

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

- Applicant:** Bar Bes (WA) Pty Ltd
(represented by Mr Noel Besson)
- First Objector:** Council of Owners of Quattro 251
(represented by Mr David Worth) f
- Second Objector:** Council of Owners of Cosmopolitan
(represented by Mr Trevor Goodman-Jones)
- Third Objector:** Mr Michael Wilson, owner/occupier of unit at
Cosmopolitan
- Fourth Objector:** City of Perth
(represented by Mr Craig Matchett)
- Observers:** Mr Sid Devlin, Financial Investor in Bar Bes
Mr Scott Teymant, Principal Environmental Health, City of
Perth
Mr Wassim Bari, approved manager, Bar Bes
Mr Tagi Altinas, landlord/owner of the licensed premises
- Commission:** Mr Paul Shanahan (Presiding Member)
Ms Kirsty Stynes (Member)
Ms Alya Barnes (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision by the delegate of the Director of Liquor Licensing with respect to two (2) of the section 117 trading conditions being:
- 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.

Premises: Bar Bes
237 Hay Street, Perth, WA 6000

Date of Hearing: 7 December 2021

Date of Determination: 13 June 2022

Determination The Application is allowed in part to amend the section 117 trading condition 3(2) and add a new section 117 trading condition 3(5) such that the section 117 Conditions set out in the Delegate's Decision shall be quashed and replaced with the Trading Conditions set out in paragraph 36(a) of this Decision.

Authorities referred to in Determination:

- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)
- *Hancock v Executive Director of Public Health* [2008] WASC 224, [53].

Background

1. This matter concerns an application ("**Application**") by Noel Besson ("**the Applicant**") for a review of a decision of the Delegate of the Director of Liquor Licensing pursuant to section 25 of the *Liquor Control Act 1988* ("**the Act**") for the licensed premises known as Bar Bes.
2. On 17 September 2020, a complaint was lodged pursuant to section 117 of the Act alleging that the amenity, quiet or good order of the neighbourhood is frequently and unduly disturbed due to the activities at the licensed premises.
3. In accordance with the Act, conciliation and negotiation was attempted and as the matter could not be settled the Director determined the matter.
4. On 23 September 2021, the Delegate of the Director of Liquor Licensing imposed the following conditions on the licence effective from 27 September 2021:
 - a) 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 ("**condition 1**").
 - b) 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 ("**condition 2**").
 - c) 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.
 - d) Emptying of glass containers into bins external to the building is not permitted after 10pm at night.
5. The Application is for a review of conditions 1 and 2 of the imposed conditions.
6. The Commission heard this matter on 7 December 2021.

The Applicant's submissions and responsive submissions

7. The application for review relates to conditions 1 and 2 only.
8. Conditions 1 and 2 impact the rear courtyard ("**the courtyard**") of the licensed premises.
9. The Applicant asserts the following in support of the application:
 - a) the courtyard represents a key element of the business;
 - b) the reduction from 124 patrons to 20 patrons after midnight has caused a significant drop in revenue;
 - c) the female restrooms are in the courtyard and women have to ask permission from security to be allowed into the courtyard to access the toilets, and this is discriminatory;
 - d) the courtyard bar has to close at the busiest time, as keeping that area open for only 20 people is not justifiable; and
 - e) the practical effect is that the Applicant has had to trade with limited capacity to avoid angst amongst customers.

10. The Applicant acknowledges at times noise levels may have been high with the full capacity and proposes the following revised conditions be imposed:
 - a) the provision of live music in the rear courtyard area to cease at 10pm each night; and
 - b) not more than 86 patrons are permitted to remain in the rear outdoor courtyard area after 12 midnight each night, and the patrons in that area are expected to use the area after midnight only as a smoking breakout or chill area for short periods before returning to the indoor area of the licensed premises.
11. The Applicant asserts that a limit to 70% capacity after midnight will greatly reduce the noise without impacting severely on their trade and customer experience.
12. The Applicant provided further responsive submissions which can be summarised as follows:
 - a) their communication with residents could have been better and they are attempting to rectify the situation;
 - b) there have been issues with communication tactics on both sides;
 - c) complaints only make up a “*tiny portion of total residents*”;
 - d) since opening the Applicant has only opened the venue 2-3 times per week and for the last 3 months only 1-2 days; and
 - e) in response to the assertion by the Third Objector (Mr Wilson) that there is vomit and litter outside the venue, the Applicant asserts that he has taken action to clean this up and that not all of the vomit and litter is attributable to the Applicant’s operation of the venue.
13. The Applicant also provided the Commission with letters in support of the Applicant from neighbouring businesses and residents. However, it appears that those letters were not before the Delegate and, accordingly, the Commission is not able to consider them in dealing with this application for review.

Submissions and responsive submissions of Trevor Goodman-Jones

14. Mr Goodman-Jones urges the Commission to uphold the decision of the Delegate with an additional condition that closing time be reduced from 5am to 2am.
15. Mr Goodman-Jones asserts in summary as follows:
 - a) Since the imposition of the conditions, the area has been more liveable although still often necessary for doors and windows to be closed.
 - b) The noise from the courtyard area has always been the major concern for residents. Allowing more patrons within this courtyard area after midnight would only intensify the noise issues once again.
 - c) The hours of operation are also a concern given the very high residential nature of the immediate precinct. The 5am close time should be amended to 2am so that at least 95% of the residents can get the very necessary rest and sleep needed to maintain their physical and mental health.

Submissions of David Worth

16. Mr Worth is the treasurer and owner of an apartment at the Quattro Apartment Complex at 251 Hay Street, East Perth.
17. Mr Worth asserts that the situation has arisen because the noise levels were three times the City of Perth limits before renovations were conducted by Bar Bes following mediations and complaints being made.
18. Mr Worth ultimately urges the Commission to further tighten the conditions by imposing the following conditions:
 - a) the number of patrons in the courtyard be limited to 20 after 10pm;
 - b) operating hours be reduced from 5am to 2am; and
 - c) the front entrance be returned to the Hay Street entrance.
19. Further submissions were provided to the Commission on 22 November 2021 in response to the Applicant's submissions as follows:
 - a) There is no evidence of a drop in revenue since the imposition of conditions. The courtyard is a small space and nowhere near as large as claimed by Bar Bes.
 - b) Entrance: there has been no prior issue with the entrance from BWS when it was operated by the previous nightclub owners. The change in the location of the entrance is a way of undermining the determination about patronage in the rear courtyard. The impact of the noise on the residents of the Quattro and Quest apartments has become significantly worse since this change.
 - c) Based on the material provided, the Commission ought to make credibility findings about Bar Bes in considering their submissions for review.

Submissions of Michael Wilson and Teresa Maines

20. Mr Wilson and Ms Maines outline their residential address as Hay Street, East Perth.
21. Mr Wilson's and Ms Maines' submissions:
 - a) outline the impact the noise from the venue has had on them and which they believe the noise is likely to have in summer months when the weather heats up and doors and windows are opened for natural ventilation;
 - b) acknowledge that there has been some improvement in those noise levels since works have been undertaken, but also assert that the bass levels still disrupt sleep;
 - c) assert that the change in the location of the entrance of the venue has greater impact on residents of Quattro, as a busy queue late at night would impact on noise levels;
 - d) assert that having the line of patrons queuing around BWS and Bar Bes instead would serve to buffer some of the noise travelling towards the Quattro apartments;
 - e) a change to 86 patrons (as requested by the Applicant) would not be quiet enough to avoid exceeding acceptable noise levels; and

- f) the only time the operators have attempted to ameliorate negative impacts has been after it became apparent they would be fined and would be facing the possibility of an adverse determination by the Delegate of the Director of Liquor Licensing.
22. Mr Wilson's and Ms Maines' submissions also supported the amended conditions proposed by Mr Worth (see paragraph 18 above).

Submissions from the City of Perth

23. A statement provided by Mr Teymant, the City of Perth's Principal of Environmental Health, outlines that there has been a significant reduction in complaints regarding noise from Bar Bes since the Delegate's decision.
24. Mr Teymant asserts that had effective measures been taken to attenuate the courtyard area of the premises prior to the decision of the Delegate, then the application might have some merit. However, the courtyard remains unchanged. Mr Teymant also attached a statement advising that:
- a) Between 12 July 2020 and 22 May 2021, the City received 53 complaints regarding noise from premises known as Bar Bes, located at 237 Hay Street, Perth. The City received complaints from 20 individuals during this time.
 - b) Since the Delegate of the Director of Liquor Licensing's decision only 2 complaints have been received regarding noise from the same premises, with the last complaint relating to noise on 13 November 2021.
 - c) Sound level readings have not been taken by the City's officers since 22 May 2021. Attempts to obtain further readings from unit 410/249 Hay Street have been unsuccessful due to the previous tenant vacating the premises.

Legal framework

25. Pursuant to section 25 of the Act (titled 'Review of a Director's decisions'), the Commission may have regard only to the material that was before the Director when making the decision (see section 25(2c) of the Act).
26. The Commission may:
- a) affirm, vary or quash the decision subject to the review (section 25(4)(a) of the Act); and
 - 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 (section 25(4)(b) of the Act); and
 - c) give directions:
 - (i) as to any questions of law, reviewed; or
 - (ii) to the Director, to which effect shall be given (section 25(4)(c)(i) and (ii) of the Act); and
 - d) make any incidental or ancillary order (section 25(4)(d) of the Act).
27. When conducting its review, the Commission is not required to find error on the part of the Director, but to undertake a full review and decide based on the same materials as were

before the Director when the decision was made (*Hancock v Executive Director of Public Health* [2008] WASC 224, [53]).

28. Section 16 of the Act prescribes that the Commission:
 - a) may make its determination on the balance of probabilities (section 16(1)(b)(ii)); and
 - b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply (section 16(7)(a)); and
 - c) is to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities and legal forms (section 16(7)(b)).
29. The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* LC 01/2017).
30. Section 117(4a)(b) of the Act provides that the Director “*if of the opinion that the allegation in the complaint is established on the balance of probabilities and that the licensee has failed to show cause why an order should not be made under this section, may make an order under this section*”.
31. Section 117(6) of the Act prescribes that “*where, under section 25, a determination made by the Director under this section is to be reviewed by the Commission:*
 - a) *effect shall be given to any determination made by the Director; and*
 - b) *any order made, or other action taken, by the Director under subsection (5) remains in force until revoked by the Director or quashed by the Commission,**unless the Commission, by way of interim order, otherwise directs.*”

Determination

32. According to the correct and established procedure as referred to in *Hancock v Executive Director of Public Health* [2008] WASC 224, the Commission has undertaken a full review, and it now determines the Application based on the same materials as were before the delegate of the Director of Liquor Licensing when the Decision was made. Accordingly, it has excluded, and places no weight on the following documents that were not before the Delegate:
 - a) the Lloyd George Acoustics Acoustic Report; and
 - b) letters in support of the Applicant from neighbouring businesses and residents produced by the Applicant.
33. In this matter, it is not contested that certain complaints lodged pursuant to sections 117(1)-(4) of the Act were valid, even though the Applicant now claims certain of those complaints should be given little to no weight because the complainants moved out of their apartments away from the licensed premises.
34. What is contested is condition 1 and condition 2 that were imposed by the Delegate and which the Applicant claims are not fair or reasonable given the scope of the licence for the premises.

The Applicant's claims in that regard are incorporated in the Applicant's submissions, as outlined in paragraphs 9, 11, 12 and 13 above.

35. Based on the evidence before the Delegate, the following factual findings are made:
- a) The premises are surrounded by noise sensitive residential and short stay buildings with levels 4 and above of the 10 story Quattro Building experiencing greater exposure to noise from the premises than the lower levels of that building. Occupants of the 9 story Cosmopolitan building to the west of the Quattro building are also impacted by street level noise coming from the venue.
 - b) The licensee has attended to several of the internal acoustic insulation measures recommended by Lloyd George Acoustics, but noise emanating from the courtyard remains problematic.
 - c) Patron noise in the courtyard is a significant problem as evidenced by the following:
 - (i) Scott Teymant of the City of Perth says that noise readings from 27 March, "*shows that noise from crowd was LA10 of 67dB when it dominated music.*"
 - (ii) David Worth's email to the City of Perth on 31 March 2021 says that there is a "*slight improvement overall from the building, but people in the rear courtyard remain a major noise source, long into the next morning, as shown by Marie-Louise's video.*"
 - (iii) Patrick McMurray's complaint on 22 April 2021 says that there is "*crowd noise, yelling and screaming until 5 am.*" Mr McMurray also made a complaint on 24 May 2021 in relation to events on 21 May 2021, for which sound recordings were taken, and which asserts that "*the crowd noise is constant*".
 - (iv) Norman Stevens of 269 Hay Street's evidence on 23 April 2021 that "*I realise that we are not subject to the noise from the outdoor area that causes some residence a lot of grief the answer to this problem is of course no customers outdoors but that is not an equitable answer.*"
 - (v) David Worth's evidence of 24 April 2021 that "[m]y feedback is the one constant is the crowd noise from the courtyard at the back – there needs to be a limit put on when they can use this area for crowds."
 - (vi) Marie-Louise Hunt's evidence of 26 April 2021 that "[the venue's] back courtyard still very noisy."
 - (vii) Scott Teymant of the City of Perth's email 20 May 2021 to Phillip Pride that "*crowd noise received at an apartment on Level 4, 249 Hay Street to exceed the Noise regulations, and at those levels would not comply at any time during the day (14 decibels over)....they can't control crowd noise without:*
 - (a) *significantly reducing patron numbers in the courtyard; and/or*
 - (b) *shutting it down at a specific time; or*
 - (c) *putting a roof on the area.*"
 - d) The noise, whether voices or music of any kind, cannot be contained in the courtyard to prevent disturbance to local residents. In that regard, the inspection report for Sunday, 27 September 2020, by G Muir and M D'Costa of the RGL, says: "*I noted the door to the rear courtyard of Bar Bes was closed. The rear courtyard is not enclosed by*

a roof and is surrounded by a brick wall about two metres high. I considered the crowd noise from those people who were in the rear courtyard was loud. I also considered the level of noise emanating from the rear courtyard from the patrons talking, laughing, and shouting could be regarded as unduly annoying or disturbing to people living nearby.”

- e) The Applicant has not produced evidence to allow the Commission to form a view as to what number of patrons in the courtyard would or would not unduly interfere with the neighbourhood’s quiet enjoyment.
- f) The Applicant has not produced evidence to allow the Commission to form a view as to the level of crowd noise alone as compared with the level of both crowd and music noise, even though he had the chance to do just that. In that regard, the Commission notes the email from Phillip Pride to the City of Perth to the effect that the Applicant would not have a DJ at the venue the following night, and the Commission also notes that (as evidenced by the video footage produced by Marie-Louise Hunt of the Quattro building) the Applicant did have a DJ at the venue that night.
- g) The Applicant has not produced any evidence that DJ music, or background music, or any other form of entertainment other than live music, in the courtyard would be any less intrusive to the neighbourhood, despite his proposal to stop live music (but not other types of music) at 10:00 pm.
- h) All music, whether live, electronic dance music or background music will, because the courtyard is not enclosed, escape the area and disturb the peace.
- i) 80 patrons in the courtyard will adversely affect the amenity, quiet or good order of the neighbourhood of the licensed premises as evidenced by Inspector G Muir’s report for 10 April 2021 in relation to the estimated 80 patrons in the rear courtyard, which says: *“I considered the crowd noise from those people who were in the rear courtyard was loud. I also considered the level of noise emanating from the rear courtyard from the patrons talking and laughing could be regarded as unduly annoying or disturbing to people living nearby. In the background of the crowd noise music could be heard at a low level.”*
- j) 15 patrons in the courtyard would not, on the balance of probabilities, adversely affect the amenity, quiet or good order of the neighbourhood given the department’s inspection carried out on Sunday, 16 August 2020, after midnight. That inspection observed that at the time of the pass inspection there were around 15 people in the court yard, that there appeared to be no outdoor music on that day, and that the inspector found: *“I did not consider that the level of noise emanating from the rear courtyard from the patrons talking and laughing was unduly offensive, annoying or disturbing during our inspection.”* It is noted that, except for certain public holidays, the Act generally requires trading to cease at 2 am Monday (section 98A(1)(c) of the Act).
- k) On 7 July 2021, the Department received, after thorough investigation, a recommendation to limit trade in the outdoor area to 12 midnight **with no patrons permitted in the courtyard area** [emphasis added] after this time. That recommendation was reported to be pivotal in limiting overall disturbance. It was also submitted by the Department’s officer that, for that recommendation to be effective, the condition would also need to require a ban on amplified or live music in the outdoor area from that time.

- l) Despite the above recommendation, the Director allowed up to 20 patrons after 12 midnight in the area as per Condition 2.
 - m) No evidence was provided to support the Applicant's assertion that condition 1 and condition 2 have materially adversely affected his trade, which the Applicant claims was already suffering due to the COVID restrictions.
 - n) Despite the lack of financial evidence, the Commission finds it is a notorious fact that condition 2 would impact the Applicant's trade given the generous statutory trading hours stipulated in section 98A of the Act and the patron capacity for the back bar in the courtyard.
 - o) If the courtyard were to operate at full capacity of 123 patrons, then the Commission accepts that moving those patrons indoors to comply with the conditions would be logistically difficult and could only be managed in a way that would adversely affect the Applicant's trade since there is a 177 persons limit for indoors.
 - p) The need to count the patrons in the courtyard and therefore monitor those women using the restrooms in that area could be perceived to be discriminatory to those patrons, although this requirement will likely remain regardless of the number of the patron limitation in order to comply with whatever the limitation is. There was no evidence from female patrons that they find the practice of stating their intent to use the restrooms discriminatory.
 - q) There is no requirement on the Applicant to close the courtyard bar early in the evening, although the Commission accepts that it may not be commercially viable to keep it open in the circumstances after 12:00 am if only 20 patrons may remain in the area.
 - r) The Director's conditions have been successful in that, since implementing the conditions, the complaints dropped from 53 to 2, and at the time of the hearing, neither the City of Perth nor the Department of Local Government, Sport and Cultural Industries had received further complaints.
 - s) It is preferable for the line to the entrance to run from the front of the premises in an easterly direction past, and wrapping around, the BWS store and down Bennet Street, as there are no residential buildings to the North and East of the premises and as the Quattro building would be more protected.
 - t) The patron line around BWS and Bar Bes was less problematic and intrusive to the neighbourhood than the redirection the Applicant was seeking as it buffers noise from travelling towards the Quattro building.
 - u) Ropes could be used to cordon off the BWS entrance which, with security, would assist to prevent anti-social behaviour and disruption to customers entering the BWS store.
36. The difficulty with this matter is that, on one hand, there is evidence that voices in the courtyard disturb the residents of the Quattro, the Cosmopolitan and the Quest buildings at night and acoustically, without erecting a roof structure, the voices are impossible to contain, and, on the other hand, there is no evidence before the Commission that shows the extent of the disturbance relative to the number of patrons in the courtyard. Nor is there any evidence as to the part music plays in that equation. Accordingly, the Commission must try to balance the licensee's right to exploit the commercial rights he bargained for with the residents' right to enjoy their homes free from unreasonable interference in such a way that allows both stakeholders, who essentially have competing interests, to maximise their entitlements. It is

hoped that the following determination balances those rights sufficiently to be tolerable to both sides. The Commission determines, based on the factual findings in paragraphs 35(a) to (u) above, as follows:

- a) The Application is allowed in part to vary the section 117 trading condition 3(2) and to add additional section 117 trading condition 3(5), such that the section 117 Conditions set out in the Delegate's Decision shall be quashed and replaced with the following Trading Conditions effective from the date of this decision:

i. Section 117 Conditions

The following conditions are imposed on the licence and become effective from the date of this decision:

- 1. The provision of music or any other form of entertainment (including background ambient music) in the rear outdoor courtyard area must cease at 10 pm each night.*
- 2. Not more than forty (40) patrons are permitted to remain in the rear outdoor courtyard area after 12 midnight each night (**patron cap**). Patrons are to be permitted to use that 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 and shall not be served any alcohol from the 'back bar' in that courtyard area after 12 midnight. Women wishing to use the restrooms located in that courtyard area may have free access and shall not be included in the patron cap, provided they do not congregate in the courtyard area.*
- 3. All front and rear airlock doors must be kept closed at all times, except when persons are passing through them. Those doors may not be propped open.*
- 4. Emptying of glass containers into bins external to the building is not permitted after 10pm at night.*
- 5. The entrance line for patrons for Bar Bes shall be on Hay Street and shall run in an easterly direction outside the BWS premises, and the line of queuing patrons must be 'cordoned off' before and after the BWS premises' front doors so as to allow BWS customers unfettered access to and from BWS. There must also be sufficient security personnel on duty at the venue to ensure that the queue of patrons is orderly at all times and that it does not cause a nuisance to the neighbourhood or BWS's customers.*

37. Other than as varied above, all other Trading Hours and Conditions imposed by the Delegate on 23 September 2021 are affirmed.



PAUL SHANAHAN
PRESIDING MEMBER



ALYA BARNES
MEMBER



KIRSTY STYNES
MEMBER