Music Industry Council

Enhancing Live Music in South Australia

Recommendations

March 2015

The Music Industry Council

The Music Industry Council (MIC) is SA's newly formed leading music industry advisory body.

Comprising key music industry stakeholders, MIC was established in 2014 as a direct response to recommendations within the State Government's Thinker in Residence, Martin Elbourne's final report into "The Future of Live Music in SA".[1] Recommendation no 1 of that report was to:

> *Create the South Australian Contemporary Music Advisory Council (SACMAC) to develop strategies for the economic development of the local music industry and to champion it.*

Championed in the first instance by Music SA, key stakeholders have independently formed (and renamed) this Council, MIC, the Music Industry Council.

MIC membership comprises high level key music industry participants including venues, agents, performers and producers as well as state and local government representatives.

These are:

- Music SA
- Australian Hotels Association (SA)
- Local Radio (Fresh 92.7)
- State Government (DMITRE)
- Arts SA
- 5/4 Entertainment
- Musitec
- APRA / AMCOS
- Adelaide Music Collective
- Adelaide City Council
- The Jam Room

Following its establishment, as a first step towards increasing live music performances and attendance and to provide a springboard for the next level of live music uptake in SA the MIC has developed a set of 'low hanging fruit' type recommendations. If implemented these would quickly and at minimal/no cost to Government greatly enhance live music in South Australia.

In developing these recommendations the MIC has collaboratively taken advice across a range of stakeholders. Firstly, the MIC would particularly like to thank John Wardle and Damian Cunningham from the Live Music Office and Patrick Donovan from Music Victoria for their invaluable input and time.

The MIC would also like to acknowledge the steps that the State Government has already taken to enhance live music in SA, including the recent establishment of the Live Music Hub.

[1] The final Thinker's report can be found here.
http://reverb.net.au/wp-content/uploads/2013/11/elbournereport2013.pdf

Background – Live Music in South Australia

South Australia is in a *relatively* healthy position for live music, compared with other States. The Deloitte Access of Economics Study of 2011 said that:

> *"Victorians aged 15 years and above are estimated to have an involvement rate in 'work' as a live music performer of 19.4 per 1000" and "only South Australia exceeds this rate – with 20.8 per 1000 persons – while the remaining jurisdictions are well behind with a national average of 15.5 per 1000 persons"*[2]

That said, competition is fierce, gig numbers for original live music have declined and rates of pay are lower relatively than in past decades. The desire to reinvigorate the local live music scene was acknowledged by the State Government in hosting a Thinker in Residence specifically for that purpose.

Commentators have variously blamed 'not enough venues', or conversely 'not enough talent', the advent of easily accessible on-line music, undue noise/amenity complaints from nearby residents, changing music tastes and the existence of pokie machines as the key reasons for a reduction in both live music gigs and the profitability of live music in South Australia. While there may be merit in *some* of these reasons in *some* cases, they are often contradicted by others and upon closer examination of the root causes of what restricts live music at the 'coal face' a number of common agreed themes emerge.

1 Hotels/pubs/clubs/nightclubs continue to host the overwhelmingly majority of live music gigs in this State, more than 76% of all APRA/AMCOS receipts for live music venue expenditure & receipts are from licensed premises.(Source: APRA/AMCOS). Licensed premises are key stakeholders and are key to solutions.

2 Onerous liquor licence/entertainment consent requirements actively discourage or prevent venues from engaging live musicians or expanding their current offerings.

3 Complicated and potential costly building/zoning requirements may also discourage venues from starting to provide live music.

4 The high additional compliance costs for venues to support live music, including Workcover.

5 There is a lack of information for both venues and musicians as to how to engage musicians and/or get a gig.

[2] Deloitte Access Economics, "Economic, social and cultural contribution of live music in Victoria" Arts Victoria, 2011 page 13

The Recommendations

As a first step in encouraging live music, the MIC provides five key recommendations to enhance live music in SA. These are the first of a tranche of recommendations which, when implemented, will provide the best possible base for SA to potentially be a leader in live music in Australia.

Implementation of these recommendations will have benefits across private and public sectors and:

- Are 'low hanging fruit' which will easily and at low cost immediately encourage a greater uptake of live music by venues.
- Support local small, medium and large businesses to support musicians and the Arts sectors.
- Provide a 'win' for the State Government via reduced red-tape and compliance costs.
- Compliment the 'vibrancy' agenda currently held by the State Government and particularly in attracting and retaining young people to the State.

Recommendation 1
Remove the requirement for separate entertainment consent on all liquor licences.

Division 5 Section 105 of the SA Liquor Licensing Act 1997 currently requires that, with the exception of small venue licence holders:

> "a licensee must not use any part of the licensed premises, or any area adjacent to the licensed premises, for the purpose of providing entertainment unless—
>
> (a) the consent of the licensing authority has been obtained"

This requirement for liquor licensees to obtain separate consent to provide any entertainment is onerous, discourages live music of any type and has been raised time and time again by the live music sector and licensees as the biggest barrier currently facing the live music sector in SA.

Acting as a default prohibition against live performance this condition is not applied to other forms of entertainment, such as recorded music and is a provision which is only in force in South Australia. This puts South Australian artists and venues at a significant disadvantage to their peers across other parts of Australia.

With the exception of the Small Venue Licence, for which Section 105 does not apply, gaining the required consent is not simple. If granted, it often stipulates both the times live music can be played and also the genre - in what must be said is ridiculous amounts of detail.

By way of examples.

The Belgian Beer Café located off Rundle Street in the heart of Adelaide's night time district 'shall not be used as a nightclub, discotheque, band venue or similar! The live entertainment in the downstairs area, must be low scale such as piano or didgeridoo, violin, harps or similar.

To make matters worse - and to ensure that whatever live entertainment is performed is not economically viable - conditions also state that 'entertainment provided shall not be advertised or promoted to the general public in any fashion which promotes its premises as an entertainment venue … it shall not incur a door charge and it shall not result in queuing'.

Edwardstown's "Castle Tavern" also has very specific entertainment consent. It "shall take the form of one or two instrument bands, playing essentially country and western/ballad style music. No rock and roll, discotheque or like entertainment is permitted".

There are many other examples of onerous and draconian entertainment consent conditions upon premises that have held liquor licenses for decades and which were in business prior to the nearby subsequent residential developments.

While the MIC understands that some local councils including the Adelaide City Council has a policy position recognising 'first occupancy rights', should an existing licensee seek new or changed entertainment consent in the face of objections this policy is sometimes hard to enforce and of course it does not support live music in the case of a new or newly developed venue.

On Wednesday 18 February 2015 the Minister for Business Services and Consumers Gail Gago announced a Cabinet intention to amend existing Entertainment Consent provisions in the *Liquor Licensing Act 1997* (The Act) in the Media Release (MR) , "*Another win for live entertainment with more cuts to red tape*."

The MIC encourages the government to pass these amendments as a matter of high priority. The MIC however remains concerned with both the intention of the Cabinet to restrict these amendments only to entertainment before midnight, as well as with the inference that under The Act provisions may be retained to regulate entertainment under certain unspecified conditions.

The MIC would also like to raise a number of issues that may not have been considered as the 12am retention for Entertainment Consent was debated.

In her media release Minister Gago said;

> *"Ms Gago said the new proposal does not seek to remove the entertainment consent process entirely but it does strike a very fair balance in reducing red tape but still maintaining adequate regulation. Once the changes have been drafted, targeted consultation will take place."*

The MIC believes that retaining The Act's Entertainment Consent provisions for live music after midnight will create additional problems now for both the Government and industry with respect to consistency and ambiguity within The Act.

The Minister's assurance that the government will be careful to maintain 'adequate regulation' infers that the Government has a perception of risk that removal of the requirement for Entertainment Consent will disrupt the amenity of those nearby, some of whom may have been there first.

It is the MIC's position that any industry regulation should be based on two principles.

1. Risk – Building Compliance, Fire Safety
2. Impact - Noise and Amenity

The MIC is of the position that building safety and personal risk related regulation such as building compliance and fire safety are not affected by the time of day or genre/type of entertainment, and that the existing regulation is adequate.

The MIC also disagrees with the inference in the government position that the existing noise and amenity redress provisions and complaints legislation while adequate before midnight is not adequate after midnight.

Removing the need for Entertainment Consent entirely will in no way giving venues a 'free reign' to noise pollute. The risk is *already* addressed in a number of ways under existing legislation. The Liquor Licensing Act 1997 very specifically deals with issues of noise complaints in Division 6 which clearly states (Section 106) that:

(1) If—

(a) an activity on, or the noise emanating from, licensed premises; or

(b) the behaviour of persons making their way to or from licensed premises,

is unduly offensive, annoying, disturbing or inconvenient to a person who resides, works or worships in the vicinity of the licensed premises, a complaint may be lodged with the Commissioner under this section.

Prescriptive requirements about the process of dealing with complaints follow and this may include the subsequent attachment of conditions on to a liquor licence IF warranted in specific circumstances. Section 106 of the Liquor Licensing Act provides an adequate mechanism to address noise complaints and protect amenity while also supporting live music.

As well, the Environment Protection (Noise) Policy 2007 provides guidelines as to reasonable levels of noise and how to measure them and this policy has been adopted by local councils.

The MIC fully supports the retention of these provisions and Section 106 of The Act. Those who believe that there is unreasonable and undue noise should have means to take action about those complaints and these should be reasonably and rationally dealt with.

Of concern is the further inconsistency that if the premises do not have a liquor licence then there is no current requirement for Entertainment Consent, with the EPA deemed adequate to address amenity issues and impact at any time of day or night.

The MIC contends that if the existing provisions under the EPA are deemed adequate for licensed and non-licensed premises, and in addition there are provisions under Section 106 of The Act, then the MIC is unclear what gap another level of Entertainment Consent just to apply after midnight would address.

A futher point requires investigation also of what is defined as in The Act as "Prescribed Entertainment" after 12am. The current definition for entertainment in the Act (Section 4) is;

> **4—Interpretation**
>
> "entertainment" means a dance, performance, exhibition or event (including a sporting contest) calculated to attract and entertain members of the public;

The current practice of regulating specific entertainment practice, such as genre, instruments, and essentially live activity whilst exempting all recorded and screen based entertainment as 'entertainment' as the current Entertainment Consent has been applied is not supported in principle at any time or day or night.

There is simply no level playing field for local South Australian live entertainment jobs and opportunities alongside imported broadcast and recorded entertainment.

The historic and out of date definition of 'entertainment' will essentially continue to restrict entertainment by live acts while at the same time exempting broadcast and recorded entertainment.

It is the MIC's position that in the year 2015 and beyond where digital and recorded entertainment provides competition for live acts, retention of entertainment consent provisions after midnight will further expose the Government's policy to mounting consistency challenges, and continue to disadvantage South Australian musicians in comparison to their counterparts in other states of Australia.

Accordingly the MIC recommends that the requirement for separate entertainment consent should be removed for <u>all licensees</u> for any and all live music and that the definition of entertainment be amended or removed.

Existing Regulations in the Planning and Environmental Protection legislation exist which may block the capacity for venues to present live music even once entertainment conditions and the associated legislation are removed. These regulations are tabled in the following two recommendations.

Recommendation 2

Changes to Building Code Regulations to encourage the uptake of live music.

The Building Code of Australia defines Classes of building by use. Requirements for fire safety, exits, construction specifications and materials, ventilation etc then differ depending on building class.

In the Building Code two building Classes can currently apply to live music venues:

Class 6: a shop or other building for the sale of goods by retail or the supply of services direct to the public, including-

a) an eating room, cafe, restaurant, milk or soft-drink bar; or
b) a dining room, bar, shop or kiosk part of a hotel or motel; or
c) a hairdresser's or barber's shop, public laundry, or undertaker's establishment; or
d) market or sale room, showroom, or service station.

Class 9b - an Assembly building

Assembly building means a building where people may assemble for-

a. civic, theatrical, social, political or religious purposes including a library, theatre, public hall or place of worship; or
b. educational purposes in a school, early childhood centre, preschool, or the like; or
c. entertainment, recreational or sporting purposes including –
   (i) a discotheque, nightclub or the bar area of a hotel or motel providing live entertainment or containing a dance floor; or
   (ii) a cinema; or
   (iii) a sports stadium, sporting or other club; or
d. transit purposes including a bus station, railway station, airport or ferry terminal.

In South Australia there are many venues which have both classifications, Class 6 in the general hotel premises and then Class 9b in any area which could be classified as a 'discotheque'.

Irrespective of the size of the venue, any areas which are classified as 9b have more onerous requirements with respect to air ventilation, smoke detectors and sprinkler systems etc.

While not disagreeing that in large assembly buildings there are safety issues to be considered, in small hotel-type establishments hosting live music the requirement to have specific and additional compliance costs is detrimental to encouraging live music.

Others states in Australia such as Victoria and New South Wales have introduced State Regulations to free up licensed venues from this onerous requirement. In Victoria at the end of October 2014 the Building Amendment (Live Music) Regulations 2014 were introduced to amend the Building Regulations.

The intent was to exempt primary purpose live music venues of 500m2 or less from being assessed as a Class 9b assembly building. A new Class "Small live music venue" was introduced. In SA it is recommended that this Class be named something else to avoid misinterpretation that it only applies to licensees in the "Small Venue" licence category.

In the case of Victoria a "Small live music venue" means the whole or the only part of a Class 6 building that has a rise in storeys of no more than two –

(a) in which live music entertainment is provided to the public; and

(b) that has a floor area of no greater than 500m^2

In NSW a variation to the Building Code was passed which simply removed the provision (c) (i) in the definition of a Class 9b building which refers to discotheques.

In both cases the result has been a freeing up of premises that provide live music from having to comply with unreasonably onerous provisions.

In South Australia the introduction of a similar change as was introduced in Victoria would do three things:

1. Enable new businesses or existing business that wish to start providing live music to have reduced compliance costs and reduce costs in meeting building requirements. Our discussions show that venues would simply not bother with live music if there were thousands of dollars in costs due to a reclassification of an existing area as a 9b Assembly Building.
2. Ensure the removal of Entertainment Consent provisions in the *Liquor Licensing Act 1997* deliver the increase in jobs and opportunities for South Australian musicians as intended
3. Send a strong message that the State Government is serious about supporting both small businesses, the live music sector, and red tape reduction

There are very few existing live music venues or licenses premises (hotels) in South Australia which have live music areas over 500m^2 and it is anticipated that this change, together with the removal of the need for separate entertainment consents would encourage existing venues to support local live music.

The risks to this change are minimal. It is not proposed that existing building classifications would be removed across the board. Reclassifications could be made to existing premises upon application.

Recommendation 3

Legislatively address issues of external noise attenuation in new buildings and developments.

The Building Code of Australia contains no provision for residential apartment buildings to address external noise. There is therefore no enshrined and universal requirement for property developers or builders to ensure that their developments are built in such a way to protect residents from external noise sources including of course live music. This has led to many cases of land use conflict between existing live music venues and the owners of new developments. While the complaints process within the Liquor License Act 1997 does take into account 'first occupancy' this provision is really 'after the horse has bolted'.

Particularly in a climate of increased urban density and revitalisation of live music it is critical that potential problems are addressed before they occur.

While various state governments and local councils have introduced some levels of planning controls to address external noise (e.g. airports, railway corridors and arterial roads), there is a lack of unified approach to such developments.

Other states are leading the way in this area. In September 2014 the NSW Department of Planning and Environment released draft guidelines for NSW residential development. These provisions include seals preventing noise transfer through gaps in buildings as well as double or acoustic glazing, acoustic louvres or enclosed balconies (wintergardens).

The Adelaide City Council's current policy of 'first occupancy rights' means that whomever was 'there first' has a right to continue and the newcomer is responsible for addressing issues of undue noise. This, not unreasonably, means that if a current live music venue proposes new development they are responsible for addressing undue additional noise so as to prevent undue hardship for first occupants. The Adelaide City Council uses EPA Noise Guidelines (not legislatively enforceable) to meet criteria for these developments and it is understood these are under review.

The approach taken by the Adelaide City Council through its Adelaide (City) Development should be commended however these criteria are not universal.

Keeping in mind that many live music venues are not in the Adelaide CBD, a state-wide change to the Building Code via regulation is recommended as a preferred approach to future proof both residents and live music venues.

The MIC will continue to advocate for workable solutions to these issues, and in the long term, recommends a more comprehensive approach to addressing land use conflict between residential development and music venues, where;

- Evening economy areas are recognised in planning schemes
- The land use character is recognised in planning controls.

- At the time of property sale, a*n associated provision* in the Land And Business (Sale and Conveyance) Act 1994 Section 7—Particulars to be supplied to purchaser of land before settlement - could be strengthened to set the ground rules.
- Residential developments are designed to attenuate external noise in the city and evening economy zones. Developers should be legislatively required to address noise issues to an accepted State Noise Standard when developing and to provide certainty and consistency across the State.
- Noise complaints processes are operating as intended, with an advisory pathway to included Council cultural staff and the MIC where live music venues are experiencing land use conflict.
- Order of occupancy provisions in s.106 of the *Liquor Licensing Act 1997* are recognised
- Consideration of capacity of planning controls to apply agent-of-change obligations as an overlay for finite areas such as evening economy precincts or suburban venues.

Recommendation 4

Minors to be able to perform in licensed premises.

Having opportunities to perform live is a crucial component in the development of young musicians. With many performance opportunities being presented in licensed premises, having a clear direction providing safe guidelines for young artists to perform in these venues will better support their development.

For teachers with gifted young students or parents who perform and are ready to have young family members on the gig, permitting young musicians to perform in licensed premises provided they are under the direct supervision of an adult will increase performance opportunities and provide paid employment.

Interstate precedents for these conditions include s.123 (3) of the NSW Liquor Act 2007.

Currently the Act requires that:

LIQUOR LICENSING ACT 1997 - SECT 112

112—Minors not to enter or remain in certain licensed premises

(1) A minor—

(a) may not enter, or remain in, licensed premises subject to an entertainment venue licence (other than a part of the licensed premises approved by the licensing authority) between the hours of 9 pm on one day and 5 am of the next; and

An amendment to the Act is suggested,

112—Minors not to enter or remain in certain licensed premises

(1) A minor—

(a) may not enter, or remain in, licensed premises subject to an entertainment venue licence (other than a part of the licensed premises approved by the licensing authority) between the hours of 9 pm on one day and 12 am of the next;

A minor does not commit an offence under subsection (112) (a) if the minor:

(b) is performing in a show or other live entertainment performance held in the bar area, and is in the company of a responsible adult while in the bar area.

Recommendation 5

Legislatively address the limitations on temporary occupation of buildings.

At present, the Development Act, 1993, does not apply any different criteria for the short – term occupation of a building. This means a costly, long and frustrating process with the result often meaning persons do not proceed with an idea to temporarily activate a space or an abandoned building. There is opportunity to consider legislative changes to make short-term occupation of a building a simpler consent process, whilst still maintaining the necessary amenity and safety considerations.

Whilst a consent authority must take into consideration whether it would be appropriate to require the existing building to be brought into total or partial conformity with the Building Rules, there is the capacity already within the Act for latitude.

DEVELOPMENT ACT 1993 - SECT 68

68—Temporary occupation

(1) A person may, with the approval of a council, occupy a building on a temporary basis without a certificate of occupancy.

(2) An approval under subsection (1) may be given on such conditions (if any) as the council thinks fit to impose.

(3) A council which refuses an application must notify the applicant in writing of—

(a) the refusal; and

(b) the reasons for the refusal; and

(c) the applicant's right of appeal under this Act.

(4) Any appeal under this section must be commenced within 28 days after a notice is given to the applicant under subsection (3) unless the Court allows an extension of time.

The MIC is aware that the Adelaide City Council supports provision of the temporary use of buildings for performance and creative opportunities.

Developing a practice note and guideline to provide consistency across the state for this activity would be a significant reform for the cultural policy framework in South Australia.

Conclusion

There is not one quick fix to the question of how to encourage live music in SA and this was acknowledged also in the Thinker in Residence, Martin Elbourne's report.

Instead, a mix of legislative, planning, educational and other measures are needed to encourage and provide practical assistance to those hosting or performing live music.

The MIC has as its core aim to develop SA's live music industry through a co-ordinated and practical approach across all relevant sectors and recognising the role that licensed premises play in supporting live music performances.

These recommendations provide deliverable first steps that will not only make an immediate difference to live music in SA, but will also reduce red tape for business and compliance costs to Government.

The measures will be a new foundation for the sector to develop from, and also send a strong message to the community that the State Government is serious about wanting to help both live music and small businesses who remain key to the success of live music. Without the Liquor and associated BCA/planning measures detailed in this submission the capacity for the MIC to achieve its objectives will be greatly diminished.

As well as the legislative measures proposed in this document it is considered key that the wider music industry, including venues and musicians are provided with the best possible information on how to get and host live music gigs. This should include how to navigate all legislative and regulatory requirements as well as how to promote musicians and gigs. To this end an industry 'rule book' is to be developed and this will be coordinated through the MIC and the Live Music Office