



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 a restaurant and café licence in respect of the premises trading as the Local Bean Café, located at 656-661 High Street, Thornbury.

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

Date of Hearing: 11 July 2018

Date of Decision: 5 September 2018

Date of Reasons: 5 September 2018

Appearances: Ms Josie Perrone, 1st Applicant
Ms Amy Robinson, 2nd Applicant
Mr Andrew Hooper, Counsel for the Licensee (instructed by Peter Petsinis, Residential & Commercial Property Transfer Co)
Mr Robert Buckmaster, on behalf of the Council
Mr Cameron Warfe, Counsel Assisting the Commission

Decision: The Commission has determined to set aside the decision of the Delegate and, in substitution, refuse to grant the licence.

Signed: 
Helen Versey
Deputy Chair



REASONS FOR DECISION

BACKGROUND

1. On 20 November 2017, Zaxaroplastio Pty Ltd (**the Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) for a restaurant and café licence under the *Liquor Control Reform Act 1998 (LCR Act)* (**the Original Application**). In the Original Application, the Licensee sought to supply liquor at its premises trading as the Local Bean Café, located at 656-661 High Street, Thornbury (**the Premises**) at ordinary trading hours for such a licence, being:

Sunday between 10am and 11pm

Good Friday and ANZAC Day between 12noon and 11pm

On any other day between 7am and 11pm

2. The proposed red line plan for the Premises included all internal areas of the Premises, but excluded the rear courtyard and the footpath trading area fronting High Street.
3. The Original Application was supported by:
 - (a) a copy of ASIC's 'Record of Registration for Business Name' for Local Bean Café Bar;
 - (b) a 'Declaration – Right to occupy the premises' form dated 19 October 2017 and signed by Ms Despina Apokoroniotakis, director of the Licensee;
 - (c) a copy of letter from City of Darebin dated 31 August 2015 stating that the Licensee's application for liquor licence did not require a planning permit under the Darebin Planning Scheme;
 - (d) evidence of RSA and New Entrant Training undertaken by Ms Apokoroniotakis in September 2015;
 - (e) a building surveyor's report dated 22 September 2016, which indicated that the maximum capacity of the licensed area of the Premises (calculated with reference to the VCGLR face sheet) was 115 persons; and
 - (f) 'Liquor Licensing Questionnaire' for Ms Apokoroniotakis dated 19 November 2017.
4. Following clarification from the Commission, the Licensee's solicitor confirmed that, with effect from 18 December 2017, the sole director and shareholder of the Licensee was



Ms Apokoroniotakis. The Licensee's solicitor also confirmed that her husband, Mr John Apokoroniotakis, was no longer a director or shareholder of the Licensee. This was subsequently confirmed through an ASIC company search of the Licensee dated 30 January 2018.

5. Pursuant to section 33(1) of the LCR Act, a copy of the Original Application was served on the Chief Commissioner of Police and relevant Licensing Inspector on 20 November 2017. Victoria Police, on behalf of the Chief Commissioner and Licensing Inspector, confirmed on 4 December 2017 that it did not object to the grant of the Original Application.
6. A copy of the Original Application was also served on the Darebin City Council (**the Council**) pursuant to section 33(2) of the LCR Act. On 22 December 2017, the Council informed the Commission that it did not object to the grant of the Original Application.
7. A total of 37 valid public objections to the Original Application were received by the Commission (**Objections**). In summary, the Objections submitted the addition of liquor at the Premises would detract from or be detrimental to the amenity of the area in which the Premises are situated. Specifically, the Objections raised the following concerns:
 - (a) the indecent and threatening behaviour of certain groups of patrons of the Premises;
 - (b) the lack of available parking in the vicinity of the Premises would worsen if a liquor licence was granted;
 - (c) smoking by patrons within the footpath trading area was in breach of the new smoking laws introduced by the Victorian government;
 - (d) excessive music and patron noise emanating from the Premises, in particular affecting nearby residences to the rear of the Premises;
 - (e) the Licensee had changed the name of the Premises from 'Melissa Cakes' to 'Local Bean Café' to attempt to avoid any responsibility for the amenity issues that had occurred under the old trading name; and
 - (f) poor management practices at the Premises and the suitability of the Licensee to hold a liquor licence.
8. A copy of the Objections were provided to the Licensee for comment.



9. On 8 January 2018, the Licensee wrote to the Commission to address the concerns raised in the Objections. The Licensee submitted the following:
 - (a) the sole director of the Licensee, Despina Apokoroniotakis, has completed Responsible Service of Alcohol training and was committed to administering her responsibilities in serving liquor correctly and responsibly;
 - (b) the Licensee was not aware of patrons acting in an unacceptable manner, or of any altercations between patrons and passers-by;
 - (c) there were no adverse comments to the Original Application by either Victoria Police or the Council;
 - (d) the Licensee would strictly enforce the new smoking laws on its patrons; and
 - (e) the Licensee changed the name of the venue from 'Melissa Cakes' to 'Local Bean Café' following the termination of the relevant franchise agreement, rather than to distance itself from any historic issues occurring under the old trading name.
10. The Licensee also provided the following further documents in support of the Original Application:
 - (a) a 'Statement of display' form for the Premises dated 14 February 2018;
 - (b) a 'Liquor Management Plan' dated July 2014, and in the Licensee's former operating name, Melissa Cakes – Thornbury; and
 - (c) 'Cumulative Impact Statement' prepared by Swindon Town Planning on behalf of the Licensee.
11. On 26 February 2018, the Commission's delegate (**the Delegate**) determined to grant the Original Application (**the Original Decision**). In granting the Original Application, the Delegate noted that:
 - (a) as the issue regarding the suitability of the Licensee is not a valid ground of objection for a member of the public, those aspects of the Objections have not been considered. However, the issue was independently considered by the Delegate;
 - (b) few of the Objections were made from individuals who reside within a location relative to the Premises;
 - (c) many of the concerns raised related directly to the footpath trading area, which was not proposed to form part of the red line plan of the Premises;



- (d) the Liquor Management Plan, prepared by the Applicant, set out policies that would adequately control the behaviour of patrons and any potential harms that may arise through the supply of liquor;
 - (e) the standard conditions of a restaurant and café licence would assist in minimising any adverse impact on the amenity of the area that may arise as a result of the grant of a licence; and
 - (f) parking within shopping strips is often problematic, and the Licensee should not be solely responsible for the provision of parking in such circumstances.
12. The Delegate determined to impose standard conditions relevant to a restaurant and café licence, and imposed a maximum capacity of 115 persons.
13. On 26 March 2018, the Commission received applications for an internal review of the decision (together, **the Review Application**) from two of the original objectors:
- (a) Ms Josie Perrone (**the 1st Applicant**); and
 - (b) Ms Amy Robinson (**the 2nd Applicant**),
- together, **the Applicants**.
14. The Review Application included requests that the Original Decision not take effect until the determination of the Review Application, also known as a stay of the decision (**Stay Requests**).
15. On 5 April 2018, after reviewing all the material available to the Commission's Delegate and the Licensee's submission in response to the Stay Requests dated 3 April 2018, the Commission determined not to grant the Stay Requests.

LEGISLATIVE FRAMEWORK AND THE TASK BEFORE THE COMMISSION

The Commission's internal review power

16. Division 2 of Part 9 of the LCR Act governs internal review applications. The Original Decision is a reviewable decision under section 152 of the LCR Act, as the decision was made under section 47 of the LCR Act as a contested application. Any objector is eligible to make an application for review of the decision by the Commission under section 153 of the LCR Act, therefore the Applicants are eligible to apply for review of the Original Decision.



17. 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 either:
 - (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.
18. Under the LCR Act, an application for grant of a restaurant and café licence may be contested or uncontested. The Original Application constitutes a contested application under section 3(1) of the LCR Act, in that it is an application for the grant of a licence in respect of which objections under Division 5 of Part 2 of the LCR Act have been received.
19. In addition to concerns relating to the Licensee's suitability, the Applicants objected to the grant of the licence on the grounds of amenity. Section 38(1), which is within Division 5 of Part 2 of the LCR Act, provides that "any person may object to the grant, variation or relocation of a licence on the ground that the grant, variation or relocation would detract from or be detrimental to the amenity of the area in which the licensed premises or proposed licensed premises are situated". Accordingly, the Original Application was contested, and the Review Application remains contested.
20. 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 contested application. In doing so, it must consider all the information, material and evidence that was before the original decision maker.¹ It may also consider further information, material or evidence as part of making its decision.²

Conduct of an inquiry

21. The general conduct of an inquiry, including an internal review, is governed by the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act)*. 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.
22. Section 33(1) of the VCGLR Act provides that "the Commission may conduct any inquiry for the purposes of performing its functions or duties, or exercising its powers under this Act, gambling legislation or liquor legislation." The functions of the Commission are listed in section 9 of the VCGLR Act.

¹ Section 157(2) of the LCR Act.

² Section 157(3) of the LCR Act.



23. Section 33(3) of the VCGLR Act provides that when the Commission is conducting an inquiry for the purposes of performing a function under section 9(1)(a), (b), (c) or (d), the Commission has certain powers specified in the subsequently repealed Division 5 of Part I of the *Evidence (Miscellaneous Provisions) Act 1958*. These powers include the power to examine a witness on oath and the power to send for witnesses and documents.
24. Section 25(3)(a) of the VCGLR Act provides that the Commission in performing a function or duty, 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 and may inform itself in any way it thinks fit. Section 25(3)(b) specifies that the Commission is bound by the rules of natural justice.

Determination of a contested application

25. Section 154 of the LCR Act provides that the Commission must notify every person who provided the original decision maker information or material, or gave evidence to the original decision maker, in writing that the Review Application has been received. The notification must specify that the Commission on review:
 - (a) will not be limited to the information or material provided or evidence given to the original decision maker; and
 - (b) may request further information or material from the person or may require the person to give evidence before the Commission.
26. 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.”
27. Under section 47(3) of the LCR Act, before granting or refusing a contested application, the Commission:
 - “(a) may have regard to any matter that 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.”*
28. 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.”³

29. Section 9(4) of the VCGLR Act 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.”

30. Decision-making guidelines titled “*Assessment of the Cumulative Impact of Licensed Premises*” dated 7 June 2012 were issued by the then Minister for Consumer Affairs and Minister responsible for administering the LCR Act (**Cumulative Impact Guidelines**). The Cumulative Impact Guidelines provides that the Commission “may assess the contribution of a new licensed premises, or the variation or relocation of an existing licensed premises, to the cumulative impact of a concentration of licensed premises in an area”.

31. 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. 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*
 - (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.”*

³ The VCGLR Act does not contain any specific objects.



32. 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.”

33. 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”.⁴ 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”.⁵

34. Pursuant to sections 47(2) and 44(2) of the LCR Act, the Commission may refuse to grant the Original Application on a number of grounds, including:

- (a) that the proposed licensee is not a suitable person to hold or carry on business under a licence;⁶
- (b) 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;⁷ and
- (c) that the grant of the application would be conducive to or encourage the misuse or abuse of alcohol.⁸

35. For the purposes of the LCR Act and relevantly in this matter, the amenity of an area is defined as being the quality that the area has of being pleasant and agreeable.⁹ Section 3A(2) of the LCR Act lists the following factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area:

- (a) the possibility of nuisance or vandalism;
- (b) the harmony and coherence of the environment;
- (c) any other prescribed matters.

⁴ See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

⁵ See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

⁶ Section 44(2)(a) of the LCR Act.

⁷ Section 44(2)(b)(i) of the LCR Act.

⁸ Section 44(2)(b)(ii) of the LCR Act.

⁹ Section 3A(1) of the LCR Act.



However, the definition of 'amenity' for the purposes of the LCR Act is not limited by these factors.¹⁰

36. Section 49 of the LCR Act provides that the Commission may impose any condition it thinks fit on the grant of an application.

MATERIAL BEFORE THE COMMISSION AND PUBLIC HEARING

37. The Commission on review had before it, and considered, all of the materials received by the Delegate and which are detailed in paragraphs 1 to 10 above. The Commission also had before it the Decision and Reasons for Decision of the Delegate in relation to the Original Application, dated 26 February 2018.
38. On 4 May 2018, the Commission wrote to the Council seeking confirmation that its position of 'No Objection' to the Original Application was maintained with respect to the Review Application. On 11 May 2018, the Council advised that Commission that it now objected to the grant of the licence on the basis that it would be detrimental to the amenity of the area.¹¹ The Council also noted that the Licensee's current planning permit only permitted a maximum of 60 patrons for the Premises, which was inconsistent with the condition of the Original Decision for 115 patrons.
39. The Commission also received the following documents:
- (a) the Review Application, together with supporting submissions from the Applicants;
 - (b) written submissions from the Licensee dated 3 April 2018 (including a copy of the Licensee's prior franchise agreement with Melissa Cakes Franchising Pty Ltd), 7 June 2018 and 20 July 2018; and
 - (c) written submissions from the Council dated 9 July 2018 outlining historic amenity issues and unauthorised building works at the Premises.
40. On 11 July 2018, the Commission conducted a public hearing in relation to the Review Application (**the Hearing**).¹² The Licensee was represented by Mr Andrew Hooper of Counsel at the Hearing and Ms Apokoroniotakis was called to give evidence on behalf of the Licensee.

¹⁰ Section 3A(3) of the LCR Act.

¹¹ The Commission notes that the Council also sought to object on the basis of the Licensee's suitability. However, the Commission did not accept this aspect of the Council's objection as the LCR Act only permit the Chief Commissioner of Police or the relevant licensing inspector to object on this basis.

¹² On 14 June 2018, a differently constituted Commission commenced a public hearing in relation to the Review Application. However, this hearing was indefinitely adjourned following the identification of a conflict of interest between one of the sitting commissioners and a witness for the 1st Applicant. For the avoidance of doubt, the conflicted commissioner played no further part in the determination of the Review Application.



41. The Applicants appeared in person at the Hearing and gave evidence to the Commission. The Council was represented by Mr Robert Buckmaster, Senior Planning Investigator, who gave evidence on behalf of the Council to the Commission.
42. At the Hearing, the Commission was provided with the following documents:
 - (a) a character reference for Ms Apokoroniotakis dated 5 July 2018 by Mr George Sianas, Sianas and Associates Pty Ltd;
 - (b) a report titled 'Traffic Engineering' for the Premises prepared by TTM Consulting (Vic) Pty Ltd dated 14 May 2018;
 - (c) statutory declarations from Ms Jennifer Greenham and Mr Wayne Savage in opposition to the grant of the licence;
 - (d) a binder of photos from the 1st Applicant purporting to evidence various breaches of local laws and detrimental impact on amenity by the Licensee;¹³
 - (e) a copy of minutes of the Council's Planning Committee Meeting on 27 October 2014 relating to the planning application of the Premises; and
 - (f) various documents relating to the hearing before the Victorian Civil and Administrative Tribunal regarding the planning issues at the Premises.
43. Deputy Chair Versey and Commissioner McMillan separately visited the Premises prior to the Hearing.

DETERMINATION OF THE REVIEW APPLICATION

44. In making its decision on review, the Commission must determine the following relevant issues:
 - (a) whether Mr John Apokoroniotakis, the husband of the sole director of the Licensee, was an associate of either the Licensee or the director of the Licensee (i.e. Ms Apokoroniotakis);
 - (b) whether the Licensee is a suitable person to hold or carry on business under a licence;¹⁴
 - (c) whether the grant of the licence would detract from or be detrimental to the amenity of the area in which the Premises are located;¹⁵ and

¹³ On 13 July 2018, the Commission also received a document from the 1st Applicant containing explanations of the photos contained in the binder as provided at the Hearing.

¹⁴ Section 44(2)(a) of the LCR Act.

¹⁵ Sections 44(2)(b)(i) and 47(2) of the LCR Act.



- (d) whether the licence should be granted or refused having regard to the objects of the LCR Act, with particular regard to the object of harm minimisation.¹⁶

Associates of the Licensee and director of Licensee

45. On the questionnaire submitted as part of the Original Application, Mr John Apokoroniotakis, the husband of the sole director, was listed as an associate of the Licensee. Despite being removed as a director and shareholder of the Licensee in December 2017, Ms Apokoroniotakis confirmed at the Hearing that her husband would still be involved in the running of the Licensee's business as it was a "family business" and, although she would take primary responsibility for the business, he would take action and make decisions on behalf of the Licensee as required.¹⁷
46. On this basis, the Commission finds that Mr Apokoroniotakis will be entitled to exercise a relevant power in the running of the Licensee's business and therefore able to exercise a significant influence over or with respect to the management or operation of the business. As such, the Commission finds that Mr Apokoroniotakis is an associate of the Licensee as defined under section 3AC of the LCR Act.
47. Further, the Commission also finds that Mr Apokoroniotakis is an associate of the Licensee's sole director pursuant to section 3AC(1)(c) on the basis that he:
- (a) is a 'relative' of the director (which is defined in section 3AC(2) to include a spouse); and
 - (b) will be involved in the business proposed to be operated under the licence.

Suitability

48. The Commission must determine whether there are grounds to refuse to grant the licence on the basis that either the Licensee, or its sole director, are not suitable to hold or carry on business under a licence. The Commission acknowledges that Ms Apokoroniotakis has completed her necessary RSA and Licensees' First Steps training, and that there is no evidence of any relevant criminal convictions or unlawful trading of liquor in the name of the Licensee or the director for the purposes of section 44(3) of the LCR Act.
49. However, the Commission has had regard to evidence presented before it regarding:
- (a) the Licensee's historic and ongoing compliance issues under the relevant planning scheme; and

¹⁶ Section 4 of the LCR Act, in particular subsection (2).

¹⁷ Transcript, page 47.



- (b) the relationship breakdown between Mr Apokoroniotakis and the 1st Applicant, which has resulted in an enduring intervention order being made against Mr Apokoroniotakis.
50. In relation to planning compliance, the Commission notes the evidence of Mr Buckmaster that the Licensee was, at the time of the Hearing, not in compliance with its planning permit due to the presence of unauthorised and non-compliant building works (specifically, the rear deck and footpath awning), as well as failing to provide necessary parking spaces as required under the permit (due to the unauthorised construction of the rear deck which occupied the proposed parking location). At the Hearing, the Commission was informed by the Licensee that it was working together with Council to rectify the outstanding planning issues, and believed that those would be resolved in the near future.
51. Ms Apokoroniotakis gave evidence that:
- (a) she and her husband had constructed the rear deck without seeking planning approval;
 - (b) her husband had the primary responsibility for the business at the time the building works and planning compliance issues commenced as she was then more focused on parental responsibilities;
 - (c) at the time of exiting the franchise agreement, they believed everything was in order as they had received legal and planning advice regarding compliance with the planning scheme;
 - (d) once aware that it was not compliant with the planning permit, they engaged relevant planning experts to request an amended planning permit (rather than remove the deck) and continue to seek retrospective approval for these works in order to comply with the planning scheme.
52. The Council set out the history of non-compliance with the planning scheme and submitted that this failure to comply indicated the Licensee's indifference to regulatory compliance which made it unsuitable to hold a licence.
53. The Commission accepts that there has been a history of non-compliance with the planning scheme at the Premises, and finds that both the current director and her husband have been involved in the relevant actions and decisions which resulted in the non-compliance. However, the Commission notes that the Licensee has worked with the Council in an effort to bring itself into compliance, and understands that the outstanding issues are in the process of being resolved by Council by way of a current planning application.
54. The Commission also notes that there was a level of complexity regarding compliance issues stemming from the previous franchisor, and that the Licensee had relied on legal and planning advice as part of its revocation of the franchise agreement that would reasonably be expected to



identify compliance issues of this nature. Despite this, the Commission finds that the Licensee did not take all reasonable steps to ensure planning compliance in relation to the construction of the rear deck that has resulted in the ongoing planning concerns at the Premises.

55. In conclusion, while acknowledging that the Licensee has been involved in a level of non-compliance with the relevant planning scheme, the Commission considers that this is not sufficient to demonstrate an unsuitability to hold or conduct a business under a liquor licence.
56. In relation to the relationship deterioration between Mr Apokoroniotakis and the 1st Applicant, the Commission notes the evidence of the 1st Applicant regarding her interactions with Mr Apokoroniotakis from about 2010, the intervention order granted in 2011 and the alleged breaches of that order leading to the perpetual order being granted. At the Hearing, the 1st Applicant conceded that there had not been any recent breaches of the intervention order, and that she had not seen Mr Apokoroniotakis around the Premises as often in recent times. The Commission also notes that, on the evidence available to it, a number of the allegations levelled against Mr Apokoroniotakis by the 1st Applicant cannot be substantiated.
57. While acknowledging the fact that there is a perpetual intervention order in effect against Mr Apokoroniotakis, the Commission does not consider that the evidence before the Commission is sufficient to make a finding that the association of Mr Apokoroniotakis with the Licensee or the sole director makes them unsuitable to hold or carry on business under a licence. In this regard, the Commission notes that the suitability of a licensee under the LCR Act is a continuing obligation that can be assessed by the Commission at any time and, if satisfied that this obligation was not being met, could result in the Commission taking necessary action, such as imposing conditions on a licence to restrict the involvement of individuals, as well as suspending or cancelling a licence if necessary.

Amenity

58. The Commission must also determine whether the grant of the licence would detract from or be detrimental to the amenity of the area in which the Premises are located, which may give rise to a ground of refusal under sections 47(2) and 44(2).
59. At the time of making the Review Application, "noise levels" and "parking facilities" were factors listed in section 3A(2) of the LCR Act that the Commission may take into account when determining whether a grant of a licence would detract from or be detrimental to the amenity of an area. Since that time, an amendment to the LCR Act removed "noise levels" and "parking facilities" as factors (along with reference to traffic movement). However, it is noted that the



Minister's second reading speech¹⁸ and explanatory memorandum¹⁹ 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.²⁰

60. In circumstances where the Licensee's planning applications remain under consideration by the Council, the Commission considers it appropriate to assess concerns regarding noise-related amenity and parking availability so it can be satisfied that amenity of the area would not be negatively impacted upon by the grant of the application. Having said that, if such issues had been (or were to be) finally considered by the local council as a part of the planning process, the Commission would have necessarily placed less weight on these concerns to reduce any possible duplication between the liquor and planning processes.
61. Similar to the objections raised before the Delegate in considering the Original Application, the Applicants referred to the following concerns that granting the licence would have a detrimental impact on the amenity of the area in which the Premises was located:
- (a) the indecent and threatening behaviour of certain groups of patrons of the Premises;
 - (b) the combination of patrons, tables and the awning at the front of the Premises restricting access along the footpath for pedestrians;
 - (c) the lack of available parking in the vicinity of the Premises would worsen if a liquor licence was granted;
 - (d) smoking by patrons within the footpath trading area was in breach of the new smoking laws introduced by the Victorian government;
 - (e) littering by staff and patrons of the Premises in front and to the rear of the Premises; and
 - (f) excessive music and patron noise emanating from the Premises, in particular affecting nearby residences to the rear of the Premises.

Indecent and threatening behaviour

62. The Objections and evidence of the Applicants raised significant concern regarding indecent and threatening behaviour by patrons at the front of the Premises. In summary, the objectors indicated

¹⁸ Victoria Legislative Assembly, Parliamentary Debates, 28 March 2018 (**Second Reading Speech**) (Ms Kairouz, Minister for Consumer Affairs, Gaming and Liquor Regulation) at 927.

¹⁹ Explanatory Memorandum, Liquor and Gambling Legislation Amendment Bill 2018, published 27 March 2018 (**Explanatory Memorandum**).

²⁰ Explanatory Memorandum at clause 29, Second Reading Speech at 928.



that the behaviour of patrons at the front of the Premises made them feel intimidated and unsafe, due to the leering and unsavoury comments regarding physical appearance (particularly in relation to females). This resulted in many people feeling unwilling to pass by the Premises when those patrons were there, and considered that the situation would only deteriorate further if alcohol was permitted to be supplied by the Licensee.

63. Ms Apokoroniotakis gave evidence that she was aware of the behaviour of the patrons in front of the Premises, and that staff would approach them regarding their behaviour. However, she also explained a further strategy to deal with the issue was to put her prices up to encourage that particular group of patrons to seek another venue to attend.²¹ She also confirmed that she didn't record those incidents of patron behaviour in any incident book or reports.
64. While accepting that complaints appear to have been made to both Council and Victoria Police regarding her Premises, Ms Apokoroniotakis gave evidence that the Applicants had not made complaints direct to her in relation to patron behaviour. She submitted that it was difficult to be expected to respond to issues and complaints in such circumstances, particularly if she was not contacted by Council or Victoria Police to respond to allegations made under those complaints.
65. In response to questions from the Commissioners, Ms Apokoroniotakis gave evidence regarding her attitude towards managing patron behaviour. In relation to ensuring patron behaviour was not impacting on the amenity of the area, Ms Apokoroniotakis stated:

... the people that lived in the area were the ones that went to a place like this. Therefore, these clientele already existed. So we had to then try and make them understand that there's rules and regulations that, you know, may not have been followed, but we have to now put it into effect ... it took a while, but they then understood that it's not an option any longer, you know, but we – at the same time, if there was an issue, we would go out and ask them to quieten it down, otherwise they would have to, you know, move on. But at the same time, they're clients within the area. A lot of them lived in the area, so it's as if they felt at one stage that we were telling them not to come because, you know, they're like, "We live in this area, but you keep telling us that we can't do this and we can't do that." I said, "Well, this is actually coming from higher up, so we need to all, you know, abide by it." And that was the reason.²²

²¹ Transcript, page 67.

²² Transcript, page 51.



66. In relation to asking patrons to keep noise to a reasonable level, Ms Apokoroniotakis stated:

*But how do we tell a group of people that are enjoying their afternoon – because that’s what they’ve come out for, for a coffee or something to eat – that, “Sorry, you need to control yourselves because you’re not allowed to have fun. You’re not allowed to enjoy yourself because you’re disturbing other people”?*²³

67. The Commission accepts that there have been issues surrounding patron behaviour at the front of the Premises in the past, and that the addition of alcohol is likely to exacerbate these issues following the grant of a licence to the Licensee. The Commission places significant weight on the number of public objections received in this regard, in particular as many of the Objections were individualised and related to discrete instances of unacceptable behaviour by patrons at the Premises.

68. In relation to the Licensee’s ability to effectively manage this behaviour in the future, the Commission accepts that the Liquor Management Plan was developed by the Licensee prior to previous application for liquor licence in 2014, and notes that the Liquor Management Plan has not been implemented as Licensee has not supplied liquor at the Premises (i.e. the Licensee’s evidence was that it was only to be implemented upon the introduction of liquor at the Premises). While the Delegate was satisfied that the policies within the Plan would adequately control the behaviours of patrons and any potential harms that may arise through the supply of liquor, the Commission was ultimately not so satisfied. Although the Liquor Management Plan broadly sets out the procedures and practices for the Licensee and staff to meet obligations surrounding the supply of liquor, the Commission considers that the Liquor Management Plan lacks specific details regarding the management of patrons within the Premises, particularly in relation to the different areas available for food service, liquor and smoking. The Commission was unclear on how the Licensee intended to ensure compliance in this, and other regards, which resulted in a lack of confidence that the Licensee could effectively manage these obligations as required under a liquor licence.

69. Ultimately, following questions put to the Licensee at the Hearing, the Commission considered that the Licensee had an overly reactive approach to managing risks and potential issues at the Premises, and to regulatory compliance in general. The Commission is not satisfied that the implementation of the Liquor Management Plan would be sufficiently effective in minimising the detrimental impact on the amenity of the area resulting from poor patron behaviour at the front of

²³ Transcript, page 56.



the Premises, and as such finds that granting the licence would detract from or be detrimental to the amenity of the area in which the Premises are situated.

Restricting access along footpath

70. Concerns were raised in the objections regarding the impact that the Licensee's business was having on accessibility along the footpath, including that the combination of the awning and presence of tables and chairs made it difficult to move through the area directly in front of the Premises.
71. While the Commission accepts that there is some evidence of the Licensee's business restricting clear passage along the footpath area, it accepts that the Licensee has made positive changes in response to these concerns in order to rectify this issue (for example, ensuring the size and placement of the awning was to the satisfaction of the Council, and introducing immovable tables to prevent patrons spilling beyond the designated trading area). As such, the Commission is satisfied that this issue can be effectively managed so as to avoid any detrimental impact in this regard resulting from any grant of licence to the Licensee.
72. Finally, the Commission notes that it is the Council that has primary control and responsibility for the footpath area (as the issuer of the relevant footpath trading permit), and any unreasonable interference with this area (or non-compliance with the planning restrictions put in place by the Council under the planning regime) can be more appropriately managed under that regime.

Parking

73. The objections allege that the grant of the licence to the Licensee will exacerbate the existing parking issues along High Street. While noting that the availability of parking appears to be an issue in the vicinity of the Premises, the Commission notes that this is not unusual for Premises located along shopping strips and considers that the Licensee should not be responsible for all parking issues within the High Street shopping strip. Ultimately, the Commission considers that this concern is more appropriately dealt with under the relevant planning scheme (a position consistent with the recent amendments to the definition of 'amenity' referred to in paragraph 59 above).
74. With regard to the Licensee's obligation to provide parking pursuant to its planning permit, the Commission accepts the evidence of the Council that the Licensee was not, at the time of the Hearing, complying with its obligation to provide two parking spaces. However, the Commission acknowledges that there is an active planning application before Council which seeks to remove this requirement, and accepts the Licensee's evidence that this issue will be resolved (one way or the other) as part of this process.



75. In relation to claims that patrons of the Premises illegally park along High Street or on the footpath area in the vicinity of the Premises, the Commission finds that there is insufficient evidence to support this claim. While it accepts that there have been instances of illegal parking in the area, the Commission does not consider that this can be positively attributed to the Licensee and notes that the enforcement of parking restrictions and issues in this regard is ultimately a matter for Council.
76. Taking into account all of the evidence, the Commission determines that the grant of a licence to the Licensee would not unreasonable contribute to the existing parking issues on High Street, and therefore does not give rise to undue amenity concerns.

Smoking

77. One of the other concerns raised by the Applicants and objectors in this matter is the Licensee's compliance with the new smoking laws and the amenity concerns arising out of patrons smoking in the footpath trading area of the Premises.
78. With regard to compliance with smoking laws, the Commission accepts that there is an initial period during which both traders and patrons are educated on new requirements under the law, and accept that there will be a higher level of non-compliance due to misunderstanding rather than deliberate contravention. The Commission notes that the Licensee has been adjusting its approach to the timings during which it will serve food in the footpath area, and therefore when it is permitted to smoke in the footpath area. The Commission accepts that the Licensee has signage at the front of its Premises to advise patrons as to the requirements of the new smoking laws and staff have been instructed to ensure compliance with those requirements.
79. In relation to the atmosphere created under the awning at the front of the Premises when patrons are smoking, the Commission accepts that the Licensee has adjusted the awning in this regard, including keeping the side blinds raised and inserting a gap in the middle of the awning to improve air flow. While the awning compliance remains with Council for consideration, the Commission considers that it is likely that the Council will consider the impact of smoking within this area when determining the requirements of the awning to its satisfaction. As this matter remains within the control of Council, the Commission is satisfied that there is an appropriate regime to address the design features of the awning with regard to the impact of smoking within the footpath trading area.
80. However, the Commission notes that there is evidence that patrons of the Premises can sometimes stray outside of the defined area of the Premises while smoking, and this can have an impact on neighbouring businesses and properties. The Commission expects that the Licensee



will take a more proactive approach to ensuring that its patrons remain within the defined area in order to limit the potential impact on neighbouring properties in this regard.

81. Ultimately, the Commission accepts that there is some impact on the amenity of the area as a result of smoking that is occurring at the front of the Premises. However, taking into account the design changes to the awning and the Licensee's commitment to ensuring compliance with its obligations under the smoking laws, the Commission is not satisfied that any grant of the licence would necessarily result in an unreasonable detriment to the amenity of the area in this regard.

Littering

82. The Commission accepts that there is some evidence of littering occurring in vicinity of Premises, however is not satisfied that the evidence available demonstrates that the Licensee or its patrons are directly responsible for these incidents. With regard to the evidence of empty milk bottles in the alley to the rear of the Premises, the Commission accepts the Licensee's evidence that this was an isolated incident and appropriately rectified by the Licensee once it was brought to its attention. Overall, the Commission is satisfied that there will not be a detriment to the amenity of the area by reason of littering in the result of a grant of the licence to the Licensee.

Excessive music and patron noise

83. The Commission also received objections regarding the excessive patron and music noise from the Premises that would worsen in the event that a licence was granted. These objections related to both noise impacting on nearby residents at the rear of the Premises, as well as patron and music noise disturbing neighbouring businesses and residents from the front of the Premises.
84. In relation to noise complaints at the rear of Premises impacting surrounding residents, the Licensee confirmed that music was played in the courtyard through one speaker, which plays background music only. The 2nd Applicant, who resides in the immediate vicinity to the rear of the Premises, raised concerns about the level of noise emanating from the rear courtyard, which in the past has included music and singing in Greek. At the Hearing, she gave evidence that she has previously raised her concerns with the Licensee and considered they were quite dismissive of her concerns. She was particularly concerned that this noise would get worse if patrons were drinking in the courtyard. The Commission clarified with the 2nd Applicant that the proposed red-line plan for the Premises did not include the courtyard, and therefore no patrons would be permitted to consume alcohol in the courtyard. The 2nd Applicant conceded that noise has not been a problem recently, with her most recent incident in or about 2015.
85. The Commission notes the Council's evidence that noise complaints were received in relation to the Premises in November 2013, December 2013 and May 2014. In response to the Council's



investigation of these complaints, the Licensee gave evidence that it conducted professional noise testing (which was confirmed through independent Council testing) and implemented recommendations that would ensure music was within reasonable limits. Following this implementation, the Licensee was informed by the Council that the issue was considered resolved.²⁴ There have been no further complaints raised with Council since the noise testing was conducted and recommendations implemented.

86. On the basis of the evidence presented, the Commission is satisfied that to the extent that noise emanating from the rear courtyard was an issue in the past, this has been successfully rectified in 2014 with no further complaints received by Council since that time. Further, the Commission notes that the rear courtyard does not form part of the red-line plan of the Premises (so that liquor cannot be consumed by patrons in that area) and any noise in that area would be subject to the standard noise amenity conditions on a restaurant and café licence.
87. In relation to noise at the front of the Premises, the 1st Applicant gave evidence that noise from patrons at the front of the Premises was often excessive and impacted on her business. She confirmed that she had previously lodged a complaint with Council regarding excessive music at the front of the Premises.
88. In response, the Licensee stated that it was not notified by Council of the 1st Applicant's complaint and was therefore unaware there was an issue. The Licensee acknowledged that it can get busy and increased patron noise can result. However, the Licensee stated that it was in regular contact with other neighbouring businesses (including a dentist who works and resides next to the Premises) and no concerns have been raised regarding noise at the front of the Premises.
89. In response to questions from the Commission, Ms Apokoroniotakis gave evidence that it was to be expected that there would be times when patrons are talking and laughing at the front of the Premises, and she considered it unreasonable to intervene as they are just enjoying themselves. She stated that "when my strip is full, it's going to be loud, but there's nothing I can do about that".²⁵
90. While it accepts that the conduct of a café business will be attended by a certain level of patron noise, the Commission has concerns about the Licensee's approach to handling situations where noise levels begin to adversely impact on the amenity of the area surrounding the Premises. The Commission accepts that there have been issues surrounding patron noise at the front of the Premises in the past, and that the addition of alcohol is likely to exacerbate these issues following

²⁴ Transcript, pages 20-25.

²⁵ Transcript, page 56.



the grant of a licence to the Licensee. As discussed in paragraphs 65 to 68 above, the Commission needs to be satisfied that a proposed licensee has the ability to proactively manage and mitigate situations that potentially will impact on the amenity of the area, in order to comply with the obligations placed on licensees in such circumstances. Based on the evidence presented at the Hearing, the Commission maintains some doubts as to the Licensee's current attitude towards minimising the impact of its business on the amenity of the area surrounding the Premises.

Conclusion on amenity

91. The Commission is satisfied that there are current amenity issues with the Premises, primarily in relation to the behaviour and noise of patrons within the footpath trading area. Having regard to the evidence presented before it, the Commission is not satisfied that the Licensee's attitude to patron management is sufficiently robust, and remains concerned that the Licensee would not be able to, or would be unwilling to, effectively and proactively manage the behaviour of its patrons once the supply of liquor was introduced at the Premises. Further, the Commission is of the view that there does not appear to be a genuine appreciation by the Licensee of its positive obligations to manage patron behaviour and minimise amenity impacts on the surrounding area.
92. For the avoidance of doubt, the Commission does not intend this decision to bar the Licensee from seeking a liquor licence in the future. Prior to making any future application, the Commission would encourage the Licensee to review its current Liquor Management Plan and include a more detailed explanation as to how it intends to manage the supply of liquor within the Premises, especially with regard to its patron management processes and complaints handling and recording procedures. Further, the Commission would also encourage the Licensee to actively engage with its neighbouring businesses and seek to address any outstanding issues in relation to protecting the amenity of the area surrounding the Premises.

OTHER CONSIDERATIONS

93. The Commission has had regard to the decision-making guidelines issued under section 5 of the VCGLR Act in relation to cumulative impact²⁶ when determining this Review Application. The Commission recognises that these guidelines define "cumulative impact" as being the "impacts arising from a concentration of licensed premises in a defined area". The Commission finds that there is a recognised concentration of licensed premises in the immediate vicinity of the Premises, generally along the High Street shopping strip. However, the Commission does not consider that the amenity concerns identified in paragraph 61 to 90 above result from, or significantly contribute

²⁶ Decision-Making Guidelines, Assessment of the Cumulative Impact of Licensed Premises, 7 June 2012.



to, the concentration of licensed premises. As such, the Commission considers the Cumulative Impact Guidelines have limited bearing on its determination of the Review Application.

94. In determining this Review Application, the Commission has also had regard to the objects of the LCR Act, in particular harm minimisation, including whether granting the licence would contribute to, and not detract from, the amenity of community life.
95. The Commission notes the evidence of instances of anti-social or harmful behaviour at the Premises in the past, and its concerns regarding the Licensee's capacity or willingness to proactively manage such behaviour at the Premises. As such, the Commission is satisfied that, if a licence were granted, it would be likely to detract from, rather than contribute to, the amenity of community life in the vicinity of the Premises.

DECISION

96. Based on the reasons detailed in paragraphs 58 to 92, the Commission is satisfied that granting a licence that is the subject of the Review Application would detract from or be detrimental to the amenity of the area in which the Premises are located.
97. Having regard to these findings and the objects of the LCR Act, pursuant to sections 47 and 157 of the LCR Act, the Commission has determined to set aside the decision of the Delegate and, in substitution, refuse to grant the licence.

The preceding 97 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.