

## **DECISION OF THE DIRECTOR OF LIQUOR LICENSING**

**LICENSEE:** BAR BES (WA) PTY LTD

**PREMISES:** BAR BES

**PREMISES ADDRESS:** 237 HAY STREET EAST PERTH

**INVESTIGATION NO.:** INV72806, INV 73894

**NATURE OF MATTER:** S 117 COMPLAINT - BAR BES NIGHTCLUB

**DATE OF DETERMINATION:** 23 September 2021

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1. On 17 September 2020, a complaint was lodged under s 117 of the *Liquor Control Act 1988* (The Act) by multiply nearby residents of the Bar Bes nightclub licence 6070007542, alleging that the amenity, quiet or good order of the neighbourhood is frequently and unduly disturbed by reason of activity occurring at the licensed premises, and associated with the licensed premises.
2. In accordance with s 117 of the Act, Inspectors authorised by the Director of Liquor Licensing (the Director) have attempted to settle the complaint through conciliation and negotiation, however the complaint has yet to be resolved. It is now for the Director to determine the complaint.

### **BACKGROUND**

3. Complainants continue to advise the Department of Local Government, Sport and Cultural Industries (DLGSC) that the operations of Bar Bes nightclub are unduly and unreasonably interfering with the quiet and good order of the neighbourhood.
4. DLGSC Inspectors, as authorised officers under the Act, have visited the premises and surrounds on numerous occasions and have confirmed that unreasonable levels of music noise, crowd noise and antisocial behaviour have been associated with the operation of the nightclub, confirming the statements of the complainants.
5. The City of Perth (the City) had been investigating noise complaints related to Bar Bes prior to the lodgement of the s 117 complaints. The City's Environmental Health Officers (EHO's) have taken multiple noise level measurements from nearby residential units which are classed as noise sensitive premises under the provisions of the *Environmental Protection Act 1986* (the EP Act) and the *Environmental Protection (Noise) Regulations 1997* (the EP Regulations). The City has determined that significant breaches of up to 30dB(A) over the permitted noise levels is occurring. Music and crowd noise generated from the operation of the Bar Bes nightclub was determined by the City to significantly contribute to excessive noise in the area. As a

result, the City has issued four Noise Abatement Directions (NADs) under the provisions of s 81 of the EP Act requiring the licensee to;

*'cease causing the emission of unreasonable noise including but not limited to unreasonable noise from amplified music.'*

6. A mediation meeting, chaired by DLGSC, was held on 9 December 2020 attended by the licensee, freehold owner, City EHO representatives and complainants. The following key action items were agreed upon in an effort to resolve the complaint;
  - *The licensee will ensure the acoustic report from their acoustic engineer is received within two weeks.*
  - *The licensee will ensure queuing of the patrons at the front of the premises will now extend East towards Bennett Street.*
  - *The licensee will accept the offer by Mr Wayne McDonald from Quest Apartments to conduct observations from a vacant apartment. Contact details of both parties have been shared.*
  - *The licensee will ensure DJ activities will cease in the rear courtyard at 10.00pm.*
  - *The licensee will ensure measures are put in place to ensure emptying of glass into bins outside the premises does not occur late at night.*
  - *The licensee will reduce the volume of sound over 100Hz by 6dB at the master desk.*
7. A second mediation session was conducted on 17 March 2021. This session identified that there were considerable renovation works underway in the venue aimed towards reducing the amount of noise escaping from the building. To determine if the works have been successful, it was agreed that the City would undertake further noise measurements and observations would also be undertaken by DLGSC Inspectors.
8. The subsequent noise measurements and observations determined that there had been some reduction in music noise for some of the residents, depending upon their location and the type of music played on the night. Low frequency bass noise was still observed to be evident and was still considered to be impacting residents as was crowd noise from the rear courtyard.
9. These noise measurements depicted significant exceedance of permitted levels of up to 20dB(A), however during one measurement event the music noise from the premises did comply, however patron noise was still well over. The inference drawn from this finding by the City was that the licensee can control music levels when they

wish, and in this instance, music was only noticeable intermittently and little bass was evident. This depicts the type of music on offer has a determinative effect on how much and what type of noise escapes the building, thus whilst the licensee had been somewhat successful in reducing noise levels overall, low frequency base noise, particularly from the Electronic Dance Music (EDM) genre, is still able to escape the building and the courtyard and remained intrusive and of concern to nearby residents.

10. After compiling reports from the complainants, the Citys' noise measurements and their own observations, DLGSC Inspectors concluded that whilst some improvement had been made, unreasonable noise was still impacting nearby residents. On 17 June 2021 the licensee was advised by DLGSC Inspectors that the complaint remained unresolved, and it was considered unlikely that further conciliation or negotiation would achieve a resolution of the complaint. As a result, the matter was referred to the Director for determination.
11. As required under the provisions of s 117(4) of the Act and as part of the determination process, all parties to the proceedings were given a final opportunity to lodge submissions.

#### **Final and Responsive Submissions - Residents**

12. Final and responsive submissions were lodged by Mr Trevor Goodman-Jones, Mr Mike Wilson and Ms Terri Maines and Mr David Worth.
13. Mr Goodman-Jones stated that even with recent acoustic upgrades to the building, the nightclub continues to exceed permitted levels. His view was that a considerable amount of time has been expended with conciliation, negotiation, official warnings and NADs, to no avail. He claimed Bar Bes appears unwilling or incapable of operating within Government legislation and in a manner that gives due consideration to the neighbouring residents.
14. Mr Goodman-Jones observed that litter, cans, bottles and broken glass continues to be present in the immediate surrounds of the nightclub and is created by patrons of the nightclub.
15. Mr Goodman-Jones claims noise from the beer garden is not resolved and stated;

*'The noise generated from the "open air" outside garden area is an issue that would seem unable to be acoustically controlled. The noise generated by such a large group of people in that outside area together with any amplified music needs to be seriously addressed. Another part of the noise complaint has been the very noticeable increase in street noise on the nights and early mornings that Barbès is open. Inebriated people speaking loudly, shouting, singing, laughing and even arguing in Hay Street. Some just slowly passing by, others sitting on the footpath seats for an hour or more.'*

16. In his responsive submissions Mr Goodman-Jones stated

*'Attendance at mediation difficult due to short notice and being in the middle of the day, noise levels continue to be exceeded. The sound levels provided by the City of Perth at the first Mediation Meeting in January 2021 confirmed that the sound emissions coming from the licensed premises were around 70 dB, being some 25 dB over the level that they are legally permitted to operate at. Even after the acoustic renovations at the premises were completed, the City of Perth again confirmed that Barbes were still well in excess of their allowed noise levels. In regard to the acoustic renovations undertaken, it is my understanding that as at the end of August 2021, neither your Department nor the City of Perth has been given a copy of the Acoustic Engineer's Report.'*

*The Outside Garden Area is a concern in that there is no way that noise from this area, whether being the noise of music or of over 100 people, can be effectively acoustically controlled.*

*Contrary to what the Licensee purports, this local precinct of East Perth is not an Entertainment or Night-Life precinct. One would have to question their claim that they contribute to the vibrancy of the local area when the experience of the past 12 months is that this nightclub has had a definite negative influence and affect, especially between the hours of 11pm and 5am, when at least 95% of people within the area are trying to get some necessary rest and sleep.'*

17. Mr Mike Wilson and Ms Terri Maines stated;

*'Despite being one building removed and somewhat buffered by Quattro, bass level noise from Bar Bes still causes significant sleep disruption in our apartment. On nights where bands are playing at the venue noise appears to be less of an issue, but on DJ nights the bass levels appear to be significantly elevated.'*

*Our understanding is that despite extensive works carried out at Barbes, noise emissions are still in excess of the regulatory volume levels. This is unfortunate for the Barbes operators, but it is an unacceptable situation for the hundreds of neighbouring residents dealing with sleep-disrupted lives and the associated health-related consequences. In addition, property values will have been negatively affected due to the loss of amenity.*

18. In their responsive submissions Mr Wilson and Ms Maines stated;

*'The Barbes letter cites the case that reasonable noise should be expected from time to time with regard to the patrons going to or leaving an entertainment establishment. The key part of this description is "time to time." In the case of the Barbes bass tones, on several nights these have been sufficiently loud to keep us awake for hours on end, thereby disrupting sleep and the resultant health impacts. By contrast, the Carlton Hotel, situated much closer than Barbes to our apartment, and unlike Barbes, in direct line of sight, causes us minimal noise disturbance.*

*I reiterate that previous incarnations of the Barbes establishment over the last 16 years have never had the all night noise impact of the current operation. I never lodged complaints with DLGSC or the City of Perth while Shape, Bullion or Sphere were in operation. Given the noise mitigation performed by the current Barbes managers it is remarkable that the noise emanating from the premises is still more intrusive than the previous clubs operating on the site.*

*Ultimately the only objective measure of whether Barbes causes amenity loss are the noise readings taken by the City of Perth. The fact that Barbes has continued to exceed regulatory noise limits despite their noise mitigation modifications suggests that the modifications were insufficient. That said, given my recollections about previous nightclubs on the site not being as noisy, it follows that music at Barbes must be significantly louder than was played at the previous clubs on the site.'*

19. Mr David Worth in his submissions stated mediations have been ineffective. His view was that many of the assertions made by the licensee are untrue. For example, the claim by Bar Bes that live entertainment in the courtyard will finish at 10pm is not correct as residents have observed entertainment until 2am. He stated live music and high levels of noise from this courtyard are a regular occurrence.

20. In his closing submissions Mr Worth stated;

*'I just want to highlight that Quattro residents have had to live with the noise from Bar Bes at levels way above the City of Perth limits for over 15 months now. Despite the s117 complaint, 2 mediations and 4 noise abatement notices, Bar Bes continues to flout the regulations and legislation dealing with night clubs and in its submission shows no signs that it will change its ways unless limits are placed on its licence.'*

### **Licensee Submissions**

21. The licensee identified that the Act stipulates that the sale of liquor under a nightclub licence is ancillary to the provision of continuous entertainment provided by one or more artists present in person performing there or by way of recorded music presented

personally by a person employed or engaged by the licensee to do so. Therefore, entertainment must always be provided to sustain the theme and manner of this class of licence.

22. The licensee advised it has taken the following actions in an effort to rectify the matter of the complaint;

- *Air conditioning ducting removed and replaced with refrigerated units, external portion of air con removed and hole bricked up.*
- *Rear door removed and replaced with new doors to create an airlock.*
- *Glass doors at the front removed and opening boarded up.*

23. The licensee put forward the following statements and quoted from various determinations in support of their position.

24. The licensee quoted Liquor Commission determination 14/2015 –

*“The noise must be one that would be regarded by a reasonable person as “undue”, having regard to what could reasonably be expected from a facility of the kind licensed” (which is cited from PSB Operations Pty Ltd Licensee of the Old Swan Brewery Restaurant –v- Jansen & Anor [2006] WASCA 270).”*

25. The licensee stated;

*‘regardless of the scientific calculations, it is understood that the enjoyment of nearby residents is respected and considered and on this we sincerely apologise for the incorrect assertion made in our letter of past July to the licensing division where it could have been interpreted that that undue disturbance to the neighbourhood of a license premises alone was not sufficient to establish a complaint made under section 117. It was that the consideration should have reflected past rulings made in the superior courts where effectively some noise is well to be expected but that any noise should not be fairly / unduly made as would be regarded by a reasonable person under the specific circumstances as was the matter before the Liquor Commission in its decision of 03/2020.’*

26. The licensee further quoted Hackney Tavern Nominees Pty Ltd –v- Mcleod (1983) 34 SASR 207, where Wells J held that;

*“Any resident who lives nearby a hotel must expect a certain amount of necessary or usual noise from people either arriving at, or, more likely, departing from the premises. From time to time one or more of the patrons might be expected to be noisier than the others – calling out, even yelling and*

*screaming might occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents”.*

27. With regards to the matter of ‘outside verbal noise’ the licensee was of the view;

*‘it is only normal that people speak, and such noise is certainly expected as again as seen and supported in the LC14/2015 matter, we as licensees also accepted that, “the level of noise that emanates from (or our premises) is (or may be) in breach of the regulations, but (we) deny that that noise is “undue”, because it represents conversational noise, that should be expected from such a facility.’*

28. As cited by the Liquor Commission “In Re McHenry [1987] 4 SR (WA) 31, Sharkey J held;

*that the word “undue” had to be determined and qualified according to the nature of the neighbourhood, so that what might constitute “undue” noise in one neighbourhood may not constitute undue noise in another. In this case, the neighbourhood is a mixed use, high-density tourist precinct, comprising of hotels, restaurants, tourist accommodation and residential accommodation. It is not outer suburbia.”*

The licensee submitted that the Eastern end of East Perth falls within this category.

29. The licensee’s view is that the intention of Parliament is clear in that the secondary objects of the Act require the Licensing Authority to have regard to the facilitation of the development and use of premises for the performance of live music that reflects the diversity of the requirements of consumers. It is the licensee’s submission that this requirement has been given insignificant weight as compared to significant weight to the contrary.
30. The licensee claims to be in continual communication with residents who have balconies looking directly over our rear courtyard and these residents have advised the licensee that Bar Bes is of no concern to them. The licensee questioned the total number of Quest and the Quatro apartment occupancies and in the licensees’ opinion, compared to the numbers of complaints made, it is evident that a significant proportion of the local area has not been affected. In questioning the number of complainants, the licensee questioned whether the operation of the nightclub is really a problem, if the majority (of residents) don’t complain.
31. The licensee further stated;

*‘On the face of the matter the complainants simply do not want a liquor licensed venue nearby and judging only by the times, this would also relate to*

*a Tavern License or Small Bar. Should this matter persist, that contrary to a significant proportion of the community, the complaints thus far may very well succeed in having the license vacated and reverting the building back into its derelict state.*

*We believe it has now become more of a personal matter with a small portion neighbour's that simply do not want any licensed venue nearby.*

*Additionally, as our premises has been in situ under a 'live' license regardless of the suspension as original occupants prior to surrounding developments, this fact supports that it appears that no account has been taken where consideration has included that new resident knew or ought to have known of the 'likelihood' of noise emanating from a license premises (particularly of a class of 'Nightclub' license) at the time of purchasing their apartments. It was confirmed by the Liquor Commission (14/2015) that "the onus is on the complainants to prove their case on the balance of probabilities, pursuant to section 117 of the Act. The onus never shifts to the respondent." The Commission further summarised that "It is clear from all of the acoustic reports that the Environmental Protection (Noise Regulations) 1997 is being exceeded. This is clearly a relevant consideration, but it is not determinative. The question is whether the applicants have discharged their onus of establishing a breach of section 117 of the Act (PSB Operations Pty Ltd Licensee of the Old Swan Brewery Restaurant –v- Jansen & Anor [2006] WASCA 270).'*

32. In conclusion the licensee stated;

*'We have up to this date taken great steps to appease all parties and will continue to consider any reasonable and fair options put forward but it must not be excluded that we are a licensed venue legislated towards entertainment and that is exactly what we have been doing since activating the long time suspended license at great expense and commitment.*

*We submit that should any additional significant conditions be imposed that may impact the services that this class of license has been approved to provide that procedural fairness would have not have been thoroughly and equally exercised when considering the justification allowed under the provisions of the Liquor Control Act that directs the theme and manner of our trade.'*

33. A submission was also lodged by the freehold owner of the premises addressing past issues with land use and the introduction of new residential accommodation buildings into the East Perth area. The freehold owner questioned the acoustic fit out of these new buildings and stated that persons living in inner-city areas should be prepared for a level of noise and disturbance.



**Determination**

34. Section 117 of the Act states that a complaint may be lodged with the Director alleging;

a) *that the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed be reason of any activity occurring at the licensed premises; or*

b) *that any-*

*i behaviour or persons on the licensed premises; or*

*ii noise emanating from the licensed premises; or*

*iii disorderly conduct occurring frequently in the vicinity of the licensed premises on the part of persons who have resorted to the licensed premises,*

*is unduly offensive, annoying disturbing of inconvenient to persons who reside or work in the vicinity, or to persons in or making their way to or from a place of public worship, hospital or school.*

35. The Act requires that if the matter referred to in the complaint has not been settled by conciliation or negotiation, which is now the case, the Director is to determine the matter. Should the Director determine that action is required to resolve the complaint the Director may by order;

a) *Vary the existing conditions of the licence, or*

b) *Redefine, or redesignate a part of, the licensed premises; or*

c) *Prohibit the licensee from providing entertainment or any other activity of a kind specified by the Director during a period specified by the Director or otherwise than in circumstances specified by the Director, and impose that prohibition as a condition to which the licence is subject; or*

d) *Otherwise deal with the matter in such a manner as is likely, in the opinion of the Director, to resolve the subject matter of the complaint.*

36. The Director in determining the complaint must consider the matter on the balance of probabilities and must be satisfied that there is a causal link between the alleged detriment to the amenity, quiet or good order of the neighbourhood and the activity occurring at the licensed premises and/or the behaviour of those resorting to such premises.

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37. Determination of the complaint must be a balancing exercise to consider the right of Bar Bes to continue to operate a lawful nightclub licence and meet the expectations of the public against the rights of the nearby residents to not be unreasonably impacted by the operation of this standalone venue.
38. The onus on establishing the validity of the grounds of the complaint lies with the complainants. If the Director accepts that the grounds of the complaint have been made out and therefore that action is warranted to resolve the complaint, the next step of the process is to determine what action should be taken.
39. The Director is required to determine whether the conduct of the licensee and its patrons is undue or unreasonable and whether the operation of this nightclub should continue under the current format or whether conditions need to be considered to lessen the impact of the nightclub on the neighbourhood.
40. It is clear that a nightclub licence by virtue of s 48 of the Act must provide live continuous entertainment. Historically this entertainment has been provided by live music or in person DJ presented music, or both as is the case with the Bar Bes. The licensee of Bar Bes states EDM is a significant music genre provided onsite. One characteristic of this music genre is an impulsive low frequency 'thumping bass' component. This type of noise characteristic generally proves more difficult to control/contain and has a greater capacity to travel through walls or the ground and to impact the neighbourhood. The low bass frequency noise is typically heard and at times felt, away from a venue when other noise sources are easily contained or have dissipated. Therefore, whilst the provision of this entertainment type may be reasonable under a nightclub licence, what must be considered is whether the entertainment unreasonably interferes with the amenity of the neighbourhood. Following on from this, the expectations of what is acceptable in the given neighbourhood also needs to be considered.
41. The term unduly is referred to in s117(1)(a) of the Act and is an important consideration in the complaint and determination process. The outcome of this decision hinges on the context of this term and as a result, the validity of the complaint. Allied to assessing whether an action is undue, it is also necessary to consider whether the action is considered unreasonable given the licence type, time of day, degree of offence or loss of amenity. An assessment of the characteristics of the neighbourhood in which the licensed premises and complainants are located is also necessary as this may influence whether the action is considered undue or unreasonable.
42. The Act does not define several relevant terms to this complaint and other definitions sources and guidance needs to be considered.
43. The Concise Oxford Dictionary defines the following;

Undue is defined as '*excessive, disproportionate*'.

Unreasonable is defined as *'not reasonable; going beyond the limit of what is reasonable or equitable'*.

Reasonable is defined and clarified as *in accordance with reason, not absurd; within the limits of reason; not greatly less or more than might be expected.'*

44. Some direction for the assessment of what is undue can be found in *Hackney Tavern Nominees Pty Ltd v MacLeod* (1983) 34 SASR 217 where Judge Wells stated;

*'the test of what is undue therefore is concerned with excess over what will naturally result from the conduct of licensed premises. Whether such annoyance and disturbance or inconvenience can be regarded as undue is a matter of degree and will depend on the circumstances.'*

Whilst this is a South Australian case, the principle is equally applicable in Western Australia.

45. Further in *McHenry* 4 SRWA (1987) Judge Sharkey stated;

*'In order to determine whether the quiet has been unduly disturbed it required the words to be given their ordinary and natural meaning. The words must be qualified by the neighbourhood. Thus in quiet neighbourhoods, disturbance might be undue which is not so in a more noisy neighbourhood.'*

46. In the *Old Swan Brewery Restaurant; Jansen & Anor – v- Osb Operations Pty Ltd* [2005] WALLC 14 'undue' was referred to as ;

*'undue whether in the circumstances of the case the activity complained of is disproportionate'*

47. And relevant to this case it was stated in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR at 207;

*'Any resident who lives nearby to a hotel must expect a certain amount of necessary or unusual noise from people arriving at, or more likely departing from the premises. From time to time one or more of the patrons might be expected to be noisier than others – calling out, even yelling and screaming may occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents.'*

48. So therefore, in determining this s117 complaint it must be determined whether what is reported in the complaint is factual and is also both undue and unreasonable. Whilst some noise or disturbance might not be undue the question is, is it reasonable in the context of the complaint, given the neighbourhood, the licence type and the times and

days the disturbances are occurring? And would a normal person given the circumstances of the disturbances find the situation reasonable or not?

49. Noise being generated from the operation of the nightclub is reported as a significant component of the complaint. For the purposes of the EP Act unreasonable noise is described as;

*'for the purpose of the Act noise is to be taken to be unreasonable if it is emitted, or the equipment emitting it is used, in contravention of this Act or and subsidiary legislation made under this Act, or having regard to the nature and duration of the noise emissions, the frequency of similar noise emissions from the same source (or source under the control of the same person or persons) and the time of day at which the noise is emitted, the noise unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person'.*

50. The EP Regulations qualify that;

*'noise emitted from any premises or public place when received at another premises must not cause, or significantly contribute to, a level of noise which exceeds the assigned level in respect of noise received at premises of that kind and must be free of tonality, and impulsiveness and modulation. A noise emission is taken to **significantly contribute to** a level of noise if the noise emission as determined under the regulations exceeds a value which is 5dB below the assigned level at the point of reception'.*

51. Whilst the EP Act and Regulations definitions provide some assistance in determining what stipulates unreasonable noise, the *Liquor Control Act 1988* requires a more open interpretation and covers more than just noise. In the context of the Act the amenity, quiet or good order of the neighbourhood must be considered. What is reasonable or unreasonable must be considered and what constitutes annoyance, disturbance or inconvenience as to be regarded as undue is a matter of degree and will depend on what is generally considered acceptable, rather than meeting a purely statutory noise limit. The neighbourhood of the Bar Bes licensed premises must therefore be considered first before the level of annoyance, disturbance or inconvenience can be judged.
52. The Bar Bes neighbourhood can be characterised as a mixture of commercial ground floor tenancies with short stay and residential accommodation above. The neighbourhood contains few licensed premises and the number of businesses operating after hours are minimal. The neighbourhood would best be described as quieter after approximately 9pm at night.
53. It must be noted that Bar Bes is not located in an entertainment precinct, which is generally a higher ambient/background noise area, where residents would be expected to receive and accept higher overall noise levels. Given the quieter

neighbourhood in this section of East Perth, there is a clear expectation from residents that they should not be impacted in the same manner as if they were in an apartment in the middle of Northbridge. Equally, City of Perth and DLGSC Inspectors assessment of any premises, neighbourhood and unreasonableness of any noise occurs on the same basis.

54. It is also reasonable to expect a higher, but not undue, level of noise and disturbance and unruly behaviour in a neighbourhood with a mixture of high rise residential, short stay and hotel accommodation and street level commercial properties, than compared to the middle of suburbia.
55. Whilst the vicinity of Bar Bes is a quieter neighbourhood than Northbridge with reduced ambient noise, particularly late at night, residents still ought to be aware of a nightclub and other licensed premises in the vicinity and have to expect some noise in such close proximity to a nightclub. Residents may have become accustomed to the previous intermittent use of the premises with lengthy periods of it sitting idle. Additionally, anecdotal evidence suggests when the venue has been used in the past, the operation of the licence did not impact residents to the same degree the current operation of the venue is purported to.
56. Whilst there may be a view that Bar Bes as a nightclub licence, has some form of tacit approval to create as much noise as it wishes due to its required manner of trade, the construction of the Act and its primary objects depict otherwise, and it is incumbent upon the Director (in determining this complaint) to balance the requirements of consumers for liquor and related services against the need to minimise harm, including that from the impact of noise and loss of amenity.
57. Some useful clarity for this determination and the impact of licence type, manner of trade and expectations of the public, with regard to noise and disturbance, can be gained from the Raffles Hotel case cited by the licensee.
58. *Ammon v Colonial Leisure Group Pty Ltd [2018] WASC* was an appeal under nuisance law as to whether noise from the Raffles Hotel unreasonably and substantially interfered with the use and enjoyment of a nearby apartment. The appellant (a resident) argued measured noise levels from the operation of the hotel were in breach of the permitted noise levels and as a result sought orders for the licensee to be compelled to comply with permitted noise levels – which the Court found was not appropriate. The nuisance case and appeal were dismissed in The Court of Appeal WA before 3 Supreme Court justices.
59. There are similarities and clear differences between the Raffles Hotel case and the Bar Bes s 117. Both involve music generated from a licensed premises with noise sensitive premises in close proximity. Both involve an impact on nearby residences, both involve exceedances of permitted levels under the EP legislation and in both cases the licensee took action to minimise the noise.

60. The Bar Bes case however differs to the Raffles Hotel matter in a number of important ways. In the Raffles Hotel case the appellants apartment formed part of the same complex as the licensed premises, whereas in Bar Bes the complainant's residential premises are stand-alone distinct venues and high rise in nature. In Bar Bes low frequency bass and elevated crowd noise have proven to be intrusive as opposed to the more general operational and music noise observed at the Raffles Hotel. The most pronounced difference however is the time of day the residents are being disturbed. With the Raffles Hotel, a tavern licence, the nearby residents could expect noise to cease by 12 midnight, the appellant was also complaining about noise interfering with his quiet enjoyment of his residence – as if it were a house in suburbia. In Bar Bes the premises is a nightclub providing continuous live entertainment up to 5am in the morning, potentially having a profound impact on nearby resident's ability to sleep. This is the most significant difference between the Raffles case and this s 117 complaint.

61. In the Raffles Hotel case Master Sanderson stated;

*'nuisance is a question of degree, and that all relevant factors must be taken into account, including in this case that the Apartments are in a busy precinct, not a quiet suburban backwater'*

62. The Raffles Hotel case was dismissed on the basis that it was not reasonable for the licensee to stop providing entertainment at the premises and it was considered unreasonable for the licensee to have to comply with the permitted noise levels when conducting their normal and lawful manner of trade. The case highlighted that the resident ought to be aware they were moving into close proximity to a long-established licensed premises and that noise and disturbance could reasonably be expected. Further, the Master made it clear that the neighbourhood of the Raffles Hotel was not a quiet area and background noise was elevated - meaning the appellant had to expect a noisier environment than they otherwise might in the suburbs.

63. What sets Bar Bes apart for the Raffles Hotel case however is the long hours of operation into the early hours of the next morning permitted for a nightclub, the highly unusual aspect of an open air, unattenuated courtyard within a night club licence and the relatively quiet nature of the neighbourhood in which this particular nightclub is situated. These matters are determinative of the reasonableness of whether the noise generated by Bar Bes is acceptable.

64. In the Raffles Hotel case it was stated the test of reasonableness is objective and that;

*The reasonableness enquiry involves a balancing exercise between the defendant's right to use his or her land freely, and the right of the plaintiff to enjoy his or her land without interference. The reasonableness requirement thus reflects the need for give and take between neighbours living within a community.*

*Exceeding noise levels assigned by the Regulations, while relevant, is not to be equated with a substantial and unreasonable interference under the law of nuisance.*

65. The direction to be gained from the Raffles Hotel case is that to require a nightclub licence to operate without causing any interference to nearby residents is unreasonable, as is attempting to make the premises fully comply with noise legislation. It must be noted that the primary object of the Act is to minimize harm, not eradicate it. Therefore, it follows, that it is necessary for this determination to balance the competing interests of the lawful operation of a nightclub licence versus the reasonable requirements of residents not to be unduly impacted by the nightclub operations – particularly later at night.
66. Bar Bes (WA) Pty Ltd is a new licensee operating from premises which have been closed for substantial periods. Other past businesses utilising this nightclub licence produced significantly less noise and disturbance and operated reduced trading hours. Bar Bes alternatively is providing a very intrusive form of music and at times trading into the early hours of the morning – much longer than any other previous business operator at the venue. The inference to be drawn is that residents moving into the area over the past few years have been accustomed to a quieter noise environment and that Bar Bes operation has significantly altered and impacted the noise environment.
67. Whilst the area surrounding Bar Bes is a quieter section of the inner-city area, it is clearly not a suburban area either. I accept the view of the licensee and freehold owner, which is supported by the City's general advice for living in an inner-city area, that residents moving into these areas must expect to receive a level of noise and disturbance – more so than if they were in the suburbs.
68. From the evidence provided it becomes apparent that there are three main issues complainants are experiencing with the premises – noise from music and crowd noise generated from the open rear courtyard, low frequency bass noise generated predominantly by the EDM music genre presented by DJ's and the negative impact of patrons once they have departed the premises – particularly in the early hours of the morning.
69. The rear courtyard is an open area to the south of the nightclub building and is surrounded on the other three sides by a high brick wall. The outdoor courtyard is not attenuated in any manner and has been used for DJ events and as a general patron access/lounge area. The licensee, as part of the conciliation process agreed to cease live music/DJ's in this area after 10pm at night, however several of the complainants have presented evidence that on occasion this has not occurred and DJ's have been observed operating in the area up until 2am. The City's noise measurements depict the outdoor courtyard as a significant noise source which strongly contributes to excessive noise being received by nearby noise sensitive premises. It is also clear that the location of complainants' units with regards to their proximity to and orientation

towards the rear courtyard has an impact on whether they receive significant noise generated from this area.

70. I do not consider that it is reasonable for an unattenuated open-air night club beer garden to be operating near residential units in the early hours of the morning, especially if DJ's are operating in the area with significant bass driven bass music.
71. The low frequency bass noise within the building appears to be able to be controlled from time to time by the licensee but may perhaps be more the result of differing music genre characteristics, rather than an attempt to reduce frequency levels. Other types of music such as live bands have been observed as being less intrusive. Complainants, Inspectors and the City EHO's have observed this type of music is less able to escape the building as easily as the low frequency bass from EDM has been reported.
72. The City's noise measurements prove noise including music and crowd noise generated from the premises greatly exceeds the assigned levels by a factor of up to 30dB(A) La10. Noise generated by the crowd and music from the nightclub was significantly above the ambient background level and were the dominant noise sources on most occasions. Therefore, it can be concluded, noise from Bar Bes is impacting residents in a substantial and unreasonable manner.
73. Even after attenuation works undertaken by the licensee and freehold owner, the City's noise measurements recorded exceedances of up to 20 to 30dB(A) over the permitted assigned level at the residential noise sensitive premises.
74. It would be incorrect to assume the licensee seeks to thumb its nose so to speak at nearby residents and create as much noise as it wishes. To their credit the licensee and freehold owner have expended significant money and resources in attempting to contain and reduce the noise generated from the venue. However, the licensee has withheld the Lloyd George Acoustic report which may have required more works to be undertaken. It can only be speculated whether the licensee and freehold owner have carried out all necessary works and whether more work may have been recommended.
75. The issue of patrons departing the premises is a complex one and is in some ways difficult for the licensee and their security staff to eliminate. They can however continue to make meaningful attempts to monitor and move on their patrons, particularly in the early hours of the morning, when all other venues in the area are closed. The licence already contains a condition which places an emphasis on moving patrons on and an obligation, which is qualified that whilst they have limited powers away from the licensed premises, there is none the less an obligation to monitor patrons leaving the premises and attempt to move them on so that they do not unduly impact nearby residents with their actions.
76. It is my view that the facts outlined by the complainants, the City's noise measurements combined with the observations of the Inspectors indicates that the



operation of the Bar Bes nightclub is having a detrimental impact on nearby residents. This impact is being created by music and crowd noise in the rear open courtyard and its use late at night, from music played within the venue (predominantly the low frequency bass noise component of that noise) and the conduct of patrons once they have left the licensed premises.

77. As a result, I consider the complainants have made out the grounds of the complaint and I consider that action is required to resolve the complaint.
78. I find on the balance of probabilities there is a clear link between the operations of the nightclub and unreasonable noise generated from the premises, resulting in disturbance to the amenity, quiet and good order of the neighbourhood and that this noise is unduly annoying, disturbing and inconvenient to residents.
79. As a result, I intend to impose the following conditions on the licence under the provisions of s 117 (5)(a) of the Act;
  - 1) The provision of music or any other form of entertainment (including background ambient music) in the rear outdoor courtyard area must cease at 10pm each night.
  - 2) Not more than twenty (20) patrons are permitted to remain in the rear outdoor courtyard area after 12 midnight each night. Patrons are expected to use the area after midnight only as a smoking breakout area or chill out area for short periods before returning to the indoor area of the licensed premises.
  - 3) All front and rear airlock doors must be kept closed at all times except when persons are passing through them. Doors cannot be propped open.
  - 4) Emptying of glass containers into bins external to the building is not permitted after 10pm at night.
80. The s 117 conditions will become effective from Monday 27 September 2021 in order to permit the licensee, their staff and contractors to effectively prepare for and to implement the licence conditions.
81. In conjunction with the s 117 conditions it is incumbent on the licensee and freehold owner to continue to work with an acoustic engineer to further contain and prevent low frequency bass noise from escaping the premises. Attention should be given to matters such as the direction and location of speakers, types of speakers and mountings and bass dampening. The ability of the of stairwell to act as a noise escape pathway needs to be investigated as does the suitability of other building facets such as ceilings and the roof to effectively contain noise to the building.

82. As discussed, the licensee must make greater use of security staff to monitor and move on patrons loitering in the vicinity of the premises. The licence conditions already require security staff to be present up to one hour after closing to assist patrons to move on with creating antisocial behaviour. There is limited evidence of this currently occurring. The licence condition states;

*- Security personnel/Crowd Controllers (licensed under the Securities and Related Activities (Control) Act 1996), are to be present to monitor the licensed premises and the behaviour of patrons arriving and departing the premises from 8 p.m. (or the time of opening the premises if after 8 p.m.), until one (1) hour after trading ceases. While these personnel have no authority over the patrons when they are away from the licensed premises, their presence may assist in the orderly dissipation of patrons once they leave the premises.*

83. In addition to their normal crowd control duties, security staff are also expected to regularly monitor persons queuing to gain access to the premises, to bar entry to any patrons consuming liquor in the queue and to ensure entry to other open businesses is not blocked by the queue.
84. It must also be noted that the City still has the capacity to undertake noise measurements, issue NAD's and otherwise deal with noise complaints. The City retains the power to instigate prosecution under the EP Act for any breach of noise levels.
85. There is a clear onus on the licensee and the freehold owner to continue to explore attenuation measures in their own interest to negate further issues with residents. The licensee must continue to ensure unreasonable noise (and in particular low frequency bass noise) is reduced and/or contained within the building by utilising suitable manual and physical control measures. The licensee should continue to monitor and control noise and patron behaviour to lessen the potential for further complaints and work constructively to be part of the neighbourhood.
86. It would also be in the licensee's interest to ensure staff at the end of trading check the perimeter of the licensed premises and remove any litter or other debris associated with their patrons.
87. Whilst this complaint is now considered closed, residents are not restricted from lodging a new s 117 complaint if they consider the noise or behaviour related to the licensed premises is disturbing them by any of the reasons referred to in s117.
88. DLGSC inspectors will continue to monitor the premises. Please note that any breach of the s 117 conditions placed on the licence constitutes an offence under s 110 (1) (aa) Act. The penalty for a licensee or manager is a \$10 000 fine if prosecuted for the alleged offence in court or a \$1000 infringement notice issued by an authorised officer.

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89. Parties to the proceedings are advised that if they are dissatisfied with this outcome, they have a right to seek a review before the Liquor Commission pursuant to s 25 of the Act. An application for review must be lodged with the Liquor Commission within one month after the date upon which the party receive notice of this decision.
90. This matter has been determined by me under delegation pursuant to s 15 of the Act.



Daryl McLauchlan  
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

23 September 2021