Victorian Commission for Gambling and Liquor Regulation

DECISION AND REASONS FOR DECISION

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision to grant an application to vary a licence held by Whippet & Co Pty Ltd in respect of the premises known as Love & Dysfunction, located at 103 Grey Street, St Kilda.

Commission: Dr Bruce Cohen, Chair
Ms Helen Versey, Deputy Chair
Mr Des Powell AM, Commissioner

Date of Hearing: 24 August 2016

Date of Reasons: 30 November 2016

Appearances: Mr Jason Wilcox, the Applicant
Mr Reginald Ridealgh, the Licensee
Mr Justin Ghattas, Counsel Assisting the Commission

Decision: The Commission has determined to affirm the decision of the Delegate.

Signed:

Bruce Cohen
Chair

Victorian Commission for
Gambling and Liquor Regulation

REASONS FOR DECISION

BACKGROUND

1. On 5 April 2016, an application was lodged by Whippet & Co Pty Ltd (**the Licensee**) with the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) to vary a licence under the *Liquor Control Reform Act 1998* (**the LCR Act**)[1] for the premises known as Love & Dysfunction, located at 103 Grey Street, St Kilda (**the Premises**).
2. The Licensee sought to vary the category of licence from a Restaurant and Café Licence (Licence No. 32307246) to an On-Premises Licence, as well as seeking to amend the conditions of the Licence (collectively, **the Variation Application**).
3. Specifically, the Variation Application sought to amend:
   (a) the number of patrons permitted at the Premises from 75 (50 internally, 25 externally in the courtyard) to 94 (made up of up to 94 internally or 25 externally in the courtyard, but with an overall maximum of 94 patrons); and
   (b) the trading hours during which the Premises can operate to permit the supply of liquor for an additional two (2) hours each day (from 11pm to 1am the following day).
4. The Variation Application included the following materials submitted by the Applicant:
   (a) a completed application form, received by the Commission on 5 April 2016;
   (b) Planning Permit 57/2011/A (**the Original Permit**) issued by the City of Port Phillip (**the Council**), amended on 24 March 2016;
   (c) Plan of Premises referred to in the Original Permit to use/develop the land on which the Premises are situated, dated 28 April 2016;
   (d) Statement of Display confirming that the Variation Application was displayed in accordance with Commission requirements, dated 8 May 2016; and
   (e) a written submission, including photographs of the external area, dated 9 April 2016.
5. In accordance with section 33(1) of the LCR Act, a delegate of the Commission (**the Delegate**) provided a copy of the Variation Application to Victoria Police on 5 April 2016. On 2 May 2016, Victoria Police informed the Commission that it did not object to the grant of the Variation Application.
6. In accordance with section 33(2) of the LCR Act, the Delegate also provided a copy of the Variation Application to the Council on 5 April 2016. At the date of the Delegate determining the matter, the Commission had not received notification from Council that it sought to lodge an objection to the Variation Application.

---

[1] All references to legislation are references to the LCR Act unless stated otherwise.

7. On 5 and 6 May 2016, the Commission received two (2) initial objections to the Variation Application from persons residing in close proximity to the Premises (**the Myers and Paulke objections**). The Myers and Paulke objections stated, in summary, that the courtyard of the Premises abuts residential homes in Clyde Street and that the noise created by patrons in the rear courtyard during the hours outlined in the Variation Application would directly impact the quality of life for local residents and residents of the nearby Sacred Heart Mission (being an elderly residential care home).
8. In addition, these objectors provided evidence to the Commission that the public notice was not displayed in accordance with the LCR Act. The Licensee was subsequently directed by the Commission to display the public notice for an additional fourteen (14) days (from 11 May 2016 to 25 May 2016). On 31 May 2016, the Commission received a completed Statement of Display from the Licensee.
9. On 16 May 2016, the Licensee provided the Commission with a written submission in response to the Myers and Paulke objections.
10. On 23 May 2016, the Commission received an additional objection from Mr Jason Wilcox (**the Wilcox objection**). Mr Wilcox (**the Applicant**) stated that, in summary, his objection was on the grounds of amenity. The Wilcox objection raised the following issues:
    (a) music being played in the courtyard every night, sometimes beyond the current licence hours;
    (b) noise from customers every night of the week, increasing later in the evening through increased consumption of liquor;
    (c) disposal of glass bottles into waste bins at the end of each shift;
    (d) use of the rear laneway as an alternative entrance to the Premises during summer months, creating increased noise and rubbish and, on occasion, patrons urinating against the property fence when leaving the courtyard; and
    (e) the courtyard neighbouring a residential care home for the elderly.
11. On 30 May 2016, the Licensee provided the Commission with a written submission in response to the Wilcox objection. The Licensee stated that:
    (a) as well as being the Licensee of the Premises, he is also an immediate resident in the area;
    (b) any music played in the courtyard is played at a low level;
    (c) the relevant Council permit does not allow for rubbish to be disposed of after 10pm on any day, and the Licensee adheres to this – rubbish is left by the back door overnight and disposed of the following day;
    (d) the rear laneway had been used for a short period during the summer months, but was closed after sunset due to safety reasons; and
    (e) the Sacred Heart Mission did not object to the Variation Application.

12. On 14 June 2016, the Delegate determined to grant the Variation Application, subject to the following special conditions (**the Original Decision**):

> *SPECIAL CONDITIONS*
> *No live or recorded amplified music other than background music is permitted on the licensed premises.*
> *Music is not permitted after 11pm on any day in the courtyard area.*
> *Maximum capacities*
> *Internal 94 patrons, Courtyard 25 patrons*
> *Overall maximum 94 patrons*
> *TRADING HOURS*
> *Sunday Between 10am and 1am the following morning*
> *Good Friday & ANZAC Day Between 12 noon and 1am the following morning*
> *On any other day Between 7am and 1am the following morning.*

13. On 28 June 2016, the Applicant lodged the application for internal review of the Original Decision (**the Review Application**). The Review Application stated that the Council failed to consider the views of local residents in issuing a planning permit,[2] and that the reasons for decision of the Delegate did not have regard to several factors, such as noise pollution and cigarette smoke that passes into the property of the Applicant as a result of patrons in the courtyard of the Premises.

LEGISLATIVE FRAMEWORK AND THE TASK BEFORE THE COMMISSION

14. Under the LCR Act, an application for a variation of a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, a contested application relevantly includes "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174)*".[3]
15. Under section 38 of the LCR Act, any person may object to the variation of a licence on the ground that the variation would detract from or be detrimental to the amenity of the area in which the licensed premises or proposed licensed premises are situated.

---

2 The Commission notes that the review of the planning permit occurred separately by the Council at the Victorian Civil and Administrative Tribunal (**VCAT**). The review of the planning permit was not a matter that influenced how the Commission undertook its task but the resultant conditions placed on the planning permit were matters that the Commission had regard to in determining the extent of which the activities of the Licensee would be regulated, regardless of the decision of the Commission, given the requirement for the Licensee to comply with the planning permit in any event.

3 Conversely, an "uncontested application" is defined in section 3(1) as being "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174)*".

16. Provision is also made under the LCR Act for notification and consideration of whether to make an objection by the Chief Commissioner of Police, the municipal council in which the premises are situated, and/or the licensing inspector.[4]
17. The Review Application is made pursuant to section 153 of the LCR Act. The Original Decision is a reviewable decision and the Applicant is an eligible person under Division 2 of Part 9 of the LCR Act.
18. Pursuant to section 157(1) of the LCR Act the specific task for the Commission with respect to the Review Application is to make a fresh decision that:
    (a) affirms or varies the reviewable decision; or
    (b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.
19. In effect, the Commission, on internal review, stands in the shoes of the original decision maker and makes a fresh decision with respect to the Variation Application. In doing so, it must consider all the information, material and evidence before the original decision maker.[5] It may also consider further information, material or evidence as part of making its decision.[6]

Conduct of an inquiry

20. Section 34 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (**VCGLR Act**) provides that subject to that Act, gambling legislation or liquor legislation, the Commission may conduct any inquiry in any manner it considers appropriate. Relevant provisions governing the conduct of an inquiry by the Commission in this matter include:
    (a) section 33 of the VCGLR Act, which provides, inter alia:

> *"(1) The Commission may conduct an inquiry for the purposes of performing its functions or duties, or exercising its powers under this Act, gambling legislation or liquor legislation.*
>
> ...
>
> *(3) When conducting an inquiry for the purposes of performing its functions under section 9(1)(a), (b), (c) or (d) the Commission is taken to be a board appointed by the Governor in Council and Division 5 of Part 1 (including section 21A) of the Evidence (Miscellaneous Provisions) Act 1958, as in force immediately before the repeal of that Division, applies accordingly."*

4 *LCR Act 1998*, sections 39 to 41.
5 Section 157(2) of the LCR Act.
6 See section 157(3) of the LCR Act.

(b) section 25(3) of the VCGLR Act, which provides:

"In performing a function or duty the Commission—

(a) except when exercising a power under Division 5 of Part 1 of the Evidence (Miscellaneous Provisions) Act 1958, is not bound by the rules of evidence but may inform itself in any way it thinks fit;

(b) is bound by the rules of natural justice."

Determination of a contested application

21. Where an application is a contested application, pursuant to section 47(1) of the LCR Act:

"Subject to Division 3, the Commission must, after the period for making an objection under Division 5 has expired, including any extension of time granted for making an objection, grant or refuse a contested application."

22. Section 47(3) of the LCR Act provides that before granting or refusing a contested application under subsection (1), the Commission:

"(a) may have regard to any matter the Commission considers relevant; and

(b) may make any enquiries the Commission considers appropriate; and

(c) must give the applicant and each objector a reasonable opportunity to be heard."

23. Section 9(3) of the VCGLR Act provides that:

"The Commission must, when performing functions or duties or exercising its powers under the Gambling Regulation Act 2003, the Liquor Control Reform Act 1998, the Casino Control Act 1991, the Racing Act 1958 or any other Act, have regard to the objects of the Act conferring functions on the Commission."[7]

24. Section 9(4) of the VCGLR Act further provides that:

"The Commission must, when performing functions or duties or exercising its powers under gambling legislation or liquor legislation, have regard to any decision-making guidelines issued by the Minister under section 5."

25. Accordingly, in exercising its discretion to either grant or refuse a contested application under section 47(1) of the LCR Act, the Commission must have regard to the objects of the LCR Act.

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

"(1) The objects of this Act are—

(a) to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—

(i) providing adequate controls over the supply and consumption of liquor; and

(ii) ensuring as far as practicable that the supply of liquor contributes to, and does not detract from, the amenity of community life; and

---

7 There are no objects specified in the VCGLR Act itself.

(iii) restricting the supply of certain other alcoholic products; and

(iv) encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and

(b) to facilitate the development of a diversity of licensed facilities reflecting community expectations; and

(c) to contribute to the responsible development of the liquor, licensed hospitality and live music industries; and

(d) to regulate licensed premises that provide sexually explicit entertainment."

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

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

28. The Court of Appeal of the Victorian Supreme Court has made it clear in *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325 (***Kordister***) that harm minimisation is a fundamental principle of the LCR Act, and can properly be regarded as "the primary regulatory object of the Act and therefore the primary consideration in liquor licensing decisions".[8] However, as was also noted by the Court of Appeal, "this is not to say ... that it [harm minimisation] is to be taken into account, or given such weight, to the exclusion of the other objects".[9]

29. Pursuant to sections 47(2) and 44(2) of the LCR Act, the Commission may refuse to grant the Original Application on the grounds, *inter alia,*

    (a) that the grant of the application would detract from or be detrimental to the amenity of the area in which the Premises to which the application relates are situated (section 44(2)(b)(i)); and

    (b) that the grant of the application would be conducive to or encourage the misuse or abuse of alcohol (section 44(2)(b)(ii)).

30. For the purposes of the LCR Act, the amenity of an area is defined as being the quality that the area has of being pleasant and agreeable.[10] Factors that may be taken into account in determining whether a proposed variation would detract from or be detrimental to the amenity of the area include:

    (a) the presence (or absence) of parking facilities;

    (b) traffic movement and density;

    (c) noise levels;

---

8 See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.
9 See *Kordister* [2012] VSCA 325, at [188] per Tate JA.
10 *LCR Act 1998,* section 3A(1).

(d) the possibility of nuisance or vandalism;

(e) the harmony and coherence of the environment; and

(f) any other prescribed matters.[11]

However, the definition of 'amenity' for the purposes of the LCR Act is not limited by these factors.[12]

31. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application. Further, the LCR Act provides, inter alia, that pursuant to section 16:

> *"(1) Subject to subsection (2), it is a condition of every licence and BYO permit that the use of the licensed premises does not contravene the planning scheme that applies to the licensed premises under the Planning and Environment Act 1987.*
>
> *(2) Subsection (1) does not apply to a pre-retail licence, a limited licence or a major event licence."*

32. The Commission also had regard to the decision making guidelines in relation to cumulative impact dated June 2012[13] when determining this Review Application (**the Guidelines**). "Cumulative impact" refers to the impacts that result from a concentration of licensed premises in a defined area and the positive and negative impacts that are associated with a range of outcomes arising from a combination of factors, such as physical and environmental setting, the mix of premises and their operating conditions.

33. Positive outcomes can include the creation of a local identity or status as an entertainment destination, enhanced vitality of the area, economic benefits, and an increase in consumer choice. Negative outcomes of cumulative impact can include crime, a loss of amenity, and antisocial behaviours. Potential cumulative impacts vary between locations and depend on the number and type of licensed premises, and the capacity of the local area to accommodate the concentration.

34. The Guidelines enable the Commission to assess the contribution of a new licensed premises, or the variation of an existing licensed premises to the cumulative impact of licensed premises in an area.

MATERIAL BEFORE THE COMMISSION AND PUBLIC HEARING

35. The Commission on review had before it, and considered, all of the materials received by the Delegate.

36. The Commission also received the following materials:

(a) Decision and Reasons for Decision of the Delegate of the Original Application, dated 14 June 2016;

---

[11] *LCR Act 1998,* section 3A(2).
[12] *LCR Act 1998,* section 3A(3).
[13] In accordance with section 9(4) of the VCGLR Act.

(b) Review Application received by the Commission on 30 June 2016, including a written submission from the Applicant and a request for a stay of the operation of the licence as varied by the Original Decision (**the Licence**);

(c) a written submission (and photographs of the Premises) from the Licensee in relation to both the request for a stay of the Licence, as well as the Review Application generally, dated 4 July 2016;

(d) a Pre-hearing Inspection and Compliance Report prepared by the Commission, dated 14 July 2016 (**the Pre-hearing Report**);

(e) Order of the Victorian Civil and Administrative Tribunal (**VCAT**), dated 26 July 2016, declaring the decision of Council to issue the Planning Permit to the Licensee as invalid; and

(f) Notice of Decision to Amend a Planning Permit issued by Council, received by the Commission on 16 August 2016 (**the Proposed Amendment**).[14]

37. On 24 August 2016, the Commission conducted a public hearing in relation to the Review Application (**the Hearing**). Both the director of the Licensee, Mr Ridealgh, and the Applicant appeared and were self-represented.

38. Deputy Chairperson Versey attended the Premises prior to the Hearing. Commissioner Powell attended the area in which the Premises are situated, but the Premises were not open for trade at that time and, therefore, his observations were limited to the surrounding area. Following the Hearing, Chairperson Cohen also visited the Premises.

DETERMINATION OF THE STAY APPLICATION

39. As part of the Review Application, the Applicant requested that the effect of the Original Decision be delayed until such time that the Review Application was completed on the grounds that "Council failed to follow the correct process in reaching their decision".

40. The Commission considered the request to stay the effects of the Original Decision and provided the Applicant and Licensee with the opportunity to make submissions in relation to this matter.

41. The Licensee stated that a substantial amount of advertising and marketing had occurred following the Original Decision. As a consequence, the Licensee submitted that substantial financial hardship would be experienced if the Commission were to now impose a stay on the effects of the Original Decision.

[14] As at the date of this Decision and Reasons for Decision, the Commission was not aware as to whether Council had, in fact, issued the permit the subject of the Proposed Amendment. The decision made by this Commission is predicated on the presumption that a permit was, or will be, issued in accordance with the terms of the Proposed Amendment and, subject to any subsequent appeal process in relation to the planning decision made by Council to issue a permit in the terms outlined in the Proposed Amendment, it is nevertheless a matter that the Licensee is responsible for in any event.

42. Having regard to the various legislative frameworks that the Licensee must comply with – being those things required under the LCR Act, as well as the relevant planning requirements within the planning scheme set by the Council – the Commission determined not to stay the effect of the decision of the Delegate.
43. As a result, the Licensee could continue to operate the Licence at the Premises (within the limits imposed by the Original Permit and the Licence) while the decision of the Council to issue the Original Permit was reviewed by the VCAT. The Commission did not consider that allowing the Licensee to continue operating in the terms outlined in the Original Decision would either place the Licensee at disadvantage, given his submissions, or impact the rights of the Applicant on review, as the Licensee was required to comply with the operative Licence and relevant planning requirements from Council.

DETERMINATION OF THE REVIEW APPLICATION

Amenity

44. In detailing the reasons for its determination of this Review Application, a key issue to be determined by the Commission is whether the grant of the Variation Application would detract from, or be detrimental to, the amenity of the area in which the Premises are situated. The Commission considered that the submissions made were in relation to four distinct ways in which the Applicant considered the Premises impacted the amenity of the area:
    (a) patron noise at the Premises;
    (b) noise emanating from the Premises during waste disposal;
    (c) noises emanating in the area in which the Premises are situated as a result of patrons departing; and
    (d) smoke emanating from the area in which the Premises are situated.

Patron noise at the Premises

45. The Applicant described the location of his property relative to the Premises. The Applicant outlined that his property and the Premises share a boundary fence, with a storage shed, garbage bins and the external courtyard bathroom immediately abutting the boundary fence between the two properties.
46. The Applicant stated that, except for emergency vehicles or similar, he does not hear noise from Grey Street. The Applicant also submitted that whilst the volume of music at the Premises had previously been a contentious matter with the Licensee (and had also been reported to the Council), it has since been resolved through discussions with the Licensee.
47. However, in oral submissions at the Hearing, the Applicant stated that when the courtyard at the

Premises is used by any more than a half-dozen patrons, and having regard to the proximity of the Premises to the Applicant's residence, ambient noise still emanates into his property and creates an ongoing sleep disturbance to the Applicant and his family, even without background music being played at the Premises. The Applicant submitted that the current fencing and noise attenuation measures in place are not sufficient to mitigate the extent of the noise disturbance experienced, particularly during the evening period of trade.

48. The Applicant recalled a particular instance of approximately 25 patrons utilising the courtyard area at the Premises for a birthday celebration at approximately 11.30pm on 25 June 2016, with a significant level of noise creating disturbance to the Applicant. The Applicant had regard to the Proposed Amendment and planning permit to be subsequently issued by Council and agreed that a planning permit issued in the terms outlined in the Proposed Amendment would go some way to resolving some of his concerns in relation to the level of noise permitted at the Premises. The Applicant agreed that other measures – such as not allowing the garage door at the Premises to be used as an entrance or exit – would assist the Licensee in complying with a planning permit issued in the terms outlined in the Proposed Amendment.
49. However, the Applicant maintained that his concerns relating to noise were centred on the level of enforceability of such conditions, and the way in which the Licensee will ensure that the level of noise does not exceed that imposed by the Proposed Amendment (or any subsequent Licence granted by the Commission).
50. The Licensee acknowledged the importance of maintaining a low level of noise at the Premises so as to not disturb or disrupt the amenity of residents in the area. The Licensee stated that he has had patrons removed who have caused excessive noise, as well as being generally wary of the impact of noise, particularly in the courtyard area, on the area in which the Premises are situated.
51. The Licensee confirmed that he has no specific role at the Premises (such as chef or bartender, for example) and is able to monitor both the Premises generally as well as having specific regard to the courtyard in relation to noise or patron issues that arise.
52. The Licensee stated that he attends the Premises seven days per week, inclusive of Mondays (when the Premises do not open for trade). The Licensee stated that for the remaining six days, he personally opens and closes the Premises, partly to ensure general oversight and supervision of activities at the Premises, and partly for financial reasons.
53. The Licensee stated that the largest number of patrons at the Premises was the result of a group booking of between 20 and 30 patrons. The Licensee also stated that, due to the level of patronage and revenue generated at the Premises, he did not accept that the level, consistency and regularity of noise emanating from the Premises was occurring to the extent that was alleged by the Applicant.
54. The Licensee stated that since the variation of the Licence was granted, permitting additional trade

between 11pm and 1am, the Premises has consistently remained open, but has not received a high level of patronage. The Licensee stated that on weekdays, approximately six to ten patrons may attend the Premises during the additional hours of trade, and on weekends, approximately 12 to 20 patrons.

55. In relation to the volume of music played at the Premises, the Licensee submitted that the ambience and style of the Premises is such that the music played would certainly be audible, but not at a level above background level or such that would be heard from the residence of the Applicant. The Licensee also outlined the disconnection of an external speaker so as to reduce the level of music that was in the courtyard and, as a consequence, reduce the level of noise that could be heard by the Applicant.
56. The Licensee submitted that the option of purchasing a sound measurement device remained and that such a device could be purchased as a measure to ensure that the level of noise emanating from the Premises did not exceed the level outlined in the Proposed Amendment and any other conditions that may form part of the Licence, should the Commission determine to grant the variation of the Licence.
57. The Licence to which this Review Application relates contains a condition that references the SEPP N-2 requirements in the Licence (**the Music Noise Condition**) as follows:

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

58. The Commission notes that it is common practice for a condition such as the Music Noise Condition to be imposed on a licence of the category the subject of the Review Application.
59. The Commission also notes the other conditions in the Proposed Amendment so as to mitigate the impact and extent of noise emanating from the Premises that may affect the amenity of residents within the area in which the Premises are situated. Such conditions include, *inter alia* –
    (a) submission of a security management plan that provides for an attendant to monitor the number of patrons at the Premises, use of a patron register, measures taken by staff to ensure that patrons enter and depart the Premises in a safe and orderly fashion, and keeping of a complaints register;
    (b) trading hours during which liquor may be sold;
    (c) maximum patron capacity;
    (d) positioning of tables and chairs to ensure that 75% of patrons attending the Premises are seated;
    (e) prohibition of playing of live or recorded music above background noise levels;

(f) prohibition on the rear of the Premises being used an entry or exit; and

(g) limiting the level of background noise to 5dB(A) after 10pm when measured from the residence of the Applicant.

60. On the basis of the evidence before it, and having regard to the concession made by the Licensee in relation to a birthday function that occurred in the courtyard at the Premises, it appears that there may have only been one occasion when noise levels at the Premises have exceeded that which is prohibited by way of conditions in the Proposed Amendment and the Licence.
61. To such an extent that this has occurred, it appears that it is not a regular occurrence and has since been rectified by the Licensee by removing the external speakers and general supervision to minimize the likelihood of recurrence.
62. The Commission acknowledges the noise concerns raised by the Applicant and the impact that those matters have in relation to amenity. However, whilst the Commission accepts that there may have been some instances in the past of noise emanating from the Premises, the Commission also considers that these incidents were isolated, and is not satisfied on the evidence before it that they are likely to recur in the future given the conditions contained in the Proposed Amendment.

Noise emanating from the Premises during waste disposal

63. The Applicant agreed that whilst issues concerning the disposal of glass bottles, as well as the Licensee using the rolling garage door as an entry and exit to the Premises, had previously been contentious matters, they had since been resolved between the Review Application being lodged and the Hearing.
64. The Licensee submitted that bottles are only placed in the waste on the following afternoon prior to the Premises opening for trade in the evening. The Commission considers it is unlikely this issue will recur in light of changes made by the Licensee and the conditions outlined in the Proposed Amendment which the Licensee must comply with in any event.

Noises emanating in the area in which the Premises are situated as a result of patrons departing

65. The Applicant alleged that there have been occasions where patrons have exited the Premises and proceeded along the laneway to smoke, litter or, on some occasions, urinate nearby his property.
66. The Licensee submitted that the rear garage door at the Premises was only used for a short period of time in connection with a promotion that the Licensee was operating at the time, and that the rear garage door was no longer used for entrance or exit by patrons at the Premises. The Licensee also confirmed that there was not any advertising or signage that directed patrons to use the rear garage door for such purposes.
67. The Licensee also considered it "highly unlikely" that the anti-social behaviour alleged by the Applicant was caused by patrons attending the Premises. The Licensee stated that there are

outdoor toilets present in the courtyard of the Premises and, therefore, considered it unlikely that patrons at the Premises would bypass such facilities to then exit the Premises (via the front door, given the locked garage door) and then proceed around the Premises into a laneway at the rear.

68. The Commission accepts that whilst such noise may occur in the area described by the Applicant, the Commission is not satisfied that there is sufficient evidence available to make a finding that it is a result of the Licensee and/or the Premises. In addition, the Commission considers the changes implemented by the Licensee – such as discontinuing use of the rear garage door – as a deterrent to patrons that may wish to use the laneway area after exiting the Premises.

Smoke emanating from the area in which the Premises are situated

69. The Applicant alleged that, in the course of the operation of the Premises as well as after the departure of such patrons, there have been occasions where cigarette smoke has passed into the residence of the Applicant.
70. The Applicant stated that the location of the courtyard directly abutted his residence and, on occasions when patrons were smoking in the courtyard area, the resulting cigarette smoke would pass into his residence. The Applicant stated that he ought not be forced to close the windows of his house to prevent the ingress of cigarette smoke to his property.
71. The Licensee stated that the likelihood of smoke transferring into the residence of the Applicant was low, given the height of the fencing surrounding the Premises, and the use of outdoor umbrellas to prevent and mitigate the transference of smoke outside of the Premises.
72. The Licensee also stated that the courtyard did not directly abut the residence of the Applicant, as it was separated by vegetation and an outdoor toilet area. The Licensee considered that this separation between the courtyard area and boundary of the residence of the Applicant contributed to mitigating the impact of smoke passing into the residence of the Applicant.
73. Having inspected the Premises, the Commission is not satisfied that there is sufficient evidence available to make a finding that smoke moving into the residence of the Applicant is an amenity impact that will result from the grant of the variation of the Licence. It also notes that the Licensee must comply with their general obligations in relation to smoking in outdoor areas.[15]

Other considerations

74. In response to questions from the Commission, the Licensee conceded that he was yet to broadly

[15] On 18 October 2016, the *Tobacco Amendment Act 2016* (**TAA**) received royal assent, which amends the *Tobacco Act 1987*. These amendments ban smoking in all outdoor dining areas, which may include licensed premises, and takes effect from 1 August 2017. The Commission notes the importance of compliance by licensees with broader legislative frameworks that operate concurrently with liquor and gaming legislation and, on the assumption that the Licensee will continue to serve food at the Premises, compliance with the changes resulting from the TAA may ameliorate some amenity concerns raised by the Applicant in this Review Application.

comply with Condition 1 contained in the Proposed Amendment, particularly in relation to the maintenance of a complaints register. However, the relevant condition provided up to three months for such measures to be implemented, during which the Licensee submitted such measures would be in place so as to comply with the requirements of the Proposed Amendment.

Findings of the Commission with respect to amenity

75. To the extent that Council grants a planning permit in sufficiently similar terms to that which is outlined in the Proposed Amendment and was before the Commission, and subject to the Licensee complying with the requirements of any subsequently issued planning permit, the Commission is satisfied that the Applicant is sufficiently experienced in operating the Premises with due consideration for any potential negative impact on the amenity of the area, particularly as a local resident in light of his regular personal presence at the Premises and the mitigation strategies he has undertaken to date.
76. In summary, the Commission finds that the grant of the Variation Application that is the subject of the Review Application will not detract from or be detrimental to the amenity of the area. Further, the Commission finds that suitable conditions can be imposed on the Licence to ensure that any music noise resulting from the Premises can be minimised to protect a negative impact on amenity.
77. The Commission also considers that the conditions outlined in the Proposed Amendment relating to the use of the Premises mitigate and minimize the likelihood of negative impact on amenity in the area in which the Premises are situated.

DECISION

78. In determining this Review Application, the Commission has had regard to the objects of the LCR Act, and in particular, harm minimisation. Further, in addition to determining issues with respect amenity (see above), the Commission has also considered whether granting the Review Application would be conducive to, or encourage, the misuse or abuse of alcohol. On this issue, the Commission notes that there has been no suggestion or allegation that the Review Application would do so.
79. The Commission has also had regard to the Guidelines when determining this Review Application.[16] The Commission considers that the Review Application will not negatively affect the cumulative impact of licensed premises in the area of the Premises. Insofar as this matter involves a change in the category of licence, as opposed to the addition of a further venue in the area in which the Premises are situated, the Commission does not consider that granting the Variation Application would result in an adverse cumulative impact. This is also the case having regard to

[16] In accordance with section 9(4) of the VCGLR Act.

the small increase in hours that will occur if the Variation Application is granted, given the Premises is a small venue and any changes are likely to have only a minimal effect on cumulative impact, if any.

80. The Commission notes that the Pre-hearing Report records two alleged breaches of the LCR Act at the Premises. The Licensee indicated at the hearing of the Review Application that the alleged breaches were immediately rectified in the presence of a Gambling and Liquor Inspector. The Licensee also submitted that there have been no instances of anti-social or harmful behaviour at the Premises in the past.
81. Based on the reasons detailed in paragraphs 44 to 80, the Commission is satisfied that granting the variation of the Licence is appropriate in the circumstances. Having regard to the objects of the LCR Act, pursuant to sections 47(1), 49 and 157 of the LCR Act, the Commission has determined to affirm the Original Decision.

The preceding 81 paragraphs are a true copy of the Reasons for Decision of Dr Bruce Cohen, Chairperson, Ms Helen Versey, Deputy Chairperson and Mr Des Powell AM, Commissioner.