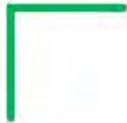




QUEENSLAND
OMBUDSMAN
Standing for fairness



The Lakeside Noise Report



An investigation of action taken by
Moreton Bay Regional Council to regulate
noise emissions from Lakeside Motor
Racing Circuit

November 2015

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Dictionary

Term	Meaning
Acting Manager	former Coordinator Healthy Places, Environmental Health Department, Community and Environmental Services, council and current Acting Manager, Environmental Health Department, Community and Environmental Services, Moreton Bay Regional Council
ASK	ASK Consulting Engineers Pty Ltd
CEO	the Chief Executive Officer of Moreton Bay Regional Council
council	Moreton Bay Regional Council
DA	Development Permit 2008/11618
dBA	decibels – being a unit to measure the intensity of a sound
Director	Director Community and Environmental Services, Moreton Bay Regional Council
EP Act	<i>Environmental Protection Act 1994</i>
EP Regulation	Environmental Protection Regulation 2008
former Director	council's former Director Community and Environmental Services, Moreton Bay Regional Council
Lakeside	Lakeside Motor Racing Circuit
LA10	The LA10 level is the noise level that is exceeded for 10% of the sample period. During the same period, the noise level is below the LA10 level for 90% of the time. The LA10 is a common noise descriptor for environmental noise and road traffic noise.
LAeq T	The equivalent continuous sound level (LAeq) is the energy average of the varying noise over the sample period and is equivalent to the level of a constant noise that contains the same energy as the varying noise environment. This measure is also a common measure of environmental noise and road traffic noise. T is the time of the sample period.
LAm _{ax}	the maximum noise level (LAm _{ax}) over a sample period is the maximum level, measured on fast response, during the sample period
Legal Services Manager	Legal Services Manager, Legal Services Department, Moreton Bay Regional Council
Manager Environmental Health	Manager Environmental Health, Moreton Bay Regional Council

Term	Meaning
Manager Legal Services	Manager Legal Services, Legal Services Department, Moreton Bay Regional Council
MCU	material change of use
my report	the report I gave council on 23 May 2013 under s.50 of the Ombudsman Act titled 'Investigation of complaint about the emission of noise from Lakeside Motor Racing Circuit'
Ombudsman Act	<i>Ombudsman Act 2001</i>
PRSC	Pine Rivers Shire Council
SPA	<i>Sustainable Planning Act 2009</i>
the operator	a company which leases Lakeside from council and runs motor racing activities at the site
the revised noise measure	source noise measured over an interval of at least 15 minutes or, if the noise continues for less than 15 minutes, the duration of the source noise, with the source noise on a race day measured over the duration of each race
this Office	the Office of the Queensland Ombudsman
2007 ASK report	noise management report prepared by ASK Consulting Engineers Pty Ltd and dated 10 April 2007
2013 ASK report	noise monitoring report prepared by ASK Consulting Engineers Pty Ltd and dated 1 July 2013

Executive summary

This report outlines the findings of an investigation of action taken by Moreton Bay Regional Council (council) in response to ongoing issues regarding the emission of noise from Lakeside Motor Racing Circuit (Lakeside).

The investigation found that council has not taken effective steps to collect data, and monitor and evaluate noise levels from events or to protect the community from potential noise exceedances arising from events. I have therefore made a number of recommendations to council regarding the monitoring and enforcement of relevant noise requirements at Lakeside.

For many years the management of noise at Lakeside has been an issue of ongoing concern to the community in its immediate vicinity. Council has responsibility for regulatory compliance in relation to noise at Lakeside as well as additional responsibilities to the community as owner of the land on which Lakeside is situated.

On 23 May 2013, I gave a report to council under s.50 of the *Ombudsman Act 2001* (Ombudsman Act) titled 'Investigation of complaint about the emission of noise from Lakeside Motor Racing Circuit' (my report). My report made recommendations to council pertaining to its role as regulator.

Following my report to council, council obtained advice from ASK Consulting Engineers Pty Ltd and decided upon the revised noise measure.¹ It then advised the operator of Lakeside and nearby residents of its position.

This report considers the effectiveness of the actions taken by council to enforce relevant noise requirements in respect of motor racing activities at Lakeside since my report and the communication of its position in relation to the revised noise measure.

The council's Chief Executive Officer (CEO) was provided with an opportunity to comment on a proposed report provided on 5 August 2015. In his response dated 2 September 2015, the CEO advised that council accepts each of the proposed recommendations contained in the proposed report and has started considering how those recommendations can be implemented effectively and expeditiously.

The investigation involved a review of:

- the background and history to this issue (Chapter 1)
- the relevant legislation (Chapter 2)
- council's actions in relation to data collection and evaluation (Chapter 3)
- council's actions to protect the community from noise exceedances (Chapter 4)
- the overall effectiveness of council's approach to managing noise issues at Lakeside (Chapter 5).

Notwithstanding council's advice to the operator and nearby residents regarding the revised noise measure, the investigation showed that there had been no change to the way in which noise was being measured at Lakeside. Although there were several reasons put forth for the delay in council achieving the change to the way noise was being measured, I did not consider any of the reasons to be valid. The investigation therefore determined that council has not taken effective steps to collect data, and monitor and evaluate noise levels from events in line with the revised noise measure.

¹ See section 1.2.3 of this report for a discussion regarding the revised noise measure.

This report identified a number of failures within council including:

- the council officer responsible for monitoring the operator's compliance with noise requirements and for the management of complaints regarding noise was not initially informed of council's change in position regarding the way in which noise is measured
- there is no evidence of planning or preparation for the change or consideration regarding how it would be effected on a practical level
- council's intentions were not clearly represented to nearby residents
- council was aware of noise monitoring being undertaken by the operator in a way that did not comply with relevant standards but did not raise the issue with the operator in a timely manner.

The investigation found that council's approach in trying to achieve co-existence between Lakeside and the complainants by working with the operator to get it to understand its requirements rather than taking a more formal approach to compliance is not currently working effectively.

The recommendations in this report are directed to council taking immediate steps to ensure the revised noise measure is put into effect, to ensure appropriate evaluation of the resultant noise data and to address any exceedances in an effective and timely manner.

The issues faced by council in trying to achieve compliance in relation to this matter are similar to some of the issues faced by councils across Queensland on a day-to-day basis in carrying out their regulatory compliance responsibilities.

Opinions and recommendations

Opinions

I have formed the following opinions:²

Opinion 1

Since council's advice to the operator of the revised noise measure in November 2013, council has not taken effective steps to collect data, and monitor and evaluate noise levels from events in line with the revised noise measure and this amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

Opinion 2

Since council's advice to the operator of the revised noise measure in November 2013, council has not taken effective steps to protect the community from potential noise exceedances arising from events, consistent with the revised noise measure and this amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

² For the purposes of Part 6, Division 1 of the Ombudsman Act.

Recommendations

I make the following recommendations:³

Recommendation 1

Council review its internal communication processes between:

- areas of council determining council's position in relation to noise issues at Lakeside; and
- the council officer/s responsible for monitoring compliance with requirements relating to noise and for the management of complaints regarding noise issues at Lakeside.

Recommendation 2

Council take immediate action to ensure the implementation of the recommendations set out in the 2013 ASK report including the measurement and evaluation of noise in accordance with the revised noise measure and the engagement of an independent acoustic expert to assess activities in accordance with the recommendations.

Recommendation 3

Council implement a system for the ongoing monitoring of adherence to each of the recommendations set out in the 2013 ASK report including monitoring:

- instructions to the independent acoustic expert; and
- the reports provided by the independent acoustic expert.

Recommendation 4

Where council is not satisfied, on a reasonable basis, that:

- noise measurements are being taken in accordance with the revised noise measure and the recommendations in the 2013 ASK report are being followed; and
- noise is kept within the prescribed limit

council take immediate action to raise the matter with the operator with a view to achieving compliance.

Recommendation 5

In circumstances where council's reliance on its relationship with the operator is not effective in ensuring compliance with legal requirements regarding noise, council explore its options, including by taking legal advice on the use of formal enforcement.

³ Under s.50 of the Ombudsman Act.

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Chapter 1: Introduction

1.1 Noise at Lakeside

Lakeside Motor Racing Circuit (Lakeside) is situated within the boundaries of the Moreton Bay Regional Council (council). The land is owned by council and leased to a company which runs motor racing activities at the site (the operator).

For many years the management of noise at Lakeside has been an issue of ongoing concern to the community in its immediate vicinity. Council has responsibility for regulatory compliance in relation to noise at Lakeside as well as additional responsibilities to the community as owner of the land on which Lakeside is situated.

On 23 May 2013, I gave a report to council under s.50 of the *Ombudsman Act 2001* (Ombudsman Act) titled 'Investigation of complaint about the emission of noise from Lakeside Motor Racing Circuit' (my report). My report made recommendations to council pertaining to its role as regulator.

This report considers the effectiveness of the actions since taken by council to enforce relevant noise requirements in respect of motor racing activities at Lakeside.

The issues faced by council in trying to achieve compliance in relation to this matter are similar to some of the issues faced by councils across Queensland on a day-to-day basis in carrying out their regulatory compliance responsibilities.

1.2 Background

1.2.1 History

Lakeside was constructed in the 1960s as a major motor sport facility. It was used on an occasional basis until the early 2000s when it fell into disuse. The then Pine Rivers Shire Council (PRSC) acquired the 60ha site in November 2001 and the then Mayor announced that council would ensure Lakeside would never again be used for motor racing. It could, instead, be adapted for community-based events.

In November 2005, PRSC invited expressions of interest for use of the site. As a consequence, council entered into a 30 year lease with the operator from 24 November 2007 for use of the site for hospitality and outdoor entertainment, and promotional, recreational and competitive motorised activities, including driver training and community purposes.

Prior to entering into the lease, PRSC engaged acoustic consultants, ASK Consulting Engineers Pty Ltd (ASK), to prepare a noise management report which is dated 10 April 2007 (2007 ASK report) on the use of the site for a range of vehicle-based activities from relatively non-noise intrusive operations to major motor racing events. The objective of the report was to provide a management framework for noise generated at the facility so that it complied with the then legislative framework governing noise emissions, namely the *Environmental Protection Act 1994* (EP Act).

The 2007 ASK report is referred to in the lease and the lessee/operator is required to conduct activities in accordance with the provisions of that document insofar as motor vehicle noise is concerned.

PRSC amalgamated with a number of other councils in March 2008 to form Moreton Bay Regional Council. The new council subsequently issued Development Permit 2008/11618 (the DA) on 18 November 2008 for use of the site for motor vehicle activities on a full-time basis. The DA contains noise conditions similar to those in the lease which, for simplicity in this report, I will refer to as 'the noise condition'.

Following the DA being issued, both council and the operator acted on the basis that the noise levels prescribed in the lease and DA were maximum levels (LA_{max}) and complaints were being addressed accordingly and generally in the manner outlined in the 2007 ASK report.

However, on 16 December 2010, council issued a letter to all residents in the proximity of Lakeside advising that it was appropriate to measure noise emissions at the raceway on a LA_{eq} (the energy average of varying noise over a sample period) basis. The effect of this decision was significant as previously daytime noise from Lakeside was not permitted to exceed a maximum of 70 dBA at any time. After the change, noise emitting from activities on the site between 9.00am and 7.00pm was to be averaged over that entire period and 70 dBA set as the average maximum noise limit. Similar averaging practices were also to be applied to activities between 6.00am to 9.00am and 7.00pm to 9.30pm. The significance of the period of time over which the noise is measured for the purposes of averaging is that, the longer the period over which the noise is averaged, the less likelihood the noise will ever reach a maximum average noise limit of 70 dBA.

1.2.2 Initial investigation

The complainant, a nearby resident, made numerous complaints to council about the high levels of noise emitted from Lakeside when motor racing events were being held at the venue.

The complainant claimed that he and other residents were being disadvantaged by council's interpretation, from December 2010, of the relevant noise conditions which permitted noise to be averaged over the duration of racing on each racing day. The complainant also claimed this revised interpretation in favour of the operator of Lakeside had progressively led to higher noise levels being permitted on a more frequent basis.

Following a complaint received in December 2011, the Office of the Queensland Ombudsman (this Office) investigated whether, in December 2010, council acted reasonably by changing its interpretation of the noise permitted from Lakeside under the DA and lease.

I issued my proposed report to council on 4 December 2012 and, following consideration of council's response, completed the investigation and issued my final report on 23 May 2013.

I formed the opinion that council's then interpretation of the DA noise condition for Lakeside (with noise being averaged over the duration of racing for the whole of each racing day), communicated to residents in December 2010, was unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act.

I made a number of recommendations, including that council engage an acoustic specialist to formulate a suitable time interval for LA_{eq} T that provides a fair and reasonable outcome for both the operator and local residents, and adopt that interval. I also recommended that council inform the operator and nearby residents of the approach adopted to interpreting the DA and lease conditions, and conduct monitoring and assessment of noise from Lakeside in accordance with that approach.

1.2.3 Council's response to recommendations

In my letter of 23 May 2013, which enclosed my report, council was requested to advise on:

- the steps taken or proposed to be taken by council to give effect to the recommendations (in the report) together with a timeframe for the completion of those steps; or
- if council does not intend to give effect to a recommendation, the reasons for the decision.

In its letter of 14 June 2013, council advised that it proposed to engage an acoustic specialist to formulate a suitable time interval for LAeq T that would provide a fair and reasonable outcome for both the operator and local residents. Council advised in its letter that it would consider its professional advice before communicating further with the operator and nearby residents.

Following requests in my letters of 18 June 2013 and 18 October 2013 for further information in relation to council's intentions, council advised in its letter of 28 October 2013 that the acoustic consultant had advised that the suitable time interval for LAeq T should be the duration of each race. Council also advised its intention to inform the operator and nearby residents of the approach it intended to adopt in interpreting the DA and lease conditions and conduct monitoring (or cause the operator to conduct monitoring and assessment) of noise from Lakeside in accordance with that approach. Council advised that arrangements had been made to meet with the operator in the near future to help resolve any outstanding issues.

In my letter of 5 November 2013, I sought clarification from council regarding its response. In a letter dated 13 November 2013, council advised that a meeting was held with the operator on 5 November 2013 and council understood that the operator would be obtaining its own independent professional advice on the matters which were the subject of my report. Council advised that the operator had been advised that council would be applying the 'current relevant legislative controls for an "open air event" at Lakeside Park'. It advised that the operator had been invited to consider whether an application under s.369 of the *Sustainable Planning Act 2009* (SPA) for a Permissible Change with respect to the noise conditions should be made to council and the operator intended to discuss this matter with its town planner.

On 12 March 2014, council provided a copy of a letter dated 6 March 2014 it had forwarded to a nearby resident, whom council also requested disseminate the letter to other residents. The letter set out council's response to my recommendations in similar terms to that which it had communicated to this Office. This included advice that council had accepted the recommendation of its acoustic specialist that the source noise should be measured over an interval of at least 15 minutes or, if the noise continues for less than 15 minutes, the duration of the source noise. It provided the example that the source noise on a race day would be measured over the duration of each race. (This approach will hereinafter be referred to as 'the revised noise measure'.) The letter said council had informed the operator of council's approach to the recommendations and said the purpose of the letter was to advise nearby residents of council's approach to these matters.

In my letter to council of 7 April 2014, I noted council's intention to apply the legislative controls for an 'open-air event' at Lakeside which I presumed to be the provisions of s.440X of the EP Act. I further noted the revised noise measure as communicated to residents. I requested the following information in relation to the revised noise measure:

- the date of commencement
- a description of the results of noise readings taken for events at Lakeside since commencement
- whether the revised noise measure had been exceeded
- the action taken by the operator or council in response to any exceedance.

In its letter of 30 April 2014, council advised that its current position was set out in its letter of 12 December 2013 (later advised by council that it should be 13 November 2013). Council advised 'a meeting was held with the operator of Lakeside Park and the operator indicated he would be seeking his own professional advice on the matter, the subject of your report, as well as on issues under the Sustainable Planning Act 2009'. It said 'The operator's decisions on these aspects will have a bearing on Council's future actions'.

On 16 May 2014, I wrote to council and advised that it was then approaching twelve months since I provided my report and during that time, council had failed to provide me with a satisfactory response about the steps taken to implement the recommendations contained in my report. For this reason, I commenced a further investigation under s.18(1)(b) of the Ombudsman Act.

1.3 *Issues for investigation*

The issues for investigation were whether council had, since council's advice to the operator of the revised noise measure:

- taken effective steps to collect data, and monitor and evaluate noise levels from events in line with the revised noise measure
- established appropriate procedures and standards for the evaluation of noise levels and reporting to council about noise levels from events, in line with the revised noise measure
- taken effective steps to protect the community from noise exceedances arising from events, consistent with the revised noise measure.

1.4 *Investigation*

I advised council in a letter of 16 May 2014 of my decision to commence this investigation and requested information to assist in the investigation.

Following various correspondence between council and myself, I enclosed with a letter to council of 1 August 2014, a notice pursuant to s.27(2) of the Ombudsman Act to permit me to exercise the powers contained in Part 4 of the Ombudsman Act. On 20 August 2014, I gave the Chief Executive Officer of council (CEO) a notice under s.28 of the Ombudsman Act which required provision of information relevant to the issues for investigation. Some of the information requested was received from council on 2 September 2014. A further notice was issued to the CEO on 28 October 2014 seeking the remainder of the information and material was received from council on 11 November 2014.

Notices under s.29(1) of the Ombudsman Act requiring attendance at an interview were provided to four council officers.

Recorded interviews were conducted with the following council officers on 13 February 2015:

- Director Community and Environmental Services (Director)
- Acting Manager, Environmental Health Department, Community and Environmental Services (Acting Manager).

Recorded interviews were conducted with the following council officers on 4 March 2015:

- Legal Services Manager (Legal Services Manager)
- the CEO.

Following interview, further information was obtained from each of these officers.

The documents received from council and the information provided by council officers during interview were considered, and a proposed report prepared for council's consideration and response.

Council responded to the proposed report⁴ by advising that it 'generally accepts each of the proposed recommendations contained in the proposed report and has started considering how those recommendations can be implemented effectively and expeditiously'. Although council's use of the word 'generally' could be interpreted as limiting the acceptance of the proposed recommendations, as no limitations were set out in council's response, I consider that council has accepted the proposed recommendations without reserve.

⁴ Letter from the CEO to the Queensland Ombudsman dated 2 September 2015.

1.5 *Focus of report*

The purpose of this report is to provide the outcome of the Office's investigation regarding the administrative actions of council in response to ongoing issues regarding the emission of noise from Lakeside.

The focus of the report is the administrative actions of council as a whole rather than the actions of individual council officers. For this reason, I have not named council officers or former council officers as it was not necessary to do so for the purpose of the report.

Furthermore, while the operator is mentioned in the report, it is only in the context of council's administrative actions and nothing in this report should be interpreted as being critical of or reflecting negatively upon the operator.

Chapter 2: Jurisdiction and legislation

2.1 Jurisdiction and Ombudsman Act

The Ombudsman is an officer of the Queensland Parliament empowered to investigate complaints about the administrative actions of Queensland government departments, public authorities and local governments. As council is a local government, it follows that I may investigate the administrative actions of council.

Under the Ombudsman Act,⁵ I have authority to:

- investigate the administrative actions of agencies on complaint or on my own initiative
- make recommendations to an agency being investigated about ways of rectifying the effects of its maladministration and improving its practices and procedures
- consider the administrative practices of agencies generally and make recommendations, or provide information or other assistance to improve practices and procedures.

The Ombudsman Act outlines the matters about which the Ombudsman may form an opinion before making a recommendation to the principal officer of an agency.⁶ These include whether the administrative actions investigated are contrary to law, unreasonable, unjust or otherwise wrong.⁷

Although the Ombudsman is not bound by the rules of evidence,⁸ the question of the sufficiency of information to support an opinion of the Ombudsman requires some assessment of weight and reliability. The standard of proof applicable in civil proceedings is proof on the balance of probabilities. This essentially means that, to prove an allegation, the evidence must establish that it is more probable than not that the allegation is true. Although the civil standard of proof does not strictly apply in administrative decision-making (including the forming of opinions by the Ombudsman), it provides useful guidance.⁹

‘Unreasonableness’ in the context of an Ombudsman investigation

It is important to note that, in expressing an opinion under the Ombudsman Act that an agency’s administrative actions or decisions are ‘unreasonable’, I am applying the meaning of the word in the context of the Ombudsman Act. In this context, ‘unreasonable’ bears its popular or dictionary meaning, not the far narrower ‘Wednesbury’ test of unreasonableness, which involves a consideration of whether an agency’s actions or decisions were so unreasonable that no reasonable person could have taken them or made them.¹⁰

2.2 Relevant legislation

The relevant legislation pertaining to the investigation includes provisions under the EP Act and Environmental Protection Regulation 2008 (EP Regulation):

Environmental Protection Act 1994 (current as at 1 January 2015)

440X Open-air events

- (1) An occupier of premises must not use, or permit the use of, the premises for an open-air event on any day—
 - (a) before 7a.m., if the use causes audible noise; or
 - (b) from 7a.m. to 10p.m., if the use causes noise of more than 70dB(A); or

⁵ Section 12, Ombudsman Act.

⁶ Sections 49 and 50, Ombudsman Act.

⁷ Section 49(2), Ombudsman Act.

⁸ Section 25(2), Ombudsman Act.

⁹ See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282. See also the discussion in R. Creyke, and J. McMillan, *Control of Government Action – Text, cases and commentary*, 2nd edition, LexisNexis Butterworths, Australia, 2009, at 12.2.20.

¹⁰ See *Re Hospital Benefit Fund of Western Australia Inc* (1992) 28 ALD 25 at 42 for a discussion of statutory unreasonableness.

- (c) from 10p.m. to midnight, if the use causes noise of more than the lesser of the following—
 - (i) 50dB(A);
 - (ii) 10dB(A) above the background level.

493A When environmental harm or related acts are unlawful

- (1) This section applies in relation to any of the following acts (*relevant acts*)—
 - (a) an act that causes serious or material environmental harm or an environmental nuisance;
 - (b) an act that contravenes a noise standard;
 - (c) ...
- (2) A relevant act is unlawful unless it is authorised to be done under—
 - (a) an environmental protection policy; or
 - (b) a transitional environmental program; or
 - (c) an environmental protection order; or
 - (d) an environmental authority; or
 - (e) a development condition of a development approval; or
 - (f) ...; or
 - (g) an emergency direction; or
 - (h) ... (my underlining)
- (3)-(6) ...

Environmental Protection Regulation 2008 (current as at 1 October 2014)

70 Definition for div 2

In this division -

source noise means a noise from a person, place or thing that-

- (a) is measured over a time interval of at least 15 minutes or, if the noise continues for less than 15 minutes, the duration of the source noise; and
- (b)-(c) ...

72 Measuring source noise

Source noise may be measured by applying the relevant procedure under—

- (a) AS 1055; or
- (b) the noise measurement manual.

73 Measuring source noise for particular noise standards

- (1) ...
- (2) Source noise for a noise standard under section 440W, 440X or 440Y of the Act may be measured as LAeq,T.

Editor's note—

section 440W (Indoor venues), 440X (Open-air events) or 440Y (Amplifier devices other than at indoor venue or open-air event) of the Act.

- (3) In this section—

LAeq, T means the value of the A-weighted sound pressure level of a continuous steady sound that within a measurement time interval (T) has the same mean square sound pressure as a sound under consideration the level of which varies over time.

Chapter 3: Data collection and evaluation

This chapter will consider the first and second issues identified for investigation being whether, since council's advice to the operator of the revised noise measure, council has:

- taken effective steps to collect data, and monitor and evaluate noise levels from events in line with the revised noise measure
- established appropriate procedures and standards for the evaluation of noise levels and reporting to council about noise levels from events, in line with the revised noise measure.

3.1 Evidence

Officers within council have different roles with respect to responding to noise issues at Lakeside.

Complaints about noise at Lakeside are not dealt with through usual complaint channels but rather are dealt with solely by the Acting Manager.¹¹ All complaints are directly referred to him and he liaises between the operator and the complainants.¹² While his position within council has changed in recent times, this responsibility has stayed with him personally.¹³ He has dealt with Lakeside noise issues since the end of 2008.¹⁴ The Director advised that complaints are made via the Acting Manager and that 'those matters are then addressed by (him) with whatever resources he has at hand'.¹⁵ The CEO described the Acting Manager as 'the points man' with regard to Lakeside noise issues and said that he 'has intimate knowledge of the facility, the operator and the complainants'.¹⁶ The Acting Manager considers that his new role as Acting Manager makes it difficult for him to give the issue as much attention as previously.¹⁷ This approach does, however, provide consistency in council's relationship with the operator and with complainants.¹⁸

The Director has strategic and operational responsibilities for the Community and Environmental Services division and this includes responsibility for compliance around noise.¹⁹ He was appointed to the position in July 2014.²⁰

While legal matters within council are allocated to an available legal officer, the Legal Services Manager has been involved in discussions in relation to Lakeside on a number of occasions.²¹

From the documents provided by council, some key documents were identified and discussed during interview with the above council officers and with the CEO. These documents are discussed below.

ASK report of 1 July 2013

ASK was commissioned by council to provide a noise monitoring report associated with activity at Lakeside and the report is dated 1 July 2013 (2013 ASK report). The report deals with noise level data obtained at various residences from Friday 15 March 2013 until Sunday 17 March 2013 which was the Tribute Race Meeting. This meeting anecdotally involved some of the noisiest events experienced at Lakeside.

¹¹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.6.

¹² Transcript of interview with the Acting Manager conducted on 13 February 2015, p.6.

¹³ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.9.

¹⁴ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.8.

¹⁵ Transcript of interview with the Director conducted on 13 February 2015, p.6.

¹⁶ Transcript of interview with the CEO conducted on 4 March 2015, p.9.

¹⁷ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.43.

¹⁸ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.11.

¹⁹ Transcript of interview with the CEO conducted on 4 March 2015, p.10.

²⁰ Transcript of interview with the Director conducted on 13 February 2015, p.5.

²¹ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.8.

The report can be summarised as follows:

- attended noise monitoring and unattended noise monitoring, using a noise logger, was undertaken over the three consecutive days
- monitoring locations were four residential properties to the south and south-west and one residential property to the north along with the two noise meters situated at Lakeside
- results showed the southern properties were exposed to noise of up to 81 dBA LA_{max}, 66 dBA LA_{eq} and 70 dBA LA₁₀, south-western properties were exposed to noise of up to 70 dBA LA_{max}, 60 dBA LA_{eq} and 64 dBA LA₁₀, and the noise at the property to the north was significantly lower
- background noise levels were of the order of 35 to 44 dBA
- ASK was instructed that the noise limit as per current environmental legislation involved maximum noise levels of 70 dBA LA_{eq} at sensitive locations
- the previous 70 dBA LA_{max} criteria was exceeded at the southern residences by up to 11 dBA with negligible exceedance at the south-western residences
- noise levels would significantly interfere with outdoor communication at the residences and with indoor recreation even with the doors and windows closed.

ASK advised in its report:

It is agreed with the Ombudsman's report that the time interval 'T' should not be represented by an interval of 10 hours (the time period from 9:00am to 7:00pm).

It is further agreed with the Ombudsman's report that in accordance with Section 70 of the Environmental Protection Regulation 2008 the source noise should be measured over an interval of at least 15 minutes or, if the noise continues for less than 15 minutes, the duration of the source noise.

The report recommended that:

- the raceway's noise meter be relocated from near the front gate to a more appropriate location to provide more meaningful and useful data
- ambient noise levels be recalculated at one of the southern and one of the south-western residential properties
- noise levels be measured against 70 dBA LA_{eq} T where T is 15 minutes or the duration of a race, whichever is lesser
- noise testing be undertaken for each vehicle before being admitted to the track using a process involving four point microphones while the vehicle is static to ensure it is not emitting noise over 95 dBA
- independent assessment be undertaken of activities on at least ten occasions in the first year and as reviewed annually thereafter but with monitoring of a minimum of three events per year.

During interview, the Legal Services Manager advised:

- he recalls organising ASK to do the report and discussing with them how data would be obtained and choosing one of the events that would 'make the most noise' so that they 'could draw some conclusions' from the data²²
- council decided to engage ASK because of the proposed report from the Ombudsman, one of the recommendations of which was that council obtain further acoustic advice and ASK was requested to comment on those recommendations²³
- in respect of the recommendations in the 2013 ASK report, he is not aware whether some have been implemented but is aware that some have not been implemented as council cannot progress them until the DA conditions and lease conditions are amended and it is understood that the operator is obtaining its own independent professional advice on the matter.²⁴

²² Transcript of interview with the Legal Services Manager conducted on 4 March 2015, pp.15-16.

²³ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, pp.15-16.

²⁴ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, pp.21-23.

During interview, the Acting Manager advised:

- he was not a party to the negotiations to get a consultant in or in determining the parameters of what they would do²⁵
- he was involved in liaising with the consultant and setting up opportunities for residents' houses to be monitored²⁶
- he also had discussions with the consultant around the volume of noise and how he thought it could be managed²⁷
- he has not seen the whole of the final report which he assumes is because it was commissioned by Legal²⁸ but has seen parts of the report²⁹
- his understanding of the purpose of the report was that it was 'an opportunity to get a true reflection on what noise was coming out of Lakeside Park for a fairly significant event' and this information could be used to involve residents in the process and 'talk about the noise and how we were going to better manage it'³⁰
- the operator was not advised prior to the event that it would be monitored³¹
- while he has had conversations about how council could implement a noise measure of LAeq T, these conversations have not been in the context of the 2013 ASK report³²
- action has not been taken to implement the recommendations in the 2013 ASK report and 'there's been no change since this report that I'm aware of'.³³

Agenda for meeting between council and operator on 5 November 2013

The agenda shows a meeting was scheduled at Lakeside from 9.30am to 10.30am on 5 November 2013 to be attended by the operator, three local councillors, council's Director Strategic Planning and Development and the Legal Services Manager.

The agenda items were:

- consideration of the recommendations made in the Ombudsman's report of 23 May 2013
- consideration by the operator of whether to submit an application under s.369 of SPA for a permissible change with respect to the noise conditions in the development permit for Lakeside to bring the requirements of the noise conditions into conformity with present legislation
- consideration be given to the conclusions and recommendations by council's acoustic consultant, particularly regarding compliance testing for the operations at Lakeside.

Council advised that no minutes were taken in relation to the meeting.³⁴

The Acting Manager advised that he was not aware of the meeting until after it had taken place.³⁵

During interview, the Legal Services Manager advised:

- he recalled attending the meeting³⁶
- representatives of the operator were in attendance at the meeting and they went through the agenda items³⁷

²⁵ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.26.

²⁶ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.26.

²⁷ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.26.

²⁸ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.26.

²⁹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.28.

³⁰ Transcript of interview with the Acting Manager conducted on 13 February 2015, pp.26-27.

³¹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.27.

³² Transcript of interview with the Acting Manager conducted on 13 February 2015, p.29.

³³ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.30.

³⁴ Document titled 'Investigation Requirement – Lakeside Motor Racing Circuit' received from council 11 November 2014.

³⁵ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.31.

³⁶ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.23.

³⁷ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.23.

- the understanding was that the operator would be taking its own independent advice on the matter³⁸
- it was put to the operator that making an application under s.369 of SPA was an option that it may wish to consider³⁹
- the process under s.369 of SPA would not involve advertising.⁴⁰

Information supplied by council indicates that council advised the operator of the revised noise measure during this meeting.⁴¹

None of the parties interviewed were aware of whether the operator had made an application under s.369 of SPA, nor were they aware of whether council had followed up with the operator about this.⁴² The Acting Manager advised he would imagine that, if the noise conditions in the DA for Lakeside were being amended, he would be advised.⁴³

Both the Acting Manager and the Director advised that, following the meeting of 5 November 2013, they were not given any advice or instructions about how council was to proceed with noise monitoring operations at Lakeside.⁴⁴

Letter from council to a nearby resident dated 6 March 2014

The letter advised of the recommendations in my report and said:

... regarding the determination of a suitable time interval for LAeq, T the Council accepts the recommendation of its acoustic specialist that the source noise should be measured over an interval of at least 15 minutes or, if the noise continues for less than 15 minutes, the duration of the source noise. For example, the source noise on a race day will be measured over the duration of each race.

It went on to say:

... please note Council has informed the operator of Lakeside Park of Council's approach to the recommendations. The purpose of this letter is to ... advise Lakeside residents of Council's approach in these matters.

In relation to the letter, the CEO advised:

... it would be my view that the letter is saying that it's council's intention to apply the current relevant legislative controls for an open-air event at Lakeside Park. As you're aware, the council have been working towards using – that's the current legislation that I think exists.⁴⁵

The Legal Services Manager advised that he had input into the development of the letter.⁴⁶ He stated that it is a 'bit awkward for council not to do anything else than to comply with the law of the land'.⁴⁷

The Acting Manager advised that he did not have any input into the development of the letter⁴⁸ and was not aware of the letter until he was advised of it by a resident.⁴⁹ He agreed that, having received

³⁸ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.24.

³⁹ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.24.

⁴⁰ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.24.

⁴¹ Agenda for meeting between council and operator of 5 November 2013, letter from council to this Office dated 13 November 2013 and letter from council to a nearby resident dated 6 March 2014.

⁴² Transcript of interview with the CEO conducted on 4 March 2015, p.27; Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.26; Transcript of interview with the Director conducted on 13 February 2015, p.11; Transcript of interview with the Acting Manager conducted on 13 February 2015, p.31.

⁴³ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.31.

⁴⁴ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.32; Transcript of interview with the Director conducted on 13 February 2015, p.11.

⁴⁵ Transcript of interview with the CEO conducted on 4 March 2015, p.28.

⁴⁶ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.28.

⁴⁷ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.28.

⁴⁸ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.35.

⁴⁹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.32.

the letter, residents would have had a reasonable expectation that council would be immediately applying the standard contained in the letter.⁵⁰

Email from the Acting Manager to the Manager Legal Services and the Legal Services Manager and copied to Manager Environmental Health and the former Director dated 17 March 2014

The email refers to the letter from council to the nearby resident dated 6 March 2014 and seeks 'clarification about what it means operationally'. The email went on to say:

My concern is that Lakeside Operators and Council do not have the capacity or resources to carry out noise monitoring of this nature and as this letter has already gone out to the resident and does not suggest a timeframe for implementation their expectations will be that this form of noise monitoring will be implemented immediately.

Secondly as this is currently not a condition under the existing lease agreement or DA has the operator been advised of the change as I will need to discuss this with them ASAP.

An early response was sought so that the Acting Manager could be clear on how to manage council's response to noise complaints.

During interview, the CEO noted the concerns expressed in the email particularly in terms of resourcing and the ability to 'have effective monitoring in place at the standard that some people expected' which he interpreted as 'constantly monitoring those on a, for want of a better term, hour-by-hour basis when an event is being operated'.⁵¹

The Legal Services Manager did not recall providing a written response to the email.⁵² He said that there may have been some discussion in March 2014 but it was still a current issue so the matter was ongoing.⁵³

The Acting Manager advised that he received from the Legal Services Manager a verbal response to the email that:

... there was an intent for council to move to this condition, but it would be following a response from the operator which was requested from the meeting of the previous November, and an agreement from the operator to change the conditions in his lease and DA. And so basically I said, so I remain with the status quo on how I assess the noise measurement being a 70 decibel average during the course of a day's activities and that was the way I've gone forward since that point.⁵⁴

The Acting Manager confirmed that the operational actions that he put in place following the advice to residents and following the response from Legal was that he continue to evaluate the noise from Lakeside after that date based on an LAeq assessment against 70 dBA for the whole of the duration of the day.⁵⁵

Draft briefing notes prepared by the Acting Manager on 3 June 2014

Draft briefing notes were forwarded by the Acting Manager to the Legal Services Manager via emails dated 3 June 2014 and requested feedback. The second draft briefing note is an amended and expanded version of the first briefing note.

⁵⁰ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.35.

⁵¹ Transcript of interview with the CEO conducted on 4 March 2015, p.30.

⁵² Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.29.

⁵³ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.30.

⁵⁴ Transcript of interview with the Acting Manager conducted on 13 February 2015, pp.35-36.

⁵⁵ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.36.

The draft briefing notes go through the background of the matter, list a number of issues with the data provided by the operator and discuss various options in relation to noise monitoring at the site. The second draft briefing note concludes that council should 'continue to engage with the operator concerning management of noise issues at Lakeside Park'.

The Acting Manager gave a presentation to councillors and senior officers at an informal meeting on 12 June 2014 about the practical difficulties likely to be encountered by council in implementing LAeq 70 dBA T(15min) for events at Lakeside. No record of the discussions was kept.⁵⁶

By way of background information, the Acting Manager advised during interview:

- there had been ongoing issues in relation to the data including:
 - issues with where the monitors were located⁵⁷
 - raw data is received but it is sometimes not possible to work out what it relates to as the clocks have been set incorrectly so the dates or times have been wrong⁵⁸
- he obtains the data monthly and then uploads it and uses noise monitoring software on his desktop to produce a graph of the noise⁵⁹
- he does not save the output of his analysis when he undertakes the process of charting the data but just considers if the average over the day is over 70 dBA which it never is⁶⁰
- he is of the view that LAeq 70 dBA is unlikely to be exceeded when measured over the whole of the day⁶¹
- he has had basic training in the use of noise monitoring equipment and the analysis of the data that comes out of it but would not describe himself as experienced in dealing with noise issues⁶²
- he believes that noise measurements should be analysed by an expert noise consultant and said 'We don't have anyone, I believe, with the expertise to do that level of acoustic analysis. Certainly within my department we don't.'⁶³

During interview, the Legal Services Manager advised that he recalled the draft briefing notes but was not sure whether he made any changes or gave the Acting Manager advice.⁶⁴

In relation to the draft briefing notes, the Acting Manager advised:

- the briefing notes were prepared for a council workshop⁶⁵
- he drafted the briefing note 'because I had concerns that we weren't following through on what we'd committed to in the letter of March 2014'⁶⁶
- this was his first formal attempt to bring the issues to the attention of council⁶⁷
- some of the issues identified in the briefing note regarding noise data have now been resolved but the following problems remain:
 - there are 'still issues with the consistency of the provision of noise measurements and the quality'
 - it is necessary to assume the description and location in respect of the files provided
 - the LAeq is provided as a mathematical average rather than a logarithmic average
 - there is no ongoing practice of static noise testing of vehicles with four point microphones
 - while drive-by testing is carried out next to the control tower, no records are kept of vehicles over the 95 dBA drive-by level.⁶⁸

⁵⁶ Email on behalf of the Manager Legal Services to this Office on 25 February 2015.

⁵⁷ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.19.

⁵⁸ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.19.

⁵⁹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.19.

⁶⁰ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.20.

⁶¹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.21.

⁶² Transcript of interview with the Acting Manager conducted on 13 February 2015, pp.6-7.

⁶³ Transcript of interview with the Acting Manager conducted on 13 February 2015, pp.38-39.

⁶⁴ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.30.

⁶⁵ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.36.

⁶⁶ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.37.

⁶⁷ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.37.

⁶⁸ Transcript of interview with the Acting Manager conducted on 13 February 2015, pp.37-38.

Email from the Acting Manager to the Manager Environmental Health of 14 July 2014

The email referred to earlier discussions between the CEO, the Legal Services Manager, council's former Director Community and Environmental Services (former Director) and the Acting Manager regarding noise conditions linked to the lease and DA for Lakeside and to some later meetings including three councillors. It stated:

At the conclusion of this meeting the CEO directed that the Lakeside MCU application needed to be progressed and finalised through Council prior to opening discussions with the operator of Lakeside regarding their current noise conditions. ...

My understanding was that once the MCU had been resolved at Council level (this happened 2 weeks ago) a meeting was to be arranged with the CEO, Legal, Councillors and the operator of Lakeside to commence discussions with regard to noise conditions.

The email noted that this is 'probably something we need to follow up'.

During interview, the CEO advised:

- he did not recall the material change of use (MCU) application referred to in the email but assumed it may be an application from the operator in relation to the noise conditions⁶⁹
- his interpretation would not be that he 'directed' because this is 'a matter of ongoing working with the operator in this regard'.⁷⁰

The Legal Services Manager advised:

- he is assuming the MCU application being referred to in the email is an MCU application in respect of some accommodation units on the site⁷¹
- his interpretation is that the CEO was saying 'look, we'd better get this MCU sorted out' before we can follow up on the noise conditions⁷²
- he thinks the MCU approval referred to has been finalised but is not certain.⁷³

The Acting Manager advised:

- during discussions, while he could not remember who said what in particular, 'the view was that the operator is very touchy at the moment because we haven't finalised his MCU application which I believe relates to camping and cabins or some building, and that if we're going to talk to him about tightening the restrictions around his noise, we need to have resolved his MCU initially.'⁷⁴
- he understood it to be a direction from the CEO that the MCU application needed to be resolved before council could talk to the operator about the noise⁷⁵
- in his opinion, an application being on foot is not relevant to the issue of negotiations about noise from events during the day as 'the two aren't inter-related'⁷⁶
- as he was not a party to discussions around the MCU application, he is not aware of 'what sensitivities that may have had and why that may have impacted on, to me, what is a completely separate operation issue.'⁷⁷

⁶⁹ Transcript of interview with the CEO conducted on 4 March 2015, p.35.

⁷⁰ Transcript of interview with the CEO conducted on 4 March 2015, p.35.

⁷¹ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.27.

⁷² Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.27.

⁷³ Transcript of interview with the Legal Services Manager conducted on 4 March 2015, p.27.

⁷⁴ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.33.

⁷⁵ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.33.

⁷⁶ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.33.

⁷⁷ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.33.

Following interview, council provided information showing that the operator had made a development application for an MCU relating to extensions to the motor racing circuit and ancillary uses. The submitted application sought to allow use of Lakeside facilities outside of daylight hours, but only to the extent applied for within the application, being function facilities and accommodation uses, including ten accommodation cabins and camping facilities for up to 100 people. The matter was discussed at a council workshop on 19 June 2014.⁷⁸

Letter from council to the operator dated 17 September 2014

The letter enclosed a copy of a photograph forwarded to this Office by a resident of the Lakeside area and said:

The resident claims the photograph (taken on Sunday 7 September 2014 at approximately 3.00pm from outside the Lakeside Raceway perimeter fence) shows the noise meter located near the main (southern) entrance to the venue is covered with what appears to be a rubber mat, and stones have been placed on top of the mat to keep it in place. The resident further states that, on return to the site the next morning, the noise meter had been removed, but the mat and stones remained in the general vicinity.

The letter noted that an event was held at Lakeside on 7 September 2014 and requested the operator to 'provide comment with regard to this matter for Council's consideration'.

Undated unsigned letter from council to the operator

The letter referred to council's letter to the operator of 17 September 2014 and the operator's response of 20 September 2014 in which it verified the siting of the noise meter in this location and advised that the rock and rubber mat 'is only to provide some shade and to keep the noise meter dry in the event of rain'. It noted that the operator's response also advised 'The location of the equipment and the mat should have no bearing on the meter readings'.

The letter stated that this method of noise measurement does not comply with relevant requirements and that 'You are required to ensure that all noise measurement taken in future comply with the requirements prescribed in the Environmental Protection Regulation 2008 and Australian Standard AS1055-1997'.

It went on to state:

With regard to the ongoing operation of Lakeside Park your attention is drawn to discussions which took place between yourself and Council representatives in November 2013. At this time you were advised that Council was reviewing the current noise conditions relating to the use of Lakeside Park and you were given the opportunity to seek your own advice with regard to these conditions. Council has received no response on this matter.

It is requested that you provide Council with feedback in regard to progressing noise measurements at Lakeside Park to LeqT (T being the duration of a race) so that noise measurement practices reflect current legislation.

Council has advised that there is no record of the letter being sent to the operator.⁷⁹

The CEO advised in a letter to this Office of 20 March 2015 that a letter to the operator on this matter will be issued in the near future. He said 'That letter will outline the appropriate processes for carrying out noise measurements for the purposes of the *Environmental Protection Regulation 2008* and advise that the positioning of a meter as depicted in the photographs would not accord with those processes and that no measurements should be taken in this way.'

⁷⁸ Briefing Note dated 17 June 2014 enclosed with council's letter to this Office of 20 March 2015.

⁷⁹ Email sent on behalf of the Manager Legal Services to this Office on 25 February 2015.

The Director advised that, while he was aware of the issue, he was not aware of the draft letter as the Acting Manager was dealing directly with the CEO's office regarding the issue.⁸⁰

During interview, the Acting Manager advised:

- he drafted the letter to address where he thought there was non-compliance and to try to continue the conversation about introducing LAeq T as the relevant noise standard⁸¹
- he was not aware of the letter having been sent but it may have been⁸²
- he has not since followed up whether the noise meter is still sited in the same manner.⁸³

3.2 Analysis

Council's position

I note the following timeline in respect of this matter:

- December 2012 – Ombudsman's proposed report
- March 2013 – event for which council instructed ASK to conduct noise measurements
- May 2013 – Ombudsman's final report
- July 2013 – 2013 ASK report.

The 2013 ASK report:

- noted that ASK had been instructed by council that the noise limit as per current environmental legislation involved maximum noise levels of 70 dBA LAeq at sensitive locations
- advised that noise levels should be measured as LAeq T where T is 15 minutes or the duration of a race, whichever is the lesser
- contained recommendations regarding how noise could be measured in accordance with the revised noise measure.

Having regard to this timeline, it is reasonable to conclude that by July 2013 council had a defined position about what noise measure to apply and had obtained specialist acoustic advice as to how to apply it.

Following requests for information from this Office, council had a meeting with the operator in November 2013 and wrote to residents in March 2014 to advise its position.

It is clear that council's position is that noise should be measured as LAeq T where T is 15 minutes or the duration of a race, whichever is the lesser.

While council's position is clear, it is necessary to consider what action council has taken to implement its position.

Council's actions

The Acting Manager has advised that action has not been taken to implement the recommendations in the 2013 ASK report and that he continues to evaluate the noise from Lakeside based on an LAeq assessment against 70 dBA for the whole of the duration of the day.

I note that this was the position:

- at the time my report was given to council on 23 May 2013
- before council advised the operator of the revised noise measure

⁸⁰ Transcript of interview with the Director conducted on 13 February 2015, pp.17-18.

⁸¹ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.42.

⁸² Transcript of interview with the Acting Manager conducted on 13 February 2015, p.42.

⁸³ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.43.

- before council advised nearby residents of its position.

In the circumstances described, it is clear therefore that council's position that there would be a revised noise measure has made no difference to how noise at Lakeside is monitored and evaluated.

This being the case, it is then necessary to consider why council has not implemented its position in relation to the way noise will be measured.

Reasons for not implementing position

- *Delay waiting for operator*

As noted above, council had a defined position when it instructed ASK to prepare the 2013 ASK report which was dated 1 July 2013. The 2013 ASK report contains recommendations as to how noise issues could be managed at Lakeside.

The Legal Services Manager advised during interview that council cannot progress the implementation of the recommendations in the 2013 ASK report until the DA conditions and lease conditions are amended which would require the operator to make an application to council under s.369 of SPA for a permissible change with respect to the noise conditions in the DA. He understands that the operator is obtaining its own independent professional advice on the matter.

While council has cited waiting for the operator to obtain advice and consider its position (including whether an application is made under s.369 of SPA) as a reason not to proceed, nobody from council who was interviewed was aware of what was happening in this regard nor were they aware of any attempts by council to find out from the operator what its intentions were.

In this regard, I do not consider it appropriate for council to delay ensuring implementation of the recommendations in the 2013 ASK report because of the possibility that the operator may submit an application under SPA to change the noise conditions or may obtain advice from a suitably qualified expert which espouses a different method of noise management. This is particularly so given that more than two years have passed since my initial recommendations and there is no evidence that the operator has taken steps that would warrant a change to the revised noise measure determined by council. Indeed council's approach provides little incentive for the operator to take any action at all.

- *Delay regarding MCU application*

There is evidence from the Acting Manager that the CEO had directed that an MCU application in respect of Lakeside needed to be progressed and finalised through council prior to further discussing current noise conditions with the operator of Lakeside. I note that the CEO's interpretation was that he did not 'direct' deferral of action.

While noting the CEO's position, I accept the evidence of the Acting Manager that he interpreted comments from the CEO, not to progress the discussions with the operator about the noise conditions until the MCU application had been finalised, as being a direction.

The CEO did not specifically recall what the MCU application related to but assumed it may be an application from the operator in relation to the noise conditions. The Acting Manager and the Legal Services Manager believed that the MCU application related to some accommodation units on the site. Having regard to evidence that an MCU application for accommodation uses was under consideration by council around that time, I consider that it is most likely that the MCU application related to accommodation units on the site.

Evidence was not provided by any party as to why an MCU application, relating to accommodation units, being on foot was relevant to discussions with the operator about the noise conditions. The Acting Manager was of the opinion that the two were not inter-related but noted that he was not a

party to discussions around the MCU application so was not aware of what sensitivities may have existed.

While I can appreciate the need for council to manage its relationship with the operator, I consider that issues regarding noise at Lakeside are not related to an MCU application for accommodation units and therefore the two issues should not impact each other. Upon this basis I do not consider that it was necessary or appropriate for council to delay the taking of actions to ensure the operator's adherence to the revised noise measure because the operator had an MCU application on foot.

- *Practical difficulties with council's position*

In addition to council's decision to wait for various other events to take place, it would seem that there are practical considerations likely to impact on the success of the implementation of the revised noise measure.

Evidence from the Acting Manager is that there are ongoing problems with the data including that it is not clear which locations the data is taken from or when. He expressed the view that the operator is not anywhere near close to being able to provide the level of detail necessary to allow the measurement of noise in accordance with the revised noise measure.

The Acting Manager has also expressed the view that council does not have the resources or capacity to monitor the revised noise measure and said that, in his opinion, nobody in his department has the expertise to do that level of acoustic analysis.

The Acting Manager attempted to raise his concerns and progress council's consideration of the matter in the following ways:

- his email to the Manager Legal Services and the Legal Services Manager copied to the Manager Environmental Health and the former Director dated 17 March 2014
- draft briefing notes prepared by him on 3 June 2014
- his email to the Manager Environmental Health of 14 July 2014
- his draft undated and unsigned letter from council to the operator.

These are not issues which will be resolved without active consideration and the formulation of a plan to resolve them. Despite efforts from the Acting Manager to start a conversation within council regarding these issues, there is no evidence that other areas of council, specifically the CEO's office and the Legal Services Unit, have been willing to actively participate in the discussion.

Decision-making and communication

Complaints about noise at Lakeside are dealt with solely by the Acting Manager. Notwithstanding this, I note the following:

- while the Acting Manager has seen parts of the 2013 ASK report, he has not seen the whole of the final report
- he was not aware of the meeting between council and the operator of 5 November 2013 until after it had taken place
- following the meeting of 5 November 2013, the Acting Manager was not given any advice or instructions about how council was to proceed with noise monitoring at Lakeside
- he did not have any input into the letter to a nearby resident dated 6 March 2014 and was not aware of it until he was advised by a resident.

There are several aspects of this scenario which do not accord with what might usually be expected in terms of organisational decision-making and communication.

As the person responsible for liaising with the operator and residents regarding noise complaints and as the person within council with some experience in relation to the technical aspects of noise monitoring and evaluation, it would have been expected that council consult with the Acting Manager before it settled on a position and advised parties external to council of what that position was.

Had council done so, it is likely that the Acting Manager would have raised concerns about the practicalities of implementing council's position and sought clarification as to what it meant operationally. I have this view because the Acting Manager did this after he became aware of council's position.

Furthermore, the fact that council did not immediately communicate its position to the Acting Manager and did not clarify with him what this would mean from an operational point of view evidences a significant disconnect between council's official position and what it intended would happen 'on the ground'.

Resident's expectations

The letter from council to a nearby resident dated 6 March 2014 advised that council accepted the recommendation of the acoustic specialist that the source noise should be measured on the basis of LAeq T with T being the duration of the race or 15 minutes, whichever is the lesser. In the letter, council made no comment as to the timeframe within which residents could expect that the change to the way in which noise was measured would take effect.

The Legal Services Manager had involvement in the development of the letter and the CEO signed the letter. The CEO provided evidence that the position at that time was that council was 'working towards' using the revised noise measure. The Acting Manager said that, in response to concerns he later raised about the implementation of the revised noise measure, he was advised by Legal Services that the letter was indicating an intent to move towards the use of the revised noise measure.

In the absence of specific comment in the letter regarding the timeframe for implementation of the revised noise measure, I consider that residents would have had a reasonable expectation that the change would happen immediately. The fact that persons responsible for the letter did not intend that the change would happen immediately indicates that the letter does not clearly represent council's intentions in the matter.

Council's failure to act

In a letter dated 17 September 2014, council raised an issue with the operator concerning a noise meter near the main entrance being covered with a rubber mat, and stones placed on top of the mat to keep it in place. From the evidence provided, it appears that the operator responded to council in a letter dated 20 September 2014 verifying the siting of the noise meter in this location and advising that the rock and rubber mat was only there to 'provide some shade and to keep the noise meter dry in the event of rain'. The operator expressed the view that the location of the equipment and the mat should have no bearing on the meter reading.

The Acting Manager drafted a letter from council to the operator stating that this method of noise measurement does not comply with relevant requirements and that 'You are required to ensure that all noise measurement taken in future comply with the requirements prescribed in the Environmental Protection Regulation 2008 and the Australian Standard AS1055-1997'. The letter also sought to progress the discussion regarding the implementation of the revised noise measure.

Council advised that this letter was not sent to the operator. The CEO advised in a letter to this Office of 20 March 2015 that a letter to the operator on this matter would be issued in the near future. He said the letter will outline appropriate processes for carrying out noise measurements and advise that the positioning of the meter in question would not accord with those processes.

This is an example of council being aware of the failure to carry out noise monitoring in an appropriate way. Notwithstanding this, six months had passed and no action had been taken by council to address the issue.

Having regard to the above, I form the following opinion:

Opinion 1

Since council's advice to the operator of the revised noise measure in November 2013, council has not taken effective steps to collect data, and monitor and evaluate noise levels from events in line with the revised noise measure and this amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

Chapter 4: Protection of the community from noise exceedances

This chapter will consider the third issue identified for investigation being whether, since council's advice to the operator of the revised noise measure, council has taken effective steps to protect the community from noise exceedances arising from events, consistent with the revised noise measure.

4.1 Evidence

The CEO provided further evidence during interview as follows:

- Lakeside is very important to the region in terms of sport and recreation but also because of the economic benefit it brings⁸⁴
- Lakeside has the overwhelming support of the community and complaints regarding noise are received from only a small group of complainants⁸⁵
- council's approach is to work with the operator to achieve co-existence between Lakeside and the complainants and this involves 'working with the operator to get the operator to understand his requirements in terms of meeting those required outcomes, and not to take a more aggressive stance in that regard'⁸⁶
- '... there is a view by some ... that has been articulated to me that, regardless of what measures are put in place, that some of the complainants won't be happy until Lakeside is shut down'⁸⁷
- for this reason, council may not be supportive of more monitoring as this would be costly and achieve no outcome⁸⁸
- the possibility of noise mitigation measures being put in place at affected residences has not been considered by council but he is sure council would be open to having a discussion around that⁸⁹
- he believes council would prefer a permanent solution to the issue and would consider buying out affected properties at an 'appropriate market value'⁹⁰
- he considers a buy-out scheme would have transparency and accountability as council would end up with an asset.⁹¹

Following interview,⁹² the CEO clarified that the prospect of council buying affected properties and the terms on which such purchases might proceed has not been formally considered by council. The CEO advised that the views he expressed on the issue represent his opinion as opposed to council's position as expressed in a resolution.

The Director provided further evidence during interview as follows:

- When asked whether council has, since its advice to the operator of the revised noise measure, taken the actions identified in the three issues for investigation, he advised that 'council's processes have remained unchanged'.⁹³
- He advised that 'my intent, at this time, is to pursue what council has already outlined to the residents, and see how that can be brought about ...'. His view of the way forward is that 'we would need to act upon what it was we said (to residents) that we were going to do'.⁹⁴

⁸⁴ Transcript of interview with the CEO conducted on 4 March 2015, p.7.

⁸⁵ Transcript of interview with the CEO conducted on 4 March 2015, p.8.

⁸⁶ Transcript of interview with the CEO conducted on 4 March 2015, p.31.

⁸⁷ Transcript of interview with the CEO conducted on 4 March 2015, p.31.

⁸⁸ Transcript of interview with the CEO conducted on 4 March 2015, p.41.

⁸⁹ Transcript of interview with the CEO conducted on 4 March 2015, p.42.

⁹⁰ Transcript of interview with the CEO conducted on 4 March 2015, p.42.

⁹¹ Transcript of interview with the CEO conducted on 4 March 2015, p.43.

⁹² Letter from the CEO to the Queensland Ombudsman dated 2 September 2015.

⁹³ Transcript of interview with the Director conducted on 13 February 2015, p.20.

⁹⁴ Transcript of interview with the Director conducted on 13 February 2015, p.16.

The Acting Manager provided further evidence during interview as follows:

- He advised:

There's amazingly, there is still a considerable amount of goodwill and tolerance by those that are impacted by Lakeside Park and they certainly don't give the indication to me that they want it closed down completely, but what they want is a relationship that can work for both parties and I believe they would be receptive to opportunities for improvement regardless of what those opportunities are.⁹⁵

- When asked what sort of response he gets when he raises concerns with the operator he advised:

A pretty relaxed response. I'm not supported in progressing those matters in any formal way. So the only progress I've been able to get with the Lakeside operators is through trying to build a relationship. They would respond and say 'Yep, we'll look at that', 'We'll get a new noise meter', 'We'll get that one recalibrated' but it was incredibly low on their priority list. That was obvious.⁹⁶ And yeah, I would push the matter no further than that.⁹⁷

- When asked whether council has, since its advice to the operator of the revised noise measure, taken the actions identified in the three issues for investigation, he answered 'no'.⁹⁸

4.2 Analysis

Council's approach

It is clear from the evidence that council's approach is to try to achieve co-existence between Lakeside and the complainants. This involves working with the operator to get it to understand its requirements rather than, in the CEO's words, taking 'a more aggressive stance'.

The approach of building a relationship with the operator and working with it to achieve compliance is not an inappropriate approach if it is working effectively to protect the community from noise exceedances.

In this instance, the steps to effective compliance would be:

1. council ensuring noise is measured and evaluated in accordance with the revised noise measure
2. when council is aware of noise not being correctly measured and evaluated or the measurement indicating an exceedance (after taking appropriate steps to satisfy itself in relation to these matters), council taking action to ensure this is addressed.

In terms of the first point, as noted in Chapter 3 of this report, noise at Lakeside is not being measured and evaluated in accordance with the revised noise measure.

While the evidence indicates significant issues in relation to the raw noise data, council has not been able to resolve these issues. In other instances, when council is aware of noise not being correctly measured, as occurred in relation to the rubber mat being placed over the noise meter, the evidence indicates that council does not take action to address the matter in a timely manner.

In instances where council does raise issues in relation to noise monitoring and those issues are not addressed in what council considers to be a reasonable timeframe, the Acting Manager advised that, as he is not supported in progressing those matters in any formal way, he does not push them any further.

⁹⁵ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.46.

⁹⁶ No view has been reached regarding the accuracy of the information provided by the Acting Manager that the operator treats requests from council in relation to noise monitoring as a low priority. What is of relevance is that this is the view of the Acting Manager.

⁹⁷ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.23.

⁹⁸ Transcript of interview with the Acting Manager conducted on 13 February 2015, p.46.

As a general comment, regulatory agencies' strategy of attaining compliance through its relationship with a responsible entity will only work if it is known that the agency is willing to explore more formal approaches to enforcement if reliance on the relationship does not produce an appropriate outcome.

Having regard to the above, I do not consider that council's approach is currently working effectively and I form the following opinion:

Opinion 2

Since council's advice to the operator of the revised noise measure in November 2013, council has not taken effective steps to protect the community from potential noise exceedances arising from events, consistent with the revised noise measure and this amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

Potential solutions

The CEO advised that he has been told that, regardless of what measures are put in place, some of the complainants will not be satisfied until Lakeside is shut down. The Acting Manager, who regularly speaks with complainants, said that there is a considerable amount of goodwill and tolerance from those that are impacted by Lakeside and they 'certainly don't give the indication to me that they want it closed down completely'. As the Acting Manager has had direct communication with complainants, I consider that the evidence he has provided has more weight than the information provided by the CEO.

I therefore do not accept the view that actions taken to monitor noise and make adjustments to operations to eliminate or reduce exceedances, will not have a positive impact on the perceptions of nearby residents who are affected by the noise. At the same time, I do accept that, irrespective of what actions are taken, complaints are likely to continue.

The CEO commented during interview that council may not be supportive of more monitoring as it would be costly and achieve no outcome. As noted above, I do not accept that monitoring would achieve no outcome. In this regard I also find any such suggestion to be at odds with the position taken by council when it approved the relevant DA conditions, noting that, pursuant to the DA conditions, noise monitoring was identified as a tool integral to the management of noise being emitted from the site.

In terms of expense, I note that the cost of noise monitoring is properly borne by the operator and that the cost of compliance with legislative and legal requirements is considered part of the ordinary costs of running a business.

The CEO advised that it was his view that council would want a permanent solution to the issue of noise at Lakeside and may consider a buy-out scheme whereby affected properties would be purchased by council. Council is certainly at liberty to broach this topic with affected parties. Reluctance by a party to have their property voluntarily acquired should not, however, be used as a reason for council not to ensure compliance with the legislation and the DA and lease conditions concerning noise.

Similarly council could look into the extent to which noise mitigation measures at affected properties may reduce the effects of noise emanating from the site.

Recommendations

Having regard to the discussion about decision-making and communication in Chapter 3.2 of this report, I make the following recommendation:

Recommendation 1

Council review its internal communication processes between:

- areas of council determining council's position in relation to noise issues at Lakeside; and
- the council officer/s responsible for monitoring compliance with requirements relating to noise and for the management of complaints regarding noise issues at Lakeside.

Having regard to the discussion in Chapters 3 and 4 of this report, I also make the following recommendations:

Recommendation 2

Council take immediate action to ensure the implementation of the recommendations set out in the 2013 ASK report including the measurement and evaluation of noise in accordance with the revised noise measure and the engagement of an independent acoustic expert to assess activities in accordance with the recommendations.

Recommendation 3

Council implement a system for the ongoing monitoring of adherence to each of the recommendations set out in the 2013 ASK report including monitoring:

- instructions to the independent acoustic expert; and
- the reports provided by the independent acoustic expert.

Recommendation 4

Where council is not satisfied, on a reasonable basis, that:

- noise measurements are being taken in accordance with the revised noise measure and the recommendations in the 2013 ASK report are being followed; and
- noise is kept within the prescribed limit

council take immediate action to raise the matter with the operator with a view to achieving compliance.

Recommendation 5

In circumstances where council's reliance on its relationship with the operator is not effective in ensuring compliance with legal requirements regarding noise, council explore its options, including by taking legal advice on the use of formal enforcement.

Chapter 5: Conclusion

For many years the management of noise at Lakeside has been an issue of ongoing concern to the community in its immediate vicinity. Council has responsibility for regulatory compliance in relation to noise at Lakeside as well as additional responsibilities to the community as owner of the land on which Lakeside is situated. This report considers the effectiveness of the actions taken by council to enforce relevant noise requirements in respect of motor racing activities at Lakeside and thereby protect the community from noise exceedances.

Following my report to council of 23 May 2013, council obtained advice from ASK and decided upon the revised noise measure. It then advised the operator and nearby residents of its position. Notwithstanding this, the investigation showed that there had been no change to the way in which noise was being measured at Lakeside. Although there were several reasons put forth for the delay in council achieving the change to the way noise was being measured, I did not consider any of the reasons to be valid. The investigation therefore determined that council has not taken effective steps to collect data and monitor and evaluate noise levels from events in line with the revised noise measure.

A number of failures within council were identified including:

- the council officer responsible for monitoring the operator's compliance with noise requirements and for the management of complaints regarding noise was not initially informed of council's change in position regarding the way in which noise is measured
- there is no evidence of planning or preparation for the change or consideration regarding how it would be effected on a practical level
- council's intentions were not clearly represented to nearby residents
- council was aware of noise monitoring being undertaken by the operator in a way that did not comply with relevant standards but did not raise the issue with the operator in a timely manner.

The investigation found that council's approach in trying to achieve co-existence between Lakeside and the complainants by working with the operator to get it to understand its requirements rather than taking a more formal approach to compliance is not currently working effectively.

Agencies with regulatory compliance responsibilities should only use a relationship management approach to achieving compliance if this approach is effective. In many cases this approach will not be effective in the long term if the agency does not also demonstrate a willingness to use other enforcement options should this become necessary.

The recommendations in this report are directed to council taking immediate steps to ensure the revised noise measure is put into effect, to ensure appropriate evaluation of the resultant noise data and to address any exceedances in an effective and timely manner.