



DECISION AND REASONS FOR DECISION

In the matter of an application by Claren Group Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to vary the late night (general) licence for the premises trading as Freddie Wimpoles, 125 Fitzroy Street, St Kilda.

Commission: Ms Helen Versey, Deputy Chair
Mr Des Powell AM, Commissioner
Dr Dina McMillan, Commissioner

Date of Hearing: 13 – 14 November 2018

Date of Decision: 20 February 2018
Date of Reasons: 20 February 2018

Appearances: Mr John Larkins, Counsel for the Licensee (instructed by LGS Legal)
Ms Lilli Owens-Walton, Counsel Assisting the Commission

Decision: The Commission has determined to affirm the decision of the Delegate and refuse to vary the licence.

Signed:

A handwritten signature in black ink that reads "Helen Versey".

Helen Versey
Deputy Chair



BACKGROUND

1. On 25 October 2017, Claren Group Pty Ltd (the **Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) to vary late night (general) licence no. 31920952 (the **Licence**) for the premises trading as Freddie Wimpoles, 125 Fitzroy Street, St Kilda (the **Premises**) (the **Original Application**).
2. The Original Application sought to vary the following condition on the Licence to allow music to be played indoors during all licensed trading hours¹, rather than limiting it to 1 am:

“Any entertainment provided on the licensed premises shall not, after 1 a.m. on any day, include electrically or electronically amplified music, whether played live or reproduced from recordings by any means whatsoever, and in particular, without limiting the generality of the above, no discotheque or other venue for dancing is permitted.” (the **Condition**).
3. On 25 October 2017, in accordance with section 33 of the *Liquor Control Reform Act 1998* (**LCR Act**), a copy of the Original Application was served on the Chief Commissioner of Police (**Victoria Police**) and City of Port Phillip (the **Council**).

Victoria Police objection

4. On 24 November 2017, Victoria Police lodged an objection to the Original Application under section 39(1) of the LCR Act due to having insufficient information to assess the Original Application. Victoria Police requested a copy of the venue management plan detailing the exact nature of the intended use of the business and entertainment to be provided. The plan should also demonstrate how the grant of the variation would not be detrimental to the amenity of the area, including any noise control measures for the insulation and management of patron and music noise escape. Victoria Police requested a period of 14 days to evaluate the venue management plan and reserved the right to lodge a formal objection to the Original Application following its assessment.
5. On 19 January 2018, the Licensee responded to Victoria Police’s request. The Licensee stated that there were no plans to develop a specific venue management plan to deal with negative amenity impacts, as there would be none. On 6 February 2018, Victoria Police advised that it maintained its objection to the Original Application on the grounds that it would detract from or be detrimental to the amenity of the area in which the Premises are situated.

¹ The trading hours for certain days of the week include up until 3am: Thursday, Friday and Saturday excepting Good Friday and Anzac Day.



Council submission

6. On 26 October 2017, Council submitted to the Commission that the requirement for a planning permit was triggered by the Original Application under clause 52.27 of the Port Phillip Planning Scheme. In response, on 11 December 2017, the Licensee stated that Council's submission was not a valid objection under section 40 of the LCR Act and argued that no planning permit is required as a result of the variation to the Licence sought. On 10 January 2018, the Commission advised Council that its submission on the basis of planning considerations are not a valid objection under section 40 of the LCR Act.

Residents objections

7. The Commission accepted the following two joint objections to the Original Application from residents living in the residential part of George Building (the **George**), in which the Premises are situated on the ground floor:
 - (a) Mr Gary Smith and Mrs Janet Smith, objection dated 23 November 2017 with supporting correspondence. Mr & Mrs Smith reside in an apartment on level two of the George, which is above the Premises; and
 - (b) Mrs Nicola Crouch and Mr Andrew Crouch, objection dated 28 November 2017 with supporting correspondence. Mr & Mrs Crouch reside in an apartment on level three of the George, which is directly above the Smith residence.

The Smiths and the Crouches objected on the grounds that approval of the Original Application would cause detriment to the amenity of the area due to excessive noise emanating from the Premises. The Smiths and the Crouches also alleged that the Licensee has continually breached the existing Licence condition relating to amenity by playing amplified music after 1 am.

8. The Commission provided copies of the objections from the residents in the George and invited the Licensee to respond. The Licensee responded to the Crouches objection on 19 January 2018 and the Smiths objection on 6 February 2018. The latter submission included a report from Noise Consulting & Management Pty Ltd, a sound engineer engaged by the Licensee who had undertaken noise transmission tests at the Premises and from the Smith residence on 15 January 2018.

Delegate's decision and internal review application

9. On 1 March 2018, the Delegate refused to grant the Original Application (**Original Decision**). According to the reasons for decision, the Delegate's determination was based on the following findings, in summary:



- (a) while noting that the Premises is within a major activity centre, consideration should be given to residents of the George suffering a negative impact from current noise levels, which would be exacerbated by the proposed variation;
 - (b) as submitted by Victoria Police, that the variation would detract from or be detrimental to the amenity of the area in which the Premises are situated due to unacceptable levels of alcohol related harm, violence and disorder, and the usage of the Premises as an entertainment venue providing loud, recorded and amplified music noise in breach of licence conditions to the detriment of residents;
 - (c) the Licensee does not have enough controls in place to prevent noise causing detriment to the surrounding amenity and other adverse impacts i.e. it has not created a patron management plan to adequately deal with noise incidents and other adverse impacts to the amenity of the surrounding area;
 - (d) the Licensee's compliance history (including a written warning letter on 9 October 2017 for breach of the Condition by playing amplified music after 1 am), does not inspire confidence that the removal of the Condition will improve the operation of the venue;
 - (e) the noise transmission tests conducted on 15 January 2018 recommended that the noise limiter in the Premises should be set 6 decibels lower and base reduced to minimise impact to residents, but this alone is not persuasive enough to grant the Original Application; and
 - (f) the removal of the Condition does not appear consistent with the Licensee's continued operation of the venue as a "premises that celebrates craft ale and low key entertainment" and opens up the possibility for the venue to operate as a late night music venue.
10. On 21 March 2018, the Licensee applied for internal review of the Original Decision (**Review Application**).

LEGISLATION AND THE COMMISSION'S TASK

The Commission's internal review power

11. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the Original Decision is a reviewable decision and the Licensee is eligible to apply for review of that decision. The Review Application was made under section 153 of the LCR Act.
12. Pursuant to section 157(1), the specific task of the Commission with respect to the Review Application is to make a fresh decision that:
 - (a) affirms or varies the reviewable decision; or



- (b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.²
13. Under the LCR Act, an application for variation of a licence may be contested or uncontested. Pursuant to section 3(1), a contested application is:
- 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) ...
14. As Victoria Police and local residents objected to the grant of the Original Application, the Original Application was contested and the application remains contested on review.
15. The Commission on review stands in the shoes of the original decision maker and, in respect of a contested application, must either:
- (a) grant the application (and may do so subject to conditions);³ or
- (b) refuse to grant the application.⁴

Exercising the internal review power

16. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act)* requires the Commission, in exercising its internal review function, to have regard to the objects of the LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act.⁵
17. The objects of the LCR Act are set out in section 4(1), which provides:
- The objects of this Act are—
- (a) to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—
- (i) providing adequate controls over the supply and consumption of liquor; and
- (ii) ensuring as far as practicable that the supply of liquor contributes to, and does not detract from, the amenity of community life; and
- (iii) restricting the supply of certain other alcoholic products; and
- (iv) encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and
- (b) to facilitate the development of a diversity of licensed facilities reflecting community expectations; and

² Section 157(2) to (5) of the LCR Act and section 25(3) of the VCGLR Act further prescribe the manner in which the Commission is to undertake internal reviews.

³ LCR Act, sections 47, 49 and 157.

⁴ LCR Act, section 47 and 157.

⁵ VCGLR Act, section 9(3) and (4).



- (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.

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

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

19. In exercising the internal review power, the Commission:

- (a) must consider all the information, material and evidence before the original decision maker;⁷ and
- (b) may consider further information or evidence.⁸

20. Pursuant to section 47(2), the Commission may refuse a contested application on any of the grounds set out in section 44(2), including that,

the granting 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.

21. Section 3A provides that, for the purposes of the LCR Act, the amenity of an area is the quality that the area has of being pleasant and agreeable. The factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area include those listed at section 3A(2) –

- (d) the possibility of nuisance or vandalism;
- (e) the harmony and coherence of the environment; and
- (f) any other prescribed matters.⁹

22. Section 3AA of the LCR Act provides a list of factors which may be taken as evidence constituting detraction from or detriment to the amenity of area (including noise disturbance to occupiers of other premises – as discussed above). Those factors include:

- (a) *violent behaviour*;
- (b) *drunkenness*;
- (c) *vandalism*;

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

⁷ LCR Act, section 157(2).

⁸ LCR Act, section 157(3).

⁹ Section 3A(2) used to include three additional factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area: (a) presence or absence of parking facilities, (b) traffic movement and density and (c) noise levels until these factors were repealed by the *Liquor and Gambling Legislation Amendment Act 2018*.



- (d) *using profane, indecent or obscene language;*
- (e) *using threatening, abusive or insulting language;*
- (f) *behaving in a riotous, indecent, offensive or insulting manner;*
- (g) *disorderly behaviour;*
- (h) *causing nuisance;*
- (i) *noise disturbance to occupiers of other premises;*
- (j) *obstructing a footpath, street or road;*
- (k) *littering.*

23. The Commission considers that while the grounds of refusal outlined in section 44(2) of the LCR Act are a relevant consideration, the ultimate determination of a contested application is to be made pursuant to section 47(1) and section 157(1) at the discretion of the Commission with reference to the objects of the LCR Act.

Conduct of an inquiry

24. Section 34 of the 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 I (including section 21A) of the Evidence (Miscellaneous Provisions) Act 1958, as in force immediately before the repeal of that Division, applies accordingly.’

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 I 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.’

MATERIAL BEFORE THE COMMISSION

25. The Commission on review had before it and considered all the material received by the Delegate, which included:



- (a) the Original Application, including:
 - i. variation to an existing licence or permit application, dated 19 October 2017;
 - ii. a copy of the Licence – Late night (general) licence no 31920952;
 - iii. planning permit for the Premises dated 15 January 1998; and
 - iv. the statement of display, received by the Commission on 28 February 2018;
- (b) various correspondence between the Delegate and the Licensee regarding submission of further documents, extensions of time to respond to objector concerns, and submissions in support of the Original Application between 24 October 2018 – 28 February 2018;
- (c) correspondence between the Delegate and the Commission's Compliance Division regarding compliance history and complaints in relation to the Premises between 3 November 2017 – 19 February 2018;
- (d) correspondence between the Delegate and the Council, as referred to in paragraphs 3 and 6 regarding the planning permit considerations;
- (e) correspondence between the Smiths, the Licensee and the Delegate in relation to the Smiths' objection referred to in paragraphs 7(a) and 8 above including the Noise Consulting & Management report regarding testing at the Smith residence on 15 January 2018 (**First Acoustic Report**), dated 1 February 2018;
- (f) correspondence between the Crouches, the Licensee and the Delegate in relation to the Crouches' objection referred to in paragraphs 7(b) and 8 above including material extracted from a discussion on social media regarding noise at the Premises;
- (g) further submissions from the Licensee in response to the objections from residents and Victoria Police including:
 - i. correspondence between Mr Harry Goldberg, chair of the Owner's Corporation Committee at the George, and the general manager of the Premises regarding action taken by the Licensee in relation to management, security, communal toilet cleaning, noise attenuation and steps taken to ensure the Licensee is 'a good Corporate Citizen or to make sure (its) clients are kept in line';
 - ii. a letter of support from Mr Goldberg in relation to the Original Application; and
 - iii. Victorian Civil and Administrative Tribunal (**VCAT**) decision in relation to a planning matter at the Premises *Morvic Pty Ltd v Port Phillip CC* [2011] VCAT 1594, and another matter of *Zanos v Melbourne CC* [2006] VCAT 1358, and



- (h) correspondence between Victoria Police, the Licensee and the Delegate regarding Victoria Police's objection to the Original Application, as referred to in paragraphs 4 and 5.
26. The Commission on review also had before it and considered additional information and material including the Original Decision, dated 1 March 2018, the Review Application, dated 21 March 2018 and various submissions made by the parties to the Review Application (as detailed in the following paragraphs 27 to 30) over the course of the public inquiry process which included three preliminary meetings and a two-day public hearing.
27. The Commission notified persons who had submitted information or material to the Delegate that the Review Application had been received.¹⁰ Subsequently, the Commission received and considered further submissions from Mr & Mrs Smith and Mr & Mrs Crouch who maintained their objections to the Review Application. This material included:
- (i) from the Crouches, two 'sound diaries' detailing amenity related events such as audible music in their residence and alleged patrons from the Premises trespassing in the common hallway at the George, dated 5 May 2018 – 28 May 2018 and 26 August 2018 – 23 September 2018 and a response dated 5 November 2018, to the expert security reports referred to in paragraph 36(b) below; and
 - (j) from Mr Smith, VCAT decisions in relation to contested matters regarding licensed premises in the George including *White Bar Pty Ltd v Port Phillip CC* [2007] VCAT 275 and *Gary Kennedy Smith v National Hospitality Group Pty Ltd (ACN: 142 978 729), Regal Hotel Pty Ltd (ACN: 074 816 363)* file no OC1192/2011.
28. On 14 May 2018, the Commission received a submission from the Council who maintained its position in relation to the requirement for a planning permit, as discussed in paragraph 6, as well as some concerns in relation to amenity. On 16 August 2018, Council advised the Commission that it did not wish to be a party to the proceedings.
29. The Commission considered evidence submitted by Victoria Police including statements from nine residents at the George, an infringement notice issued to the Licensee and a SEPP N-2¹¹ Compliance Assessment undertaken by Octave Acoustics between 3 May 2018 and 18 May 2018, commissioned by the Council (**Second Acoustic Report**).

¹⁰ LCR Act, section 154(1) states that, 'following receipt of an application under section 153, the Commission must notify every person who provided the original decision maker information or material, or gave evidence, to the original decision maker for the purposes of the eligible decision of that receipt.'

¹¹ State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (**SEPP N-2**) is a condition commonly imposed by the Commission on licences for premises with entertainment music. SEPP N-2 is a policy set by the Victorian Environment Protection Authority in 1989 with the following policy goal: 'to protect residents from levels of music noise that may affect the beneficial uses made of the noise sensitive areas while recognising the community demand for a wide range of musical entertainment'. See Victorian Government Gazette No. S 43 Thursday 3 August 1989 'Environment Protection Act 1970 State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.'



30. The Commission had before it and considered evidence submitted by the Licensee in the course of the inquiry process including:
- (a) a draft venue management plan for the Premises, dated 25 August 2018 and a final venue management plan dated 31 October 2018 (together known as the **Venue Management Plan**);
 - (b) preliminary and final expert security reports in relation to the Premises prepared by Dr Tony Zalewski, dated 24 September 2018 and 30 October 2018 (**Expert Security Reports**);
 - (c) acoustic reports prepared by Renzo Tonin & Associates (**RT&A**) including:
 - i. preliminary commentary in response to the Second Acoustic Report, dated 18 September 2018 (**Third Acoustic Report**);
 - ii. report regarding installation and calibration of sound level limiter, dated 19 October 2018 (**Fourth Acoustic Report**); and
 - iii. addendum to the Fourth Acoustic Report, dated 5 November 2018 (**Fifth Acoustic Report**).
 - (d) witness statement of Mr Liam Ganley, director of the Licensee, dated 31 October 2018 with attachments; and
 - (e) witness statement of Mr Harry Goldberg, dated 5 November 2018.
31. The Commission had before it and considered submissions from Regal Hotels Pty Ltd, the Licensee's landlord, in support of the Review Application. Regal Hotels Pty Ltd requested to be included in proceedings, which the Commission allowed. Regal Hotels Pty Ltd did not attend the Hearing.
32. The Commission also had before it and considered a pre-hearing compliance report for the Premises prepared by the Compliance Division at the Commission, current as at August 2018 (**VCGLR Pre-Hearing Report**).

THE HEARING

33. The Commission held three preliminary meetings¹² prior to the public hearing of the Review Application which was conducted on 13 – 14 November 2018 (the **Hearing**). The purpose of the preliminary meetings was to ensure the Hearing was focused on the substantive issues. The Licensee was represented by Mr John Larkins of Counsel who called Mr Ganley, Dr Zalewski and Messrs Nicholas Peters and Peter Harris of RT&A to give evidence. Mr Smith attended the Hearing and gave evidence to the Commission. Mr & Mrs Crouch attended the Hearing and

¹² The preliminary meetings were held on 31 July 2018, 21 August 2018 and 1 November 2018.



Mr Crouch gave evidence. Victoria Police also attended the Hearing and Senior Constable Wilson gave evidence to the Commission.

POST-HEARING SUBMISSIONS

34. After the Hearing, on 19 November 2018, the Licensee submitted proposed conditions, should the Commission be minded to grant the variation of the Licence that is the subject of the Review Application.

REASONS FOR DECISION ON REVIEW

Issues for determination on review

35. In making its decision on review, the Commission is required to determine whether the grant of the variation of the Licence would detract from or be detrimental to the amenity of the area in which the Premises are situated and whether it should be granted having regard to the objects of the LCR Act, in particular harm minimisation, which is the primary object.¹³

Whether the grant would detract from or be detrimental to the amenity of the area

36. A ground of refusal is that the variation of the Licence would detract from or be detrimental to the amenity of the area in which the Premises are located.¹⁴

37. At the time of making the Review Application, 'noise levels' was one of the factors listed in section 3A(2) of the LCR Act that the Commission may take into account when determining whether a grant or variation of a licence would detract from or be detrimental to the amenity of an area. Since that time, an amendment to the LCR Act¹⁵ removed 'noise levels' as a factor, along with reference to parking facilities and traffic movement. However it is noted that the Minister's second reading speech¹⁶ and explanatory memorandum¹⁷ in relation to this matter indicated that the removal of the factors from section 3A(2) is not intended to limit the Commission's ability to grant a licence that has conditions relating to parking, traffic or noise levels as it sees fit on the basis of its consideration of amenity, and further, the rationale in removing these was to reduce duplication between the planning and liquor processes.¹⁸

38. The Commission notes that the impact on music noise levels of the proposed variation being two additional hours of music that may be 'electrically or electronically amplified music,'¹⁹ has not

¹³ The Commission notes that in determining this matter, it has also considered each of the grounds set out in section 44(2).

¹⁴ See sections 47(2) and 44(2) of the LCR Act.

¹⁵ Section 29 of the *Liquor and Gambling Legislation Amendment Act 2018*.

¹⁶ Victoria Legislative Assembly, Parliamentary Debates, 28 March 2018 (**Second Reading Speech**) (the Hon Ms Marlene Kairouz, Minister for Consumer Affairs, Gaming and Liquor Regulation) at 927.

¹⁷ Explanatory Memorandum, *Liquor and Gambling Legislation Amendment Bill 2018*, published 27 March 2018.

¹⁸ *Ibid.*, clause 29, Second Reading Speech at 928.

¹⁹ See the Condition extracted in paragraph 2.



been considered in any planning process undertaken by the Council. The Commission therefore considers it is appropriate to take into account the potential noise impacts associated with the proposed variation of the Licence subject of this Review Application.

Detriment to the area due to noise concerns

39. The Premises is situated on the ground floor of the George, which is a historic building in St Kilda's entertainment precinct on Fitzroy Street. The George encompasses both residential and commercial uses. Of the commercial tenants, there are four licensed premises, one of which is currently closed (White Bar). The toilets for the Premises are located outside the confines of the Premises itself, within the common area of the George. Noise concerns arise both in relation to both music emanating from the Premises and patron generated noise.

Licensee's view

40. The Licensee seeks the variation to the Licence to allow electrically or electronically amplified music, to be played between 1 am and 3 am, the same hours within which it is licensed to supply liquor. Mr Ganley, director of the Licensee, stated that the existing music is only played at background music levels, though he also said that it was adjusted to be 'just above background' when patron noise increased. He said that the intention of the Review Application is to retain the customers already present with some background music. He explained that the current practice for adherence to the Condition is to start gradually turning the music down from 12.30 am so that it is completely off at 1 am. He said that patrons assume that once the music is off, the venue is closed and they gradually leave because it is 'awkward' to remain. For this reason, he stated that the Premises probably never trades until 3 am because there are no customers.
41. The Licensee acknowledges that noise has been a concern at the Premises since taking ownership, and prior to that. At the Hearing, Mr Ganley also admitted to having misinterpreted the Condition and said the venue had previously played what he described as low-level background music between 1 am and 3 am, until being alerted to the breach by Victorian Commission for Gambling and Liquor Regulation inspectors. Mr Ganley said that after this occurred the Licensee sought to have the Condition removed and they changed their practices to stop playing amplified music after 1 am.
42. Mr Ganley told the Commission that the Licensee had a good relationship with the owners of residences in the George when it took over the Premises, which was previously operating with live music on Saturday nights, which he then stopped. He also stated that the Licensee always encourages the residents to '*come and speak to us directly if they ever had any issues*'. After one such discussion with Mr Smith and the Council, in January 2018, the Licensee engaged Mr Andrew Rogers of Noise Consulting & Management Pty Ltd to undertake transmission testing



from within the Smith residence and to set limits on the in-house amplifiers to calibrate music noise from the Premises.²⁰ When further noise complaints were received indicating that those measures were not effective, the Licensee engaged new acoustic consultants RT&A.

43. Mr Ganley gave evidence that the engagement of RT&A was something of a turning point in understanding the acoustic profile of the Premises with a view to taking appropriate attenuation measures. Relevantly, RT&A acousticians were the first acoustic experts to conclude that the sound from the Premises was 'structure borne' i.e. being transferred through the walls in the building. Following this conclusion, RT&A could undertake appropriate acoustic attenuation measures to effectively address the source of the noise concerns including installation and calibration of a CESVA LRF-04f sound level limiter (**CESVA Limiter**) and vibration isolation mounts for all speakers at the Premises to minimise structure borne sound transmission.²¹
44. The Fourth Acoustic Report, which contains the music noise measurements taken after the installation and calibration of the CESVA Limiter, indicates that SEPP N-2 compliance was achieved at the time of testing on 8 – 9 October 2018 and that measures taken would ensure this would continue. The tests were conducted within the Premises and the Smith residence. Tests were not conducted in the Crouch residence as it is further from the source of the sound and therefore less affected (Mr Peters from RT&A gave evidence that structure borne sound reduces by three decibels per floor). Testing was conducted between midnight and 3.30 am – 4 am while the Premises was closed.
45. The Fourth Acoustic Report and RT&A evidence at the Hearing indicates that the CESVA Limiter has many features which will ensure compliance with SEPP N-2 including security measures to prevent the sound levels from being tampered with and data storage for 100 days so that compliance/non-compliance can be verified. The Licensee submitted that these measures would prevent further noise disturbance to the residents in the George and that amplified music between 1 am and 3 am would not cause detriment to the amenity of the area in which the Premises are situated.

Objectors' view

46. Mr & Mrs Smith, Mr & Mrs Crouch and the witness statements of residents and former residents attached to the Victoria Police submission argued that the amenity of the area in which the Premises are situated has been adversely affected by excessive noise emanating from the Premises and patrons coming and going from the Premises accessing the toilets. They argue that further detriment to the amenity of the area would be caused by allowing a further two hours of

²⁰ Document referred to in paragraph 25(e) above.

²¹ Measures detailed in the Fourth Acoustic Report summarised in the Fifth Acoustic Report.



amplified music between 1 am and 3 am, both in terms of noise from music as well as the noise from patrons within the venue and leaving the venue.

47. Mr Smith, whose residence is most directly affected by noise emanating from the Premises and which has been the site for acoustic testing by three different acoustic consultants, submitted that:
- (a) the Premises should be subject to the 'music noise control regime' set up by VCAT for other venues in the George which involves, among other things, setting the music limit to SEPP N-2 minus three decibels and installing a sound limiter that cannot be tampered with and which records noise levels for later inspection by Council;²²
 - (b) the recent acoustic testing by RT&A following the installation and calibration of the CESVA Limiter, which shows a sound reduction of eight decibels below the non-compliant level identified by Octave (in the Second Acoustic Report), only shows that through the entire period of Freddie Wimpole's tenancy in the George, the Licensee has been in breach of SEPP N-2 every weekend; and
 - (c) it is the Licensee's responsibility to ensure compliance with the Licence, which they have never done and yet which they are now promising to do.
48. At the Hearing, the acoustic expert Mr Peters responded to Mr Smith's argument that SEPP N-2 minus three decibels was the most appropriate by stating that the regime had been imposed by VCAT to address a scenario where a number of different premises in the George were simultaneously breaching SEPP N-2 leading to the requirement for a lower sound limit to be imposed, and that this scenario was no longer occurring as one of those venues (the White Bar) is not currently in operation.
49. Mr & Mrs Crouch submitted that hearing very audible music from Freddie Wimpoles in their home is depressing and negatively impacts their health. They stated that they have double glazed all their windows in an effort to stop the music penetrating their home to no avail, and that they sleep with earplugs. At the Hearing, Mr Crouch told the Commission that, when they have concerns about music noise, they record data about noise levels in time logs. While acknowledging that there had been no disturbance in the week prior to the Hearing, he said time will be the judge of whether the acoustic measures implemented are effective in dealing with the noise concerns. Mr Crouch expressed the view that the additional two hours of amplified music will attract the patrons from the Fifth Province across the road, also owned by the Licensee, which closes at 1 am, to come over and party for another two hours.
50. Sergeant Wilson for Victoria Police obtained statements from nine residents and owners at the George (including one each from Mr & Mrs Crouch), some of which detailed current noise related

²² Submission of Mr Smith dated 4 June 2018.



amenity concerns such as an inability to sleep before 3 am on weekends. Sergeant Wilson's statement detailed discussions with the Council compliance planning coordinator, who informed him that residents had also raised their concerns with the Council. He stated that on 28 May 2018, the Council provided him with a copy of the Second Acoustic Report, which determined that music noise from the Premises exceeded SEPP N-2 during the assessment period of 3 – 18 May 2018.

Commission's view

51. The Commission finds that noise has clearly adversely affected some residents at the George. It finds that noise is an issue which was largely ignored by the Licensee until it was forced to act following the involvement of the Council in relation to the complaints by residents, the identified breach of the Condition by Commission compliance inspectors, Victoria Police's objection to the proposal in the Original Application and the Delegate's decision to refuse the Original Application.
52. The Commission accepts that following the engagement of RT&A, who recognised the structure borne nature of the sound transmission from the Premises, that certain acoustic attenuation measures have been implemented purporting to have dealt with the issue. The Commission notes that there is some evidence that these measures may improve music noise attenuation, as indicated by Mr Crouch's evidence about improvements in noise levels set out at paragraph 49 above, however, the Commission finds that there are still unknowns regarding the extent of the effectiveness of the measures. At the time of the Hearing, the CESVA Limiter had only been operational for a little over one month (having been installed on 8 October 2018), and evidence from Mr Smith at the Hearing indicates there had been one occasion in the intervening period where noise levels exceeded tolerance, which should have been impossible if the findings in the RT&A acoustic reports were reliable.
53. The Commission therefore considers that, in light of the sustained noise-related detriment to the amenity of the area in which the Premises are located since the Licensee took over in 2015, it needs more time to see if the new acoustic attenuation measures in place at the Premises have resolved those concerns.
54. Taking into consideration the evidence before it, the Commission finds that the proposed variation would be likely to detract from or be detrimental to the amenity of the area in which the Premises.

Detriment to the amenity of the area due to other factors and misuse and abuse of alcohol

Objectors' view

55. Material submitted by Mr & Mrs Crouch and Victoria Police includes submissions alleging the existence of some of the factors referred to in paragraph 22 in the area surrounding the Premises, which they allege are attributable to the Licensee and the patrons of Freddie Wimpoles.



56. Mr & Mrs Crouch and Victoria Police submit that granting the Review Application will exacerbate existing detriment to the amenity of the area that occurs due to intoxicated patrons of the Premises gaining access to the residential common areas of the George, in part due to the access point to the Premises toilet being located in the common property. The objectors described loud, drunken and rowdy patrons who show little consideration and respect to owners and residents in the George.
57. Mr & Mrs Crouch submitted evidence of indecent and disorderly behaviour such as naked intruders caught on the CCTV cameras operating in the George, as well as on the Crouches' own CCTV camera. They submitted statements regarding threatening behaviour such as a person they believed to be a patron of Freddie Wimpoles attempting to gain entry to their residence (which is on the third floor).
58. The statements annexed to Sergeant Wilson of Victoria Police's statement detail the concerns of other residents and lot owners at the George regarding security concerns. The statements include allegations of drunk patrons wandering the communal hallways at the George, underwear littering in the hallways, lewd acts being performed in the hallways, fighting in the street and further noise concerns from the Premises staff dragging the outdoor tables inside, changing kegs and emptying bins at 3 am disturbing the neighbours.
59. Victoria Police stated that since May 2016 there had been 10 licensed premises incident reports (**LPIR**) recorded against the Licensee. The LPIRs relevantly include incidents such as intoxicated patrons gaining access to the residential area of the George, violent altercations with security due to patrons being ejected or refused entry, intoxicated persons departing the Premises, amplified music after 1 am, and an infringement notice for supply of liquor other than in accordance with the Act (specifically, serving liquor outside trading hours).

The Licensee's view

60. The Licensee responded to the above allegations that patrons from the Premises are responsible for security breaches by stating that they themselves are similarly affected by those issues. The Licensee argued that patrons at the Premises are not necessarily responsible for detriment arising from security breaches because there are other licensed premises in the George whose patrons have access to the Freddie Wimpoles toilets,²³ and there is an alternative exit from Grey Street into the George which is accessible to patrons of the other licensed premises and residents of the George.
61. At the Hearing, Mr Ganley said that the Licensee had always tried to assist with the security of the building and always engaged with the body corporate, the chairperson of the body corporate

²³ The male and female toilets at the Premises are in a common area at the George. The male toilets are maintained by the body corporate and the female toilets are maintained by the Licensee.



Mr Goldberg, the Council and Victoria Police. He stated that it was in his best interests to ensure the building was secure because the Licensee has a 20 year lease and is in it for the long term. He stated that he had concerns in relation to LPIRs recorded against the Licensee in cases where his staff had done the right thing by refusing entry to an intoxicated person and a fight has ensued outside the Premises. He stated that he had raised these concerns about LPIRs at meetings of the St Kilda liquor licensing forum.

62. At the Hearing, Mr Ganley submitted that the Premises is not a nightclub, but rather has a 'premium product' and is one of the more expensive bars on the street in terms of its beer offering. He said that, late at night, the Premises attracts hospitality workers from other venues who are interested in the premium product offered including beer, high end whiskies and bourbons and that they play cards and board games. He said the Premises has an informal dress code but does not allow patrons to attend in High-Vis clothing after 9 pm. He stated that, while the Premises has a capacity of 146 patrons, it never operates at 146 and would '*struggle to push past 120 because of the environment and seating around the bar*'. He said that there is no dance floor and that there is food available at all times.
63. The Licensee relied on the Expert Security Reports and evidence of Dr Zalewski who argued that, in his experience, the Premises is not a 'high risk' venue for misuse and abuse of alcohol. Dr Zalewski gave evidence at the Hearing that he considered the Premises to be a low risk venue because, among other things, it is not a nightclub or 'vertical drinking' establishment, it attracts a more mature clientele over the age of 30 and there is a reasonable balance of gender. Dr Zalewski stated that he did not consider the proposed variation to the Licence to allow music to be played between 1 am and 3 am would affect this low risk profile. Dr Zalewski said that, if the patron profile was younger, one might have to think about additional security and protections.
64. The Licensee submitted a Venue Management Plan containing suitable procedures and controls to ensure the responsible supply of alcohol and reduce risks to the Commission on review. At the Hearing, Mr Ganley stated that the Venue Management Plan had always been in place, however it is noted that the Licensee had declined to provide it when requested by Victoria Police during the Original Application.
65. The Licensee stated that it had taken measures to address the risk of security breaches through installing extra CCTV and adding signage directing patrons to the toilets, prohibiting glassware being taken beyond the bar area, prohibiting patrons from accessing residential floors in the George, requiring the Grey Street door to remain closed at all times, and locking the glass doors at the top of the stairs in the common area. It stated that it would formally implement additional measures in the Venue Management Plan as recommended by the Expert Security Reports if the Review Application was successful. The Licensee also supported the installation of a security door by the body corporate. However, Dr Zalewski stated that, had he been consulted on the



design of the security door, he would have recommended that it extend to the ceiling and not be in such a position as to be easily scaled using the hand rail as a step up.

Commission's findings

66. The submissions of the objectors and statements in support of Victoria Police's objection suggest that security issues at the George have increased since the Licensee commenced its tenancy. However, the Commission notes that there are other licensed premises currently operating in the George and the exit on Grey Street could potentially be an access point for trespassers who may not have any connection to the Premises if someone opens the door for them. The Commission therefore finds that it is not possible to conclude with certainty that the security issues in the George are necessarily attributable to patrons of the Premises.
67. The Commission accepts some of the evidence of Dr Zalewski regarding the profile of the Premises as 'low risk'. However, it notes that Dr Zalewski's assessment of the Premises is, in part, based on patron data supplied by the Licensee regarding attendances up to 10 pm, and that his observation that there was a decline in patron numbers after 10 pm was not supported by any facts or data. The Commission finds there are limitations in relying on the Expert Security Reports when attempting to understand the patronage of the Premises who are present at the Premises at 1 am and whose behaviour would therefore most directly affect the amenity of the area with respect to non-music related amenity concerns, or the risk of an increase to misuse and abuse of alcohol should the Review Application be approved.
68. The Commission also notes that at the Hearing, Mr Ganley indicated that he was never at the Premises during the hours of 1 am and 3 am (or even after 10 pm). Therefore, the Commission has less confidence in Mr Ganley's assurances regarding the nature of the Premises being low risk, because he is reliant on second hand information from his staff as to the issues that occur during the hours where the detriment to the amenity of the area is most likely to occur. Further, the Commission is concerned about the likelihood of the Licensee delivering the additional security and patron management protocols proposed in the Expert Security Reports, given its history of consistently failing to respond to the resident's concerns over time, until the Original Application was made.
69. In consideration of the reasons above, in particular due to lack of evidence regarding the patron profile after 1 am, the Commission cannot be satisfied that an additional two hours of amplified music at the Premises between 1 am and 3 am will not increase the risk of detracting from, or detriment to, the amenity of the area arising out of the wider potential amenity impacts or the risk of an increase to misuse and abuse of alcohol.



Whether to grant or refuse the licence having regard to the objects of the LCR Act

70. The Commission is mindful of the need to ensure that appropriate regard be given to the objects of the LCR Act and particularly the harm minimisation object,²⁴ recognising that it is the primary object of the LCR Act.
71. In relation to the risk of harm associated with the misuse or abuse of alcohol the Commission notes that the Licensee now has an improved Venue Management Plan in place which could assist it to minimise any potential risk of harm associated with the misuse and abuse of alcohol by providing controls over the supply of liquor and reducing the impact of amenity concerns (such as factors listed in section 3AA of the LCR Act) across all its trading hours. Nevertheless, the Commission finds that there is also the risk that the provision of an additional two hours of amplified music between the hours of 1 am and 3 am has the potential to change the character of the Premises in a way that may increase the risk of harm arising from the misuse and abuse of alcohol.
72. In relation to the music noise related amenity concerns, the Commission relies on its findings in paragraphs 51 to 53. The Commission has had regard to the amenity of the area in which the Premises are situated with respect to the impact of two additional hours of amplified music noise and finds that there is likely to be a detrimental impact to that amenity to such an extent that it is not appropriate to grant the Review Application.

DECISION ON REVIEW

73. Based on all of the matters set out above, the Commission on review has decided to affirm the Delegate's decision to refuse to vary the Licence.

The preceding 73 paragraphs are a true copy of the Reasons for Decision of Ms Helen Versey, Deputy Chair, Mr Des Powell AM, Commissioner and Dr Dina McMillan, Commissioner.

²⁴ LCR Act, section 4(1)(a) and (2).