



**REASONS FOR DECISION**

In the matter of an application by GDL VIC Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to vary the licensed area for a late night (on-premises) licence (licence no 32260274) for the premises trading as the Noble Experiment situated at 284 Smith Street, Collingwood.

**Commission on review:** Mr Ross Kennedy, Deputy Chairman

Mr Des Powell, Commissioner

Ms Kate Hamond, Commissioner

**Date of hearing:** 20 May 2015

**Date of decision:** 20 May 2015

**Date of reasons:** 22 May 2015

**Appearances:** Mr Daniel Lemura, Director of the Licensee

Mr Stewart Martin, Yarra City Council

Ms Anna Clarke as Counsel Assisting the Commission

**Decision:** The Commission has determined to vary the decision of the Delegate by extending the external kerbside trading hours on Smith Street to 1am. In all other respects, the decision of the Delegate is affirmed.

A handwritten signature in black ink, appearing to read 'R Kennedy'.

**Signed:**

Ross Kennedy

**Deputy Chairman**



## REASONS FOR DECISION

### BACKGROUND

1. On 21 January 2015, GDL VIC Pty Ltd (**the Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) to vary a late-night on-premises licence (licence no 32260274) (**the Licence**) for the premises located at 284 Smith Street, Collingwood (**the Premises**). The existing licensed area of the Premises included a footpath trading area on Smith Street (**the Smith Street Footpath**) and the Applicant was authorised to supply liquor on this footpath until 1 am. The application to vary the Licence sought to increase the licensed area by including an additional footpath trading area located on Otter Street (**the Otter Street Footpath**).
2. Pursuant to section 33 of the *Liquor Control Reform Act 1998* (**the Act**), a copy of the application was served on Victoria Police (**the Police**) and the City of Yarra (**the Council**). Both the Police and Council responded to the Commission, advising they did not object to the application.
3. On 5 February 2015, a public objection was received by Mr Adam Warhaft who objected on the basis that the grant of the application would lead to increased noise levels and foot traffic on Otter Street, as well as other amenity issues.
4. A response by the Applicant to the objection was received on 16 February 2015, addressing the concerns raised by Mr Warhaft.
5. On 2 March 2015, an authorised delegate of the Commission (**the Delegate**) sought to confirm with Council what the permitted trading hours are for the supply of liquor on the footpath areas applicable to the Premises. On 12 March 2015 Council advised that the trading hours approved for the Otter Street Footpath are until 11 pm. Upon the Delegate requesting further clarification regarding the hours for the Smith Street Footpath, Council responded advising, "Yarra City Council will only support footpath trading until 11.00pm daily."
6. On 12 March 2015 the Delegate granted the application, licensing the Otter Street Footpath to trade until 11pm. The trading hours for the Smith Street Footpath was also reduced from 1 am to 11pm, in line with Council's policy.
7. On 10 April 2015, the Applicant lodged an application for an internal review of the decision of the Delegate, specifically regarding the decision to reduce the trading hours



for the Smith Street Footpath. The internal review application was accepted by the Commission in accordance with section 153(3) of the Act.

### **LEGISLATION AND THE TASK BEFORE THE COMMISSION**

8. The powers and obligations of the Commission in relation to decisions on internal review are set out in Section 157 of the Act.
9. The Commission, on internal review, stands in the shoes of the original decision maker and makes a fresh decision. This matter, being a contested application to grant a liquor licence, must be determined in accordance with section 47 of the Act.
10. Furthermore, section 16 of the Act provides that it is a condition of every licence and BYO permit that the use of the licensed premises does not contravene an applicable planning scheme under the *Planning and Environment Act 1987*.

### **MATERIAL BEFORE THE COMMISSION**

11. The Commission, on review, had before it and considered all of the material before the Delegate, including:
  - an application to vary an existing licence or permit dated 21 January 2015;
  - a copy of public space licence Invoice dated 8 December 2014; and
  - a Statement of Display.
12. The Applicant filed an application for internal review, including an attachment with supporting details.
13. The Commission also considered:
  - a pre-hearing inspection and compliance report prepared by Commission officers; and
  - correspondence on behalf of the Yarra City Council including the Council's footpath trading permit and policy document dated December 2013.
14. A public inquiry was conducted by the Commission on Wednesday 20 May 2015.

### **THE APPLICANT**

15. Mr Daniel Lemura, a Director of the Applicant, appeared before the Commission at the hearing together with his wife Ms Kristin Lemura, who is involved in the management of the business, and made submissions regarding the application.



16. The basis for the review related to the reduction in the external kerbside trading hours on Smith Street Footpath from 1am to 11pm. He advised that while he was not entirely satisfied with the grant of the Otter Street Footpath trading hours to 11pm, he accepted this decision.
17. Mr Lemura submitted that the reduction in trading hours on the Smith Street Footpath was imposed without consultation. Mr Lemura stated that had the Applicant not applied for the Otter Street Footpath approval, the reduction to the Smith Street kerbside trading hours would not have occurred.
18. Mr Lemura stated that from his experience there were other licensees in Smith Street that had both liquor licensing and Council permission to trade after 11pm. He stated that on most Friday and Saturday evenings, especially in the summer months, he would utilise the Smith Street Footpath for patrons consuming food and alcohol.
19. Mr Lemura stated he had only become aware that the policy stated that footpath trading must cease by 11pm. He also noted that the permit issued by the Council did not state a time to cease trade. His permit stated he had extended trading hours, but did not outline what these trading hours were. Therefore, Mr Lemura always was of the belief that he had permission from both the Commission (up until the decision of the Delegate) and the Council that he could trade until 1am on Smith Street.
20. He further submitted that Mr Lemura had been running the business for the past two and half years and believed the venue added to the vibrancy of the street's restaurant and café culture. He submitted that the Applicant was now running an upscale cocktail bar, with food available until 2am on Friday and Saturday evenings. He also confirmed there had been no public disorder or amenity issues since they have been operating the venue.
21. Finally, he submitted that he was always present at the venue until close (3am) on Friday and Saturday evenings to ensure the smooth running of the business and strict compliance with liquor regulations.

## **YARRA CITY COUNCIL**

22. Mr Stewart Martin, Manager of Compliance at Yarra City Council, appeared before the Commission and made an oral submission regarding the Council policy.
23. Mr Martin submitted the Council's "Footpath Trading Policy" dated June 2013 which stated the following:



*“All items associated with footpath trading must be removed from the footpath daily, within 30 minutes of the time at which footpath trading has ceased or by 11:00pm at the latest unless an extension of time has been authorised by Council”.*

24. Further, Mr Martin submitted that the Applicant in this matter does hold a permit stating that an extension of time is permitted. However, he understood that this extension only related to the placement of furniture on the footpath and not trading past 11pm. He clarified that the Council also has a policy that trade can continue up to 30 minutes after 11pm to allow for patrons to finish consuming of food and drink.
25. Mr Martin told the Commission that while Council's policy was published in December 2013, he acknowledged it had not been effectively communicated to traders in Smith Street Collingwood, particularly those who may have had previous permission to trade longer hours on the footpath, including the Applicant in this matter. Further, Mr Martin accepted that the Council has not articulated the trading hours on this permit, nor clarified the conditions relating to the placement of furniture on the footpath past 11pm.
26. Finally, Mr Martin stated that Council was currently in the process of ensuring a better understanding of policy and consistency across all traders in relation to their footpath permits he noted cooperation of the Applicant in relation to this process.

## **DECISION OF THE COMMISSION**

27. The Commission accepts that there are concerns regarding the consequence of the original decision in that the Applicant had no opportunity to respond to the information provided by Council. However, the Commission notes that the onus remains with the Applicant to ensure they understand the compliance requirements in terms of their planning permission and limits on any permits granted by Council.
28. The Commission notes that upon further explanation from Council, it appears that while the Council's policy attaching to the footpath permits is clear (i.e. that trading on footpaths must cease at 11pm) this change had not been clearly communicated to the Applicant.
29. Further, the Commission accepts that there may also be situations where venues have had extension of footpath hours which were not stipulated on the relevant permit. Therefore, while the policy may state footpath trade ceases at 11pm, a licensee may have had prior approval and it is unclear as to whether the policy overrides the previous approvals.



30. The Commission accepts the evidence from Mr Lemura and is satisfied that the current operation of the Premises, with respect to its operations until 1am on the Smith Street Footpath, is not detracting from or is not detrimental to the amenity of the local area.
31. The Commission notes its appreciation of the Council for attending the hearing and providing submissions regarding the current footpath policy and its position on the variations of footpath trading permissions in Smith Street.
32. In the interests of both the Applicant and the Council, the Commission encourages communications regarding how the current, and any further, amendments to the Council policy should be implemented.
33. While this process is undertaken by Council, the Commission is satisfied that the external trading hours on the Smith Street Footpath should revert to the hours prior to the original application. Accordingly, the Commission has determined to vary the decision of the Delegate with respect to the trading hours by extending the external kerbside trading hours on Smith Street to 1am. In all other respects, the decision of the Delegate is affirmed.
34. The Commission determines the following conditions under the "TRADING HOURS" be amended as follows:

#### **INTERNAL AREAS**

Sunday:	Between 10am and 1am the following morning.
Good Friday and ANZAC Day:	Between 12 noon and 11pm
Monday to Thursday:	Between 7am and 1am the following morning
Friday and Saturday and the eve of a public holiday: (excluding Good Friday & Anzac Day)	Between 7am and 3am the following morning

#### **APPROVALS/CONSENT**

Section 9A(1)(b) Footpath/External Area. The Licensee is authorised to supply liquor on a premises other than the licensed premises shown on the approval plan during the hours specified below for the consumption on those premises:

Sunday:	Between 10am and 11pm the following morning.
Good Friday and ANZAC Day:	Between 12 noon and 11pm
Monday to Thursday:	Between 7am and 1am the following morning

***The preceding thirty-four (34) paragraphs is a true copy of the Reason for Decision of Mr Ross Kennedy (Deputy Chairman), Mr Des Powell (Commissioner) and Ms Kate Hamond (Commissioner).***