of Live Music Venues.

A common theme that emerged through the interview process with council planners, Live Music Venue operators and acoustic engineers was the problem of identifying proximate Live Music Venues and understanding what a Live Music Venue is. The confusion around definition is not so much a problem when the venue is a dedicated use and high profile but around the edges of the definition when it is an 'as-of-right' use. However, even when a Live Music Venue is well known and, in some cases, has a relationship with Council through their arts and culture programs, the planning process fails to identify or acknowledge the Live Music Venues.

The definition of a Live Music Venue in s53.06 of the VPP means:

"a food and drink premises, nightclub, function centre or residential hotel that includes live music entertainment, a rehearsal studio or, any other venue used for the performance of music and specified in clause 2.0 of the schedule to this clause, subject to any specified condition or limitation."

This definition is wide and in broad terms, includes any land use where music is played or performed. As such there is a difficulty in identifying all Live Music Venues and in particular Live Music Venues that are of cultural importance. The total number the Agent of Change clause Live Music Venue definition covers is likely to possibly be in the tens of thousands in Victoria, if the broadest interpretation is adopted. Whilst Melbourne Live Music Venues, where performance (musicianship) is the focus, is 553 in number according to the Melbourne Live Music Census Report 2017 (p6).

The Melbourne Live Music Census Report 2017 defines a Live Music Venue as:

a venue that has a "minimum of two advertised presentations by 'featured' performers on a weekly basis" and

defines Live Music Performance as *"a creative presentation of music by a featured performer in the presence of an audience gathered in a public space designated for the performance where appropriate technology is utilised to communicate that performance to those in attendance". A 'featured' performer (musician/band/DJ) is one who is specifically named in advertising/promotion."*

This definition excludes 'open mic' nights, 'club/party nights with DJs' (p28) where the performer is not identified. In other words where foreground amplified music is used only for economic, not cultural purposes primarily.

<https://www.musicvictoria.com.au/assets/2018/MLMC-2017-Report-compressed.pdf>

The land-use definition for Live Music Venues should be included in s74 Land Use Terms of the VPP. For instance, if a Tavern with a Late-night On-premises liquor license trades to 5am and plays amplified music for the purposes of dancing using a play-list, is this a Nightclub and therefore a Live Music Venue? Tavern is not included in the Live Music Venue definition but the use would be captured through nesting by the Food and Drink premises use definition. The point being that the definition requires unpacking, research and should be immediately obvious.

The s53.06 Live Music Venue definition gives no guidance as to the relevance of 'frequency of operation'. So, is a restaurant that has live music played by musicians occasionally and DJs for functions infrequently, a Live Music Venue within a planning context? There are valid arguments to support both interpretations.

In s53.06, the 'Purpose' states:

"To recognise that live music is an important part of the State's culture and economy."

Yet there is no guidance as to the weighting

of economic use and cultural use. In the interview process, planners and acoustic engineers both highlighted that guidance would be useful. The City of Melbourne planners pointed to a misalignment between "Purpose" and "Decision guidelines" in s53.06.

As can be seen in the Live Music Venue definition used in the Melbourne Live Music Census 2017, the music industry sees that performance and frequency of gigs is central to the cultural relevance and therefore importance of a Live Music Venue.

The State Planning Policy Framework is deficient in addressing the importance of cultural land-use, only mentioning 'culture' twice: once in the context of the activity in the City of Melbourne and the other in the specific context of 'alpine histories of aboriginal culture'. Music is only mentioned in reference to noise (SEPP N-2). Considering the important role Melbourne's extensive and diverse live music plays in the cultural life of Victorians, the SPPF should be updated to address this oversight including consideration of as-of-right use for cultural and artistic land -uses. This is a much larger subject worthy of separate discussion and is beyond the scope of this document to explore this in depth.

For further reference see:

Submission to the Victorian Land Use Terms Review dated 3rd April 2018 and prepared by Jon Perring from Fair Go 4 Live Music (FG4LM), Helen Marcou from Bakehouse Studios/Save Live Australia's Music (SLAM), John Wardle from the National Live Music Office, and Dr Kate Shaw from the School of Geography, University of Melbourne,

https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/1615/2273/2824/land_use_terms_sub_final.pdf

However it is worth noting that the definition of Live Music Venue contained in s53.06 would need to be included in s74 Land use terms, of the VPP and to be referenced in s30 Zones, to be listed

in the 'Table of use' of each Zone, as consideration is currently being given by the DELWP Land Use Terms Advisory Committee as to the merits of as-of-right arts and cultural uses outside of the existing as-of-right uses within Hotel, Tavern and Food and drink premises as defined in s74 of the VPP.

Tightening the definition of a Live Music Venue in terms of cultural activity and the economic use of music would then aid in the identification and documentation of Live Music Venue locations, and assist in delivering better planning outcomes.

Recent high profile planning applications have not identified Live Music Venues and council planning departments have failed to identify these oversights in the planning application assessments.

In the interview with Brendon Brogan of Howler, the planning application submitted to Moreland Council for 8-14 Michael St, Brunswick referred to Howler, the adjacent Live Music Venue, as a "former wool store".

This resulted in initial design with an apartment bedroom mechanically coupled to the venues stage locating the bed no more than a meter from the venues PA sub-woofers. No amount of post-occupancy retrofitting could have resolved the structure borne vibrations effectively making this apartment uninhabitable if constructed without a complete building redesign.

The Planning application for 23-33 Johnston St, Collingwood was submitted with no reference to s53.06 and the Renzo Tonin acoustic report (29th Nov 2016, p3) incorrectly claimed that:

"Using applicable tests, it was found that Victorian Planning Provision 53.06 and Yarra Planning Scheme 22.05 are not triggered by the Subject Development Proposal, therefore no additional treatment to the development application is required to address these planning provisions."

From an Interview with Bakehouse Studio's owner Helen Marcou, it was revealed that in the planning process for 6-14 Elizabeth St, Richmond, the impact that existing live music sound emissions emanating from Bakehouse Studios would have on the development was excluded from the site assessment because the City of Yarra Council failed to notify Bakehouse Studios of the planning application and also did not identify their land-use as a rehearsal studio. This further resulted in

Bakehouse Studios being excluded as a party in latter VCAT proceedings.

In all these examples, local government planning assessments have failed to apply the Agent of Change clause. In some cases, it has come into play because of the intervention in the planning process by Live Music Venue operators. What is common about these examples is that the initial identification of proximate Live Music Venues has either been ignored by the council or deliberately ignored by the developers and planning and acoustic consultants. In all these cases the council planning officers supported the application and recommended the issuing of a planning permit.

The motivation for developers to downplay their responsibilities is doubtless economic. The failure of councils to apply the Agent of Change clause is likely to be a combination of: a lack of available resources or insufficient knowledge to identify Live Music Venues, the council planner's knowledge of acoustics being insufficient for the task of assessing acoustic assessment and their interpretation of the clause itself. Planning Note 81 (p8) is unambiguous and requires that an acoustic report be submitted by the planning applicant *"to the satisfaction of the responsible authority and identify all potential noise sources and noise attenuation work required to address any noise issues to comply with State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2"*.

In Section 7, Resources of this report, I have identified reliable data sources that can be used by both planning and acoustic consultants and also local councils in identifying Live Music Venues of significance. The data sources all have different definitions of land-uses but never the less, these data sources can effectively and accurately be used as the basis for Live Music Venue identification.

It would be useful if these sources were converged into dedicated, online planning resources. This could assist in avoiding the planning failures outlined above and avoid potential challenges to the legality of developments that don't properly address the requirements of the Agent of Change policy as is required by law.

Nevertheless, responsibility for the accurate identification of Live Music Venues lies both with the planning applicant (developer) and local government. If the council planning departments lack the necessary resources and expertise to adequately assess the development site for potential noise sources, and the resultant necessary noise attenuation works required to comply SEPP N-2 guidelines, then as a minimum a peer review of the acoustic report should be requested by suitably qualified and accredited acoustic consultants. This is currently the practice of Yarra Council in complex cases and it may well be the practice of other councils, but all councils should consider it as best practice.

If the peer review of the acoustic report does not concur, then officer support for the planning application should not be forthcoming.

Recommendation 2

That the definition of Live Music Venue contained in s53.06 be reviewed to tighten its meaning specifically addressing cultural and economic use and, frequency of use of live and-or amplified music. That the definition be either moved or added to s74 Land use terms, of the VPP and also addressed in the SFFP.

Recommendation 3

Unless a council has the necessary qualified staff and resources to robustly identify all potential noise sources and assess the noise attenuation work required to address any noise issues necessary to comply with State Environment Protection Policy (Control of Music Noise from Public Premises) No .2, then it should be best practice to have the relevant acoustic reports peer assessed by a suitably qualified and accredited acoustic consultant. The cost of which, should be explicitly borne by the planning permit applicant. Officer support for the issuing of a planning permit should not be given unless the acoustic reports concur. If necessary, s53.06 should be amended accordingly.

6.1.3. Notice of Permits Applications to Live Music Venues.

Similarly, in discussion with Frank Butera of acoustic consultants, Arup, he recalled that a multi-residential development next to Cherry Bar in ACDC Lane in the Melbourne CBD was approved by the City of Melbourne without identifying Cherry Bar as a Live Music Venue and therefore the installation of appropriate soundproofing did not occur as required. The acoustic design flaws in the development were not identified by Arup until building construction had commenced. Because the Capital City Zone excludes third-party appeals, there was no opportunity for the Live Music Venue to be notified of the application and therefore alert the Council planners of the Live Music Venue's proximity to the development.

Recommendation 4

Notification of affected Live Music Venues should be automatically notified by adding an entry for s53.06 in s66.05 'Notice of permit applications under state standard provisions' of the VPP. Such a statutory requirement for notification would help overcome the situation where third-party appeal rights don't exist, such as in the Capital City Zone.

Music Victoria should consider whether it should adopt the role of the central industry receiver of planning referrals or notifications under section 66 of the VPP.

<https://www.vcglr.vic.gov.au/community-services/government-initiatives/designated-areas>

[Ballarat Central Business District](#)

[Bendigo](#)

[City of Yarra - 7 August 2008](#)

[City of Yarra - 30 July 2009](#)

[Colac Central Business District](#)

[Dandenong](#)

[Docklands](#)

[Footscray](#)

[Frankston](#)

[Geelong](#)

[Knox City Shopping Centre](#)

[Melbourne and the surrounding suburbs](#)

[Mildura Central Business District](#)

[Mornington Central Business District](#)

[Shepparton](#)

[South Yarra and Prahran](#)

[St Kilda](#)

[Sunshine](#)

[Traralgon](#)

[Warrnambool](#)

6.1.4. The potential use of precincts to better apply the Agent of Change policy.

In 2007, The VCGLR, in conjunction with Victoria Police, defined a number of areas, known as 'Designated areas', to be used for the purpose of banning orders. These declared areas are entertainment precincts as they have high concentrations of licensed premises that are active and important parts of the night-time economy. Live Music Venues are mostly clustered in a number of these existing entertainment precincts. As such, most of the Live Music Venues identified and documented by Music Victoria and the Live Music Office exist within the predefined Designated areas.

Although the regulatory purpose of these Designated areas is not relevant to the planning purpose of the Agent of Change policy, they could be used as a proxy by local government to assume that live music venues will be proximate to a development application located within these Designated areas. It is much easier for a council planning officer to reference a couple of precincts in their municipality as to whether the Agent of Change policy should apply than to sift through a couple of hundred potential locations that may intersect with a 50m buffer zone around the planning applications site.

It would be reasonable to assume that if a planning application site is located within any of these Designated areas, it would be highly likely that the site will be affected by Live Music Venue sound emissions. If these Designated areas were used as a trigger mechanism, the Agent of Change policy could automatically be considered as relevant unless actively assessed as otherwise. This would ensure that the large majority of Live Music Venues locations would be captured ensuring that the Agent of Change policy is rigorously applied.

6.1.4.1. Examples of entertainment precincts.

The Cities of Yarra, Moreland, Darebin, Melbourne, Port Phillip, Stonnington, Maribyrnong, Geelong, Ballarat, Bendigo and Mornington all have entertainment precincts with high densities of live music venues that are well defined.

The first of the Purposes of s53.06 is "to recognise that live music is an important part of the State's culture and economy." No weight is given to the importance between cultural and economic value. It therefore makes sense to cast the net of Live Music Venue identification wider to capture both the cultural and industrial use of music, even though the information resources are more granular and accurate for the cultural use of music.

Recommendation 5

It is recommended that the Victoria State Government consider amending s53.06 to include the use of Designated areas as a trigger for live music impact assessment to ensure that the Agent of Changes policy is applied.

It is recommended that each of the relevant councils formally define the location of these Designated areas and reference these areas in their local policies to streamline and ensure that the Agent of Changes policy is applied by adopting the practice of assuming that the Agent of Change policy is applicable if a planning application site is located in a Designated area.

This practice should also be reflected in an amendment of Practice Note 81.

6.1.5. The purpose of the 50m requirement.

The purpose and logic behind the quantitative choice of a 50m zone around a development site, to apply the applicability of the Agent of Change policy, is not clear. This raises questions as to what purpose it serves and how and when should it be applied.

In the officer's report for the planning application for 23 – 33 Johnston St, Collingwood the City of Yarra accepted that the live music soundscape to be considered should include all operating venues located in the Collingwood Arts Precinct and, the Tote Hotel, even though two out of the four live music sound sources were in excess of the 50m distance from the proposed development. These being:

- Circus Oz rehearsal rooms within 50m

- Circus Oz and CAP amphitheatre within 50m
- The Melba Spiegeltent / 80-100m
- The Tote Hotel / Approx 150m

"The protection of Live music venues and residential amenity should not be dependent upon an arbitrary distance which has no scientific or policy justification. Restricting the application of the clause to a mere 50 metre distance is bad planning. The clause should apply wherever there is an impact, and not simply because of a figure plucked out of thin air."

A new noise sensitive use must ensure that it is properly protected against existing noise from a venue."

- Nicholas Tweedy SC



It would be counter to the purpose of the clause to quarantine two of the venues from the acoustic assessment process and design an attenuation solution for the residential development that only half worked. Such a scenario would only result in a permanent dysfunctional planning outcome to no ones benefit. At VCAT, all parties, including the VCAT members, accepted that the aggregate of all four venues' live music sound emissions should constitute the existing soundscape to be assessed.

The clause does allow for a requirement to be waived. It states,

"A noise sensitive residential use that is within 50 metres of a live music entertainment venue."

"A live music entertainment venue must be designed, constructed and managed to minimise noise emissions from the premises and provide acoustic attenuation measures that would protect a noise sensitive residential use within 50 metres of the venue."

*"A permit may be granted to reduce or **waive** these requirements if the responsible authority is satisfied that an alternative measure meets the purpose of this clause."*

There is no guidance as to how the 50m distance should be determined. Should the distance be measured from property boundary to property boundary, building centre-point to centre-point or, building boundary to building boundary? Does 50m refer to a distance, radius or polygon offset? Differing results could result in different arbitrary determinations as to the applicability of the Agent of Change policy if a narrow interpretation of the 50m distance requirement is applied.

As an example, during the interview with two City of Melbourne planners, each had a different interpretation of how to apply the 50m distance rule. One as a 50m radius from a centre point, one as a polygon

offset from the title boundary.

There is further unnecessary confusion as to the applicability of the 50m distance rule. When applied to a Live Music Venue, this is a 'Requirement' but the 50m distance rule, applied to a noise sensitive residential use, is defined in the section labelled 'Scope'. The applicability of the waiver is conditional on the responsible authority being satisfied 'alternate' measures meet the purpose of the clause. This wording is ambiguous and clumsy and leaves wriggle room for a skilful lawyer to avoid responsibility for their client. Why do measures need to be 'alternate'? Surely, they just need to be in place (adequate and existing) or proposed to meet the purpose and therefore if not present, need to be so.

If 'existing' or 'unreasonable' sound emissions from a live music source or sources are to be protected against, the 50m distance mechanism required to trigger the clause can only be considered to be used as a guide. It is therefore critical that the council's planning officers are cognisant of the locations of proximate Live Music Venues, to the planning application's site, to be properly assessed.

As the 50m distance requirement can only be relied upon as a guide to policy applicability, its purpose is better understood as a mechanism to exclude the unnecessary application of the Agent of Change policy to the majority of planning applications not in proximity to live music venue land-uses or potentially, entertainment precincts.

6.1.6. What is an Indoor Venue and an Outdoor Venue?

S53.06 attributes different design methodologies to indoor and outdoor Live Music Venues. It states,

A noise sensitive residential use must be designed and constructed to include acoustic attenuation measures that will reduce noise levels from any:

- *indoor live music entertainment venue to below the noise limits specified in State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2).*
- *outdoor live music entertainment venue to below 45dB(A), assessed as an Leq over 15 minutes.*

The terms, definitions and methodologies originate from and are referenced within SEPP N-2. However, as the terms are not defined with the VPP, by law their meaning must be taken from the dictionary definition, and not from referencing SEPP N-2. As such the meaning is changed from what is intended.

Although not entirely clear in SEPP N-2, it is generally accepted among acoustic engineers that an outdoor venue is a reference to large concerts (open air stadiums) or festivals that can be conducted up to six times a year on a particular site. Whilst in the Agent of Change policy it is interpreted to mean 'no roof'.

In SEPP N-2 if it is not an outdoor concert, then the methodology applied is that defined by an 'indoor venue'. This includes music played outdoors such as within a beer garden or open-air bar.

Recommendation 6

That the definitions for indoor and outdoor live music entertainment venues in the Agent of Change policy be aligned with definitions of indoor and outdoor venue in SEPP N-2.

That the definitions in SEPP N-2 for indoor and outdoor venues clarify the use of music outside in non-concert and non-festival contexts.

6.1.7. Post construction, pre-occupancy testing of soundproofing solutions.

In an interview with Marshall Day Acoustics, they emphasised the importance that the proper installation of soundproofing measures is to the overall acoustic performance of the final built and installed attenuation solution. They regarded correct installation as critical as material specification.

Recommendation 7

It is recommended that a standard draft condition be added to Practice Note 81 that addresses the necessity of pre-occupancy acoustic testing and that an occupancy permit is not granted unless the sound attenuation performance criteria of the soundproofing solution is achieved and demonstrated. For example:

Prior to occupancy, a suitably qualified and accredited acoustical engineer test, verify and certify the acoustic performance of the building and that it meets the performance and design criteria articulated in the endorsed acoustic report, to the satisfaction of the responsible authority.

6.1.8. Is it a recording studio and rehearsal studio?

The difference between a rehearsal studio and a recordings studio is, in practice, slight. The major difference is that by default a recording studio must functionally be sound proofed to a high degree. A recording studio must prevent the external soundscape, whatever its source, from penetrating its rooms. Otherwise the unwanted sound will be captured in the recording process.

Other than this, live music is played and

rehearsed by musicians both in pre-production and when recording. The use of instrument and monitoring amplification is core to the land-use activity. The only difference between a recording studio and rehearsal studio is the act of documentation (recording).

VCAT states in:

ARA Builders and Developers Pty Ltd v Moreland CC [2014] VCAT 1306 (17 October 2014)

54. *"Unlike the other land uses specified in the preceding paragraph, a rehearsal studio is not a land use that is defined in the planning scheme. As such, this needs to be determined on the particular facts and circumstances. In this case, Audrey Studios has explained that it composes, performs and records live music. Pre-production is an arranging and rehearsing session of the material to be recorded, which is done with a P.A. system and amplified instruments as are rehearsals for live performance. Audrey Studios also offers the premises as a rehearsal venue for its regular clients. In light of this information, I am satisfied Audrey Studios is a rehearsal studio".*

Recommendation 8

It is therefore recommended that a Recording Studio should be considered to be a Live Music Venue although in reality, the use is far more benign. Sound emissions will be practically, minimal. As such it should be included in the Live Music Venue definition, alongside rehearsal studios and referenced in Planning Practice Note 81.

6.1.9. The acoustic consequences of existing building demolition

After the planning process was completed for the apartments adjacent to the Gasometer Hotel, the development site was cleared by demolition of the existing two-story warehouse. This structure was acting as an acoustic buffer and once demolished, the Gasometer started receiving multiple noise complaints from a nearby residence. Clint Fisher, part owner of the Gasometer Hotel, indicted in an interview that this resulted in multiple fines from the City of Yarra.

Consideration was not given during the planning permit application process by the City of Yarra as to the impact of the adjacent building's demolition on local residents. In fairness to the City of Yarra's planners, there is no guidance on this subject in Planning Practice Note 81 and the planning assessment was one of the first to use the Agent of Change policy.

In the case of the Gasometer Hotel, enforcement action did not affect its operation but scenarios where development sites remain cleared for periods of several years, prior to any construction activity commencing, are not unknown. Such a scenario could easily result in a Live Music Venue ceasing its operation due to no fault of its own.

The onus on the agent of change should include the requirement to resolve unintended music noise impacts on nearby residences if a developer demolishes an existing building which was acting as an acoustic buffer. Such a trigger should relate to an increase in noise complaints from the Live Music Venues neighbours.

Recommendation 9

That Planning Practice note 81 be amended to cover the consequences of removing an existing building or structure that is effectively acting as an acoustic shield to existing residents proximate to a Live Music Venue. This should include draft planning permit conditions that address this scenario. For example,

If the responsible authority receives music related noise complaints from local residents then, at the developers cost, the developer erects a temporary structure, designed by a suitably qualified and accredited acoustic engineer, to act as acoustic shield to protect the affected residents.

6.2. Mechanisms to alert real-estate buyers to the nature of the neighbourhood soundscape.

In discussion with planning officers from the City of Melbourne, different mechanisms were discussed to help inform potential real-estate buyers of the nature of the neighbourhood soundscape and the amenity they are likely to expect via the Section 32 requirements of a Contract of Sale.

Section 173 agreements on land titles were discussed but they were considered by the planning officers to be cumbersome instruments and not fit for purpose. They suggested an alternative, which would be the use of a note on the planning permit or a statement contained within the Section

32 of the Contract of Sale describing the character of the neighbourhood soundscape and the nature of the amenity to be expected by the property owner.

As many apartments are sold 'off the plan', buyers are often surprised to learn that they are proximate to a Live Music Venue after they have moved in. The residential

Recommendation 10

That the wording for a standardised note, to be included on planning permits that are subject to the Agent of Change policy, be drafted and included in Planning Practice Note 81. The Note would describe the nature of the neighbourhood soundscape and the type of amenity to be expected by the property owner.

Recommendation 11

A 'Buyer's Beware' mechanism be inserted into section 32 (d) the Sale of Land Act 1962 requiring disclosure within the s32 of the Contract of Sale, of the nature of the neighbourhood soundscape to potential real-estate buyers of a proximate Live Music Venue.

consumer should be informed if they are considering living within an area characterised by the night time economy.

6.3. Building Regulation

A case could be put for updating the Building Code of Australia, to include default residential buildings glazing standards for defined live music precincts based on The City of Brisbane's "Indicative glazing solutions" contained in: Brisbane City Plan 2014 - 9. Guide for the noise impact assessment planning scheme policy. Appendix B - Residential design in the Fortitude Valley Special entertainment

area.

The inclusion of these standards within the BCA would only be of value if there was a move to add precincts as a method to apply the Agent of Change policy by the use of the 'designated areas' or by councils reflecting live music precinct areas in local policy. These policy mechanisms would then mandate the application of these glazing standards by default.

The purpose would be to assist the design of new residential development that need to account for potentially higher levels of noise exposure than experienced in purely residential zones. This would reduce the work load on council planning officers, reduce the need for Live Music Venues to continually engage in the objection process of planning applications, give certainty to property developers and assist in standardising the residential design process within live music precincts. As the rules would be known upfront, the process of site assessment by property developers when scoping potential development sites, would be streamlined, resulting in more appropriate land usage for potential development sites.

By moving away from bespoke acoustic attenuation solutions, there would be cost savings for all parties involved in the planning process: councils, Live Music Venues, property developers and ultimately a flow on to residential real-estate consumers. As the acoustic design would be part of the initial building design brief, costly redesign and retrofitted sound attenuation solutions could be avoided.

It should be noted that SEPP N-2, as it currently stands, would still apply state-wide as there is no statutory mechanism in SEPP N-2 to allow councils to apply different music noise emission standards such as utilised by the City of Brisbane in their local laws.

If a council local policy did define a live music entertainment precinct and it was known that all venues emitted less than 88dB @ 63Hz at 1m from all parts of

the building, then as stated in planning practice note 81:

"The schedule to Clause 53.06 can be used to specify:

"areas to which Clause 53.06 does not apply: this may be necessary where alternative noise control requirements are already in place for a noise sensitive residential use through the planning scheme or SEPP N-2". (page 2).

Conversely, if any Live Music Venue sound emissions are unknown within a precinct referenced in a local council policy, then the Agent of Change clause will apply. By implication, a bespoke sound attenuation solution is then required to be designed for any planning applications of a residential development based on an acoustical site assessment. The aforementioned precinct should not then be listed in the schedule to clause 53.06.

The Fortitude Valley Entertainment Precinct Design Standards are summarised as follows:

- A. Indicative glazing to achieve a noise reduction of LLeq,T 25dB at 63Hz. Assumes that proximate Live Music Venue are not emitting more than 88dB @ 63Hz at 1m from all parts of the Building

Double glazing design

- 12.38mm laminated glass, 200mm air gap, 10.76mm laminated glass
- 10.38mm laminated glass, 400mm air gap, 6.76mm laminated glass

Enclosed balcony design (Wintergarden)

- 6mm laminated glass, 1000mm air gap, 6.76mm laminated glass

- B. Indicative glazing to achieve a noise reduction of LLeq,T 20dB at 63Hz. Assumes that proximate Live Music

Venue are not emitting more than 86dB @ 63Hz at 1m from all parts of the Building

Double glazing design

- 10.38mm laminated glass, 200mm air gap, 8.38mm laminated glass

Enclosed balcony design (Wintergarden)

- 6.38mm laminated glass, 1000mm air gap, 6.38mm laminated glass

- C. Indicative glazing to achieve a noise reduction of $L_{Leq,T}$ 18dB at 63Hz for short-term accommodation. Assumes that proximate Live Music Venue are not emitting more than 86dB @ 63Hz at 1m from all parts of the Building

Double glazing design

- 8.38mm laminated glass, 200mm air gap, 8.38mm laminated glass
- 12.38mm laminated glass, 12mm air gap, 12.38mm laminated glass

"All operable glazing systems are to include acoustically rated seals and a closing mechanism that is acoustically effective. While these systems are calculated to achieve the required noise reduction, the performance of the systems is indicative only and details should be confirmed on a case-by-case basis. Manufacturers' test data should be obtained if possible, though if manufacturers' test data is not available, the acoustic assessment should include a description of the methodology used to forecast the performance of the glazing system. All operable glazing systems are to include acoustically rated seals and a closing mechanism that is acoustically effective. While these systems are calculated to achieve the required noise reduction, the performance of the systems is indicative only and details should be confirmed on a case-by-case basis. Manufacturers' test data should be obtained if possible, though if manufacturers' test data is not available, the acoustic assessment should include a description of the methodology used to

forecast the performance of the glazing system". (page 16)

Recommendation 12

That consideration be given to adding standardised glazing solutions, such as the Fortitude Valley Entertainment Precinct Design Standards, to the Building Code of Australia, if a precinct based method of apply the Agent of Change policy is contemplated by Government.

If the existing live music soundscape exceeded any of venue sound emissions detailed above, then these guidelines would be inapplicable triggering the application of the Agent of Change policy.

6.4. Other areas

6.4.1. SEPP N-2

The review of SEPP N-2 has been delayed several times. Although there are a number of reasons why this has been the case (personnel changes at the EPA, other review processes impacting the EPA such as restructuring and budgetary constraints), the lack of clarity and legal contradiction between how the Agent of Change policy intends to protect sensitive uses and, how the enforcement of music noise emissions are conducted in accordance to SEPP N-2, continues to complicate the design and implementation of proposed engineered sound attenuation solutions intended to protect sensitive uses.

A resolution of this regulatory dissonance by the best endeavours of the EPA would reduce the cost burden on Live Music Venues, residential developers and by implication the purchaser of the finished residential freehold and, the council that assesses the planning applications.

This regulatory dissonance between the

Agent of Change clause has come about because

SEPP N-2, designed to be an environmental tool of sound emission management and compliance, is now (nearly 40 years later) being used as the acoustical design reference standard for acoustic protection of residential developments for which it wasn't intended. There are two inherent contradictions between the SEPP N-2 and s53.06.

6.4.1.1. Capturing the entire sound transmission path and the use of background sound in acoustical design criteria based on SEPP N-2.

Because the Agent of Change policy allows for the flexibility of sound attenuations solutions to protect the sensitive use to be installed on either or both the emitter (Live Music Venue) and sensitive use (a residence), the entire sound transmission path must be taken into account in any music noise sound assessment. The Agent of Change clause acknowledges this by mandating that the measurement point is required to be conducted inside for the case of indoor venues when referencing SEPP N-2. However, SEPP N-2 is designed

to use background sound measurements and music sound measurements that are taken outside. There is a fundamental conflict between the two approaches.

Currently, for the purposes of enforcement, SEPP N-2 measurements are taken outside. This then excludes any soundproofing intended to protect the sensitive use within habitable rooms (sleep) in the sound assessment. If the sound measurement is taken inside, then there is a question of what background levels are used and how.

The measurement point needs to be specified inside the habitable room when assessing

SEPP N-2 compliance in both planning and enforcement contexts. This policy alignment is necessary so that the entire sound transmission path is taken into account and therefore any soundproofing is accounted for whether it is installed on the Live Music Venue or the residence.

As discussed earlier in Section 6.1.1, there is an advantage in using standardised background levels, particularly if the existing background sound levels are already higher than average. This is because if the levels drop over time, the

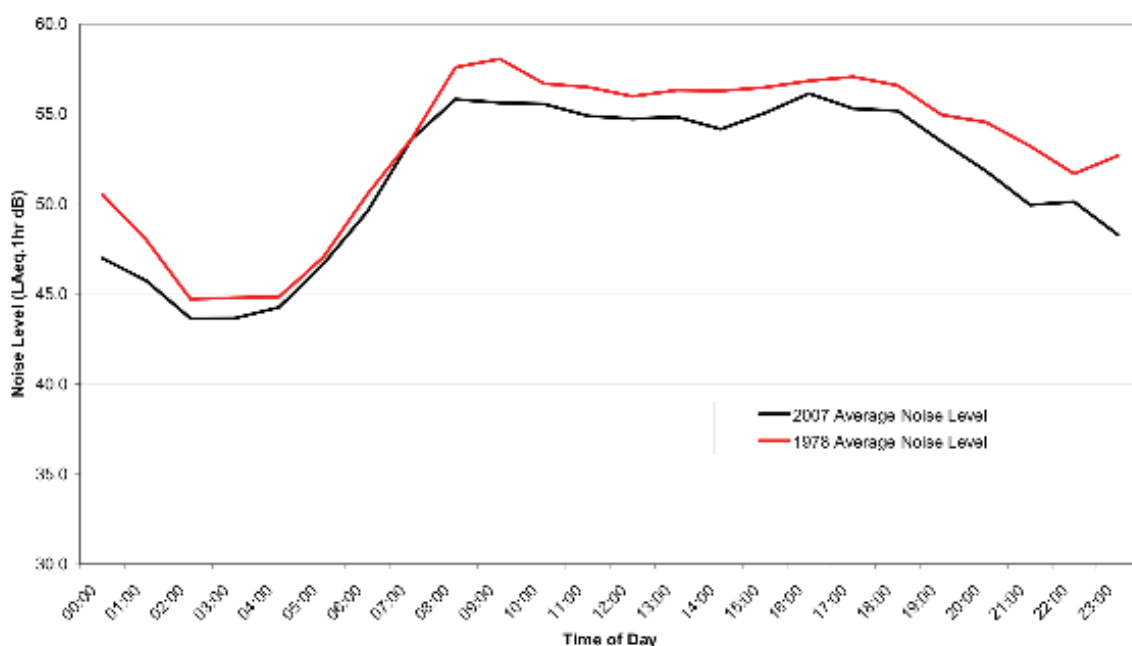


Figure 2: Average noise level for each hour on weekdays for 1978 and 2007

required sound proofing on the residence will not become inadequate

and there will be no need for retrofitting in the future. Historically, background sound has dropped by approximate 2db(A) between 1978 and 2007. A trend expected to continue.

By the use of specified base levels, such as either specified in Schedule B3 2(c) of SEPP N-2 or potentially updated by the EPA, the inside background levels can then be calculated and accounted for in SEPP N-2 assessments. This also would enable the use of internal sound measurements and eliminate any compliance shift over time.

Furthermore, background sound typically reduces later in the night. There is a difference of 3db(A) between 1am and 3am. If the Live Music Venue liquor licence trading time is taken into account in the soundscape assessment used to set the design criteria for the sound attenuation solution, the background sound levels used can be accurately calibrated accordingly. This is particularly important if a residential development is proximate to a late trading nightclub.

Recommendation 13

That the EPA consider guidelines for acoustic engineers to use standardised levels of background sound and recommended 'worst-case' sound levels of Live Music Sound within Live Music Venues, for the purpose of establishing SEPP N-2 design criteria for acoustic attenuation design solutions, in the aPolicy.6.4.1.2.

Assumed Internal Venue Live music sound levels.

Both SEPP N-2 and s53.06 need to be amended to address these contradictions to achieve the necessary policy alignment.

6.4.1.2. Assumed Internal Venue Live music sound levels.

An acoustic engineer, when designing sound attenuation solutions to protect a sensitive use, should use the maximum worst case sound levels that might be used within the indoor Live Music Venue when live music is being played. European standards in Belgium and the Netherlands recommend 103db(a)leq over 45 minutes as a maximum safe level measured at the mixing desk. This can be considered as a practical real world operating level. An acceptable margin (say 3dB) should then be added when designing the required venue attenuation solution, for a minimum satisfactory result to be achieved.

http://www.dbcontrol.nl/uploads/1/6/8/2/16828146/sheets_trondheim_part_2_level_limits_for_ears_and_future.pdf

Marshall Day Acoustics use a different approach. They assume 100dB flat with a bump of 110dB at 63Hz as average maximums. Different methodological approaches are employed by different acoustic engineers. These different approaches are not necessarily a problem, but it would be useful if minimum design assumption were adopted and reflected in SEPP N-2 or the Agent of Change policy to exclude the possibility of venue operational changes and sound level assumptions that are just too low.

It should be noted that different types and genres of live music can measure different average maximum levels over time. Electronic Dance music consistently meters higher than band-based genres such as Rock, Punk, Soul, Funk or any of the multitude of the 'core' based styles. This is due to instrumentation, technology, space between songs and the dynamics of the genres themselves. These differences will likely change in unpredictable ways in the future, as is the nature of arts and culture.

External Music Levels are adequately covered by SEPP N-2.

6.4.1.3. Winter Gardens.

The status of what a Winter Garden is, in terms of SEPP N-2, unclear. They are enclosed glazed spaces that were originally intended to be private open space on balconies. The question needs to be asked: are they non-habitable rooms, private open spaces or an entity of their own? Why this is relevant is that SEPP N-2 requires compliance sound level measurements to be taken outside. By extension this raises the question: are measurements taken in a winter garden valid? The space inside a winter garden is also part of the glazing solution, which also blurs its status as to whether it is inside, outside or liminal.

Apartment balconies are often used for drying washing, storage, smoking cigarettes, but seem rarely used as 'recreational space' or places of 'conversation', which SEPP N-2 is intended to protect. The Better Apartment Design Standards (December 2016) does not discuss balcony or Wintergarden usage or purpose. There is no reference that discusses the difference in use and community amenity expectation between ground level garden space, balconies and wintergardens. Currently they are all treated as 'private outdoor spaces' to be equally protected by the Agent of Change clause. Because there is no specific guidance in the Agent of Change clause or SEPP N-2, outside measurements for compliance purposes become implausible within a wintergarden. If SEPP N-2 is amended to locate the measurement point inside habitable rooms for the purpose of compliance, then this will no longer be an issue.

Recommendation 14

The status and definition of Winter Gardens should be discussed in Planning Practice Note 81. in "ATTENUATING A NOISE SENSITIVE RESIDENTIAL USE" (p3) and "Better Apartment Design Standards". SEPP N-2 should be amended so the measurement point for compliance should be located in habitable rooms.

6.4.2. Acoustic Surveillance

During some of the planning applications and VCAT consultation processes, acoustic consultants engaged by the planning applicant (residential developers) have carried out covert acoustic surveillance activities to monitor Live Music Venue compliance to SEPP N-2. This is the responsibility of local councils, the EPA, the VCGLR or Victoria Police to determine compliance as they are the 'responsible authorities' in terms of the *Planning and Environment Act 1987* if SEPP N-2 is referenced on a planning permit, s31A of the *Environment Protection Act 1970* for breach of SEPP N-2 or the *Liquor Control Reform Act 1998*.

The purposes of these covert assessments is not for the purposes of better building design, the engineering of acoustic attenuation solutions or the wellbeing of other neighbourhood residents but to gain leverage in negotiations between planning applicant and objector, so as to shift the burden of attenuation costs away from the planning applicant: a property developer. This is counter to the principle of the agent of change in s53.06 of the VPP.

This goes to the heart of the independents of the acoustic engineering consultant, their role in the planning process and, their ability to give evidence at VCAT. This

is because it changes their relationship with their client. If they are conducting covert SEPP N-2 compliance assessments, they are no longer providing independent advice. They are acting as agents of the developers and as such, taint the purpose of their expert opinion.

This practice is both ethically and legally dubious with the possibility that the practice is an offence under the Private Security Act 2004. It may be a requirement for acoustic engineers to hold a Private Security License if they act as agents of their clients when conducting acoustic surveillance for the purposes of collecting compliance evidence.

Recommendation 15

It is recommended that the written opinion of the Chief Commissioner of Victoria Police be sort as to whether a Private Security License under the Private Security Act 2004, is required by parties other than the responsible authorities or the Live Music Venue and its consultants, to carry out acoustic surveillance for the purpose of third party SEPP N-2 compliance assessments.

The nature of musical sound is that its experience by a listener can vary from pleasure to nuisance. How it is characterised by the sound receiver can't be determined by a sound meter. The purpose of SEPP N-2 is to protect sleep, speech and normal domestic and recreational activities. Acoustic measurements can't be expected to be a substitute for a sound recipients experience. Councils and the EPA do not conduct compliance audits of Live Music Venues. Their compliance teams respond when they receive noise complaints. This approach has historically served the community and the music industry well.

There is therefore a policy disconnect between the application of SEPP N-2 as a compliance tool used by the responsible authority for the purposes of protecting the community and a commercial interest using a technical breach of SEPP N-2 that is not based on an actual noise complaint, to leverage their commercial interests. The latter practices should be actively discouraged by government.

Recommendation 16

That the purpose of SEPP N-2 be amended to emphasise that it is only used for enforcement purposes when based on a valid and verified noise complaint received by a responsible authority.

6.5. Suggestion around the provision of effective education and other actions over the next 12-24 months.

6.5.1. Planning Consultants

Discussion around the application and interpretation of the Agent of Change clause at a professional conference, such as the VPELA conference in Lorne in August 2018, is extremely worthwhile. Whilst the reaching of consensus is unlikely, dialectical interrogation of the Agent of Change clause and the sharing of real world case study experience can only result in an improvement in future planning outcomes.

6.5.2. Acoustic Engineering Consultants

Acoustic Engineering consultants should be encouraged to discuss the standardisation of SEPP N-2 analysis techniques. In particular, the use and appropriate levels of background sound, identification of pertinent Live Music Venues, correct profiling and measurement of typical live music usage

by pertinent Live Music Venues for the strict purpose of a site analysis and planning responses to the Agent of Change policy.

6.5.3. Council planning staff

Council planners are not trained in acoustics and are unfamiliar with the information resources available to locate and identify Live Music Venues. Specific targeted professional development training for front line council planners covering basic acoustics, acoustic design fundamentals, case study examples and an overview of applying the Agent of Change clause would be of value, as nothing exists currently.

Councils should facilitate their own internal processes to loop in their arts and culture teams to assist in informing their front-line planners as to the identification of potentially affected Live Music Venues by proximate residential development planning applications.

Councils should also be encouraged to develop their own strategic live music planning policies that identify the areas that contain high concentrations of Live Music Venues that specifically address the application of the Agent of Change policy. These policies should more broadly address the development and sustainability of a healthy and vibrant live music sector within council areas.

6.5.4. Live Music Venues

There have been many seminars on the Agent of Change policy and SEPP N-2 run by Music Victoria over the last few years. Most Live Music Venue operators have now been briefed on the subject at some point.

Discussion among Live Music Venues around better ways to be notified about the lodgement planning applications in proximity to Live Music Venues would be of value. In particular within the City of Melbourne, where a Live Music Venue may be unaware of the lodgements of pertinent planning applications.

The sharing of information and documentation of installed sound proofing solutions on Live Music Venues and techniques for managing sound pressure levels should be encouraged such as a series of video blogs placed on YouTube on a dedicated channel. This would be a quick and easy way to document installed soundproofing solutions. Music Victoria could facilitate this activity.

6.5.5. Peak bodies

Music Victoria should consider whether it has the resources to act as referral authority or to be provided with notice of relevant planning applications under Section 66 'Referral and Notice Provisions' of the VPP.

<http://planningschemes.dpcd.vic.gov.au/schemes/vpps/66.pdf>

Music Victoria has a central role in organising forums to discuss Live Music best practice. It engages with other peak bodies such as the Municipal Association of Victoria, Association of Australian Acoustical Consultants and Victorian Planning and Law Association to continue the dialogue to deliver better planning decisions and process that also facilitate a healthy and vibrant live music sector. An example is the session at the VPELA's State Planning Conference "Rock 'n' Roll ain't noise Pollution".

The Association of Australian Acoustical Consultants should facilitate discussion amongst its members to discuss the standardisation of SEPP N-2 analysis techniques. In particular, the use and appropriate levels of background sound, identification of pertinent Live Music Venues, correct profiling and measurement of typical live music usage by pertinent Live Music Venues for the strict purpose of a site analysis and planning responses to the Agent of Change clause.

The AAAC should also engage with the issue of acoustic surveillance and modify its code of conduct to prevent unethical

and possibly illegal practices by its members.

The AAAC should accredit its members who are both suitably qualified and experienced to conduct SEPP N-2 analysis and provide professional advice within the context of the Agent of Change policy. Council planners stated in an interview they would appreciate this knowledge when assessing acoustic reports.

6.5.6. Live Music Roundtable

The Live Music Roundtable continues to play a central role in co-ordinating and facilitating live music policy reform between the various silos of government. As such the Live Music Roundtable role will be vital to the process of improving the Agent of Change policy and monitoring its efficacy into the future.

As none of the residential buildings with soundproofing solutions installed on them, as a result of the Agent of Change policy, have yet reached occupancy, a future review in 5-7 years should be diarised to review the experience of the residence of these projects.

Recommendation 17

The Live Music Roundtable should consider facilitating the convergence of the information resources discussed in this report into an online tool for the purpose of identifying Live Music Venues. This project should be funded by DELWP.

7. Resources

There is no information source that specifically maintains an accurate database of the Agent of Change clause's Live Music Venue definition. However, there are several excellent information sources that are useful in locating Live Music Venues in proximity to sensitive use development sites.

7.1. VCGLR Data

The VCGLR have all liquor license data including:

Venue Name

Venue address

Geo-location (latitude and longitude)

Council area

License Type

https://www.vcglr.vic.gov.au/sites/default/files/current_victorian_licences_by_location_-_31_may_18.xlsx

In 2008 the then Liquor Licensing Director, designated a number of entertainment precincts. Although for the purpose of area-specific licensing policy application (barring individuals from an area for up to 72 hours), these areas could form the basis for guiding and defining areas that apply s53.06 of the VPP to all planning applications contained within.

<https://www.vcglr.vic.gov.au/community-services/government-initiatives/designated-areas>

These polygons, when defined in a Geographical Information System (GIS) mapping systems could easily filter the geo-located liquor licensing data to quickly identify potential live music venues as defined in s 53.06. It should be noted that this would not locate unlicensed (no liquor licence) music venues such as rehearsal rooms.

Similarly, GIS technology could also cross-reference the location of the planning application's site with geo-located liquor licensing data to check if any venues are within 50m of the development site. This technique is sometimes known as point-in-polygon overlay or more generally an overlay function.

7.2. Music Victoria Data

Music Victoria publishes on their web site a list of Live Music Venues, Rehearsal Rooms and Recording Studios in Victoria. It is sorted alphabetically. There is no mapping or filtering capability.

<https://www.musicvictoria.com.au/directory/tag/Venues>

<https://www.musicvictoria.com.au/directory/tag/Recording%20Studios>

<https://www.musicvictoria.com.au/directory/tag/Rehearsal%20Studios>

There is also a well-researched list of Melbourne Live Music Venues contained in the Melbourne Live Music Census 2017.

<https://www.musicvictoria.com.au/assets/2018/MLMC-2017-Report-compressed.pdf>

7.3. Live Music Office – Live Music Map.

There is also a well-researched list of Melbourne Live Music Venues contained in the Melbourne Live Music Census 2017.

The Live Music Office has built in association with the South Australian Government through the Music Development Office (MDO) and the Australian Music Radio Airplay Project (Amrap), the Live Music Map. It is an interactive map that can locate Music related uses down to a one km radius of a specific address.

The Categories are:

- Music Venue
- Radio

- Recording & Rehearsal
- Music Education Centre
- Production & Backline
- Agents & Promoter
- Music Organisations

This is an excellent tool. Australian Performing Rights Association (APRA) licensed venues are given the opportunity to be included or opt out of the Live Music Map on the Live Music Office website as their applications/renewals are processed. The APRA Communications team update the additions and any opt outs as they are submitted through the APRA licensing processes. This tool should be considered the easiest method to locate live music related uses in proximity to a development site. However, it should not be considered to include all uses or to be assumed to be 100% accurate as the definition of a Live Music Venue for the purposes of Victorian planning law and the Copyright Act 1968, do not align.

<http://livemusicoffice.com.au/livemusicmap/>

7.4. City of Melbourne GIS project

It should be noted that The City of Melbourne is committed to geo-locating in their GIS system all the Live Music Venues listed in the 'Melbourne Live Music Census 2007' that are within the council's boundary.

Appendix A

Interview questions for Council planning officers.

Introduction

This is not a test and the questions are intended to facilitate conversation around the council planning officer's experiences in applying s53.06 of the VPP to planning application assessments. Part of the brief is also to assess councils "understanding of the agent of change law". An individual officer's response does not constitute the organisations corporate understanding but does give me an insight. Please feel free to qualify your response as official policy or "that it's your opinion" if you feel the need to do so. No one will be quoted without his or her consent.

The purpose of the report is to suggest: pathways for professional development, to develop planning resources and tools and, propose possible wording clarification to s53.06, if necessary.

The report is intended to improve the effectiveness of the stated purpose of s53.06 and, NOT to assess or comment on an individual officer or the council's statutory performance.

The reports brief is attached for reference.

S53.06 Purpose.

1. Is the purpose of 53.06 Clear? Brief discussion. Refer to the MAV template as a resource.
2. What does "unreasonable" mean in the context of the following statement?

"To ensure that noise sensitive residential uses are satisfactorily protected from unreasonable levels of live music and entertainment noise."

The 50m requirement

A planning application within 50m of a live music venue is required to address s52.27 of the VPP.

3. What is the requirement responsibility of the applicant?
4. What is the requirement assessment responsibility of the Council?
5. How is the 50m radius measured?
6. If the planning application is for a music venue use and the nearest residence is beyond 50m, what is the responsibility of the applicant to that sensitive use?
7. If the planning application is for a residential use and a venue is beyond the 50m, what is the responsibility of the applicant to the existing music venue use?
8. Is the councils responsibility in applying s53.06 different depending on use separation, if the separation distance is great or less than 50m?
9. Does the Council have the discretion to waive the 50m requirements?
10. In council's opinion, how does the 50m use separation distance relate to the s53.06-3 Requirements to be met and s53.06-5 Decision guidelines?
11. If yes, what determines the basis for the council's decision?
12. If there are two music venues in proximity to a proposed residential use and one is within the 50m zone and the other outside the 50m zone, how should this scenario influence the applicant's response to the soundscape and the council's assessment?

Identification of Live Music Venue Venues

The definition of a Live Music Venue is defined as:

"a food and drink premises, nightclub, function centre or residential hotel that includes live music entertainment, a rehearsal studio, any other venue used for the performance of music and specified in clause 2.0 of the schedule to this clause, subject to any specified condition or limitation."

13. Are Council planning officers aware of existing resources in identifying Live Music Venues such as published or maintained by Music Victoria, Live Music Office, APRA/AMCOS?
14. Do council planning officers require additional tools to identify Live Music Venue Locations?
15. As the presence of an audience or that music is to be played by musicians is not a defining attribute of a live music venue, what other uses should be assumed to be live music venues? Recording studios, radio studios, music teaching faculties, etc?

No councils have listed any live music venues in other uses in the schedule to clause 2 of s53.06.

16. What are the impediments or reasons why council have not used this planning tool?

Attenuation solutions that are deployed to protect the sensitive use in a planning application are different depending on whether the live music venue to be acoustically protected against, is an indoor or outdoor venue.

- *Indoor live music entertainment venue to below the noise limits specified in State Environment Protection Policy (Control of Music Noise from Public*

Premises) No. N-2 (SEPP N-2).

- *Outdoor live music entertainment venue to below 45dB(A), assessed as an Leq over 15 minutes.*

17. Are council staff cognisant of the difference in the methodological approaches?

SEPP N-2 states that its intended purpose is to protect conversation and sleep.

An acoustic measurement to assess SEPP N-2 is to be taken inside habitable rooms. This protects 'sleep' as it's an indoor activity. However, 'conversation' and 'normal domestic and recreational activities' are both an indoor and outdoor activity. This could mean that a different acoustic protection strategy could be deployed to protect 'conversation' and normal domestic and recreational activities' in private open space. However, no guidance in SEPP N-2.

18. How would council approach this requirement?
19. Do councils require resources to assist them in the acoustic assessment process? If so, what?
20. Did council participate in the EPA's review of SEPP N-2?

Some Councils have assumed that once an acoustic report has been submitted by the applicant, that s53.06 of the VPP has been adequately addressed and therefore the application can be supported by the council officer and that relevant objector's concerns can be adequately addressed by the application of permit conditions. The Music Industry's experience at VCAT has been that this approach is inadequate. Reference: Howler, Gasometer Hotel, Collingwood Arts Precinct/Tote, Bakehouse Studios.

21. How should the process of planning application assessment by council be improved? What are Council's views on:

- Better methods to identify the location of Live Music Venues.
- Peer assessment of acoustic reports.
- Development of guidelines for conducting acoustic measurements and site assessments.
- Development of templates of permit conditions to better implement sensitive use protection relating to the installation of attenuation measures by the registered builder, post building acoustic testing, protection of sensitive uses during demolition and building (use of temporary acoustic shields), requirements to be met prior to occupancy permits being granted, ongoing maintenance requirements (if relevant), etc.
- The use of s173 agreements and body corporate rules to help inform future residents of developments of the nature of the local neighbourhood and soundscape.
- Other ideas.

22. Do you have any suggestions as to how the Building Code of Australia could

be improved to assist in protecting sensitive uses or mitigating music noise emission from music venues?

Appendix B

Declared interests of the report's author.

The author of this report is Jon Perring. He is part owner of the Tote Hotel and Bar Open, both popular and long established Live Music Venues. Jon is a member of The Live Music Roundtable, convener of FG4LM, former board member and vice president of Music Victoria, former member of The Live Music Taskforce (2004), a musician and residential neighbour to a Live Music Venue (Dancehouse). He was also a party to *Gurner 23-33 Johnston Street Pty Ltd v Yarra CC* [2018] VCAT 794 (23 May 2018) that was successfully resolved by mutual consent. He has a Bachelor of Arts (Fine Art) (Honours) and majored in sound from RMIT University.

Appendix C

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12. Letter from Martin Foley ALP to Patrick Donovan Music Victoria dated 6th November 2014.
<https://www.musicvictoria.com.au/assets/Martin%20Foley%20ALP%20Letter%20to%20Music%20Victoria%20Final.pdf>

Appendix D

Interview Subjects

<u>Arup</u>	<u>Frank Butera</u>
<u>Bakehouse Studios</u>	<u>Helen Marcou</u>
<u>City of Melbourne</u>	<u>Julian Larkins, Colin Charman and Jack Berryman</u>
<u>Collingwood Arts Precinct</u>	<u>Marcus Westbury</u>
<u>The Gasometer Hotel</u>	<u>Clint Fisher</u>
<u>Howler</u>	<u>Brendan Brogan</u>
<u>Marshall Day Acoustics</u>	<u>Gillian Lee, Tim Marks, Elizabeth Hui, Simon McHugh, Edward Griffen and Liam Kemp (work experience student)</u>
<u>Music Victoria</u>	<u>Patrick Donovan</u>
<u>Revolver Upstairs</u>	<u>Lucie Ribush</u>
<u>Nicholas Tweedy S.C.</u>	<u>Nicholas Tweedy</u>

Requested interviews not conducted

City of Moreland

City of Yarra

Tim Gurner (Developer)

