



DECISION AND REASONS FOR DECISION

In the matter of an application by Hansen Partnership Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to grant a restaurant and cafe licence to Captain Obvious Pty Ltd for the premises trading as Park, located at 132-138 Little Bourke Street, Melbourne.

Commission:

Ms Deirdre O'Donnell, Deputy Chair

Mr Ross Kennedy, Chair

Ms Helen Versey, Deputy Chair

Date of Hearing

28 August 2019

Date of Decision:

30 August 2019

Date of Reasons:

10 January 2020

Appearances:

Mr Chris Taylor of Planning & Property Partners Pty Ltd for the Applicant (on behalf of multiple land and business owners and operators)

Mr John Larkins, Counsel for the Licensee (instructed by LGS Legal)

Mr Cameron Warfe, Counsel Assisting the Commission

Decision:

The Commission has determined to vary the decision of the Delegate and grant the restaurant and cafe licence subject to the conditions set out in Appendix A.

Signed:

A handwritten signature in black ink, appearing to read 'Deirdre O'Donnell'.

Deirdre O'Donnell

Deputy Chair



BACKGROUND

1. On 18 December 2018, Captain Obvious Pty Ltd (**Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) for a restaurant and cafe licence for the premises trading as Park, located at 132-138 Little Bourke Street, Melbourne (**Premises**) (**Original Application**).
2. Relevantly, the Original Application sought a restaurant and cafe licence with a maximum patron capacity of 300 patrons, with the following trading hours:

Good Friday and ANZAC Day	Between 12noon and 1am the following morning
Sunday	Between 10am and 1am the following morning
On any other day	Between 7am and 1am the following morning
3. In accordance with section 33(1) of the *Liquor Control Reform Act 1998* (**LCR Act**),¹ a copy of the Original Application was served on the Chief Commissioner of Police (**Victoria Police**) on 4 January 2019. On 1 March 2019, Victoria Police objected to the Original Application and advised that it would withdraw its objection if the following condition was endorsed on the licence:

Any music played at the licensed premises must not be higher than background level at any time.
4. In accordance with section 33(2) of the LCR Act, a copy of the Original Application was served on the City of Melbourne (**Council**) on 4 January 2019. Council did not respond.
5. In response to the Original Application, the Commission received 14 objections from local land and business owners and operators (represented by Hansen Partnership Pty Ltd (**Applicant**)) on the basis that the open-air hospitality venue would have a detrimental impact on the amenity of the area, primarily related to noise, smoking and patron behaviour. An additional objection was also received by Mr Karl Henry, Manager of Mantra on Russell, who also objected on similar amenity grounds.
6. On 8 May 2019, a delegate of the Commission (**Delegate**) determined to grant the Original Application (**Original Decision**). The Delegate imposed the condition as proposed by Victoria Police (which was not opposed by the Licensee). With reference to a patron capacity report submitted in support of the Original Application, the Delegate also imposed a maximum patron capacity of 446 patrons.

¹ All references to sections in this decision are references to sections of the LCR Act, unless otherwise indicated.



Application for Internal Review

7. On 5 June 2019, the Applicant applied for internal review of the Original Decision to grant the restaurant and cafe licence (**Review Application**). The Applicant maintained its objections in relation to amenity, and also sought review of the Delegate's Decision to impose a maximum patron capacity of 446 patrons, in circumstances where the Licensee had only sought a maximum of 300 patrons in its Original Application.
8. On 13 June 2019, the Commission served a copy of the Review Application on Victoria Police and sought to confirm if Victoria Police maintained its position of 'no objection'. Victoria Police confirmed that it did not object to the grant of the Original Application on the basis that the proposed condition had been imposed on the licence.

LEGISLATION AND THE COMMISSION'S TASK

The Commission's internal review power

9. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the Original Decision is a reviewable decision, and the Applicant is eligible to apply for review of that decision. The Review Application was made under section 153 of the LCR Act.
10. Pursuant to section 157(1), the specific task of the Commission with respect to the Review Application is to make a fresh decision that:
 - (a) affirms or varies the reviewable decision; or
 - (b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.²
11. Under the LCR Act, an application for the grant of a licence may be contested or uncontested. Section 3(1) of the LCR Act defines a "contested application" as,

an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174) ...
12. On the basis of the objections maintained by the Applicant and Mr Henry in relation to the Original Decision, the matter before the Commission on review is therefore contested.

² Sections 157(2) to (5) of the LCR Act and section 25(3) of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act)* further prescribe the manner in which the Commission is to undertake internal reviews.



13. The Commission on review stands in the shoes of the original decision maker (in this case, the Delegate) and, in respect of a contested application, must either:
- (a) grant the application (and may do so subject to conditions);³ or
 - (b) refuse to grant the application.⁴

Exercising the internal review power

14. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act (VCGLR Act)* requires the Commission, in exercising its internal review function, to have regard to the objects of the LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act.⁵

15. The objects of the LCR Act are set out in section 4(1), which provides:

The objects of this Act are—

- (a) to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—
 - (i) providing adequate controls over the supply and consumption of liquor; and
 - (ii) ensuring as far as practicable that the supply of liquor contributes to, and does not detract from, the amenity of community life; and
 - (iii) restricting the supply of certain other alcoholic products; and
 - (iv) encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and
- (b) to facilitate the development of a diversity of licensed facilities reflecting community expectations; and
- (c) to contribute to the responsible development of the liquor, licensed hospitality and live music industries; and
- (d) to regulate licensed premises that provide sexually explicit entertainment.

16. Section 4(2) of the LCR Act provides further that:

It is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act must be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.⁶

³ Sections 47, 49 and 157 of the LCR Act.

⁴ Sections 47, 44(2), 44(3) and 157 of the LCR Act.

⁵ There are no decision-making guidelines issued by the Minister applicable to this matter.

⁶ See further *Kordister Pty Ltd v Direction of Liquor Licensing* [2012] VSCA 325, which confirms that harm minimisation is the primary regulatory object of the Act and therefore the primary consideration in liquor licensing decisions (although not to the exclusion of the other objects).



17. Pursuant to section 47(2) of the LCR Act, the Commission may refuse to grant a contested application on the basis of any of the grounds contained in section 44(2), including (but not limited to):
 - (a) that the grant of the application would detract from or be detrimental to the amenity of the area in which the premises to which the application relates are situated; and
 - (b) that the grant of the application would be conducive to or encourage the misuse or abuse of alcohol.
18. For the purposes of the LCR Act and relevantly in this matter, the amenity of an area is defined as being the quality that the area has of being pleasant and agreeable.⁷ Section 3A(2) of the LCR Act lists the following factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area:
 - the possibility of nuisance or vandalism;
 - the harmony and coherence of the environment;
 - any other prescribed matters.However, the definition of 'amenity' for the purposes of the LCR Act is not limited by these factors.⁸
19. The Commission considers that, while the grounds of refusal set out in section 44(2) are a relevant consideration, the ultimate determination of a contested application is to be made pursuant to sections 47 and 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.
20. In exercising the internal review power, in accordance with section 57(2) of the Act, the Commission must consider all the information, material and evidence before the original decision maker. It may also consider further information or evidence.⁹
21. Section 49 of the LCR Act provides that the Commission may impose any condition it thinks fit on the grant of an application.

⁷ Section 3A(1) of the LCR Act.

⁸ Section 3A(3) of the LCR Act.

⁹ Sections 157(2) and (3) of the Act.



MATERIAL BEFORE THE COMMISSION

22. The Commission had before it and considered all of the material received by the Delegate in the Original Application, which included:
- (a) the Original Application, consisting of:
 - i. application for a restaurant and cafe licence, dated 22 December 2018;
 - ii. letter from the Council's Planning Team, dated 18 December 2018, confirming that no planning permit is required to make the Application;
 - iii. a copy of a patron capacity report prepared by Patron Capacity Report Consultants, dated 9 November 2018;
 - iv. various plans and diagrams of the proposed Premises, including a proposed red-line plan;
 - v. relevant questionnaires and declaration of associates forms by the Licensee and its associates;
 - vi. evidence of completion of the New Entrant Training by a director of the Licensee, dated 21 June 2011;
 - (b) copies of objections received from the Applicant, dated 5 and 6 February 2019;
 - (c) Licensee's responses to the Objections, dated 18 February 2019;
 - (d) correspondence from Victoria Police regarding proposed conditions, dated 1 March 2019;
 - (e) a submission from the Objectors and Mr Henry, dated 8 March and 11 March 2019 respectively;
 - (f) copy of a report to the Future Melbourne (Planning) Committee regarding the Original Application, dated 19 March 2019; and
 - (g) a final submission from the Licensee, dated 27 March 2019.
23. The Commission also had before it and considered additional information and evidence as follows:
- (a) the Review Application, dated 5 June 2019, attaching a copy of the Decision of the Delegate dated 8 May 2019 granting the Original Application;
 - (b) submissions by the Applicant, dated 19 August 2019; and
 - (c) submissions by the Licensee, dated 26 August 2019.



Public hearing

24. On 28 August 2019, the Commission held a public hearing (**Hearing**). The Applicant and the Licensee were represented at the Hearing and made oral submissions for the Commission's consideration.
25. Following the Hearing, the Commission received an amended red-line plan for the Premises, including the indicative location of internal and external speakers at the Premises.

REASONS FOR DECISION ON REVIEW

Issues for determination on review

26. In making its decision on review, the Commission must determine the following issues:
 - (a) whether the grant of the Licence would detract from or be detrimental to the amenity of the area in which the Premises are located;
 - (b) whether the grant of the Licence would be conducive to or encourage the misuse or abuse of alcohol; and
 - (c) whether the Licence should be granted or refused, having regard to the objects of the LCR Act, with particular regard to the object of harm minimisation.
27. Each of these issues are discussed in turn below.

Amenity

28. The Commission has considered whether the grant of the Licence would be detrimental to the amenity of the area in which the Premises are located.
29. Section 3A of the LCR Act lists the factors which may be considered in determining whether the grant of the licence would detract from or be detrimental to the amenity of the area in which the premises are located.
30. In summary, the Applicant submitted that the grant of the Licence would detract from or be detrimental to the amenity of the area for the following reasons:
 - (a) any impact on the amenity of the area must take into account the location of the Premises within the Chinatown precinct, a highly valued city asset and pedestrian promenade within Melbourne;
 - (b) the Licensee will not be able to control off-site amenity impacts, particularly in the late evening operating hours when food is likely to become incidental to the serving of alcohol;



- (c) although there are many restaurants and licensed premises along Little Bourke Street within the vicinity of the Premises, most do not trade beyond midnight and there are no existing outdoor restaurants or outdoor bars;
 - (d) a number of residential uses exist in close proximity to the Premises, including short term hotel uses and apartments occupied on a permanent basis;
 - (e) there are inadequate amenity safeguards to overcome the amenity concerns resulting from the outdoor nature of the Premises and its location on Little Bourke Street;
 - (f) the Licence would allow a large number of potentially intoxicated patrons engaging in drinking, including vertical drinking, up to 1am at night, at close range to pedestrians on Little Bourke Street;
 - (g) the impact of patrons drinking, particularly in the late evening combined with patrons queuing on the adjacent footpaths, and patrons occupying the adjacent footpaths for smoking purposes, will have a detrimental impact on the existing amenity of Little Bourke Street; and
 - (h) the outdoor premises cannot attenuate crowd and music noise by way of built form, and would interfere with a number of sensitive interfaces (including prominent restaurants on Little Bourke Street, short-term residential accommodation, and longer term residential uses).
31. In the event the Commission determined to grant the Licence, the Applicant submitted that licence conditions as proposed by the Licensee (including reduced trading hours to 11pm on Sundays to Wednesdays, a maximum capacity of 300 patrons, and requiring noise testing to confirm compliance with background music level conditions) should be endorsed on the Licence, together with additional conditions that:
- (a) restrict trading hours for external areas to 11pm on any day;
 - (b) any alcohol consumed in an external area must be by patrons who are seated at tables and consuming a meal;
 - (c) no background music in any external areas after 11pm; and
 - (d) a Venue Management Plan be developed by the Licensee setting out procedures for queuing of patrons, recording noise levels associated with music, and prohibiting the use of televisions etc. in the external areas after 11pm.



32. The Licensee submitted that the grant of the Licence, subject to appropriate conditions, to an experienced and responsible licensee with an excellent record of operating within the Melbourne CBD, would not unreasonably detract from or be detrimental to the amenity of the area. In summary, the Licensee submitted that:
- (a) the grant of the Licence would transform the Premises from an unsightly carpark to a diverse licensed premises constituting an asset to Chinatown and improving amenity;
 - (b) the application was supported by Council and the objection by Victoria Police was withdrawn following agreement to limit music to background levels;
 - (c) a restaurant and cafe licence is considered a low risk licence, and does not require a planning permit within the Capital City Zone; and
 - (d) the Licensee would operate the Licence in accordance with the requirements of a restaurant and cafe licence, namely that the predominant activity carried out at all times on the premises must be the preparation and serving of meals for consumption on the licensed premises; and
 - (e) the Licensee accepted a number of restrictive conditions on the Licence to mitigate the risk of impact on amenity of the area, however submitted that the Applicant's proposal to include conditions as set out in paragraph 31(b) and (d) above were too onerous and unnecessary in light of the low risk nature of the licensed premises.
33. The Commission has taken into account the submissions of the Applicant and notes the potential for the operation of a licensed premises at the proposed location, particularly incorporating an external area, could impact on the amenity of the local area. The Commission refers to the amended red-line plan provided by the Licensee after the Hearing, and has considered the potential impact on amenity on the basis that the Premises would operate in the nature proposed by those plans.
34. As such, the Commission considers that a number of conditions would be required to mitigate the risk of adverse amenity impacts in this regard, specifically in relation to proposed trading hours and the restriction of music played in the external areas of the Premises. The Commission agrees with the Licensee that the inherent requirements of a restaurant and cafe licence (that the predominant activity carried out at all times on the premises must be the preparation and serving of meals for consumption on the licensed premises) reduces the risk that the Premises will operate otherwise than a restaurant (i.e. as a tavern, bar or live music venue).



35. Finally, the Commission has considered the submission of the parties in relation to the maximum capacity of the Premises and has determined to reduce the maximum capacity as endorsed by the Delegate from 446 to 300 patrons. This reduction in the maximum capacity will also act to mitigate against potential amenity impacts arising from the operation of the Premises.
36. The Commission therefore considers that the potential amenity impact associated with the grant of the Licence subject to the endorsed conditions would not unreasonably impact on the amenity of the area in the vicinity of the Premises.

Misuse and abuse of alcohol

37. As stated at paragraph 26(c), the Commission must consider whether the grant of an application for a licence would be conducive to or encourage the misuse or abuse of alcohol. The minimisation of harm arising from the misuse and abuse of alcohol is the primary regulatory object of the LCR Act.
38. The Commission notes that it has received no objection from relevant entities with concerns that the grant of the Licence would be conducive to or encourage the misuse or abuse of alcohol.
39. Further, the Commission notes that the Review Application is for a restaurant and cafe licence that includes a number of restrictive conditions relating to the predominant activity at the Premises. The Commission considers that these conditions, together with the other conditions agreed to by the Licensee, will mitigate the risk that the grant of the Licence would be conducive to or encourage the misuse or abuse of alcohol.
40. For these reasons, the Commission is satisfied that the grant of the Review Application would not be conducive to or encourage the misuse or abuse of alcohol.

General discretion

41. In addition to the harm minimisation object contained in section 4(1)(a), the objects of the LCR Act also aim “to facilitate the development of a diversity of licensed facilities reflecting community expectations” and “to contribute to the responsible development of the liquor, licensed hospitality and live music industries”.
42. The Commission accepts the submission of the Licensee that granting the Licence would further the object of the LCR Act to facilitate the development of a diversity of licensed facilities reflecting community expectations, being that the Premises would provide patrons with an attractive venue with both indoor and outdoor areas for the consumption of a meal together with alcohol.



DECISION ON REVIEW

43. Based on the matters set out above, the Commission on review determined to vary the decision of the Delegate and grant the restaurant and cafe licence, subject to the conditions set out in Appendix A. Specifically, the Commission determined to require the Licensee to provide to the Commission, within three months of commencing operation at the Premises, an acoustic report to demonstrate compliance with SEPP No. N-2, as well as to:

- (a) vary the maximum patron capacity for the Premises from 446 to 300 patrons;
- (b) reduce the trading hours to the following:
 - i. Good Friday and ANZAC Day Between 12noon and 11pm
 - ii. Sunday Between 10am and 11pm
 - iii. Monday to Wednesday Between 7am to 11pm
 - iv. Thursday to Saturday Between 7am and 1am the following morning

The preceding 43 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell, Deputy Chair, Mr Ross Kennedy, Chair and Ms Helen Versey, Deputy Chair.



Appendix A

TYPE OF LICENCE

This is a restaurant and cafe licence and authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises during the trading hours specified below.

RESTAURANT & CAFE CONDITIONS

This licence is subject to the following conditions:

- (a) The predominant activity carried out at all times on the premises must be the preparation and serving of meals for consumption on the licensed premises; and
- (b) Tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending the premises at any one time; and
- (c) The licensee must not permit:
 - i. the live performance of any musical works; or
 - ii. the playing of any recorded musical works –

on the premises at higher than background music level at any time.

AMENITY

The licensee shall not cause or permit undue detriment to the amenity of the area to arise out of or in connection with the use of the premises to which the licence relates during or immediately after the trading hours authorised under this licence.

The licensee shall ensure that the level of noise emitted from the licensed premises shall not exceed the permissible noise levels for entertainment noise as specified in the State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.

No music is permitted to be played in the external area after 11pm.

The licensee is to provide the Commission, within three (3) months of the licensed premises commencing operation, an acoustic report prepared by an appropriately qualified acoustic expert demonstrating the compliance of the licensed premises with the State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.

CONDITIONS OF APPROVAL

- (a) This licence is not effective until the building works have been completed and the Commission has provided written confirmation of the effectiveness of the licence.
- (b) The licensee must apply to the Commission for confirmation of the effectiveness of the licence by providing certification the building works have been completed.



- (c) The licensee must apply for confirmation of the effectiveness of the licence on or before 02/05/2021.
- (d) If the licensee does not apply for confirmation on or before 02/05/2021 this licence is invalid without further notice.
- (e) The premises is to be completed in accordance with the plans endorsed by the Commission.

MAXIMUM CAPACITY

300 patrons

TRADING HOURS

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