

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

- Applicants:** Mr Michael R Bell and Mrs Irene A Bell
Mr Stephen Miller and Mrs Catherine Miller
Ms Elizabeth Anne Verbrugge
Ms Jennifer Gardiner
- Respondent:** Mr Grant McClintock
(licensee, Moody Cow Brewery)
- Commission:** Mr Michael Egan (Presiding Member)
Dr Eric Isaachsen (Member)
Ms Mara Barone (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to dismiss a complaint lodged under section 117 of the *Liquor Control Act 1988*.
- Premises:** Moody Cow Brewery
791 Ferguson Road, Ferguson
- Date of Determination
(on papers):** 3 August 2017
- Determination:** The application for review is dismissed.

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *OSB Operations Pty Ltd v Jansen & Anor* [2006] WASCA 270
- *Re McHenry* [1987] 4 SR (WA) 31
- *Mr Tyrrell, G Gardiner and Mrs Jennifer Gardiner & Others v Grant McClintock* (LC 01/2015)

Background

- 1 On 2 December 2016, an application in the name of Mr Michael Bell of 763 Ferguson Road, Ferguson (“review application”), was lodged pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) seeking a review of a decision dated 2 November 2016 of the delegate of the Director of Liquor Licensing (“the Director”) to dismiss a complaint made on 17 November 2015 under section 117 of the Act (“the section 117 complaint”).
- 2 The review application is accompanied by a letter signed by Michael and Irene Bell (“the Bells”), Stephen and Catherine Miller (“the Millers”), and Elizabeth Verbrugge (“E Verbrugge”), all of whom are signatories to the section 117 complaint. Another signatory to the section 117 complaint, Jennifer Gardiner (“J Gardiner”), has also signed the Primary and Responsive Submissions in support of the review application (the individual complainants are collectively referred to as “the complainants” or “the applicant”).
- 3 The section 117 complaint alleges, among other things, that the music and other activities carried out at the Moody Cow Brewery, Ferguson Road, Ferguson (“the MCB”) adversely affect the amenity of the area in which the complainants live.
- 4 The complainants describe themselves as “close neighbours” and all give Ferguson Road as their residential address and live in relative close proximity to one another and the MCB.
- 5 A number of responsive and closing submissions (and clarifying submissions) were lodged with the Director by the complainants and the licensee of the MCB (“the licensee” or “the respondent”). The licensee also submitted a compilation of video footage of activities at, and in the vicinity of, the MCB licensed premises on various dates, some coinciding with the activities complained of by the complainants (“video footage”).
- 6 The section 117 complaint was determined on the papers and at the request of the complainants, this review application has been also determined on the papers.

Background to lodgement of the Complaint

- 7 It will be helpful to an understanding of the complaint to outline the history of the licensed premises and some of the circumstances leading up to the lodging of the section 117 complaint.
- 8 It is somewhat difficult to be definitive about the circumstances and information, given the varying accounts of each of the parties, but the following is a brief distillation solely for the purpose of framing a background to the complaint.
- 9 The Bells acquired their property and built their home in 1994.

- 10 The MCB licensed premises is located on 2.2 hectares on Ferguson Road, Ferguson. The land was acquired by the licensee from the Bells in 2007 and shares a boundary with the Bells who live approximately 90 metres from the MCB premises.
- 11 According to a map of the location submitted by the complainants, the distance between the MCB premises and each of the complainants is:
 - i. the Bells: 82 metres;
 - ii. the Millers: 306 metres;
 - iii. J Gardiner: 415 metres; and
 - iv. E Verbrugg: 156 metres.
- 12 Three other neighbours live in the area at an approximate distance from the MCB premises of 308 metres, 479 metres and 600 metres, but are not signatories to the complaint.
- 13 A winery and commercial function facility – St Aidan’s Wines Function Centre – is also shown some 300 metres or more away from the MCB premises.
- 14 The area in the vicinity of the MCB premises is predominantly rural in character.
- 15 The initial development approval by the Shire of Dardanup (“the local authority” or “Council”) relating to the MCB premises was for the establishment of a micro-brewery. The MCB has subsequently developed into premises with a broader use, now hosting occasional functions within the terms of its liquor licence.
- 16 On 26 May 2010, a Tavern Licence was issued in respect of the MCB premises as it was seen to be the most appropriate licence for the premises. The licence is conditioned requiring that the primary focus of the licensed premises always remain on being a micro-brewery with beer brewed on the premises.
- 17 The MCB commenced trading on 28 May 2010, and, although it is not entirely clear, as the Bells contend noise disturbances became a problem immediately following the opening of the MCB, music commenced at about this time or shortly after.
- 18 Relations between the Bells and the licensee reached a point where each applied to the Magistrates Court for restraining orders against the other. Ultimately the parties signed a Minute of Consent Orders dated 10 May 2011 (“Consent Order”), the terms of which were (and remain):

All parties agree:

- i. not to communicate with each other except in writing;

- ii. not to go to each other's property;
 - iii. to act in a civil manner towards each other; and
 - iv. the Misconduct Restraining Orders be withdrawn (which had been applied for and which were replaced by this Consent Order).
- 19 At about this time, it appears that the licensee made some adjustments to the positioning of the musicians playing at the premises and moderated the amplification of the music. It is not apparent if the licensee then, or subsequently, made any structural modifications to the MCB premises to attenuate noise emissions.
- 20 It also appears that management of the noise problem and complaints to Council from the Bells became such an issue that Council acquired its own noise measurement device in May 2012.
- 21 There is a significant amount of disagreement and inconsistency between the accounts of the Bells and Council about the manner in which noise levels were determined, and the frequency with which noise levels were exceeded around this period.
- 22 On 25 June 2014, the delegate of the Director approved an application from the licensee to increase the patron numbers at the MCB premises from 120 to 200 (decision A224124). A review application was lodged and a hearing was held by the Commission on 12 November 2014.
- 23 The Commission quashed the decision of the delegate of the Director (reference: LC 01/2015 dated 20 January 2015). The Commission considered that an increase in the number of patrons would "further exacerbate the conflict of use situation that currently applies in the locality" and accepted the evidence of those who objected to the application (which included the Bells, the Millers and J Gardiner) in relation to "the likelihood that undue offence etc. would occur to persons who reside in the vicinity of the (MCB) premises".
- 24 From January 2015 to March 2016, Mr Bell maintained a hand-written diary of activities held at the MCB premises, mainly on the weekends, and also recorded the impact on the Bells.
- 25 More recently, the licensee has received Council approval to redevelop or further develop the MCB premises, which will, according to the licensee, improve efficiencies in the brewing process and provide further space in the existing building. No details of the proposal or the potential impact, if any, of noise emissions resulting from the modifications are before the Commission.

Details of the section 117 Complaint

- 26 In its letter accompanying the section 117 complaint, the complainants identify a number of specific events and activities, which they allege have had “disturbing impacts upon our homes and farming tasks and the quiet amenity of this formerly tranquil location”.
- 27 The problems are identified as the volume and nature of the music played at the MCB premises (particularly the repetitive base beat), noise from children’s games and activities (in a playground and grassed area overlooked from the verandah of the MCB premises), noise from car and motorcycle groups frequenting the licensed premises, and crowd noise from outdoor wedding receptions.
- 28 The complainants specifically identify the following dates and events:
- i. 8 August, 5 September and 24 October 2015: noisy children’s games and activities;
 - ii. 23 August 2015: 12 motorcycles with particularly loud exhaust systems (and engines revving);
 - iii. 3 September 2015: an organised group of vehicles (“car group”) with engines revving;
 - iv. 24 October 2015: children’s games and activities (including a “bouncy castle”) from lunch time until 10.20pm, comprising “loud music, adults shouting, clapping etc and children yelling and screaming”; and
 - v. 31 October 2015: a wedding reception from mid-afternoon to 10.00pm with progressively loud music (and repeated base beat) and “adults yelling, screaming and cheering at the tops of their voices”.
- 29 The complainants also contend, in subsequent submissions accompanying the section 117 complaint, that the noise impacts from the MCB premises are historical and their complaint is a sample of, and is linked to, the past failures of the local authority to deal with the various noise impacts experienced.

Response to Complaint by Licensee

- 30 The licensee has addressed each of the specific events and activities identified in the section 117 complaint and has made general and specific submissions relating to past events and circumstances.
- 31 In relation to the events and activities specified in the complaint, which according to the licensee were not notified to the licensee at the time of their occurrence, the licensee has responded in the following terms:

8 August 2015

- 32 By reference to a diary maintained of activities at the MCB premises (“the MCB diary”), which records that “7 kids (under 12) meals” were sold on this day, the licensee contends it could be concluded that “7 kids are unlikely to create much noise” and has suggested that “this is a fabricated complaint”.

23 August 2015

- 33 The MCB diary confirms the attendance at the MCB premises of a Harley Davidson motorbike group. There were no customer complaints and the Assistant Director of the Harley Davidson group, who lead the group on the day, has vehemently denied the allegations of revving engines in a written note. The licensee submits that given these facts there is no evidence to support the complaint, so that “again, it could be suggested that this is a fabricated complaint”.
- 34 The licensee also, by reference to video footage of trail bikes on the Millers’ property at 10.00am on 24 October 2015, questions why the Harley Davidson group would be an issue given the noise trail bikes emit.

3 September 2015

- 35 The MCB diary reveals that the organised car club (comprising cars manufactured in the early 1960’s) arrived at the licensed premises at 11.00am. By reference to a photograph of the cars parked on the grassed area at the premises, and the dismissal by a car club member present on the day of the complainants’ allegation that the cars’ engines were revved excessively, the licensee submits that it could again be suggested this is a fabricated complaint.
- 36 The licensee also highlights video footage of a car or cars on the Bells’ property revving their engines on 22 December 2015, which the licensee suggests “was a deliberate act on behalf of the Bells to impact on patrons” at a wedding reception at the MCB premises.

5 September 2015

- 37 The MCB diary reveals bookings for a total of 29 children for whom 26 meals were sold, with no additional children’s activities scheduled.
- 38 By reference to a professional acoustic assessment carried out on Monday 27 April 2015 on the Anzac Day holiday weekend (“acoustic assessment”) when 39 kids meals were sold and the MCB was found to be compliant with noise level emissions, the licensee submits that it would be reasonable to conclude that the complaint relating to activities on 5 September 2015 when far fewer children were present has no basis whatever and could be considered to be malicious and vexatious.

24 October 2015

- 39 The MCB diary shows bookings for 23 children (and +105 adults) up until 5.00pm, and a birthday function for 40 people from 5.00pm. The licensee contends that while live music was performed between 1.00pm and 4.00pm, the video evidence of activities that day demonstrates that there was no “huge noise impact that commenced at lunch time” as claimed by the complainants. However, the video footage does show two tractors on the Verbrugge’s property raking and bailing hay at 3.34pm (as well as trail bikes at the Millers’ property at 10.00pm).
- 40 The artist performing that day was playing an acoustic guitar, which, as the video footage of 24 October confirms, contains no base beat.

31 October 2015

- 41 The wedding hosted at the MCB premises on this day was for 100 people and commenced with the ceremony on the grassed area at 3.00pm. Video footage shows that music cannot be heard 30 metres from the premises at 9.20pm, but a chainsaw can be heard at 4.35pm (on the Millers’ or Bells’ property) and at 6.03pm (on the Bells’ property) which the licensee again suggests was a “deliberate, malicious act designed to impact on the wedding guests and hence MCB”.
- 42 It is also contended by the licensee that it defies logic that J Gardiner could be “disturbed by the constant base beat and noise between approximately 5.30pm and 10.00pm” when she lives 370 metres from the premises.

General and historical complaints

- 43 In response to the more general claims by the complainants, the licensee contends:
- i. MCB has continuously worked towards ensuring music levels are as low as possible, having suspended live music for a time in 2015 as a proactive and conciliatory measure until a suitable house speaker system was sourced;
 - ii. the configuration of the musician and speaker system is given careful consideration to minimise noise emissions;
 - iii. the musicians selected by the licensee play an attractive style of music that allows patrons to enjoy the surrounds and converse with one another – furthermore, the level of music is monitored by taking a number of measurements throughout the day close to the artist performing and on the boundary with the Bells’ property;

- iv. as a general rule, live music is hosted once a week on a Saturday or Sunday between 12 noon and 4.00pm (in the form of 3x45 minute sets) and played during the evening from an iPod connected to the house speaker system;
- v. since opening there have been minimal breaches of the Noise Regulations with only two (2) minor breaches of 6 dB(A) and 10dB(A) recorded by Council out of a total of 43 measurements between July 2011 and January 2015;
- vi. the amenity of the area is not a quiet sleepy rural area, but rather a vibrant and fast developing region with a wide variety and ever increasing range of pursuits – in contrast to 10 to 20 years ago, the Dardanup Shire Planning Strategy aligns with Ferguson Valley as a tourist development area as reflected by all the attractions in the valley and, for example, the activities of the Ferguson Valley Marketing and Promotions organisation funded by the local authority;
- vii. in contrast to the nearby St Aiden’s Wines Function Centre which accommodates wedding functions and large concerts (none of which are complained about by the complainants), the MCB is not a function centre;
- viii. the MCB does not prevent rural duties from being performed;
- ix. the MCB does not operate illegally as a Tavern;
- x. the MCB has not hosted a concert since April 2014 and has no plans to host any concerts in the foreseeable future;
- xi. the Consent Order entered into on 10 May 2011 is no impediment to the complainants communicating with the MCB manager and staff if noise is an issue; and
- xii. it is not possible that each of the complainants experienced each and every one of the impacts identified in the section 117 complaint (despite signing the complaint) which suggests “there is a level of coercion, collusion, dishonesty and skulduggery (sic) in the compilation of the allegations” and shows the complaints are “a total fabrication designed to eventually force MCB to close” and should be dismissed.

Complainants’ Responsive and Closing submissions in respect of the section 117 complaint

- 44 The complainants do not agree with many of the licensee’s statements, as they contend that the statements are “untrue, provocative and inflammatory”.

- 45 The complainants contend that the specified allegations in the complaint over a three month period are a very small sample of six years of noise impacts which clearly show it is not just music that is the problem, but volume, base beat, crowd noise, motoring events and many children's activities that produce annoying levels of noise.
- 46 The complainants contend that when the impacts increased in September 2010 and again in May 2011, the adverse impacts were not properly addressed by Council.
- 47 Despite objections from members of the local community based on impacts experienced at the time, Council approved both one-off events and gave permission for MCB to play regular live music.
- 48 One-off events have resulted in complaints due to either the event's impact or non-compliance with noise levels or both, resulting in, among other things, cattle stampeding and breaches of the conditions of approval, including noise limits.
- 49 Moreover, residents are not notified of wedding receptions, parties etc., denying them the opportunity to comment on music volume limits and other impacts.
- 50 In relation to the specific events and activities giving rise to excessive noise from children playing, the applicant points out that:
- i. all the events specified in the complaint have been confirmed by the licensee;
 - ii. although the MCB diary records the number of meals sold to children, the MCB also operates outside meal times and, in any event, the issue is not about the number of children, but about the total noise they make and how it affects the complainants, particularly the Bells given the proximity of the play area to the boundary with the Bells' property;
 - iii. the fact the "bouncy castle" was organised by a customer, as claimed by the licensee, is no excuse, and the fact 23 children's meals were sold supports the contention of the complainants that noise was excessive; and
 - iv. the conduct of children's amusements as public entertainment is contrary to the relevant Town Planning Scheme No.3.
- 51 In relation to the visit to the MCB by a group of Harley Davidson motorcycle enthusiasts, the complainants contend Harley Davidson motorbikes are typically noisy, and parking the motorbikes on the soft grass at the licensed premises and the consequential difficulty in parking the bikes would possibly explain the noise generated.

- 52 As with the motorbikes, the complainants submit that the organised car club vehicles were parked on the grassed area at a point closest to the Bells' home; further, at least two of the cars appeared to be modified V8 vehicles. According to the complainants, the video footage presented by the licensee, which is for a short period, is not evidence of the total noise produced at the time.
- 53 In respect of the more general comments by the licensee, the complainants submit:
- i. the change in the speaker system at the MCB premises has not made any noticeable difference and has not changed the strong base beat inherent in some music;
 - ii. there is a distinct difference between the unobtrusiveness and occasional noises from farm equipment, which is accepted as part of rural life, and annoying noises produced at a tavern;
 - iii. Ferguson is not a fast growing area as portrayed by the licensee, but, in fact, development in the area has slowed;
 - iv. the video footage presented by the licensee is of limited value as it is taken at pre-arranged times and the base beat will not have been turned up at the time;
 - v. the crux of the problem is that the licensee is endeavouring to over extend the capabilities of the small block of land on which the MCB premises are located and that the premises are designed in such a manner as to allow easy transmission of noise; and
 - vi. when the MCB is not operating, the area is quiet and rural in character and to simply adhere to noise guidelines when operating does not have any regard for the amenity of the area.

Licensee's Responsive and Closing submissions in respect of the section 117 complaint

- 54 In response to what the licensee characterises as a "plethora of information on numerous subjects...as far back as March 2007", the respondent submits that all the issues raised by the complainants have been dealt with by the relevant authorities, yet the Bells seem unable or unwilling to accept the outcomes.
- 55 The unsubstantiated accusations against the local authority and its officers, including inaction, bias, provision of false information, deception and misrepresentation, could be described as defamatory and made without any supporting evidence.

- 56 The majority of the information submitted by the complainants in its further submissions is not relevant to the section 117 complaint and should be summarily dismissed.
- 57 Further, in contrast to the licensee and the evidence submitted in the form of letters, photos, videos and copies of diaries, the complainants have not provided evidence to substantiate their complaint, but rather have gone back some nine years dragging up any number of issues that have been dealt with previously.
- 58 The evidence submitted by the complainants is, according to the respondent, a total fabrication and it is open to find that the complainants are, in fact, frivolous, malicious and/or vexatious in their complaints.
- 59 The licensee points out that despite numerous complaints to various bodies since the MCB commenced operating none have mentioned children “constantly screaming and shouting” even though the MCB has always operated with the same grassed area and children’s swing set.
- 60 The acoustic assessment undertaken over the Anzac Day weekend in 2015 and the MCB’s compliance with the assigned noise levels, and video footage of various activities is at odds with the allegations made about the level of noise generated by children playing and music being played.
- 61 The contention of the complainants that the Harley Davidson motorbike group was parked on the grassed area is not correct as the bikes were parked in the rear car park along the driveway beside the grassed area which is the furthest part of the licensed premises from the Bells’ house.
- 62 The claim that the car club vehicles included one or two modified V8 cars is simply not supported by the photographic evidence and has not been substantiated.
- 63 In addition, the claim that the video footage presented in evidence of the event and activities on 31 October 2015 may have been taken when the music volume was at a lower level while filming or the base beat was turned down is totally refuted as a ludicrous circumstance.
- 64 Moreover, contrary to the comment by the Bells that the practice of playing music inside the licensed premises through an iPod system seems to indicate that the licensee is not permitted to play music outside at night is totally incorrect – the licensee elects to play night time music inside the premises (and controls the volume of the house speaker system) to ensure there is negligible impact on the neighbourhood.
- 65 According to the licensee, Ferguson Valley has changed over the years and now offers a wide range of activities including: restaurants, wineries, cottage industries, art and craft studios, B&B’s, cellar door sales and holiday chalets as

well as the nearby St Aiden's Wines Function Centre which caters for an increasing number of weddings and movie nights over the summer months.

Investigation initiated by the Director

66 In accordance with the Act, upon receipt of the section 117 complaint the Director initiated a process, including an investigation of the complaint, in an attempt to conciliate or negotiate a resolution to the complaint.

67 The investigation involved, among other things, communications with the local authority, attendance at the MCB premises, an inspection of the locality and correspondence and separate meetings with the licensee and complainants (as the complainants did not wish the licensee to be present at their meeting with the investigating officers).

68 The more salient matters reported upon, some of which are a record of statements by the complainants, may be summarised as follows:

- i. on 22 December 2015, two investigating officers attended the MCB premises during a wedding function and reported:

“At 1900 hours we could hear music noise but it was not excessive and unlikely to be in breach of the noise regulations. The genre of music was middle of the road/popular to suit the crowd in attendance. There was no deep base beat. The music was delivered by iPod with the speakers facing into the tavern. The tavern doors were open for the reception at the wedding ceremony. There was a solitary musician on a guitar singing and his music was not amplified. I was standing on the verandah of the tavern and (could) hardly hear him. The wedding was held at 1700 hours”;

- ii. the local authority advised that between 1 July 2011 and January 2015, 43 noise measurements had been conducted, with three breaches identified, one on 21 January 2012 resulting in a warning letter to the licensee, another on 27 April 2013 resulting in the issue of an Infringement Notice to the licensee and a third on 4 January 2015 resulting in the issue of another warning letter;
- iii. the principal investigating officer and another officer visited the MCB premises and experienced the iPod music playing at both the usual level and at a level that would prevent, or at least make difficult, conversation in the premises – whilst no measurements were taken, the investigating officer reported that at the higher level the music could barely be heard at the boundary closest to the Millers and E Verbrugg, and could not be heard at the boundary of the Bells' property although the wind was blowing away for the Bells' property;

- iv. whilst not conclusive, the video footage of events shown by the licensee indicated there was minimal noise coming from the premises;
- v. in the opinion of the principal investigating officer, based on his observations, “the Bells are the only one of the complainants that could possibly be affected by noise coming from the (MCB) premises”;
- vi. on 26 March 2016, prior to meeting with the complainants, the investigating officer reports that he and his colleague stopped at St Aiden’s Church and could hear “children’s noise coming from the premises” (yet, apparently it was raining with the MCB premises at capacity and all patrons inside);
- vii. at the meeting with the complainants, the details of the complaint were discussed, and the complainants questioned how “the tavern was allowed to be built, and how it had expanded...from a boutique brewery with tastings for 60 people (the complainants’ understanding at the time) and now was developing into a 200 seat function centre and tavern”;
- viii. the principal investigating officer observes that based on his experience of attending to noise complaints, although the mandated noise levels are similar in the metropolitan and country areas, noise travels further and appears louder in a rural area;
- ix. the complainants allege the Council rescinded its resolution to require the licensee to have in place a Noise Management Plan and as the premises is a commercial business it is surprising (to the complainants) that the licensee has not been required to erect a high solid commercial fence around the premises (to mitigate noise); and
- x. the Bells have planted 200 trees in an attempt to attenuate the noise (which has not proven successful), yet the licensee hasn’t established any buffer at all.

Applicant’s Primary and Responsive submissions relating to the review application

69 For the purposes of the review application, the applicant characterises the instances of unacceptable noise detailed in the section 117 complaint as “specific occasions when appalling, totally excessive noise was forced upon us as neighbours, totally destroying the amenity of our homes”.

70 Other aspects of the complaint of particular importance to the applicant are:

- i. the issue of cattle and horses being spooked from the sudden emission of loud noises; and

- ii. noise from the children's playground.
- 71 The Bells residence is particularly affected by music because of the topography and orientation of the MCB premises creating, according to the applicant, an amphitheatre effect directing the music upwards and towards the Bells' home.
- 72 In addition, the applicant:
- a) outlines the properties of noise transmission and sound barriers, and refers to the Noise Regulations and the assigned levels (submitting that the Bells should not have to endure noise levels greater than 35dB(A) to 45dB(A) depending on the time of day) and the characteristics of noise emissions (tonality, impulsiveness and modulation) again pointing out that the "base beat" can be difficult to contain and transmits over significant distances;
 - b) disputes the suggestion or implication that because J Gardiner has not complained about noise from St Aiden's Winery it is difficult to understand why she is concerned about noise from the MCB premises, highlighting the fact St Aiden's Winery Function Centre is a purpose built acoustic building, orientated 180 degrees to the J Gardiner's home;
 - c) is critical of the findings of the departmental investigation as the assessment of noise (not measured by appropriate equipment) on the boundary of the Bells' property overlooks the fact the boundary is at a low point, below the music source with the noise substantially passing overhead;
 - d) highlights provisions of the Liquor Control Act and submits that having children often unsupervised and not, or no longer, partaking of a meal (as required by the Act) on the premises of a licensed tavern is not in the best interests of the child and contrary to the intention of the provisions of the Act;
 - e) maintains that the breakdown in the relationship between the complainants and the licensee is as a consequence of the failure of the licensee to properly and adequately address their concerns and any animosity towards the local authority and the department is because of their failure to follow appropriate processes;
 - f) points out that the noise readings taken and reported on by the local authority are not available to the applicant to verify (apparently because releasing the noise recording readouts "could prejudice or compromise any future compliance action") and that, in any event, the Council utilised an incorrect limit of 65dB(A) (rather than 30dB(A));

- g) contends the acoustic assessment is irrelevant as there is no reference to where the boundary readings were taken (and the Bells' residence is at an elevated level) and the assessment confirms there was no live music or bands - in addition, the applicant claims it was a quiet day probably with "no screaming kids"; and
- h) submits that, contrary to the licensee's claim that all complaints at the MCB are taken very seriously, the licensee flouts authority knowing they will not act and shows a disregard for the interests of neighbours (as is evidenced by the claim in the MCB liquor licence application that "no one lives within 250 metres of the brewery" and the licensee's advice to the Bells that they "should find somewhere else to live").

Respondent's Primary and Responsive submissions relating to the review application

- 73 The respondent reiterates that neither the MCB nor the local authority was advised of the specific complaints outlined in the section 117 complaint and again addresses each of the specific allegations.
- 74 In response to the contention that the acoustic assessment is not relevant, the respondent points out that the assessment, conducted by a firm reputable in its field, identified the Bells' residence as the nearest noise sensitive premises and undertook an accurate assessment of the noise received at those premises.
- 75 The respondent questions the "unhealthy connection between each of the complainants" and claims the complaint has been "put together by the Bells who have got others to sign the complaint, one would assume to try and add weight to their argument".
- 76 Furthermore, according to the respondent, the complaint is not about whether:
 - i. the complainants trust the local authority;
 - ii. the complainants' animal stock gets spooked when the MCB last held a concert some three years ago; or
 - iii. the MCB has the required planning approval which has been addressed by the department on numerous occasions,

but needs to be solely determined on the allegations made in the section 117 complaint and the corresponding evidence before the Commission.

Determination

- 77 In conducting a review pursuant to section 25 of the Act, the Commission is not required to find an error in the Director's decision. The Commission is required to undertake a full review of the materials before the Director and make its own determination on the merits, based upon those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224).
- 78 Pursuant to section 25(4) of the Act, the Commission may: (a) affirm, vary or quash the decision subject to the review; (b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and (c) give directions as to any questions of law reviewed, or to the Director, to which effect shall be given; and (d) make any incidental or ancillary order.
- 79 Section 117(1)(a) of the Act provides that a complaint can be made that the amenity, quiet or good order of the neighbourhood of the premises is frequently unduly disturbed by reason of any activity occurring at the licensed premises.
- 80 Section 117(1)(b) of the Act provides that a complaint can be made that any behaviour of patrons on the licensed premises, or noise emanating from the licensed premises, or 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 or 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.
- 81 The section 117 complaint, the subject of these proceedings, has been signed by the Bells, the Millers, J Gardiner and E Verbrugge and satisfies section 117(2a) of the Act.
- 82 According to the complaint the signatories are all close neighbours to the licensed premises and all have experienced "disturbing impacts" on their homes and farming tasks.
- 83 Although stated in various ways in the multiple submissions made by the complainants, the action sought by the complainants is to "restore the amenity of the area" in which they live and:
- i. have the children's play area and equipment removed from the licensed area;
 - ii. see that juveniles (those under 18 years) are only permitted on site when partaking of a meal;
 - iii. stipulate that the marketing of the MCB as a function centre for children's parties etc. is expressly prohibited;

- iv. impose a condition restricting all music being played and amplified announcements being made outside the building, and requiring any music played inside the building to be played with the doors closed; and
 - v. remove condition 5 of the licence that permits one-off events.
- 84 The onus is on the complainants to establish, on the balance of probabilities, that the licensee is in breach of section 117(1) of the Act.
- 85 Although the section 117 complaint does not specify instances other than the events and circumstances described in the complaint, the complainants have referred in some considerable detail in their submissions to past events and circumstances claiming that the specified allegations in the complaint are a small sample of the noise impacts that have been experienced since the MCB commenced operating.
- 86 The respondent has responded to these submissions on historical events and circumstances, but has argued that they are irrelevant to a consideration of the complaint.
- 87 It is appropriate to clearly state at the outset that these proceedings are not about the correctness or otherwise of the local authority's planning decisions or complaint resolution processes, but are the determination of a section 117 complaint alleging disturbing noise impacts emanating from the MCB.
- 88 In the Commission's view, given the nature and content of the submissions from the complainants and the licensee, it is appropriate to consider the specific allegations in the complaint in the context of both past and present activities occurring at the licensed premises.
- 89 Before turning to the merits or otherwise of the complaint, it is necessary to consider the meaning of the terms "neighbourhood" and "vicinity" in the context of section 117 of the Act.
- 90 In *OSB Operations Pty Ltd v Jansen & Anor* [2006] WASCA 270, Steytler J considered the meaning of the terms in subsections 117(1)(a) and 117 (1)(b) in circumstances where the complainant was the occupant of one of a number of apartments in an apartment building. His Honour determined that the entire building and not merely the apartment of the complainant comprises the neighbourhood for the purposes of section 117(1)(a) and that the term vicinity in the context of section 117(1)(b) extends to adjacent residents.
- 91 The Commission is satisfied and finds that the complainants, in the rural environment in which they live, can, in the context and for the purposes of this application, be regarded as persons living in the neighbourhood and, in the case of the Bells, in the vicinity of the MCB licensed premises.

- 92 For the section 117 complaint to be established, it must also be shown that:
- a) the amenity, quiet or good order of the neighbourhood is frequently unduly disturbed by reason of the activities complained of (section 117(1)(a)); or
 - b) the behaviour of persons on, noise emanating from, or disorderly conduct occurring frequently in the vicinity of, the licensed premises is unduly offensive, annoying, disturbing or inconvenient (section 117(1)(b)).
(emphasis added)
- 93 In considering the term “undue”, Steytler J in *OSB Operations* (supra at [68]), stated:
- “While it is true that, in considering whether a disturbance etc is “undue”, regard may be had to the circumstances of the complaint and the nature of the complaint, the test remains objective, in the sense that the disturbance etc must be one that would be regarded by a reasonable person as “undue”, having regard for all the relevant circumstances and taking into account what might reasonably be expected from premises of the kind licensed”.*
- 94 It is in this sense that His Honour stated that this construction does not leave a licensee at risk by reference to the “subjective sensitivities of its immediate neighbours”.
- 95 What might reasonably be expected from premises of the kind licensed requires a consideration of the nature of the MCB premises and its activities, and the conditions governing the operation of the premises.
- 96 The MCB premises have been developed in a rural area as a micro-brewery and restaurant with the approval of the local authority. The MCB premises are the subject of a tavern licence and must operate in accordance with the terms of the licence and the Act, including the condition that the premises maintain a primary focus on brewing beer in the microbrewery. Serving food and providing entertainment for patrons as an ancillary and complementary service to the primary activity of brewing and selling retail and packaged beer are activities consistent with the operation of a licensed venue under a tavern licence.
- 97 Whilst it is clear that the MCB hosts wedding ceremonies and functions from time to time, and has in the past hosted a limited number of outdoor concerts, the MCB does not, according to the licensee, operate as a function centre - if it were to operate primarily as a function centre, it would appear to the Commission to be contrary to the conditions of its licence.
- 98 In addition to a consideration of the nature of the premises and what may be expected from the licensed premises, the neighbourhood in which the licensed premises are located is also a relevant consideration.

- 99 In *Re McHenry [1987] 4 SR (WA) 31*, Sharkey J held that the word “undue” has 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.
- 100 Although there is some dispute between the applicant and respondent about the character of the area, the Commission notes that the type of activities and services provided in the region have expanded beyond farming activities and that the Ferguson Valley region is promoted as a visitor and tourist destination.
- 101 However, while there is a focus on tourism in the region, there are sections within the valley in which much of the land is still utilised for farming purposes.
- 102 In this situation, there is a need to strike a balance between traditional farming practices and the development and operation of non-farming and tourist orientated activities.
- 103 In reviewing the discrete allegations of the complainants, the Commission notes that the licensee was prepared to attend a meeting with the complainants in the company of departmental officers investigating the complaint with a view to arriving at a resolution, but the complainants declined to participate in such a meeting with the respondent present. It is certainly unfortunate that this matter is unable to be managed by conciliation or negotiation, and the resort to the regulatory authority on this occasion ought not be the example for future interactions.
- 104 The particulars of the allegation with respect to the Harley Davidson motorcycle group (23 August 2015) are that the engines of the motorcycles with particularly loud exhaust systems were revved upon arrival and kept running for some time after parking.
- 105 The Commission is satisfied upon consideration of the material before it that the motorcycle group did attend the MCB as alleged, but is not satisfied on the evidence presented that the noise generated in the circumstances was particularly prolonged or unreasonable.
- 106 The particulars of the allegation regarding the organised visit by members of a car group (3 September 2015) are that some nine vehicles visited the MCB premises, parked in close proximity to the boundary between the Bells’ property and the MCB and revved their engines abnormally high when arriving and leaving.
- 107 While there is some dispute about whether there were, or were not, modified V8 cars within the group, it appears to the Commission that the vehicles were predominantly older type vehicles and that the evidence is insufficient, and does not support, the allegation that the revving of the car engines was prolonged or otherwise unreasonable in the circumstances.

- 108 It is not entirely clear whether the impacts of the motorcycle and car groups were experienced by, or at the properties of, complainants other than the Bells, but based on the evidence it would appear to the Commission to be unlikely.
- 109 Moreover, visits to the MCB premises by these two groups, as described, would seem to the Commission to be something that might reasonably be expected from the premises of the kind licensed, particularly in the Ferguson Valley region where visitors and tourists are encouraged to visit.
- 110 The particulars of the allegation regarding the wedding reception (31 October 2015) is of a disturbance due to the noise from outside the MCB premises, commencing mid afternoon, which progressed to a “terrible level” as the day went on, with a constant base beat from 5.30pm to about 10.00pm with adults yelling, screaming and cheering at the tops of their voices.
- 111 Complaints regarding this event are provided by J Gardiner, the Millers, the Bells, and A Verbrugge, and include diary notes from Mr Bell at various intervals between 5.30pm and 9.15, listing loud crowd noise and music with a definite base beat. The latter specifically at the Bells’ property.
- 112 The licensee has provided video footage of the event in question – a reception attended by 100 people – at various times during the day: 4.35pm, 6.03pm, 6.44pm, 7.00pm, 9.20pm and 9.22pm and contends this evidence shows that the music cannot be heard approximately 30 metres from the music source.
- 113 The complainants have submitted that:
- “it is no surprise” the music level was at a lower level while filming;
 - the video was not independent filming without the licensee’s knowledge; and
 - it is possible the base beat had been turned down during the filming.
- 114 The licensee strongly refutes any suggestion or implication that the volume or base level was turned down prior to the taking of the video footage.
- 115 In the absence of cogent evidence to the contrary, the Commission has no reason to find that the video footage presented in evidence by the licensee is not representative of the activities that occurred, and of the music that was played, at the wedding reception on the day the complainants have specified in the complaint.
- 116 After consideration of the diary entry of Mr Bell and the statements from the complainants about the level of noise generated from the hosting of the wedding reception, as well as the licensee’s submission, the Commission is not satisfied, on the evidence presented, that the level and duration of the music and accompanying crowd noise was unreasonable.

- 117 In relation to children's game noise, the dates of the disturbing noise impacts are specified in the complaint as occurring on 8 August, 5 September and 24 October 2015. However, no details are provided other than for the 24 October when it is alleged children's games and activities, which included a "bouncy castle and sumo suits", created a "huge noise" comprised of "loud music, shouting, clapping etc and children yelling and screaming" from lunch time to about 10.20pm. Mr Bell provided diary notes for that day.
- 118 Although the licensee submits that this is the first time the Bells have made a complaint about the noise impacts of children playing (notwithstanding the play area has not changed in all the years of the MCB operation), Mr Bell's diary makes numerous references over the 14 month period during which the diary was apparently maintained referencing noisy, very noisy or shouting and screaming children.
- 119 In support of the contention that the level of noise emanating from the children's activities is not unreasonable, the licensee refers to the acoustic assessment conducted at the premises by acoustic experts over the Anzac Day weekend in 2015. The objective of the acoustic assessment was to measure noise from "general operations" which comprises noise from crowd and light ambient music (and does not include emissions from live music or bands).
- 120 The nearest noise sensitive premises to the licensed premises was identified to be the Bell's property and "noise data loggers" were placed in the MCB premises and on the boundary with the Bells. The acoustic assessment report indicates the noise levels at the Bells' premises were determined through a calculation based on the distance to the neighbour's residence and the measured noise levels, which gave rise to a calculated noise level of 33dB(A) and was within the assigned noise level of 40dB(A).
- 121 The Bells contend the report and assessment does not represent the situation complained of as:
- a) measurements should have been taken at the Bells' residence (which is elevated above the source of the noise);
 - b) the report does not state how the level of 33dB(A) was calculated; and
 - c) the assessment only confirms that there was no live music or impulsiveness and that it was a quiet day probably with no screaming children.

Whilst the acoustic report is helpful, the exact circumstances that prevailed on the days over which measurements were taken is not clear. It would appear from the number of children assessed as present that the noise evaluation should provide a guide to the level of noise to be expected when children are playing. Certainly this is the contention of the licensee.

- 122 There is little doubt that the Bells experience noise from children playing at the MCB premises. In addition to the diary entries and the specific complaint, there is some independent evidence from the departmental investigating officer that noise from children playing may be heard some distance way, for example at St Aiden's church on 26 March 2016 when two of the investigating officers were in the region to meet with the complainants.
- 123 The task of the Commission is not assisted in relation to the current complaint due to the absence of noise levels, determined and measured by persons qualified in their field, on the specified occasions on which the Bells contend the level of noise was excessive.
- 124 However, in relation to both of the events on 24 and 31 October 2015, there is the additional evidence in the form of video footage compiled of the events on those days. The videos show various stages of a wedding reception throughout the day and evening with children playing on the grassed area and playground, and both live music in the afternoon and indoor recorded music in the evening. These recordings do not bear out the complainants' characterisation of the noise on those days.
- 125 Having regard to all of this evidence, in particular the absence of objective evidence in support of the complainant's contention, the Commission is not satisfied that the complainants have demonstrated to the requisite degree that the noise emanating from the MCB premises on the days specified in the complaint was unreasonable in the circumstances.
- 126 More generally, the complainants allege that the licensee has not taken any action to mitigate the noise emanating from the licensed premises. However, the Commission notes the evidence of the licensee that consideration has been given to the type of music played at the premises, that the configuration and orientation of the music system has been determined having regard to the environment, and that control is exercised by the licensee over the volume of the music.
- 127 The licensee submits that music is generally restricted to one outdoor performance per week on either Saturday or Sunday between 12 noon and 4 pm (for a maximum of 3x45 minute sets only). Furthermore, the Commission notes that the licensee ensures all music at night is played indoors on the in-house music system as is permitted under the MCB licence.
- 128 In addition, according to the licensee no live bands have played at the premises since October 2010 and the licensee has not hosted one-off concert events since April 2014 and has no plans to host any in the foreseeable future.
- 129 In the Commission's view, these actions are indicative of the licensee having regard to the environment in which the business operates and endeavouring to

arrive at a balance between the interests of the business on the one hand and the amenity of the neighbourhood on the other.

- 130 It is clear that the persons most affected by noise emanating from, and other activities conducted by, the MCB premises is the Bells. The evidence before the Commission supporting the impact on the other complainants and persons living in, and comprising, the neighbourhood, certainly on an ongoing or frequent basis, is far from persuasive.
- 131 In summary, the Commission is of the view the complainants have not discharged the onus on them to demonstrate to the requisite degree that the noise disturbances specified in the complaint are either individually or collectively unduly offensive, annoying, disturbing or inconvenient to those residents living in the vicinity of the MCB premises or that the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed by reason of the activities occurring at the licensed premises.
- 132 Accordingly, the application to review the Director's decision is dismissed.

A handwritten signature in black ink, appearing to read 'Michael Egan', written over a horizontal line.

MICHAEL EGAN
PRESIDING MEMBER