

## Decision and reasons for decision

In the matter of an application by Bay Road Hotel Pty Ltd under subsection 3.3.4(1) of the *Gambling Regulation Act 2003* (Vic) for approval of the premises, to be known as “The Silk Lounge”, located at 388 Lonsdale Street, Melbourne, Victoria 3000, as suitable for gaming with fifty (50) electronic gaming machines.

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**Commission:** Ms Deirdre O’Donnell, Deputy Chair  
Ms Danielle Huntersmith, Commissioner

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**Date of Hearing:** 31 January, 1 & 3 February 2022

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**Date of Decision:** 14 February 2022

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**Date of Reasons:** 15 March 2022

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**Appearances:** Mr Daniel Robinson of Counsel for the Applicant (instructed by BSP Lawyers)  
Mr John Rantino (Maddocks) for the City of Melbourne (the Council)  
Mr Andrew Sim of Counsel with Mr Paul Davis as Counsel Assisting the Commission

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**Decision:** The application is granted subject to the conditions outlined at Appendix A.

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**Signed:**



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**Deirdre O’Donnell**

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Deputy Chair

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## Background

1. This is an application by the Bay Road Hotel Pty Ltd (**the Applicant**) to the Victorian Gambling and Casino Control Commission<sup>1</sup> (**the Commission**) for approval of a proposed new venue, namely “The Silk Lounge”, located at 388 Lonsdale Street, Melbourne, Victoria 3000 (**the Premises**), as suitable for gaming with fifty (50) electronic gaming machines (**EGMs**) (**the Application**). The Application was made on 13 October 2021.
2. The relevant municipal authority is the City of Melbourne (**the Council**). On 17 December 2021, the Council provided the Commission and the Applicant with a written submission in opposition to the Application.
3. The Commission considered the Application by way of a public hearing.<sup>2</sup> The public hearing was conducted remotely by Zoom on 31 January, 1 and 2 February 2022 (**the Hearing**). The Applicant was represented by Mr Daniel Robinson of Counsel, instructed by BSP Lawyers. The Council was represented by Mr John Rantino of Maddocks.

## PRELIMINARY MATTER

4. The Commission has considered this matter on all the available evidence before it. The Commission is aware that the COVID-19 pandemic, and associated restrictions implemented by government have had, and are likely to continue to have, some impact on the social and economic conditions of Victoria, including the community of the Council. The continued nature and extent of this impact on the municipality is not able to be forecast with certainty. However, it is expected that any deferral of the likely positive impacts associated with the Application resulting from future government-imposed restrictions on the operation of EGMs will be balanced by a matching deferral of the likely negative impacts.
5. The *Gambling Regulation Act 2003* (**the Act**) expressly states that “*the Commission must use its reasonable endeavours to determine an application within the required period*”.<sup>3</sup> The Commission has accordingly used its reasonable endeavours to determine this matter on the basis of the information and evidence before and available to it within the required period, noting that there is no information or evidence before the Commission to suggest that the continued impacts of the COVID-19 pandemic are likely to materially skew its assessment of the social and economic benefits and disbenefits associated with the Application.

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<sup>1</sup> The Application, dated 11 October 2021 was made to the Victorian Commission for Gambling and Liquor Regulation (**VCGLR**). On 1 January 2022, the VCGLR became the Commission, which retains all the powers and responsibilities of the VCGLR until liquor regulation transfers to the Department of Justice and Community Safety later in 2022.

<sup>2</sup> A public inquiry is required to be conducted by the Commission in relation to the Application pursuant to s 28(g)(iii) of the *Victorian Gambling and Casino Control Commission Act 2011* (**VGCCC Act**). As to the manner in which the Commission is to conduct an inquiry, see generally Pt 3, Div 2 of the VGCCC Act (Inquiries); see also Pt 2, Div 3 of the VGCCC Act (Performance and exercise of the Commission's functions, powers and duties).

<sup>3</sup> Section 3.3.8(1A) of the Act.

6. The Commission also notes that the parties to this Application have a right of review to the Victorian Civil and Administrative Tribunal (**VCAT**) should they wish for the Commission's decision to be reviewed under section 3.3.14 of the Act.

## Legislation and the Commission's task

7. Gambling on EGMs is a legal recreational and commercial activity in Victoria so long as it is done in accordance with the Act. The Act recognises that, notwithstanding individual rights of self-determination, gaming on EGMs causes harm to some communities and some members of some communities. For this reason, the Act includes safeguards to ensure an appropriate balance is struck between a lawful and legitimate recreational activity for some, and a potentially harmful activity for others.

8. The objectives of the Act are set out in section 1.1(2), which provides, inter alia:

...

*(2) The main objectives of this Act are—*

*(a) to foster responsible gambling in order to-*

*(i) minimise harm caused by problem gambling; and*

*(ii) accommodate those who gamble without harming themselves or others;*

*(ab) to ensure that minors are neither encouraged to gamble nor allowed to do so;*

*(b) to ensure that gaming on gaming machines is conducted honestly;*

...

*(f) to promote tourism, employment and economic development generally in the*

*State.*

9. Chapter 3 of the Act deals with the regulation of gaming machines. Section 3.1.1 of the Act sets out the purpose of Chapter 3 as follows:

*(1) The purpose of this Chapter is to establish a system for the regulation, supervision and control of gaming equipment and monitoring equipment with the aims of—*

*(a) ensuring that gaming on gaming machines is conducted honestly; and*

*(b) ensuring that the management of gaming equipment and monitoring equipment is free from criminal influence or exploitation; and*

*(c) regulating the use of gaming machines in casinos and other approved venues where liquor is sold; and*

*(d) regulating the activities of persons in the gaming machine industry; and*

(e) *promoting tourism, employment and economic development generally in the State; and*

(f) *fostering responsible gambling in order to—*

(i) *minimise harm caused by problem gambling;*

(ii) *accommodate those who gamble without harming themselves or others.*

(2) *The purpose of this Chapter is also to—*

(a) *provide for the allocation of gaming machine entitlements in order to maximise the financial and social benefits to the Victorian community within the regulatory framework applying to the allocation of entitlements;*

(b) *promote a competitive gaming industry with the aim of providing financial and social benefits to the Victorian community.*

10. Section 9(3) of the VGCCC Act<sup>4</sup> provides, inter alia:

*The Commission must, when performing functions or duties or exercising its powers under the Gambling Regulation Act 2003 ... or any other Act, have regard to the objects of the Act conferring functions on the Commission.*

11. The relevant provisions concerning this Application are to be found in sections 3.3.7 and 3.3.8 of the Act. Section 3.3.7 provides:

(1) *The Commission must not grant an application for approval of premises as suitable for gaming unless satisfied that—*

(a) *the applicant has authority to make the application in respect of the premises; and*

(b) *the premises are or, on the completion of building works will be, suitable for the management and operation of gaming machines; and*

(c) *the net economic and social impact of approval will not be detrimental to the well-being of the community of the municipal district in which the premises are located.*

(2) *In particular, the Commission must consider whether the size, layout and facilities of the premises are or will be suitable.*

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<sup>4</sup> Formerly the *Victorian Commission for Gambling and Liquor Regulation Act 2011*.

(3) *The Commission must also consider any submission made by the relevant responsible authority under section 3.3.6.*<sup>5</sup>

...

(5) *The Commission cannot approve an area as a gaming machine area unless that area is wholly indoors.*

12. Section 3.3.8 relevantly provides:

(1) *The Commission must determine an application by either granting or refusing to grant—*

(a) *approval of the premises as suitable for gaming; and*

(b) *if applicable, approval for 24 hour gaming on the premises on any one or more days.*

...

(2) *An approval must specify—*

(a) *the number of gaming machines permitted; and*

(b) *the gaming machine areas approved for the premises; and*

(c) *if applicable, the days on which 24 hour gaming is permitted on the premises.*

...

13. Section 3.3.7(1)(c) provides for what is now commonly described as the ‘*no net detriment*’ test. It requires the Commission to be satisfied that there is no net detriment arising from the approval through positively and objectively establishing that the net economic and social impact will not be detrimental to the wellbeing of the community.<sup>6</sup>

14. The Act does not specify the matters which the Commission must consider in deciding whether the ‘*no net detriment*’ test is satisfied. However, the statutory signposts are provided by the test itself. The Commission must consider:

(a) the likely economic impacts of approval;

(b) the likely social impacts of approval; and

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<sup>5</sup> Section 3.3.6 of the Act allows the Council to make a submission addressing the economic and social impact of the proposal for approval on the wellbeing of the community of the municipal district in which the premises are located, and taking into account the impact of the proposal on surrounding municipal districts.

<sup>6</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors* [2013] VCAT 101 at [52] per Dwyer DP (*Mount Alexander*)

- (c) the net effect of those impacts on the well-being of the relevant community.<sup>7</sup>
15. As such, the ‘*no net detriment*’ test is a composite test requiring consideration of a single net impact in economic and social terms on the well-being of the community.<sup>8</sup> The test will be satisfied if, following the weighing of any likely impacts, the Commission is satisfied that the net economic and social impacts of approval on the well-being of the relevant community will be either neutral or positive.
16. The Commission recognises that the task of identifying likely benefits and disbenefits will not always be straightforward given the overlap of socio-economic issues, and the quality and availability of relevant data and cogent evidence. Some economic outcomes may have social consequences, and vice versa.<sup>9</sup> On review, decisions in VCAT have held that for impacts that may be both economic and social – for example the benefits of gaming consumption – it does not matter whether the impact is considered on the economic side, or the social side, or both, so long as it is included and not double-counted in the ultimate composite test.<sup>10</sup>
17. The Commission also accepts the position expressed by Morris J in *Branbeau Pty Ltd v Victorian Commission for Gaming Regulation* [2005] VCAT 2606 (**Branbeau**) at [51] that:
- Although the [no net detriment] test requires consideration of the impact of approval on the well-being of the community of the municipal district in which the premises are located, logic and common sense require this to be considered in the context of the spatial impact of the gaming machines to be installed in the venue concerned.*<sup>11</sup>
18. The Commission also notes that on review, it has been indicated by VCAT that:
- A table of likely economic and social benefits and disbenefits, and with some comments relevant to the relative weight to be given to particular factors ... is a useful way of transparently dealing with the ‘no net detriment’ test, and might perhaps be considered for wider application.*<sup>12</sup>
19. This approach has been adopted in a number of VCAT decisions.<sup>13</sup> To facilitate greater consistency between the Commission and VCAT, the Commission has adopted the same approach in this matter.

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<sup>7</sup> *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd and Anor* (2008) 19 VR 422, per Warren CJ, Maxwell P and Osborn AJA at [42] – [43] (**Romsey**).

<sup>8</sup> *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation* [2009] VCAT 2275, per Bell J at [332] and [348] (**Romsey #2**), cited in *Mount Alexander* per Dwyer DP at [58].

<sup>9</sup> *Mount Alexander* per Dwyer DP at [57].

<sup>10</sup> See *Romsey #2* per Bell J at [352]; *Mount Alexander* per Dwyer DP at [58].

<sup>11</sup> See also *Romsey #2* per Bell J at [274].

<sup>12</sup> *Mount Alexander* per Dwyer DP at [60].

<sup>13</sup> See for example: *Darebin CC v Victorian Commission for Gambling and Liquor Regulation & Anor* [2013] VCAT 1389; *Melbourne CC v Kingfish Victoria Pty Ltd & Anor* [2013] VCAT 1130 (**Kingfish**); *Monash CC v L’Unico Pty Ltd* [2013] VCAT

20. If the Commission is not satisfied that the ‘*no net detriment*’ test is met, that is clearly fatal to the application given the opening words of s 3.3.7(1) of the Act. The test is a mandatory pre-condition to approval. However, although section 3.3.7(1) sets out certain mandatory considerations for the Commission, the provision is not cast in exhaustive terms. If the Commission is satisfied that the ‘*no net detriment*’ test is met, it still has an ultimate discretion as to whether or not to grant the approval.<sup>14</sup> The Commission must decide whether to grant the approval, even where an applicant has satisfied the minimum threshold of the ‘*no net detriment*’ test.<sup>15</sup>
21. In considering the exercise of this discretion:
- (a) it must be exercised having regard to the purposes of the Act and, in particular, the specific purposes of Chapter 3 of the Act dealing with the regulation, supervision and control of gaming machines;<sup>16</sup> and
  - (b) it may also be influenced by other factors such as broad policy considerations drawn from the content and objectives of the Act as a whole.<sup>17</sup>
22. The Commission agrees with the comments of Deputy President Dwyer in *Mount Alexander*<sup>18</sup> that if all of the mandatory considerations under the Act favour the grant of an approval, one would expect that the ultimate discretion will commonly favour approval – other than in relatively rare or exceptional circumstances arising in a particular case. In such a case, any such circumstances should be separately and transparently identified.
23. It is further noted that pursuant to section 9(4) of the VGCCC Act, the Commission must have regard to Ministerial guidelines issued under section 5 of the VGCCC Act when performing functions under gambling legislation.
24. On 14 February 2017, Ministerial decision-making guidelines issued under section 5 of the VCGLR Act [as it then was, now called the VGCCC Act], were published in the Government Gazette in relation to the locating of gaming machines in a building with permanent residential accommodation (**the Ministerial Guidelines**). The relevance of the Ministerial Guidelines to this Application will be discussed later in these Reasons.
25. Finally, if the Commission approves premises as suitable for gaming, section 3.3.9 provides for both mandatory conditions of approval and the Commission’s discretionary power to impose other conditions. These include:

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1545 (**L’Unico**); *Bakers Arms Hotel Pty Ltd v Victorian Commission for Gambling and Liquor Regulation* [2014] VCAT 1192 (**Bakers Arms**).

<sup>14</sup> See *Mount Alexander* per Dwyer DP at [97]; *Ocean Grove Bowling Club v Victorian Commission for Gaming Regulation* [2006] VCAT 1921 per Morris J at [32] (**Ocean Grove**); *Bakers Arms* per Code PM and Nelthorpe M at [126].

<sup>15</sup> The Act, section 3.3.8(1).

<sup>16</sup> *Mount Alexander* per Dwyer DP at [98].

<sup>17</sup> *Ocean Grove* per Morris J at [32]; *Mount Alexander* per Dwyer DP at [99]; *Bakers Arms* per Code PM and Nelthorpe M at [126]. As to policy principles identified for consideration, see *Romsey* per Warren CJ, Maxwell P and Osborn AJA at [7].

<sup>18</sup> At [98].

- (a) there must be a continuous 4 hour break from gaming after every 20 hours of gaming; and
- (b) there must not be more than 20 hours of gaming each day;
- (c) that the applicant has obtained a permit under the *Planning and Environment Act 1987* permitting the premises to be used for gaming on gaming machines; or
- (d) that the approval does not take effect until the applicant has satisfied the Commission that it has complied with any other condition imposed by the Commission, as the Commission thinks fit.

## Material before the Commission

26. The Applicant provided the Commission with the following material in support of its Application:
- (a) 'Application for approval of premises for gaming' form dated 11 October 2021 (**Application Form**);
  - (b) 'Consent of the Owner' dated 23 September 2021 (signed by Cieran Richard John Kayes for and on behalf of Bay Road Hotel Pty Ltd as a Director, that company being the tenant and not the owner of the site);
  - (c) A document that appeared to be a company extract for "388 Lonsdale St Hotel Pty Ltd – ACN 651 276 961";
  - (d) 'Application for a Planning Permit' with the City of Melbourne (in respect of the subject location of the Premises) dated 1 October 2021 and associated documents;
  - (e) Social and Economic Impact Statement prepared by Ms Colleen Peterson, CEO of Ratio Consultants Pty Ltd (**Ratio**) dated October 2021 (**Ratio Report**);
  - (f) Report of Mr Tim Stillwell, partner of SW Accountants and Advisors (**SW**) dated 17 September 2021 (**SW Report**);
  - (g) Report of Mr Andrew Jeynes of PVS Australia Pty Ltd (**PVS**) dated September 2021 (**PVS Report**);
  - (h) Statement of Mr James Weston Bate, a registered architect and director of Insite Architects Pty Ltd, dated October 2021, attaching Curriculum Vitae;
  - (i) Statement of Mr Cieran Richard John Kayes, a director of the Applicant, dated 6 October 2021, attaching Draft Conditions;
  - (j) Statement of Mr Rodrigo De Jesus Da Costa (preferred name Jay Costa), gaming room manager at New Bay Hotel, Brighton, dated October 2021;
  - (k) Correspondence from the Applicant's solicitors to the Council, dated 12 October 2021;
  - (l) Macquarie Bank Funds Transfer Receipt to VGGLR Revenue Account in the sum of \$13,173.50 on 12 October 2021;



- (m) Correspondence from the Applicant’s solicitors to the Commission, dated 18 October 2021, enclosing confirmation that the Application was advertised in the Herald Sun newspaper on 18 October 2021;
  - (n) Letter from the Applicant’s solicitors to the Commission, dated 28 January 2022, setting out the Applicant’s position in response to recommendations in the Social and Economic Impact Statement prepared by Bonnie Rosen of SymPlan on behalf of the Council, and enclosing various documents (set out below at (n) to (p));
  - (o) Architects [sic] Submission – VCGLR Hearing, 388 Lonsdale St, Melbourne, dated August 2021;
  - (p) New Bay Hotel – Responsible Gambling Code of Conduct, Policies and Procedures, dated December 2021; and
  - (q) Memorandum from Mark Chew, Associate at Enfield Acoustics Pty Ltd, dated 26 January 2022.
27. The Council provided the following material in opposition to the Application:
- (a) Letter from Markus Tschech, Principal Urban Planner at the Council, dated 23 November 2021, advising that the Council intended to make a submission addressing the social and economic impact of the Application;
  - (b) Council’s economic and social impact submission, dated 17 December 2021; and
  - (c) Report titled ‘*Proposed Gaming Venue, The Silk Lounge – Social and Economic Impact Statement*’ prepared by Ms Bonnie Rosen, Principal of SYM Plan, dated 13 December 2021 (**SymPlan Report**).
28. The following reports, prepared by Commission officers, were provided to the Applicant and the Council and were considered by the Commission:
- (a) *Economic and Social Impact Report*, dated 18 November 2021;
  - (b) *Economic and Social Impact Report* (2<sup>nd</sup> version), dated 11 January 2022, with Table of Amendments to the first edition of the Report (dated 18 November 2021) (**VGCCC Report**);
  - (c) *Pre-Hearing Size, Layout and Facilities Report – The Silk Lounge*, dated 24 January 2022 (**VGCCC Premises Report**);
  - (d) Map showing a 5 kilometre radius from the location of the Premises; and
  - (e) Compliance History Check of the Applicant, undated (**VGCCC Compliance History Report**).
29. During the Hearing, the Commission was provided with:
- (a) “Consent of the Owner” (undated), which was signed “for and on behalf of 388 Lonsdale Street Pty Ltd” by a Director (of that company), namely Cieran Richard John Kayes;
  - (b) Submissions dated 1 February 2022, on behalf of Applicant about the application of the Ministerial Guidelines;

- (c) Submissions dated 1 February 2022, on behalf of Council about the application of the Ministerial Guidelines;
  - (d) Letter from the Applicant's solicitors to the Commission, dated 2 February 2022, enclosing various documents (set out below at (r) to (v));
  - (e) Video site inspection of the Premises, comprising video files of site inspections at various locations within the Premises;
  - (f) View line drawing of the gaming lounge in the Premises, prepared by Insite Architects;
  - (g) Amended architectural plans for the Premises prepared by Insite Architects;
  - (h) Memo from Applicant's solicitors, dated 2 February 2022, providing details of the average and longest length of stays at Brady Hotels within the Melbourne CBD for the period 2019 to 2021;
  - (i) Gaming room monitoring reports of the New Bay Hotel for the period 24 to 30 January 2022; and
  - (j) Objections from various persons to the Applicant's planning application (provided to the Commission on 1 February 2022).
30. Following the Hearing, the Commission was provided with:
- (a) Submissions on behalf of the Applicant, dated 3 February 2022;
  - (b) Submissions on behalf of the Council, dated 3 February 2022;
  - (c) Council's proposed draft permit conditions, dated 4 February 2022;
  - (d) Letter from the Applicant to the Commission and Council responding to Council's proposed draft permit conditions, dated 4 February 2022 and enclosing a "clean" copy of Council's draft permit conditions and a version of Council's draft permit conditions "marked up" with the Applicant's suggested changes and commentary.

## Decision and Reasons for Decision

### Background

31. The City of Melbourne is a metropolitan municipality located at the centre of the Melbourne metropolitan area. The area of the City of Melbourne is approximately 37 square kilometres. In addition to the Melbourne central business district (**CBD**), other suburbs located within the City of Melbourne's boundaries include Carlton, North Melbourne, Kensington, and Southbank.<sup>19</sup>
32. The estimated total adult population is 183,942, ranking the City of Melbourne the fourth most populous out of 31 metropolitan municipalities. The City of Melbourne's estimated annual population growth of 4.76% in 2021

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<sup>19</sup> VGCCC Report, p. 11.

is projected by the Department of Environment, Land, Water and Planning (**DELWP**), to be higher than the Victorian average of 1.20.<sup>20</sup>

### *Current gaming in the City of Melbourne*

33. Some areas of the City of Melbourne have a combined cap of 149 EGMs. Those areas include Carlton, Flemington, Kensington and North Melbourne. The remainder of the City of Melbourne (excluding the Melbourne CBD, Docklands and Southbank)<sup>21</sup> has a municipal limit of 143 EGMs. As the proposed Premises will be located in the Melbourne CBD, it is not subject to any municipal caps.<sup>22</sup>
34. At present, there are 184 EGMs in capped regions of the City of Melbourne. There 740 EGMs in the whole of the City of Melbourne area. <sup>23</sup>
35. There are currently 11 venues with EGM entitlements in the City of Melbourne.<sup>24</sup> However, one of those venues, The Celtic Club, closed in 2017, though it still holds entitlements.<sup>25</sup>
36. The VGCCC Report notes that the City of Melbourne has an EGM density of 4.0 EGMs per 1,000 adults, which is 12.8 percent lower than the metropolitan Local Government Area (**LGA**) average of 4.6 and 18.7 percent less than the State average of 4.9. This places the City of Melbourne as the 20<sup>th</sup> of 31 metropolitan LGAs in terms of EGM density per 1,000 adults.<sup>26</sup>

### *Location*

37. The Premises will be located at 388 Lonsdale Street, Melbourne, being on the north-eastern corner of the intersection of Lonsdale Street and Hardware Street. It is located in the Capital City Zone Schedule 1 (**CCZ1**) under the Melbourne Planning Scheme.<sup>27</sup> The purpose of the CCZ1 zone is to provide for a range of different uses, including commercial, financial, legal, administrative, cultural, recreational, entertainment and tourist uses.<sup>28</sup>

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<sup>20</sup> VGCCC Report, p. 11.

<sup>21</sup> As those areas are excluded from the Ministerial Order dated 20 September 2017.

<sup>22</sup> VGCCC Report, p. 8.

<sup>23</sup> VGCCC Report, p. 8.

<sup>24</sup> VGCCC Report, p. 8.

<sup>25</sup> VGCCC Report, p. 9.

<sup>26</sup> VGCCC Report, p. 12.

<sup>27</sup> SymPlan Report, pp. 7 – 8.

<sup>28</sup> SymPlan Report, p. 7.

38. The Melbourne CBD and the wider City of Melbourne area is the epicentre of the Melbourne metropolitan area. Within the City of Melbourne are many of Victoria's major commercial, financial, cultural, research, education and entertainment attractions. The City of Melbourne is also home to an increasing number of residents.<sup>29</sup>
39. The building's location is on the corner of Lonsdale and Hardware Streets. Hardware Lane (on the southern side of Lonsdale Street) and Hardware Street (on the northern side of Lonsdale Street) contain a large number of restaurants and cafes.
40. Other land uses within 400 metres of the site (being the area described as the standard walking distance from the Premises by Ms Bonnie Rosen) include educational institutions (secondary and tertiary), student accommodation, residential accommodation, serviced apartments used for residential purposes, retail premises, courts and legal services, community services and other business entities.<sup>30</sup>

#### *Details of the Premises*

41. The location of the Premises is a recently redeveloped 19 level building. With the exception of the top level of the building, the levels above ground level house Brady Hotels Serviced Apartments (**Brady Hotels**), which comprises 147 serviced apartments. Brady Hotels opened in November 2021 and can be booked from one night up to six months. Access to Brady Hotels is via a separate entrance on Lonsdale Street.<sup>31</sup>
42. The Premises will occupy the majority of the ground floor and basement of the building. It will also occupy the rooftop level of the building.
43. The total floor space of the Premises is approximately 1,102.1 square metres, comprising part of the basement, ground floor and rooftop. The Applicant proposes to develop the Premises in the following way:
  - (a) Develop the ground floor to include:
    - (i) New central air-lock entrance;
    - (ii) A lounge and café lounge;
    - (iii) Snug lounge with outdoor smoking area;
    - (iv) Takeaway window on Hardware Street;
    - (v) Gaming room with 50 EGMs;
    - (vi) Administration office;
    - (vii) Unisex and disabled toilets;
    - (viii) Bar and servery to service the lounge and café lounge; and

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<sup>29</sup> SymPlan Report, p. 6.

<sup>30</sup> SymPlan Report, p. 8.

<sup>31</sup> SymPlan Report, p. 6.

- (ix) Cashier's desk to service the gaming room.
- (b) Develop the basement level to include:
- (i) Sports lounge / meeting room with sliding acoustic screens;
  - (ii) Bistro lounge and lounge area;
  - (iii) Bar and servery to service the bistro and sports lounge;
  - (iv) Unisex toilets; and
  - (v) Back-of-house facilities including storage and cool rooms.
- (c) Develop the roof-top bar to include:
- (i) Rooftop bar and alfresco area located on the southern side;
  - (ii) Semi-enclosed rooftop function room and outdoor function space located on the northern side;  
and
  - (iii) Unisex toilets including a disabled toilet.<sup>32</sup>
44. The Applicant estimates that \$5.4 million will be spent on capital expenditure in the event the Application is approved.<sup>33</sup>

#### *Catchment area of the Premises*

45. The 'no net detriment' test refers to 'the community of the municipal district in which the approved venue is located'. In determining the impact of an application of this nature on a municipal district, previous Commission and VCAT decisions have had particular regard to the area serviced by the relevant premises, which is generally referred to as the 'catchment area'.<sup>34</sup> The determination of the likely catchment area in this instance is important in the Commission's consideration of the identity of those residents who will be most affected by the Application in terms of gambling-related benefits and harms.
46. As the City of Melbourne is a metropolitan municipality, typically, the Commission would take the catchment area to be a 2.5 kilometre radius from the Premises' site (as is the case in the VGCCC Report). The Applicant and the Council, however, had differing views about whether the Commission should consider the catchment to be a 2.5 kilometre radius from the Premises' site, or a wider catchment.
47. Ms Colleen Peterson, CEO of Ratio Consultants, gave evidence on behalf of the Applicant. This included the detailed Ratio Report as well as oral evidence before the Commission. Ms Peterson noted that the Premises

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<sup>32</sup> Ratio report, p. 12; statement of James Weston Bate and "Insite's Architects Submissions – VCGLR Hearing, August 2021".

<sup>33</sup> Application, p. 11.

<sup>34</sup> See for example, *Romsey #2* [2009] VCAT 2275; *Whittlesea CC v George Adams Pty Ltd* [2011] VCAT 534.

was likely to serve both patrons living in the Melbourne CBD and wider City of Melbourne area, as well as people from metropolitan Melbourne.<sup>35</sup> Ms Peterson in the Ratio Report stated that the local community comprised people who live in the Melbourne CBD, as well as those working in the CBD.<sup>36</sup> However, she also stated in the Ratio Report (on the same page) that “we have determined the patron catchment to primarily consist of residents within the suburb of Melbourne”.<sup>37</sup> Later still in the Ratio Report, it was contended that as the Premises was located in the Melbourne CBD, it was expected that the venue catchment would be “far more widespread” than the usual 2.5 kilometre radius for venues in metropolitan Melbourne.

48. The Commission understood Ms Peterson’s evidence to be that the majority of the patrons will be residents in the Melbourne CBD, with the remaining catchment profile made up of employees from across metropolitan Melbourne who work in the Melbourne CBD.
49. Ms Bonnie Rosen gave evidence on behalf of the Council. Ms Rosen provided the SymPlan Report to the Commission and also gave oral evidence. She noted that a 2.5 kilometre radius is usually used for the primary catchment, and a 5 kilometre radius for a secondary catchment. Owing to the high number of venues with EGMs in the Melbourne CBD and immediate surrounding suburbs, Ms Rosen’s evidence was that there should be a further division of catchments applied to the Premises. First, a 400 metre radius, which equates to a standard walking distance referred to in the Melbourne Planning Scheme, and then a 2.5 kilometre radius.
50. The Commission, having considered all the evidence, considers that the primary catchment area of the Premises is 2.5 kilometres. However, the Commission also accepts and takes into account in its consideration of this matter that patrons will also be drawn from further afield.

## REASONS FOR DECISION

51. Pursuant to section 3.3.7 of the Act, there are three elements of which the Commission must be satisfied before it can grant the Application. The three elements are:
  - (a) First, the authority to make the Application;
  - (b) Secondly, the suitability of the Premises for the management and operation of gaming machines; and
  - (c) Thirdly, the application of the ‘no net detriment’ test.
52. The three elements will be dealt with in turn.

## AUTHORITY TO MAKE APPLICATION

53. The first element that the Commission must be satisfied of is that the Applicant has the authority to make the Application in respect of the Premises.

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<sup>35</sup> Ratio Report, para 6.1.1.

<sup>36</sup> Ratio Report, para 6.1.4

<sup>37</sup> Ratio Report, para 6.2.3.

54. In the Application, the Applicant noted that it was not the owner of the building, or more accurately, the areas within the building from which the Premises will operate. In support of the Application, the Applicant provided to the Commission a document headed "Consent of the Owner", however it was signed "for and on behalf of Bay Road Hotel Pty Ltd" by a Director (of that company), namely Cieran Richard John Kayes on 23 September 2021.
55. In the Application Form, the Applicant (being Bay Road Hotel Pty Ltd) stated that it was not the owner of the Premises. That document did not reveal the owner of the Premises.
56. The Applicant also provided to the Commission a copy of an Application for a Planning Permit in respect of the Premises lodged with the City of Melbourne on 1 October 2021. That document stated that the owner of the Premises was "388 Lonsdale Street Pty Ltd".
57. The Commission was not provided with a Consent of the Owner document signed by and on behalf of 388 Lonsdale Street Pty Ltd, which was the apparent owner of the Premises.
58. Prior to the Hearing, the Commission communicated with the Applicant's legal representatives, noting that there did not appear to be an authority from the owner of the Premises consenting to the Applicant making the Application .
59. The Applicant subsequently provided the Commission with a document headed "388 Lonsdale St Hotel Pty Ltd – ACN 651 276 961", appearing to be a company extract produced by InfoTrack.
60. Upon receipt of that document, the Commission again wrote to the Applicant's legal representatives, advising that the company extract was in respect of a company that had a different name (and different company number) to the name of the company stated as being the owner of the Premises in the Applicant's application for a planning permit.
61. The Commission was subsequently provided with a further document, headed "Consent of the Owner", which was signed "for and on behalf of 388 Lonsdale Street Pty Ltd" by a Director (of that company), namely Cieran Richard John Kayes. The document was undated, however the Commission was informed that it had been signed on the day of its provision to the Commission
62. Based on the evidence above, the Commission is satisfied that this first element is satisfied.

## **SUITABILITY OF PREMISES FOR THE MANAGEMENT AND OPERATION OF GAMING MACHINES**

### *Preliminary matter – consideration of the Ministerial Guidelines (Permanent Residential Accommodation)*

63. The VGCCC Premises Report raised the issue that the Premises was proposed to be located in the same building as Brady Hotels. The VGCCC Premises Report drew attention to the Ministerial Guidelines and queried whether the nature of the accommodation in the building, in which the Premises would be co-located, would be considered "permanent residential accommodation".

64. The Ministerial Guidelines state that “...*the Commission must have regard to the Victorian Government’s Policy that any building that includes (or is planned to include) permanent residential accommodation should not be approved as premises suitable for gaming*”. This was an issue that the Commission raised with the parties on the first day of the Hearing. The Commission asked the parties to provide written submissions on the question of whether Brady Hotels amounted to “permanent residential accommodation” within the meaning of the Ministerial Guidelines. Both parties filed written submissions with the Commission on the second day of the Hearing addressing the issue. During the Hearing, there was also evidence about the nature of the serviced apartments of Brady Hotels including evidence that there was no plan to change that use.
65. Additionally, on 2 February 2022, the Applicant provided the Commission with a Memo entitled “388 Lonsdale Street, Melbourne – Length of stay in Brady Hotel”, which addressed the length of stays in Brady Hotels (in the building in which the Premises would be co-located known as Brady Hotels Hardware Lane), as well as two other Brady hotels in the Melbourne CBD (being Brady Hotels Central Melbourne and Brady Hotels Jones Lane). The Applicant’s evidence was that for the 2019 year (pre-COVID) only the Brady Hotels Central Melbourne and Jones Lane operated and had an average mean length of stay across both hotels of 2.4 nights with the longest stay during 2019 of 91 nights (being Central Melbourne 91 days and longest stay at Jones Lane of 17 nights). For the 2021 year the Brady Hotels operated at three locations being Central Melbourne and Jones Lane, as well as Hardware Lane. There was, across all three, an average mean length of stay of 1.8 nights with the longest stay during 2021 of 55 nights (being Central Melbourne 51 nights, Jones Lane 55 nights and longest stay at Hardware Lane of 14 nights). The Applicant gave evidence that although the serviced apartments had a kitchen, people were not likely to stay long as the cost of the apartments, being fully furnished hotel style, was quite high and most people are visiting Melbourne for short stays and people would not stay there long enough to be considered permanent residents.
66. The Commission has carefully reviewed and considered the parties’ submissions and the evidence presented to it. Based on the evidence and submissions, the Commission has determined that Brady Hotels (located in the same building as the Premises) does not, based on its present use (and does not plan in the future to), provide “permanent residential accommodation” within the meaning of that term in the Ministerial Guidelines.
67. The Commission is also required to be satisfied that the Premises are, or on the completion of building works will be, suitable for the management and operation of gaming machines. In particular, the Commission must consider if the size, layout and facilities of the Premises are or will be suitable.<sup>38</sup>
68. The VGCCC Premises Report was prepared based on the plans in relation to the Premises and the gaming machine area (**GMA**) provided by the Applicant and referred to in the Ratio Report, and the statement of Mr Bate, architect. The VGCCC Premises Report details that new venues are assessed by Commission Licence Management and Audit Inspectors against standards and guidelines in relation to size, location and layout of the GMA, type and height of perimeter barriers, floor numbering and layout of the gaming machines, windows,

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<sup>38</sup> Subsection 3.3.7(2) of the Act.



proximity of the GMA to other facilities within the venue and any liquor or statutory authority conditions imposed.

69. Based on the plans submitted, and subject to any planning issues, the VGCCC Premises Report concluded that the size, layout and facilities of the Premises would be suitable for gaming. The proposed plans do not include a children's play area.
70. During the Hearing, the Commission heard evidence from Mr Bate, Mr Kayes, Ms Peterson and Ms Rosen in relation to the design and suitability of the Premises for the management and operation of EGMs. Some of the evidence relevant to this consideration included the following:
- (a) the extent to which the gaming room would be discrete from other areas of the venue, including the suitability of the location of both the snug lounge and the only toilets on the ground floor in relation to the entry to the gaming room;
  - (b) whether the entrance to the gaming room should have any screen behind the sliding door into that space, to prevent a direct line of sight into the gaming room for patrons in and around the snug lounge and toilets on the other side of the door into the gaming room;
  - (c) that there was no direct entry into the gaming room from the outside of the Premises, nor was it visible from the street;
  - (d) the amount of natural light that would penetrate into the gaming room (noting the Commission was not initially provided with any three-dimensional plans of the gaming room despite such plans being provided for the other main areas of the Premises); and
  - (e) the layout of the gaming room, including the number of staff (three) that would be present at all times in which the gaming room was open, and whether that was sufficient to allow for ongoing surveillance of the patrons in the gaming lounge and the entrance to the gaming room from the café lounge on the ground floor.
71. Based on the evidence, the Commission is satisfied that this second element has been met.

### **'NO NET DETRIMENT' TEST**

72. The third element in relation to which the Commission is required to be satisfied is that the net economic and social impact of approval will not be detrimental to the wellbeing of the community of the municipal district in which the premises are located. Set out below (and summarised in tabular form at Appendix B) is the Commission's assessment of the economic and social benefits and disbenefits associated with the Application, including the weighting given to each of these impacts.

## Economic Impacts

73. The materials before the Commission, including the evidence adduced at the Hearing, either referred specifically to, or provided the evidentiary basis for, a range of economic benefits and disbenefits associated with this Application.

### Gaming expenditure not associated with problem gambling

74. As the economic category of gaming expenditure not associated with problem gambling includes consumption, then to the extent that such expenditure is not associated with problem gambling, it has been recognised (by, for example, the Productivity Commission in its 1999 report) that it can be treated as an economic benefit.<sup>39</sup> As Bell J noted, this approach also brings to account the benefit obtained from pure consumption by the lone gambler who does not use machines for social reasons.<sup>40</sup>

### Expenditure estimates

75. In the SW Report, Mr Tim Stillwell observed that, as the Silk Lounge is a proposed venue, he has adopted a benchmarking approach, analysing similar venues and LGA's currently operating gaming machines, in order to determine an appropriate estimate of gross gaming revenue. He anticipated the level of gross gaming expenditure generated from an introduction of 50 EGMs at the Premises would be between \$5,201,250 and \$5,748,750. Mr Stillwell also provided a "Covid adjustment at 95%", thereby reducing those figures to between \$4,941,188 and \$5,461,313. Mr Stillwell estimated that 85% of the gross gaming expenditure estimate would be achieved within the first 12 months of trade (estimated to be commencing on 16 August 2022) and 100% would be achieved from year 2 onwards.<sup>41</sup> The estimated figures in the first 12 months are between \$4,200,009 and \$4,642,116, which take into account the 95% covid adjustment and the first year's figures likely being 85% of the second and subsequent year's figures.<sup>42</sup>

76. In terms of transferred expenditure, Mr Stillwell adopted a notional transfer rate of 60%, based on the following considerations:

- (a) There are eight active competitor venues located in the CBD that are within two kilometres of the Premises;

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<sup>39</sup> See *Romsey #2* at [351] per Bell J.

<sup>40</sup> See *Romsey #2* at [351] per Bell J. His Honour observed at [352] that the other approach is to say, as did Morris J did in *Branbeau* at [79] that gaming extends 'substantial economic and social benefits' to gaming machine users, which treats consumption as a benefit without saying whether it is economic or social. While Bell stated in *Romsey #2* that both approaches are correct, for the purposes of this Application, this benefit is treated as an economic benefit.

<sup>41</sup> SW Report, pp 15 – 16.

<sup>42</sup> SW Report, p. 16.

- (b) Gaming patrons currently have access to high performing gaming competitors. With there being available gaming machines at the Premises, there exists an ability for gaming patrons to transfer from those competitor venues to the Premises;
  - (c) Empirical evidence regarding recent effective transfer rates; and
  - (d) It would still be reasonable to conclude that there will be a component of the Premises' gaming expenditure which will be derived from gaming patrons who do not currently conduct gaming activities at other venues (in part or in full).<sup>43</sup>
77. Mr Stillwell also noted that, as the Premises is located in the CBD, gaming patrons at the Premises may come from other municipalities in metropolitan Melbourne, and as such, the estimated transfer rate of 60% may in fact be higher.<sup>44</sup>
78. Mr Stillwell estimated that the 40% of new expenditure will equate to between \$1,680,004 and \$1,856,846 in the first year, and then between \$1,976,475 and \$2,184,525 in the second year.<sup>45</sup>
79. Ms Peterson referred to Mr Stillwell's assessment of new expenditure in the Ratio Report, but she did not provide any commentary or analysis about what Mr Stillwell had concluded. However, in her evidence before the Commission, Ms Peterson said she considered the transfer rate might be as high as 90% (including EGM and food and beverage expenditure). Ms Peterson assessed the potential economic impact associated with additional EGM expenditure as a low benefit.<sup>46</sup>
80. Ms Rosen identified that EGM expenditure not directly associated with people affected by gambling-related harm is considered an economic benefit to the City of Melbourne. She offset this benefit against the number of venues in the CBD that people not affected by gambling-related harm can access. Mr Rosen ultimately concluded that the potential economic impact associated with EGM expenditure not associated with gambling-related harm is assessed as marginal.<sup>47</sup>

#### *The Commission's view*

81. In all the circumstances, the Commission accepts the evidence of Mr Stillwell in relation to anticipated gaming expenditure as outlined in paragraphs 74 to 77 above, and finds that:
- (a) It is likely that within the first 12 months of operation of EGMS at the Premises, EGM expenditure will be between \$4,200,009 and \$4,642,116;

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<sup>43</sup> SW Report, p 18.

<sup>44</sup> SW Report, p. 18.

<sup>45</sup> SW Report, p. 18.

<sup>46</sup> Transcript, p. 182.

<sup>47</sup> SymPlan report, p. 42.

- (b) In subsequent years, EGM expenditure at the Premises is likely to rise to between \$5,201,250 and \$5,748,750, though those figures include the “Covid adjustment of 95%”. If the Covid adjustment is not included, the estimated figures are between \$4,941,188 and \$5,461,313 per annum.
- (c) New EGM expenditure (which is estimated to comprise no more than 40% of all EGM expenditure) at the Premises will be between \$1,680,004 and \$1,856,846 in the first year of operation of EGMs, and will rise to between \$1,976,475 and \$2,184,525 per annum in the second and subsequent years.
82. In assessing the extent of the benefit of gaming expenditure not associated with problem gambling, the Commission has had regard to all the evidence before it. The Commission notes that as a result of the estimated high amount of transfer from other gaming venues, the overall increase of gaming expenditure in City of Melbourne is not great. The Premises will also have a modest number of EGMs, which will be in close proximity to a number of existing venues in the Melbourne CBD (including the Melbourne Casino).
83. Accordingly, the Commission given the benefit of gaming expenditure not associated with problem gambling no weight to marginal weight.

#### Expenditure on capital works

84. A potential economic benefit associated with this Application is that arising from the expenditure on the proposed development of the Premises.
85. The Applicant estimates that the fit-out of the Premises will cost approximately \$5.4 million. The Commission refers to the evidence of Mr James Bate, architect, which provided plans of the Premises, albeit detailed plans of the gaming room in the Premises were not provided.
86. Mr Kayes’ evidence was that the fit-out of the Premises would not proceed if the Application before the Commission was unsuccessful. Ms Peterson referred to this in the Ratio Report, and observed she understood that if the Application was unsuccessful, the tenancies in the subject site would be used for retail purposes.<sup>48</sup>
87. Ms Rosen gave evidence that the estimated amount for the capital works is an economic benefit in the short term. In the SymPlan Report, Ms Rosen groups expenditure on capital works, supply contracts and complementary expenditure together, and assesses these three factors collectively under the description “economic stimulus”.<sup>49</sup> Ms Rosen observed that “*should the application not be successful, investment arising from works associated with other tenancies [in the building in which the Premises is to be located] would also create an economic stimulus*”. Ms Rosen went on to state that “*the economic stimulus is likely to be marginally positive if the supply contracts and complementary expenditure benefit the City of Melbourne, and if the refusal of the proposal precludes the development of the proposal site for alternate uses*”.<sup>50</sup>

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<sup>48</sup> Ratio Report, p. 13.

<sup>49</sup> Symplan Report, p. 41.

<sup>50</sup> Symplan Report, p. 41.

### *The Commission's view*

88. The Commission accepts Mr Kayes' evidence that the development would not occur without the approval of this Application. Further, the Commission is mindful of VCAT's decision in *L'Unico*, where it held (albeit in relation to an application for an increase of the number of existing EGMs) that it is not appropriate under the relevant statutory framework to either engage in a 'project feasibility' or 'existing financial capacity' assessment. VCAT determined that the appropriate approach (with two provisos)<sup>51</sup> was to simply take the proposal for what it is and then assess its likely social and economic impacts as per the 'no net detriment' test. In this Application, the Commission considers that neither of those two provisions are enlivened, and it has a sufficient degree of confidence that the development of the Premises (at least in the manner presented to the Commissions) would not proceed if this Application was unsuccessful.
89. The Commission regards the expenditure of capital works to be a benefit. Here, the Commission accepts that the fit-out of the Premises will cost approximately \$5.4 million. In determining the weight to be attached to this benefit, while \$5.4 million is, of itself, a reasonably significant sum associated with the fit-out of the Premises, there was evidence before the Commission that it is comparatively minor when considered as a proportion of the overall economic activity in the City of Melbourne.
90. The Commission also notes that the Applicant presented no evidence, nor any commitment nor intention that any of the builders, contractors or tradespersons working on the fit-out would either live in or be based in the Council. Accordingly, there was no evidence before the Commission that the capital expenditure on the fit-out of the Premises will directly benefit the community of the City of Melbourne. In the circumstances the Commission accords this benefit no weight to marginal weight.
91. In making this assessment, the Commission notes it is important that the benefits associated with the capital works are not double-counted, having regard to the social impact that may result from the proposed development of the Premises, and the services at the Premises. The social aspect of the development of the Premises has been considered separately later in these Reasons.

### Employment creation

92. The economic benefit of employment creation arising from this Application can be described as both short term and long term, which includes:
- (a) short term employment benefits that arise during the development of the Premises (related to but separate from the economic benefit associated with the expenditure on capital works); and

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<sup>51</sup> At [30] – [31]: the first proviso was that common sense suggests that there needs to be a reasonable degree of corroborating information, to at least provide comfort that the 'estimated project value' of the proposed works is more than just an ambit or 'back of the envelope' calculation. As such, less weight should be given to purported proposed works where there is a concern about the bona fides of the 'project value' figure being relied upon. The second proviso was that it seemed appropriate to recognise that the proposed works may in practice be easier to achieve financially if the Application were approved.

- (b) longer term employment benefits arising from the Premises commencing operation, including the gaming lounge and the 50 EGMs located within it. (As noted at paragraphs 86 to 88 above, the Commission accepts that the capital works and the ongoing operation of the Premises will not occur if the Commission does not approve the application for EGMs in the Premises).
93. In relation to short term employment benefits, the extent of the works are described generally in paragraphs 41 to 43 above. As noted above, it is not clear to what extent, if at all, this work will be undertaken by individuals who live in the City of Melbourne.
94. Based on the evidence, the Commission concludes that it should not place any weight on short term employment creation as a further economic benefit. To the extent that it arises in relation to this Application, the Commission considers that the value of this benefit has been captured in the benefit associated with the expenditure on capital works considered in paragraphs 84 to 91 above.
95. Separate from the short term economic benefits associated with the capital works is the potential benefit associated with longer term employment arising from the Application.
96. In relation to this benefit, the evidence was that 42 full-time equivalent (**FTE**) positions would be created at the Premises, including nine FTE positions in the gaming room. The Applicant did not provide any evidence, intention nor commitment to source employees who live in the City of Melbourne.
97. There was evidence before the Commission that there are presently a significant number of available jobs available in the Melbourne CBD and surrounding areas, especially in the hospitality industry.<sup>52</sup>

#### *The Commission's view*

98. The Commission is of the view that granting the Application will generate employment at the Premises, and this is a positive economic benefit. The Commission accepts the Applicant's evidence that 42 FTE positions will be created if the Application is successful, including nine FTE positions in the gaming room. While it is possible that some of persons filling those positions will reside in the City of Melbourne, as already noted, the Applicant provided no evidence, nor indicated any intention or commitment to try to employ staff living in the City of Melbourne area.
99. In considering all the relevant matters, the Commission gives this benefit no weight to marginal weight.

#### *Complementary expenditure*

100. Complementary expenditure is the increased economic activity in the LGA, apart from gaming expenditure, that may arise if the Application is granted. However, the extent of this benefit will likely depend upon a range of factors, including the extent to which the expenditure is a consequence of new spending. An example of new spending may include additional people coming to the City of Melbourne as tourists, or for business,

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<sup>52</sup> See, for example, the evidence of Ms Peterson at transcript pp. 118 – 119.

compared to transferred complementary expenditure from other venues within the municipality, and the extent to which that complementary expenditure results in additional spending on local goods and services.

101. In the Application Form, the Applicant estimates complementary expenditure to be in the amount of \$3.2 million in the first 12 months of operation, consisting of food and beverage sales.
102. Ms Peterson considered this to be a low economic benefit.<sup>53</sup> In considering both supply contracts and complementary expenditure, she also estimated that up to 90% of the complementary expenditure would be transferred from other venues. Ms Rosen considered that the economic benefits would be marginally positive *“if the supply contracts and complementary expenditure benefit the City of Melbourne”*.<sup>54</sup>

#### *The Commission's view*

103. While the Commission notes the Applicant's estimate of \$3.2 million for complementary expenditure in the first 12 months of operation, it considers that there is some uncertainty whether that estimate will be realised, given the broad assumptions made by the Applicant in calculating that amount. Further, the Commission notes the evidence before it that a very high proportion (up to 90%) of the food and beverage sales are likely to be transferred from other venues within the immediate vicinity of the Premises and the wider CBD.
104. The Commission also notes that the estimated sum of \$3.2 million in the first 12 months of operation, whilst not insignificant, is comparatively small when considered as a proportion of the larger economic profile of the City of Melbourne.
105. The Commission accords the complementary expenditure associated with the Application no weight to marginal weight. The Commission is also careful here not to place any weight on the impact associated with supply contracts as this impact is considered below in relation to the 'no net detriment' test.

#### Supply contracts

106. The Applicant considers that the approval of the Application will result in contracts for food and beverage suppliers, various gaming and non-gaming service providers (eg, cleaners, security, rubbish removals) and other contracts for the Premises (eg utilities), all of which are separate from the anticipated gaming revenue to be generated through the operation of EGMs.
107. In the annexure to the Application Form, the Applicant estimated that the value of supply contracts would be \$2 million in the first 12 months. That amount is made up by the following: food supplies: \$620,000; beverage supplies: \$740,000; services contracts: \$441,000; utilities: \$110,000; subscriptions: \$55,000; and gaming service contracts: \$43,000.

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<sup>53</sup> Ratio Report, p. 55.

<sup>54</sup> SymPlan report, p. 41.

### *The Commission's view*

108. While the value of the estimated supply contracts is not insubstantial, the Commission has considered the information provided by the Applicant in its Application Form, which contains little specific information about the contractors that will be engaged to provide such services. The Applicant did not proffer any evidence on this issue, nor did it indicate an intention or commitment to use suppliers of food and beverages and other services who are located within the City of Melbourne.
109. The Commission accepts the Applicant's evidence that there will be supply contracts in the amount of \$2 million in the first 12 months of operation of the Premises if the Application is granted. The Commission accepts that amount is not insignificant, but it notes that it is comparatively small when considered within the larger economic profile of the City of Melbourne.
110. Accordingly, the Commission gives this economic benefit no weight to marginal weight.

### Community contributions

111. In determining the net economic and social impact of applications, both the Commission<sup>55</sup> and VCAT<sup>56</sup> have regularly treated community contributions as a positive benefit.
112. In its Application, the Applicant proposes a community contribution of \$75,000 per annum. For the Applicant's proposed contribution to be regarded as a benefit associated with the Application, it is necessary that it is properly regarded as a community contribution and that it will be the result of the Application being granted. In assessing the weight to be attached to this benefit, it is important that the Commission does not conflate this benefit with the social benefit associated with community contributions (which is considered separately below).
113. The Applicant's evidence was that if the Application is successful, it will set up a committee (which will include a Council representative, if the Council agrees, or a community representative nominated by the venue operator) to determine how to expend those funds each year.
114. The Applicant also indicated that it would provide a meeting room that could be used by community and sporting groups without cost, at a minimum from opening until 12 noon daily and otherwise by arrangement. The Commission has considered this benefit under Social Benefits below in these Reasons.

### *The Commission's view*

115. Having regard to the evidence and submissions made with respect to the community contributions that are set out in paragraphs 168 to 171 below, such contributions can also have a positive economic impact. The Commission considers that community contributions and their impact on local community organisations in the Council are an economic benefit.

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<sup>55</sup> See, for example, *Richmond Football Club Ltd at Wantirna Club Premises* [2015] VCGLR 31 (24 July 2015).

<sup>56</sup> See, for example, *Kingfish; Bakers Arms*.



116. The Applicant has proposed community contributions in the sum of \$75,000 per annum, to be given to one or more charitable organisations. While the Applicant has advanced high-level plans about this issue, the Commission was not provided with details of the potential recipients of those contributions (though it is noted the Applicant's evidence was that some charitable organisations had been approached but had declined any prospective donations from a venue operating EGMs).
117. The Commission considers the economic benefit of the Applicant's intended community contributions to be given no weight to marginal weight.

#### *Increased gaming competition in the City of Melbourne*

118. Increasing competition in gaming in the City of Melbourne is a factor in light of the statutory purpose of Chapter 3 of the Act,<sup>57</sup> and the consequential consumer benefits that derive from such competition.
119. The VGCCC Report identifies that, on the basis of an estimated adult population in the City of Melbourne of 183,942, this Application would (if approved):
- (a) increase the number of approved venues within the City of Melbourne by one to a total of 11 (albeit one (The Celtic Club) has not operated since 2017);
  - (b) increase the overall number of EGMs within the City of Melbourne by 50 to 740; and
  - (c) increase the EGM density of the City of Melbourne from 4.02 EGMs per 1,000 people to 4.29 EGMs per 1,000 people (compared with the metropolitan average of 4.6 EGMs per 1,000 people and the Victorian average of 4.9 EGMs per 1,000 people).<sup>58</sup>
120. As noted at paragraphs 75 to 76, 78 and 82 above, the evidence before the Commission is that should the Application be approved, there will be a high transfer rate (60% to 90%) from other venues particularly in the Melbourne CBD.

#### *The Commission's view*

121. The Commission finds that granting the Application will increase gaming competition in the City of Melbourne (and specifically in the Melbourne CBD) by providing an additional venue at which patrons may choose to play EGMs. This is given additional force because of the evidence of the expected high transfer rate.
122. The gaming lounge in the Premises will be located within a new venue that will have aesthetic design features. That may place some pressure on some venues in the Melbourne CBD to upgrade their facilities. The estimated high transfer rate of 60% to 90% indicates that the Premises is viewed as a competitive gaming venue, if the Application is granted.

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<sup>57</sup> Section 3.1.1(2).

<sup>58</sup> VGCCC Report, pp. 12 – 13.

123. However, it is noted that the number of EGMs in the Premises will be small when considering the overall number of EGMs in the Melbourne CBD, as well as the number of EGMs at the Melbourne Casino (located approximately 1 kilometre to the south of the Premises).

124. The Commission gives this economic benefit no weight to marginal weight.

#### Gambling expenditure associated with problem gambling

125. To the extent that a portion of new expenditure is attributable to problem gambling, this represents an economic disbenefit.<sup>59</sup> In assessing the extent of this disbenefit, the Commission recognises that it does not include transferred expenditure because such expenditure cannot exacerbate problem gambling.<sup>60</sup> Also in assessing this impact (and other impacts involving problem gambling), the Commission recognises that harms associated with problem gambling may be experienced directly and indirectly as a consequence of gambling undertaken by individuals within a number of problem gambling severity index risk factors, which include: 'problem' gamblers, 'moderate-risk' gamblers, and 'low-risk' gamblers, as well as across the community more broadly.

126. In assessing the extent of the economic disbenefit of gambling expenditure associated with problem gambling below, the Commission has had regard to expenditure evidence and its findings set out in paragraphs 74 to 82 above.

#### The vulnerability of the City of Melbourne and the catchment area

127. The extent to which it can be considered that new expenditure will be associated with problem gambling, and hence may be regarded as a disbenefit associated with this Application, will be influenced by the socio-economic status and vulnerability of the community in the area surrounding the Premises. This is because communities characterised by socio-economic disadvantage are regarded as more vulnerable to problem gambling and the negative impacts of gambling.

128. The VGCCC Report identifies that, within the 2.5 kilometre radius of the Premises:

- (a) the SEIFA rankings show that, of the SA1s within a 2.5 kilometre radius of the Premises, 15.7% are in the first quintile, 19.5% are in the second quintile, 12.4% are in the third quintile, 17.6% are in the fourth quintile, and 34.8% are in the fifth quintile;<sup>61</sup>

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<sup>59</sup> The Commission recognises that on review, the key likely disbenefit of 'problem gambling' has for convenience been treated under the heading of 'social impacts' in various instances: see *Mount Dandenong Tourist Hotel Pty Ltd v Greater Shepparton CC* [2012] VCAT 1899 at [121] and following; *Kingfish* at [47]. However, this is not an approach that has been uniformly adopted at the VCAT: see, for example: *Mount Alexander* at [178] and following. For completeness, the Commission considers both the economic and social impacts of problem gambling in its assessment of this Application and is careful to not double-count in so doing.

<sup>60</sup> See *Bakers Arms* at [113]; *Kilsyth and Mountain District Basketball Association Inc v Victorian Commission for Gambling Regulation* [2007] VCAT 2 at [40].

<sup>61</sup> VGCCC Report, p. 36.

- (b) the unemployment rate is 6.0%, being higher than the employment rate of the City of Melbourne which is 5.32%, and higher than the metropolitan Melbourne and Victorian rates of 5.97% and 5.56% respectively;<sup>62</sup> and
- (c) housing stress is 100%, which is higher than housing stress in the City of Melbourne which is 86.9%, and higher than the metropolitan Melbourne and Victorian averages at 64.5%% and 60.2% respectively.<sup>63</sup>

129. In the Ratio Report and in her evidence at the Hearing, Ms Peterson notes that the socio-economic characteristics of the primary and secondary catchment areas and the LGA include that:

- (a) Based on the 2016 Census data, the catchment area currently exhibits a mixed-level of socio-economic disadvantage, evidenced by:
  - (i) SEIFA rankings indicating “pockets of significant disadvantage scattered throughout the CBD and in the northern portion of the 2.5 km radius, with a number of SA1’s location in the 2<sup>nd</sup> or 3<sup>rd</sup> decile, however these areas are located closer to a number of other gaming venues within the City of Melbourne. There are also large portions of the 2.5 km radius that sit in the 8<sup>th</sup> decile and above”;<sup>64</sup>
  - (ii) generally higher levels of housing stress, particularly those renting in the City of Melbourne, where the proportion of households in housing stress (34.6%) is more than triple the rate of households in housing stress in metropolitan Melbourne (11.0%) and Victoria (10.4%). However, the rate of households with mortgage payments in the City of Melbourne (4.6%) was less than the rate in metropolitan Melbourne (8.1%) and Victoria (7.5%);<sup>65</sup>
  - (iii) the unemployment rate for the City of Melbourne was 5.4%, compared to 6.2% in metropolitan Melbourne and 6.6% in Victoria. The unemployment rate in the Melbourne SA2 where the venue will be located is 5.7%;<sup>66</sup>
- (b) in relation to the future profile of the City of Melbourne, the current population of 135,959 (as at 2016) is projected to increase by 78.1% to 242,210 in 2026, and by 115.2% to 292,630 by 2036;<sup>67</sup>
- (c) Based on the VCGLR statistics:

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<sup>62</sup> VGCCC Report, p. 39.

<sup>63</sup> VGCCC Report, p. 32.

<sup>64</sup> Ratio Report, pp. 33 – 34.

<sup>65</sup> Ratio Report, pp. 36 - 37.

<sup>66</sup> Ratio Report, p. 37.

<sup>67</sup> Ratio Report, p. 25.

- (i) the City of Melbourne has a gaming machine density of 3.97 EGMs per 1,000 adults, which is lower than both the metropolitan (4.68) and state (5.02) averages;
  - (ii) gaming expenditure per adult in the City of Melbourne is \$344, which is lower than both the metropolitan (\$384) and state (\$378) averages; and
  - (iii) the City of Melbourne has a higher number of adults per venue (17,610) than the metropolitan (13,043) and state (10,746) averages;<sup>68</sup>
- (d) information from the Victorian Responsible Gambling Foundation indicated that the local gamblers help provides services in one location in the Melbourne CBD, being the Melbourne Counselling Service. During the period 1 July 2019 to 30 June 2021, there were 119 unique clients who presented for financial counselling and 282 unique clients who presented for therapeutic counselling. Within the inner north catchment area, 97.4% of clients receiving support within five business days of being referred to a Gamblers Help service;<sup>69</sup> and
- (e) while the Productivity Commission estimated in the order of 40% of expenditure results from problem gambling, seeking to attribute 40% of increased gaming expenditure from problem gambling is a rudimentary approach, not accurate or useful for determining the impact of granting the Application. However, it is reasonable to assume that there is a risk of an increase in problem gambling as a result of a new venue being introduced.<sup>70</sup>

130. Ms Rosen's evidence was that "the City of Melbourne would not be considered to be experiencing high levels of socio-economic disadvantage. Nevertheless the City of Melbourne has the second highest level of socio-economic disadvantage of all adjoining municipalities". Ms Rosen observed that the "potential impact on the health and wellbeing of the community of the City of Melbourne is therefore likely to be limited, particularly given there are already several opportunities to use EGMs in the municipality".<sup>71</sup>

#### *The Commission's view*

131. The Commission agrees that it is appropriate in the circumstances of this Application to pay particular attention to the potential for gambling-related harm to people living within 2.5km from the Premises, whilst also considering the potential for gambling-related harm to people living further afield. The Commission finds that the profile of the patrons who will use the EGMs at the Premises if the Application is granted is uncertain. It is likely patrons will constitute persons living in the local community (that is, the immediate surrounds of the

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<sup>68</sup> Ratio Report, p. 21. The report noted that those figures do not include the EGMs at Crown Casino.

<sup>69</sup> Ratio Report, pp. 44 – 45.

<sup>70</sup> Ratio Report, p. 44.

<sup>71</sup> SymPlan Report, pp. 44 – 45.

Premises), as well as persons attending the Melbourne CBD for work, commercial, educational, social, recreational and other purposes.

132. Accordingly, the Commission finds that the socio-economic profile of patrons of the Premises will be mixed. While the local community presents some risk factors (most noticeably the high levels of rental stress), these risk factors may be diluted depending on who will be the patrons of the Premises. The Commission also notes that the gaming lounge in the Premises is a modest size. While there may be an increase in problem gambling expenditure at the Premises, the high rate (60% to 90%) of transfer expenditure from existing gaming venues in the Melbourne CBD lessens, to some extent, the Commission's concerns about this aspect of this consideration.

#### *The convenience of the Premises*

133. Mr Jeynes, in the PVS Report, stated that "the Venue's location together with the restricted views and entrance to the gaming room does not increase the likelihood for impulse gambling, as individuals would need to make a conscious decision to attend the Venue".<sup>72</sup>
134. Ms Rosen considered that the location of the Premises was in close proximity to a number of businesses and services that had gambling-sensitive use, and as such, "could contribute to convenience gambling and / or is directly associated with people affected by or vulnerable to gambling-related harms".<sup>73</sup>

#### *The Commission's view*

135. While Mr Kayes may wish the Premises to be seen as a destination venue, and while the plans presented to the Commission suggest that the Premises will have impressive aesthetic and design features, there was little evidence before the Commission as to why the Premises will of itself be a more attractive venue than other food and beverage businesses in that part of the Melbourne CBD or the whole of the CBD, however, the Commission notes the evidence that the transfer rate could be as high as 90%.
136. The Commission largely agrees with the Council's evidence. The Commission considers the Premises and the location of the Premises to be more of a convenience than a destination (though the two descriptors are not binary opposites).

#### *Proposed Responsible Service of Gambling measures*

137. In considering the extent to which any new expenditure may give rise to problem gambling, the manner in which gaming is to be conducted at the Premises is a relevant factor.
138. The Applicant relied on various pieces of evidence in respect of this consideration, including:

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<sup>72</sup> PVS Report, p. 5.

<sup>73</sup> SymPlan Report, p. 10.

- (a) The statement and evidence of Mr Jay Costa, who is presently the venue manager at the New Bay Hotel (the Applicant's existing premises that has EGMs) which includes responsibility for the gaming lounge, and who will move to the Premises to be the venue manager if the Application is granted;
  - (b) the statement and evidence of Mr Kayes (director of the Applicant);
  - (c) the report and evidence of Mr Andrew Jeynes from PVS Australia Pty Ltd, which detailed the RSG processes (including staff training) at the Applicant's existing premises; and
  - (d) the Ratio Report and evidence of Ms Peterson.
139. Mr Costa has been the venue manager of the New Bay Hotel for several years and will become the venue manager of the Premises if the Application is approved. He demonstrated a solid understanding and application of RSG practices. He gave evidence about the various RSG practices at the New Bay Hotel, including staff training through, and ongoing contact with, the local Gambler's Help Venue Support Service.
140. Mr Costa accepted that the patron profile at the Premises is likely to be quite different to that of the New Bay Hotel, and gave evidence that he would tailor his approach to the different patron mix at the Premises.
141. Mr Costa also gave evidence that the Premises, if the Application is successful, will engage Leigh Barrett & Associates to assist in the development of an RSG program at the Premises and to provide ongoing assistance and training, noting that this firm had been recently engaged at the New Bay Hotel.
142. While Mr Kayes did not have as much hands-on experience of RSG, the Commission notes his evidence that he has delegated the responsibility for RSG practices at the New Bay Hotel to Mr Costa (and other staff), and that Mr Costa would take on the same role at the Premises. Mr Kayes gave evidence that he would make a significant investment to ensure all EGMs at the Premises are entirely cashless. Also, Mr Kayes committed to operating hours for the gaming room of 9am to 1am, which would provide for an 8-hour break in play.
143. Mr Jeynes in the PVS Report and in his oral evidence observed that the Applicant had demonstrated a commitment to engage Leigh Barrett & Associates at the Premises, noting that firm had been engaged by the Applicant at the New Bay Hotel. Mr Jeynes' evidence was that if the Application is successful, the Premises will have "negligible impact on the prevalence of problem gambling in the City of Melbourne".<sup>74</sup> He relied on the following matters in support of that conclusion:
- (a) the relatively modest size of the gaming room and the number of EGMs;
  - (b) the layout of the gaming room and that there will be three staff in the gaming room at all times it operates;
  - (c) the Applicant's commitment to RSG best practices;
  - (d) the hours of operation of the gaming room at the Premises;

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<sup>74</sup> PVS Report, p. 5.

- (e) the Applicant's commitment to ensuring that it establishes a meeting and training framework with the local Gambler's Help Venue Support Service, before the gaming room commences operation at the Premises if the Application is granted; and
- (f) the impressive "customer interaction processes" that the Applicant has in place at the New Bay Hotel and which will be adopted at the Premises, and that a "key" aspect is the staff at a gaming venue, which he considered to have been done very well at the New Bay Hotel.<sup>75</sup>

144. Ms Peterson's report and her evidence drew upon the matters set out in the preceding paragraphs, and she ultimately concluded that there is unlikely to be an increased risk of problem gambling to the local community.

#### *The Commission's view*

145. The Commission finds that there was compelling evidence about the management of responsible gambling at the Premises. The evidence before the Commission is that Mr Jay Costa will be the venue manager and that he will bring with him a depth of knowledge and experience gained at the New Bay Hotel and that he has a genuine commitment to RSG practices.

146. The estimated amount of gaming expenditure at the Premises is set out in paragraphs 74 to 77 above. As already observed in these Reasons, the evidence before the Commission was that there is an estimated high rate (60% to 90%) of transfer from existing gaming venues in the Melbourne CBD. The gaming lounge at the Premises is also a modest size, with 50 EGMs proposed. The Commission accepts that there will be an increase in problem gambling expenditure at the Premises, but that is to be viewed in the context of the matters just referred to.

147. However, there will still be a portion of new expenditure (between 10% and 40%) that is not transferred expenditure from existing venues in the Melbourne CBD. There will be a portion of this new expenditure on gaming that will be attributable to problem gambling.

148. In relation to the management of the premises, the Commission is satisfied that responsible gambling and harm minimisation initiatives, and the protective factors about which the Applicant's witnesses gave evidence, will assist in minimising the potential risk of an increase in problem gambling.

149. Balancing those matters, the Commission finds that there will be an economic disbenefit associated with problem gambling as a result of this Application, on which it places marginal weight.

#### *Potential diversion of non-gaming trade from retail / non-gaming and other gaming facilities*

150. Mr Stillwell gave evidence on behalf of the Applicant that the introduction of EGMs at the Premises would cause a diversion of trade, in the form of transferred expenditure, from other gaming venues particularly in the Melbourne CBD. He estimated that transferred expenditure to be as much as 60%. Ms Peterson estimated that the transferred expenditure would be between 60% and 90%.

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<sup>75</sup> PVS Report, p. 5, and transcript of Mr Jeynes' evidence, pp 102 – 104.

151. There was also evidence before the Commission that there will be a similar high transfer rate of non-gaming trade from other proximate venues. However, given the number of other facilities both in the immediate area surrounding the Premises and in the wider Melbourne CBD and City of Melbourne, any diversion of non-gaming trade will be diffused between the large number of venues in those areas.

#### *The Commission's view*

152. In relation to the potential diversion of trade from other gaming venues, the Commission refers to and relies on its findings regarding the anticipated transferred expenditure from other gaming venues, where the Commission found that transferred expenditure could be as high as 90%.

153. The Commission accepts that the diversion of non-gaming expenditure from other venues (both gaming and non-gaming) in the City of Melbourne is also likely to be high, but will be diffused amongst many venues. As such, the diversion of trade is unlikely to materially impact any single retail facility. Further, the Commission notes the location of the Premises in the heart of the Melbourne CBD, home to a sizeable residential population and a very significant number of people that come into the Melbourne CBD for employment, business, education and cultural and entertainment reasons.

154. Accordingly, the Commission finds that there is an economic disbenefit associated with the diversion of trade from retail and other gaming facilities within the City of Melbourne as a result of this Application, to which the Commission affords no weight to marginal weight.

#### **Conclusion on economic impacts**

155. After considering the economic benefits of the proposal against the detriments, the Commission considers that, on balance, the proposal is likely to have no impact to a marginally positive impact.

#### **Social Impacts**

156. The materials before the Commission, together with the evidence at the Hearing, detailed a range of social benefits and disbenefits associated with the Application.

#### *Additional and improved services and facilities at the Premises*

157. Ancillary to the capital works expenditure that will occur if this Application is granted, the proposed developments will also result in improved services and facilities being available to the community. Access to such services and facilities is an outcome which the Commission and VCAT have regularly determined is a positive social impact associated with applications of this nature.

158. The nature of the proposed developments has been described in paragraphs 37 to 43, above.

159. Mr Kayes gave evidence that he intends the Premises to be "a world class food and bar operation over the ground floor and basement". Both in his affidavit and in his evidence at the Hearing, he detailed the preparation involved in devising the business plan and consulting with the relevant professionals to best present this Application. Through another company of which he is a director, he has been the gaming nominee at the New Bay Hotel in Brighton since about 2007. He was involved in the renovation of that premises.



160. Ms Rosen considered that the venue does not provide recreational facilities other than the café on the ground floor and the restaurant / bar in the basement. Accordingly, she considered that the Premises would not offer diversity in the range of social, leisure, entertainment and recreation facilities in the City of Melbourne.

*The Commission's view*

161. The Commission find that the Premises would see the introduction into the Melbourne CBD of a venue that has aesthetic design qualities, offering different spaces for different patrons. The Premises would offer both casual and more formal dining options and a new rooftop bar as well as a function room. However, the location of the Premises is in an area of the Melbourne where there are a significant number of facilities that provide dining and bar experiences.

162. The Commission accepts that there is a high number of similar venues in the Melbourne CBD. The Commission finds that the proposed development is a social benefit to which it accords no weight to marginal weight.

163. The Commission has not counted the free use of the function room by community groups as part of this benefit as it has considered this aspect under the heading of the social benefit of community contributions below.

*Increased gaming opportunities for those who enjoy gaming*

164. Related to the economic benefit of increased competition is the social benefit that arises from there being increased gaming opportunities for those who enjoy gaming.

165. The Commission notes the current number and location of EGMs and venues in the City of Melbourne. According to the Commission's Report, the City of Melbourne is ranked 10<sup>th</sup> out of 31 metropolitan LGAs for adult population per venue.<sup>76</sup> Read in context, this indicates that the City of Melbourne is in the bottom third of all metropolitan LGAs for the number of venues based on adult population. Those figures do not factor in the high number of persons that attend the Melbourne CBD from other metropolitan LGAs and across Victoria for various purposes (employment, study, recreation).

*The Commission's view*

166. Having regard to the evidence and submissions made with respect to increased gaming competition in the City of Melbourne and in view of the evidence as to gaming expenditure set out in paragraphs 74 to 82 above, the Commission finds that granting approval of the Application will provide increased gaming opportunities for persons who enjoy gaming. In part, this is demonstrated by the high transfer rate ascribed to the increase in gaming provided at the Premises. Overall, the Commission considers this to be a social benefit on which it places no weight to marginal weight. The Commission is mindful not to double count any benefits considered above under economic benefits.

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<sup>76</sup> VGCCC Report, p. 15. The Council has 16,772 adult persons per venue, compared to the metropolitan average of 13,269 adult persons per venue, and the Victorian average of 10,932 adult persons per venue.

#### *Social benefit derived from increased community contributions*

167. Related to the financial impact associated with increased community contributions, such contributions can also have a positive social impact by improving the social fabric of the community in which they are made. In assessing the weight to be placed on such a benefit, it is important that the Commission does not conflate this benefit with the economic benefit associated with such contributions.
168. The Applicant has committed to making community contributions of \$75,000 per annum to one or more (as yet) unspecified charitable organisations. Mr Kayes gave evidence that some charitable organisations had been approached to see if they were willing to receive some or all of the proposed annual sum of \$75,000. Mr Kayes' evidence was that at least two of those organisations that had been approached expressed an unwillingness to receive any such funds, on the basis that it was associated with EGMs.
169. The Applicant also committed to making available to community and sporting groups, at no charge, the meeting room from opening until 12pm each day, and at other times by arrangement.

#### *The Commission's view*

170. The Commission accepts that the proposed annual community contribution will be a positive social benefit. The Commission accords this no weight to marginal weight.

#### *Possibility of increased incidence and impact of problem gambling on community*

171. Wherever accessibility to EGMs is increased there is always a risk of an increase in problem gambling, which leads to other costs such as adverse health outcomes, relationship breakdowns, emotional harms and other social costs, some of which cannot be quantified. Associated with these costs, the Commission has also considered the economic costs of providing community support services to assist those experiencing such harms. The Commission accepts that, in addition to the economic cost, there is potential for negative social costs through possible increased problem gambling. The Commission also accepts Ms Rosen's evidence that some of the patrons will be from vulnerable groups at risk of gambling harm.
172. The Commission refers to and relies upon the evidence set out in paragraphs 125 to 150 with respect to the economic impact of problem gambling on the community.

#### *The Commission's view*

173. Overall, the Commission finds that this Application will result in the introduction of 50 EGMs in the Melbourne CBD, and that this is estimated to be associated with new expenditure as summarised in paragraphs 74 to 82 above. The Commission's view is that it is a modest but not insubstantial level of new expenditure, which is estimated to increase as the Premises attracts new patrons. However, the Commission also notes that there will be a high level of transferred expenditure (estimated to be between 60% and 90%) from other venues. The Commission also notes the RSG elements identified above, which the Commission accepts would mitigate the impact to some extent.
174. Notwithstanding the estimated amount of transfer expenditure, the Commission accepts that a proportion of the expenditure at the Premises will be associated with new problem gambling. Further, as noted above, the

Commission finds that the catchment area surrounding the Premises does show factors indicating vulnerability to problem gambling, especially in respect of housing stress. The Commission considers the local community to be the population living in and around the immediate area surrounding the Premises, though there will also be patrons from across the City of Melbourne and the wider metropolitan Melbourne area (that is, persons coming into the CBD for work, social and other reasons).

175. While the evidence disclosed some risk factors, there was also evidence of the Applicant's commitment to sound RSG practices at the Premises, and the Applicant's history of implementation of RSG practices at its other venue.
176. The Commission notes the Applicant has committed to the Premises being closed for 8 hours each day, has a modest number of EGMs, that the Applicant intends to make the gaming area in the Premises entirely cashless, and that there will be three staff members in the gaming lounge at all times. The Commission also notes that there are a number of other existing venues in the Melbourne CBD (including the Melbourne Casino) easily accessible to gaming patrons.
177. Weighing all those matters, the Commission considers that granting this Application has the potential to increase the incidence and impact of problem gambling in the City of Melbourne, specifically the Melbourne CBD. As such, the Commission accepts that the disbenefit associated with problem gambling is a negative social impact upon which it places marginal weight to low weight.

#### Community attitude

178. As was determined in *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd and Anor*, the Commission recognises that while community apprehension is not an overriding factor (in the sense that neither this Application nor any application is a referendum on gaming), it is certainly a relevant factor in the consideration of particular social impact as part of the 'no net detriment' test.
179. The evidence before the Commission indicates that there has been a negative community attitude towards the Application. In summary:
  - (a) the Council, as the representative body of the relevant community and charged with statutory duties under various statutes, has made a submission in opposition to the Application and appeared at the Hearing;
  - (b) the SymPlan Report raises feedback from various community and business stakeholders about their concerns about the Application;
  - (c) the Council provided the Commission with a number of objections from residents and businesses about the Applicant's application for a planning permit, many of which raised concerns about the Premises having EGMs; and
  - (d) the Applicant did not conduct any community consultation in an attempt to gauge community views about the Application.

180. At time of writing the Ratio Report, community attitudinal evidence was not available to Ms Peterson. In her report, Ms Peterson weighed the community attitude as having nil disbenefit. In the Ratio Report, Ms Peterson referred to the Court of Appeal's decision in respect of the Romsey Hotel, but she sought to distinguish that decision on a number of bases. Ultimately, Ms Peterson's view, based on the Application and the site of the Premises, was that the Application would not "have any material impact on the psyche of residents".<sup>77</sup> There was no reference in the Ratio Report which indicated that it had conducted any community consultation to gauge community views about the Application.
181. Ms Peterson's evidence at the Hearing was that she did not seek the views of the community. Having considered Ms Rosen's report, Ms Peterson still maintained her weighting in relation to community attitude.
182. Ms Rosen identified community sentiment as a negative social impact that she weighted as 'significant likely'. Ms Rosen sent out a survey to nine stakeholders, seven of which were service providers, and two were criminal defence firms operating in close proximity to the site of the Premises. Ms Rosen received responses from four of the seven service providers (the Salvation Army, the Victorian Association for the Care and Resettlement of Offenders, Youth Projects, and Gambler's Help). Ms Rosen also undertook two telephone interviews with criminal solicitors operating on Hardware Street, near the site of the Premises. The stakeholders' concerns were essentially twofold: first, that the Premises would have EGMs; and secondly, that problem gamblers attend (and will continue to attend) services in close physical proximity to the Premises.
183. Ms Rosen noted that none of the stakeholders identified any social or economic benefits associated with the Application. Ms Rosen stated that the feedback from the stakeholders indicates that the Application, if granted, has "the potential to result in gambling-related harms among people who are at an elevated risk of harm".<sup>78</sup>
184. During the Hearing, the Council provided the Commission with written objections from residents and businesses near the site of the Premises, in response to the Applicant's application for a planning permit. None of those objections supported the application for a planning permit. The objections raised various concerns about the Application, which included the Premises having EGMs.

#### *The Commission's view*

185. The Commission accepts the views of Council that there were community concerns in relation to the Application. However, as noted above, there was also evidence before the Commission about the number of existing gaming venues close to the Premises, as well as the RSG practices that the Applicant will implement at the Premises (supported by the Applicant's RSG practices at its existing venue). Accordingly, the Commission considers community attitudes to be a social disbenefit to which it attributes marginal weight.

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<sup>77</sup> Ratio Report, p. 52.

<sup>78</sup> SymPlan Report, p. 57.

### Conclusion on social impacts

186. After considering the social benefits of the Application against the detriments, the Commission considers that, on balance, the proposal is likely to have a neutral social impact.

### NET ECONOMIC AND SOCIAL IMPACT

187. The ‘no net detriment’ test in section 3.3.7(1)(c) of the Act requires the Commission to weigh the likely positive social and economic impacts of an application against the likely negative social and economic impacts. The test will be satisfied if, following the weighing of any likely impacts, the Commission is satisfied that the net economic and social impacts of approval on the wellbeing of the community will be either neutral or positive.<sup>79</sup>
188. According to Ms Peterson, in considering the various economic and social factors, the Application will have a slightly positive impact on the local community and more broadly with respect to the City of Melbourne.
189. According to Ms Rosen, the Application, if granted, will likely cause or exacerbate gambling-related harms to the community in which it will be located. Ms Rosen opined that those disbenefits will cause disproportionate harm to those who are most at risk. Ms Rosen concluded that, in balancing the various economic and social factors, the impact of the proposal on the community impacted by the Application, if granted, will be negative.
190. After considering the material before it, including the evidence at the Hearing, and weighted as outlined above and summarised in the table at Appendix B to these Reasons for Decision, the Commission has concluded that there will be no net detriment to the social and economic wellbeing of the community in the municipal district in which the Premises are location if the Application is approved.

### OTHER RELEVANT CONSIDERATIONS

191. On the material that has been put before it, the Commission has determined that the ‘no net detriment’ test has been satisfied and the Commission is also satisfied of the other matters in section 3.3.7(1). However, the Commissions has a residual discretion to approve or refuse the Application.
192. The Commission has considered the purposes of the Act generally and Chapter 3 specifically, as well as the relevant policy considerations drawn from the content and objectives of the Act as a whole, and is satisfied that there are no matters that would warrant the Commission exercising its discretion to refuse this Application. Accordingly, the Commission is satisfied that it should approve the Application.
193. The Commission was told during the Hearing that the Applicant would be prepared to accept various conditions. After the conclusion of the Hearing, the Council provided the Commission with proposed draft conditions (dated 4 February 2022). The Commission was then provided with a Letter from the Applicant which responded to Council’s proposed draft conditions, along with a version of Council’s proposed draft conditions that was “marked-up” with the Applicant’s suggested changes and commentary.

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<sup>79</sup> *Mount Alexander* at [52] per Dwyer DP.

194. In granting approval in this Application, the Commission believes it is appropriate that such approval should be subject to conditions. The conditions to the Commission's decision in this matter, imposed under subsection 3.3.9(3) of the Act, are set out in Appendix A (and were previously appended to the Commission's decision of 14 February 2022).

***The preceding 194 paragraphs and the following Appendices are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell, Deputy Chair, and Ms Danielle Huntersmith, Commissioner.***

# Appendix A

Conditions of the Decision of the Commission dated 14 February 2022 to grant the application by Bay Road Hotel Pty Ltd (**Venue Operator**) for approval of the premises, to be known as “The Silk Lounge”, located at 388 Lonsdale Street, Melbourne, Victoria 3000 (**Premises**), as suitable for gaming with fifty (50) electronic gaming machines.

## Conditions imposed under subsection 3.3.9(3) of the *Gambling Regulation Act 2003*

### 1. The Works

- (a) The Premises Approval does not take effect until the Commission has notified the Venue Operator in writing, that the Premises have been inspected for the purpose of section 3.3.7(1)(b) of the *Gambling Regulation Act 2003* and the Commission is satisfied at that time that the Premises are suitable for the management and operation of electronic gaming machines (**EGMs**).
- (b) The approval does not take effect until the Venue Operator satisfies the Commission that the Venue Operator has obtained planning approval permitting the Premises to be used for gaming on gaming machines.
- (c) The approval does not take effect until the works have been completed, to the satisfaction of the Commission, substantially in accordance with the plans prepared by Insite Architects, which were submitted as part of the Application and detailed in the evidence of Mr Bate at the Hearing (**Works**). The Works must be completed by 31 December 2022 (**Completion Date**). The Commission may, upon the request of the Venue Operator, agree to extend the Completion Date. The request must be made in writing not less than sixty (60) days before the Completion Date. Without limiting the matters that may be taken into consideration by the Commission in determining any extension to the Completion Date, any request for an extension of time must include an explanation as to why the Works has not been completed by the Completion Date.

### 2. Community Contributions

- (a) The Venue Operator must make cash contributions in the sum of \$75,000 per annum (indexed to CPI) for as long as any of the fifty (50) gaming machines are operational at the Premises (**Contribution**).
- (b) The Contribution must be allocated each year to not-for-profit community groups and sporting organisations providing services and facilities to residents within the City of Melbourne (**Council**).
- (c) The Contribution must be distributed as determined by a Committee (**Committee**) established by the Venue Operator comprising:
  - (i) Two representatives of the Venue Operator; and

- (ii) One representative of Council, or in the event that Council is unwilling to provide a representative, a community representative nominated by the Venue Operator.
- (d) The Committee must advertise annually in a newspaper circulating in the City of Melbourne area for submissions from not-for-profit organisations providing services and facilities to residents within the City of Melbourne (such as community and sporting organisations), regarding the distribution of the Contribution to be made by the Venue Operator each year. The Committee will assess requests for cash contributions in accordance with guidelines to be established by the Committee.
- (e) If the Contribution is not allocated in each full year in accordance with this condition, the operation of fifty (50) gaming machines must cease immediately for as long as the Contribution (or part thereof) remains outstanding.

### 3. Staffing of the gaming room

- (a) A minimum of three (3) members of staff must be rostered in the gaming room at all times the gaming room is open to members of the public. The cashier may be counted as one of the three (3) members of staff provided the cashier is rostered to work either within the green line area or behind the cashier's desk.

### 4. No service of alcohol or drinks from the cashier's desk

- (a) The cashier's desk in the gaming room must not at any time be used for the sale, supply or service of food or drinks.

### 5. Dedicated Responsible Gambling Officer

- (a) Prior to the commencement of gaming at the Premises, the Venue Operator must appoint a Responsible Gambling Officer (**RGO**). The RGO will be a full-time role. The RGO will:
  - (i) Develop and manage the venue's self-exclusion program (**SEP**);
  - (ii) Focus on implementation and maintenance of harm reduction measures and staff training; and
  - (iii) Establish and maintain relationships with community services operating within the City of Melbourne with the intent of safeguarding vulnerable community members impacted by gambling.

### 6. Making the meeting room available

- (a) The Venue Operator must make the meeting room at the Premises available to community and sporting groups at no charge from opening until 12 noon daily and at other times by arrangement.

### 7. Staff

- (a) Staff are prohibited from using EGMs at the Premises at any time.



## Appendix B

### Summary of social and economic impacts

The following table is a summation of the economic and social benefits and disbenefits considered by the Commission in reaching its decision. The table is to be read in conjunction with the main body of the Reasons for Decision, as the weight attributed to each factor is determined in light of the particular circumstances of the Application and the evidence presented.

#### Economic impacts

|                 | Impact   | Paragraph reference | Comments relevant to weight  |
|-----------------|--|---------------------|--|
| <b>Benefits</b> | <i>Gaming expenditure not associated with problem gambling</i> | 74 - 83             | <p>The portion of new expenditure not attributable to problem gambling is an economic benefit.</p> <p>It is estimated that the Premises in the first 12 months of its operation will earn expenditure from gaming in the amount of between \$4,200,009 and \$4,642,116. It is estimated that after the initial 'ramp up' period (not defined by the Applicant), the Premises will earn expenditure in the amount of \$4,941,188 to \$5,461,313 per annum. Some of that expenditure will not be associated with problem gambling.</p> <p>Transferred expenditure is estimated to be between 60 percent and 90 percent.</p> <p>The Commission's assessment of this benefit takes account of the expected high amount of transfer from other venues, so the overall increase is not great. Also, the Premises will have a modest number of EGMs and there are a number of other existing venues in the Melbourne CBD (including the Melbourne Casino) easily accessible to gaming patrons.</p> <p>No weight to marginal weight.</p> |

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|  | <i>Expenditure on capital works</i> | 84 - 91   | <p>The Applicant estimated that the development of the Premises in the pre-existing building at the site will cost \$5.4 million. While that amount is significant on its own, there is evidence before the Commission that it is comparatively minor when considered as a proportion of the overall economic activity in the City of Melbourne.</p> <p>The Applicant did not provide any information, nor any intention (nor commitment) to source employees or contractors to undertake the capital works who live in or are based in the City of Melbourne.</p> <p>No weight to marginal weight.</p> |
|  | <i>Employment creation</i>          | 92 - 99   | <p>The Applicant estimated that, if successful, there will be 42 FTE jobs at the Premises, including 9 FTE jobs in the gaming room.</p> <p>The Applicant did not provide any information, nor any intention (nor commitment) to source employees for the Premises from within the City of Melbourne.</p> <p>There was evidence before the Commission that there are a significant number of available jobs at present, especially in the hospitality industry, in the Melbourne CBD and surrounding areas.</p> <p>No weight to marginal weight.</p>   |
|  | <i>Complementary expenditure</i>    | 100 - 105 | <p>The Applicant estimated that the complementary expenditure would be approximately \$3.2 million in the first 12 months of operation. While that amount is not insignificant, it is comparatively small when considered within the larger economic profile of the City of Melbourne.</p> <p>Also, evidence before the Commission was that up to 90 percent of that amount is likely to come from transferred expenditure from other venues, of which there are a significant number in the immediate area surrounding the location of the Premises.</p> <p>No weight to marginal weight.</p>          |
|  | <i>Supply contracts</i>             | 106 - 110 | <p>The Applicant estimated that supply contracts would be worth approximately \$2 million in the first 12 months of operation.</p> <p>While that amount is not insignificant, it is comparatively small when considered within the larger economic profile of the City of Melbourne.</p>  |

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|                    |  |           | <p>The Applicant did not indicate a commitment or intention to use suppliers of food and beverage and other services from within the City of Melbourne.</p> <p>No weight to marginal weight.</p>   |
|                    | <i>Community contributions</i>                               | 111 - 117 | <p>The Applicant has proposed community contributions in the sum of \$75,000 per annum, to be given to one or more charitable organisations. While the Applicant has advanced high-level plans about this issue, the Commission was not provided with details of the potential recipients of those contributions (though it is noted the Applicant's evidence was that at some charitable organisations had been approached but had declined any prospective donations from a venue operating EGMs).</p> <p>The Applicant's evidence was that if the Application is successful, it will set up a committee (which will include a City of Melbourne representative, if the City of Melbourne agrees, or a community representative nominated by the venue operator) to determine how to expend those funds each year.</p> <p>The Applicant also indicated that it would provide a meeting room that could be used by community and sporting groups without cost, at a minimum from opening until 12 noon daily and otherwise by arrangement. The Commission has considered this benefit under Social Benefits.</p> <p>No weight to marginal weight.</p> |
|                    | <i>Increased gaming competition in the City of Melbourne</i> | 118 - 124 | <p>The Application will increase gaming competition in the City of Melbourne by providing an additional venue. The gaming lounge will be located within a new venue that will have architectural aesthetic design features. That may place some pressure on some venues in the Melbourne CBD to upgrade their facilities and the venue is estimated to have a high transfer expenditure of between 60 percent and 90 percent indicating it is viewed as a competitive gaming venue</p> <p>However, it is noted that the number of EGMs in the Premises is small when the overall number of EGMs in the Melbourne CBD (and the Melbourne Casino) is considered.</p> <p>No weight to marginal weight.</p>  |
| <b>Disbenefits</b> | <i>Gambling expenditure associated with problem gambling</i> | 125 - 149 | <p>The portion of new expenditure attributable to problem gambling is an economic disbenefit.</p>  |

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|  |   |           | <p>The profile of patrons using EGMs in the Premises is uncertain. It is likely patrons will constitute persons living in the local community (that is, the immediate surrounds of the Premises) as well as persons attending the Melbourne CBD for work, social, recreation and other reasons.</p> <p>The location of the Premises has some risk factors including high levels of rental stress, though this factor may be lessened depending on the makeup of the patrons attending the Premises.</p> <p>The gaming lounge in the Premises is a modest size. There will be an increase in problem gambling expenditure at the Premises, but there will be a high rate (60 percent to 90 percent) of transfer from existing venues in the Melbourne CBD.</p> <p>There was evidence before the Commission that the Applicant has a strong commitment to RSG practices, and that it also has a demonstrated history of robust RSG practices at the other venue it operates that has EGMs.</p> <p>Marginal weight.</p> |
|  | <i>Potential diversion of trade from retail and other gaming facilities</i> | 150 - 154 | <p>There was evidence before the Commission that the Premises would have a high transfer rate (60 percent to 90 percent) from other gaming venues in the Melbourne CBD.</p> <p>There was also evidence before the Commission that there will be a similar high transfer rate of non-gaming trade from other proximate venues. However, given the number of other facilities in the City of Melbourne, any diversion of non-gaming trade will be diffused.</p> <p>No weight to marginal weight.</p>   |

### Social impacts

|                 | Impact   | Paragraph reference | Comments relevant to weight   |
|-----------------|--|---------------------|---|
| <b>Benefits</b> | <i>Additional and improved services and facilities at the Premises</i> | 157 - 163           | <p>The Applicant proposes to fit out an existing building on parts of the ground floor, basement and rooftop.</p> <p>The Premises would have a café lounge and the gaming lounge on the ground floor, a sports bar / more formal dining area in the basement, and a dedicated</p> |

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|                    |   |           | <p>rooftop bar for pre-booked functions (which would not be accessible to the general public). The evidence before the Commission was that the Premises would have aesthetic design qualities offering different spaces for different patrons.</p> <p>The location of the Premises is in a part of the Melbourne CBD where there is a significant number of facilities that provide dining and bar experiences.</p> <p>While the development would bring a social benefit, the volume of similar venues reduces the weighting given to this benefit.</p> <p>No weight to marginal weight.</p>  |
|                    | <i>Increased gaming opportunities for those who enjoy gaming</i>                      | 164 - 166 | <p>The Premises will provide another gaming venue in the Melbourne CBD. It will contain a modest number of EGMs. The evidence before the Commission was that there will likely be a high transfer rate (60 percent to 90 percent) from existing venues. The Premises will be new with architectural aesthetic design elements with different multiple facilities available to patrons.</p> <p>The Premises will provide increased gaming opportunities for persons who enjoy gaming; however, the weight is reduced as there are a large number of other existing gaming venues in the City of Melbourne with EGMs, including the Melbourne Casino.</p> <p>No weight to marginal weight.</p> |
|                    | <i>Social benefit derived from increased community contributions</i>                  | 167 - 170 | <p>The Applicant will commit to community contributions of \$75,000 per annum to one or more (as yet unspecified) charitable organisations. The Commission has considered such contributions under Economic Benefits.</p> <p>The Applicant will make the meeting room at the Premises available at no charge to community and sporting groups at a minimum from opening until 12pm daily and at other times by arrangement.</p> <p>No weight to marginal weight.</p>   |
| <b>Disbenefits</b> | <i>Possibility of increased incidence and impact of problem gambling on community</i> | 171 - 177 | <p>A proportion of total gaming expenditure at the Premises will be associated with problem gambling contributed by patrons gaming at the Premises.</p> <p>The questions of who is the local community and who will patronise the gaming lounge are relevant. The Commission considers the local community to be the population living in and around the immediate area surrounding the Premises, and notes that there will be patrons from across the City of Melbourne and the wider</p>   |

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|  |                           |           | <p>metropolitan Melbourne area (persons coming into the CBD for work, social and other reasons).</p> <p>While the evidence disclosed some risk factors, there was also evidence of the Applicant's commitment to sound RSG practices at the Premises, and the Applicant's history of implementation of RSG practices at its other venue. The Applicant's gaming manager at its existing venue will transfer to the Premises to become its gaming manager. The Applicant will continue to regularly engage with an experienced RSG consultant as well as organisations including Gambler's Help.</p> <p>The Commission notes the Applicant has committed to the Premises being closed for 8 hours each day, has a modest number of EGMs, that the Applicant intends to make the gaming area in the Premises entirely cashless, and that there will be three staff members in the gaming lounge at all times.</p> <p>The Commission also notes that there are a number of other existing venues in the Melbourne CBD (including the Melbourne Casino) easily accessible to gaming patrons.</p> <p>Marginal weight to low weight.</p> |
|  | <i>Community attitude</i> | 178 - 185 | <p>The Council has opposed the Application. There was evidence before the Commission of stakeholders' concerns in relation to the Premises. Some of those concerns relate to gaming issues. These include concerns about problem gamblers attending services proximate to the Premises.</p> <p>There was also evidence as to the number of gaming venues close to the Premises and the sound RSG practices that the Applicant will implement at the Premises (supported by the Applicant's demonstrated RSG practices at its existing venue).</p> <p>Marginal weight.</p>  |