



**DECISION AND REASONS FOR DECISION**

In the matter of two applications under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to vary the on-premises licence held by the Australian College of Trade Pty Ltd in respect of the premises known as the Thornbury Theatre, located at 851-859 High Street, Thornbury.

**Commission:** Ms Deirdre O'Donnell, Deputy Chair  
Ms Helen Versey, Deputy Chair  
Mr Des Powell AM, Commissioner

**Date of Hearing:** 12 February 2020, 12 March 2020 and 10 June 2020

**Date of Decision:** 30 September 2020

**Appearances:** Mr Darren Wells, the first Applicant  
Mr Martin Hughes, the second Applicant  
Mr John Larkins of Counsel, for the Licensee, instructed by Wisewould Mahony lawyers  
Ms Lilli Owens-Walton and Ms Amy Rudolph, Counsel Assisting the Commission

**Decision:** The Commission has determined to vary the decision of the Delegate and grant the variation to the licence subject to the conditions in Appendix A.

**Signed:** 

**Deirdre O'Donnell**  
Deputy Chair

## REASONS FOR DECISION

### BACKGROUND

1. On 5 July 2019, the Australian College of Trade Pty Ltd (the **Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) under the *Liquor Control Reform Act 1998* (the **LCR Act**)<sup>1</sup> to vary on-premises licence no. 32223963 (the **Licence**) for the premises known as Thornbury Theatre, located at 851-859 High Street, Thornbury (the **Premises**) (**Variation Application**).
2. The Variation Application sought to expand the licensed area (red-line area) of the Premises to include a new area previously not occupied by the Licensee. This new area previously operated as a restaurant under a separate licence. The Variation also sought to vary the conditions on the Licence to increase the patron numbers that are permitted during certain trading hours.
3. The Variation Application included:
  - (a) a completed application form for variation to an existing licence or permit, submitted on 5 July 2019;
  - (b) a letter to the Commission from the City of Darebin (the **Council**) regarding Amendment C133 to the Darebin Planning Scheme and its relationship to operations of the Commission, dated 20 August 2015;
  - (c) a current Australian Securities and Investment Commission company extract for the Licensee, dated 29 June 2019;
  - (d) a copy of the Licence; and
  - (e) a copy of the proposed new red-line area for the Premises.
4. On 7 August 2019, the Licensee submitted a statement of display confirming that the public notice requirements of the LCR Act had been satisfied.
5. On 5 July 2019, in accordance with section 33(1) of the LCR Act, a delegate of the Commission (**Delegate**) provided a copy of the Variation Application to the Chief Commissioner of Victoria Police (**Victoria Police**) and to the Council. On 24 July 2019, a licensing inspector at Victoria Police informed the Commission that Victoria Police did not object to the Variation Application. On 1 August 2019, the Council informed the Commission that it objected to the Variation Application on amenity grounds.
6. The Council stated that the Variation Application envisages an intensification of the use of the Premises by markedly increasing patron numbers in the latter part of the night period and extending the red-line area.

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<sup>1</sup> All references to legislation are references to the LCR Act unless stated otherwise.

7. The Council also submitted that based on the extensive history of noise complaints (16 formal complaints in five years) and the detailed testimony of neighbours, Council had formed the view that:
  - the Licensee regularly breaches its permit condition of containing entertainment noise within State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (**SEPP N-2**)<sup>2</sup> levels;
  - management lacks the resolve to address and contain unreasonable noise emissions; and
  - the venue is compromising the neighbouring residential amenity.
8. For these reasons, Council considered that the intensification of use posed by the Variation Application was entirely inappropriate.
9. On 1 and 2 August 2019, the Delegate received amenity-based objections from two neighbouring residents, Darren Wells and Martin Hughes, who each live on a street parallel to the Premises. In summary, Mr Wells and Mr Hughes stated that the current operation of the Premises causes considerable amenity issues in the area around the Premises including excessive noise and disturbance to local area leading to sleep deprivation, inability to park their cars in their street during an event at the Premises and a poor attitude by management to managing the noise issues and concerns of local residents. Mr Wells and Mr Hughes submitted that approval of the Variation Application would make these amenity issues even worse.
10. On 21 August 2019, the Licensee made submissions to the Commission in response to the concerns raised by Council and the residential objectors.
11. In response to the Council submission, the Licensee said that there had been no notification of any noise complaints since 2018 and that an acoustic engineer had been engaged to perform sound testing at the venue, identify strategies to reduce noise emissions and set appropriate limits in accordance with SEPP N-2. The Licensee said the results of the sound testing showed the venue was compliant with SEPP N-2 and that further noise attenuation measures had been undertaken to address the issues. The Licensee submitted that the Premises is in an area with 21 other licensed premises which all contribute to any detriment to the amenity of the area.
12. In response to the submissions of the residential objectors, the Licensee refuted the claims of excessive noise associated with the Premises. The Licensee said that acoustic testing undertaken

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<sup>2</sup> 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.'*

in 2017 in the laneway behind the Premises (which is between the street that the residential objectors live on and the Premises), and again in 2019, both showed that the Premises was compliant with SEPP N-2. The Licensee said that management did not have a poor attitude as illustrated by the implementation of new noise attenuation policies and procedures at the Premises. In response to concerns about parking related disturbance in the street when events are on at the Premises, the Licensee referred to the 21 licensed premises in the area for which those parking in their street may be attending, and said that patrons attending the Premises would represent a small amount of people parking in the street.

13. The Delegate considered that the amenity issues raised could be addressed through conditions imposed on the Licence. In summary, the Delegate found that the acoustic attenuation measures taken by the Licensee showed recognition of the impact that noise emanating from the venue can have on the amenity of the area. The Delegate noted that the evidence of acoustic testing showed that the venue was compliant with SEPP N2, while noting that this testing was undertaken during a concert that was considered “quiet”. The Delegate found that the amenity issues relating to parking in the neighbouring street could not be attributed to the venue with certainty. In order to address the issue of noise from live and amplified music events, the Delegate considered the following condition was appropriate to be imposed on the Licence:

*The licensee shall install and maintain at the licensed premises, noise limitation or sound attenuation equipment set at a level by a qualified acoustic engineer so that the escape of amplified music is limited or restricted to comply with the E.P.A N2 condition. Such equipment to operate in a way that if the levels are exceeded the power supply to the amplification equipment is cut off.*

(the **Original Condition**).

14. On 18 October 2019, the Delegate granted the Variation Application subject to the Original Condition set out above (the **Original Decision**).
15. On 24 October 2019, the Commission received an application from Mr Wells for internal review of the Original Decision that included an application for a stay of the operation of the Original Decision<sup>3</sup>. On 28 October 2019, the Commission received another internal review application from Mr Hughes which also contained a stay application.
16. The Commission proceeded to deal with the two applications for internal review from Mr Wells and Mr Hughes (the **Applicants**) together (**Review Application**). The Commission also proceeded to deal with the two applications for a stay of the Original Decision together (**Stay Application**).

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<sup>3</sup> In accordance with section 160(1)(b) of the LCR Act

### *Stay Application*

17. In making the Stay Application, the Applicants sought to delay the effects of the Original Decision until such time as the Review Application was determined. The Commission sought submissions regarding the Stay Application from the Licensee, the Applicants and the Council and, having regard to these submissions, determined to grant the Stay Application. The Commission concluded that on balance, the community interest would be better served by granting the Stay Application.

## **LEGISLATIVE FRAMEWORK AND THE TASK BEFORE THE COMMISSION**

### ***The Commission's internal review power***

18. The Review Application is made under section 153 of the LCR Act. The Original Decision is a reviewable decision and the Applicant is an eligible person under Division 2 of Part 9 of the LCR Act to apply for review of that decision.

19. Pursuant to section 157(1) of the LCR Act, the specific task for the Commission with respect to the Review Application is to make a fresh decision that:

- (a) affirms or varies the reviewable decision; or
- (b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.

20. Under the LCR Act, an application to vary a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, a contested application relevantly includes "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174)*"<sup>4</sup>.

21. As the local residents and the Council objected to the Variation Application it is a contested application.

22. In effect, the Commission, on internal review, stands in the shoes of the original decision maker and makes a fresh decision with respect to the Variation Application. The Commission must either:

- (a) grant the application (and may do so subject to conditions)<sup>5</sup>; or
- (b) refuse to grant the application<sup>6</sup>.

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<sup>4</sup> Conversely, an "uncontested application" in the context of a Variation Application is defined in section 3(1) as being "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174)*".

<sup>5</sup> Section 44, 49 and 157 of the LCR Act

<sup>6</sup> Section 44 and 157 of the LCR Act



23. In doing so, it must consider all the information, material and evidence before the original decision maker<sup>7</sup>. It may also consider further information, material or evidence as part of making its decision<sup>8</sup>.

### **Conduct of an inquiry**

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

(a) section 33 of the VCGLR Act, which provides, inter alia:

*“(1) The Commission may conduct an inquiry for the purposes of performing its functions or duties, or exercising its powers under this Act, gambling legislation or liquor legislation.*

...

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

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

*“In performing a function or duty the Commission—*

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

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

### **Exercising the internal review power**

25. 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”<sup>9</sup>.*

<sup>7</sup> Section 157(2) of the LCR Act.

<sup>8</sup> See section 157(3) of the LCR Act.

<sup>9</sup> There are no objects specified in the VCGLR Act itself.



26. 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.

27. 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.”*

28. 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.”*

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

- (a) must consider all the information, material and evidence before the original decision maker<sup>10</sup>; and*
- (b) may consider further information or evidence<sup>11</sup>.*

### **Determination of a contested application**

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

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<sup>10</sup> LCR Act, section 157(2).

<sup>11</sup> LCR Act, section 157(3).



*“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.”*

31. Section 47(2) of the LCR Act provides that the Commission may refuse to grant a contested application on any of grounds set out in section 44(2).

32. Section 44(2)(b)(1) of the LCR Act provides the following grounds for refusal –

*“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;”*

33. 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<sup>12</sup>.*

34. 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;*

*(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.*

35. Section 44(4) of the LCR Act provides that before granting or refusing a contested application under subsection (1), the Commission may:

*“(a) ...have regard to any matter the Commission considers relevant; and*

<sup>12</sup> 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*.



(b) *make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.*"

36. 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*"<sup>13</sup>. 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*"<sup>14</sup>.
37. The Commission considers that, while the grounds of refusal outlined in section 44(2) are relevant considerations, the ultimate determination of a contested application is to be made pursuant to sections 44(1), 47(1) and 157(1) at the discretion of the Commission with reference to the objects of the LCR Act.
38. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.

#### **MATERIAL BEFORE THE COMMISSION AND PUBLIC HEARING**

39. The Commission on review had before it, and considered, all materials received by the Delegate. The Commission also received and considered the following materials (which, for the purpose of these reasons are organised according to who submitted the material):
- (a) Original Decision and reasons for decision of the Delegate, dated 18 October 2019;
- From the first Applicant:*
- (b) Review Application received by the Commission on 24 October 2019 with accompanying submission;
  - (c) submission in support of Stay Application, dated 1 November 2019;
  - (d) further submission with a petition annexed signed by 28 local residents (primarily from the street he lives in), dated 29 November 2019;
  - (e) photo of cars parked on the Applicant's street on 16 February 2020 while there was an event at the Premises, received 11 March 2020;
- From the second Applicant*
- (f) application for internal review dated 28 October 2019 with accompanying submission;

<sup>13</sup> See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

<sup>14</sup> See *Kordister* [2012] VSCA 325, at [188] per Tate JA.



- (g) submission in support of Stay Application, dated 31 October 2019;
- (h) further submission summarising his objection, dated 29 November 2019;

*From Council*

- (i) submission in opposition to Variation Application, dated 10 February 2020.

*From the Licensee*

- (j) submission opposed to Stay Application, dated 31 October 2019;
- (k) correspondence from new legal representation for the Licensee seeking an adjournment of the hearing due to the unavailability of the Licensee's acoustic engineer and preferred barrister, dated 28 November 2019;
- (l) Venue Management Plan dated 21 August 2019, received on 4 February 2020;
- (m) planning report dated 6 February 2020 prepared by Priority Planning regarding the proposed variations to the licence sought by the Variation Application, received 10 February 2020;
- (n) witness statement authored by Alope Kumar, Chief Executive Officer of the Thornbury Theatre, dated 11 February 2020;
- (o) witness statement authored by Bill Alt, Director of Studies for the Licensee (a hospitality training college known as the Australian College of Trade Pty Ltd), dated 11 February 2020;
- (p) a document titled Addendum to Venue Management Plan, received 6 March 2020;
- (q) a building report determining the maximum number of people to be accommodated in the Premises, dated 6 March 2020; and
- (r) acoustic report prepared by Noise Consulting titled '*SEPP N-2 Noise Transmission Test and Recommendations – Band Room and Proposed Front Bar 20 – 26 February 2020*', dated 4 March 2020;
- (s) letters of support for the Variation Application from the following organisations:
  - i. Music Victoria, dated 11 March 2020;
  - ii. Kustom Burgers Thornbury, received 11 March 2020; and
  - iii. Carwyn Cellars, received 12 March 2020;
- (t) letter to the Commission from Mr Kumar, the director of the Licensee, and menu for the "New Bar", dated 18 March 2020;
- (u) two versions of draft proposed licence conditions received by the Commission on 15 April 2020 and 3 June 2020;
- (v) three versions of a revised Venue Management Plan, dated 18 March 2020, received by the Commission on 15 April 2020, 3 June 2020 and 2 July 2020;
- (w) a letter from Noise Consulting to the Commission, dated 15 June 2020, confirming what type of noise limiter will be installed at the Premises; and

(x) letters to the Commission from the Licensee dated 2 July 2020 and 13 July 2020 in response to the matters raised in an email from the Commission dated 10 June 2020;

40. The Commission also had before it and considered the following documents from within the Commission's own records:

(a) a 2017 variation application by the Licensee that was approved by the Commission, which was provided to the parties on the First Hearing Day;

(b) a pre-hearing compliance history report for the Premises, dated 11 March 2020.

41. On 5 February 2020 Commissioners Versey, O'Donnell and Powell attended the Premises to conduct a site inspection.

### ***The public hearing***

42. The Commission listed the Review Application for public hearing on 11 December 2019. In response to the request by the Licensee, on 2 December 2019, the Commission adjourned that date and listed the Review Application for public hearing to 12 February 2020 (**First Hearing Day**).

43. On the First Hearing Day, the Licensee sought an adjournment of proceedings to enable it to complete further building works at the Premises, to undertake sound testing at the Premises and in neighbouring residences, and to make further written submissions. The Commission adjourned the hearing until 12 March 2020 (**Second Hearing Day**) and sought further submissions from the Licensee on matters raised on the First Hearing day, including any proposed conditions, developed in consultation with the Applicants, that they submitted should be imposed on the Licence, should the Commission be minded to grant the variation subject of the Review Application,

44. The Commission listed a further third hearing day for 28 April 2020, to be conducted by teleconference due to the COVID-19 pandemic related restrictions on indoor gatherings. The Licensee sought an adjournment of that date to enable it to consult with the Applicants in relation to the proposed conditions. The third day of the hearing was held on 10 June 2020 (**Third Hearing Day**).

## **REASONS FOR DECISION ON REVIEW**

### ***Issues for determination on review***

45. In deciding whether to affirm, vary or set aside the Original Decision and in turn grant or refuse the Variation Application that is the subject of the Review Application, the key issue to be determined

by the Commission is whether the proposed variation would detract from or cause detriment to the amenity of the area in which the Premises are situated.

46. The Commission considers the following matters to be relevant in making this determination:
- (a) the impact of the proposed increased red-line area on the amenity of the area in which the Premises are situated; and
  - (b) the impact of the proposed variation to patron numbers on the amenity of the area in which the Premises are located.
47. In exercising its ultimate discretion to grant or refuse the Variation Application, the Commission must have regard to the objects of the LCR Act, with particular regard to the object of harm minimisation, including by providing adequate controls over the supply and consumption of liquor at the Premises.

#### ***Background in relation to the Variation Application***

48. One reason for seeking the Variation Application was to enable the Licensee to open a new bar on the ground floor at the front of the Premises (**Front Bar**) in the area that was previously occupied by a separately operated restaurant called “Masala Craft” under an on-premises licence number 32292116. The Licensee obtained the right to occupy this area on 15 March 2019 and the licence was transferred to the Licensee. As a part of the Variation Application process, the Licensee surrendered the on-premises licence that had just been transferred to it and instead applied to extend the red-line area of the Premises to cover that area previously licensed under the surrendered licence.
49. Prior to the grant of the Variation Application, when the red line area did not include the new Front Bar area, the patron capacity conditions on the Licence were as follows:

1096 patrons during these hours:

Sunday	10 am – 10.30 pm
Monday – Thursday	7 am – 11 pm
Friday – Saturday	7 am – 12 midnight
Good Friday & ANZAC Day	12 noon – 10 pm

416 patrons during these hours:

Sunday	10.30 pm – 11 pm
Monday – Thursday	11 pm – 1 am the following morning
Friday – Saturday	12 midnight – 1 am the following morning
Good Friday & ANZAC Day	10.30 pm – 11 pm



50. The patron capacity conditions for On-premises licence #32292116 while it was operating were:

122 patrons during these hours

Sunday	10 am – 10.30 pm
Good Friday & Anzac Day	12 noon – 10.30pm
On any other day	8.30am – 10.30pm

For the purpose of these reasons, the above conditions relating to trading hours and patron capacity for both licences (the Licence #32223963 and On-premises licence #32292116) which now form the Premises will be known as the “**Original Trading Hours and Patron Capacity Conditions**”.

51. As demonstrated above, prior to the Original Decision, trade was permitted at the Premises until 1 am six nights a week, but with only 416 patrons in the later hours of the evening between 11 pm and 1 am Monday to Thursday, 12 midnight and 1 am on Friday and Saturday and between 10.30 pm and 11 pm on Sunday, Good Friday and ANZAC Day. At the time, the red line area did not include the area previously occupied by the restaurant which was licensed for 122 patrons.

52. As a result of the Original Decision, the Licensee was permitted to trade in the expanded space including the area previously occupied by the restaurant until 1 am, six nights a week and 11 pm on Sunday, Good Friday & ANZAC Day with a capacity of 1096 patrons during all those times, subject to the conditions of the Licence.

### ***Amenity***

53. The Commission must 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).

54. In the past, "noise levels" and "parking facilities" were specific 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) to reduce duplication between the planning and liquor processes.<sup>15</sup>

55. The Commission is of the view that in this case, it is still appropriate to consider the potential amenity impacts associated with the Variation Application but notes that a Council delegate has previously considered the likely amenity impacts and determined to grant the planning amendment as sought by the Licensee.

<sup>15</sup> Explanatory Memorandum at clause 29, Second Reading Speech at 928.

*Views of Applicants*

56. In summary, the Applicants submitted that the Premises causes great amenity issues in the area through noise pollution including excessive music noise late at night, noise from patrons exiting the Premises after an event and disturbance associated with those patrons returning to cars parked in Mr Wells and Mr Hughes' street. They also submitted that parking issues are created in the street in which they reside as a result of large numbers of patrons attending the Premises. The Applicants submitted that the Variation Application would exacerbate these already existing noise issues and the parking issues.
57. Mr Hughes submitted that the noise disturbance related to the operation of the Premises is so bad that his family were considering whether to move house. Mr Hughes said that management at the Premises had previously told him to get insulation in order to deal with the noise. He said that the music sometimes goes until 3 am (when permitted under a temporary licence obtained by the Licensee) and that it is hard to nurse his young children who are awake due to the unbearable noise reverberating the house.
58. The Applicants submitted that they are prepared to accept a reduced level of amenity in order to live in a location that is close to a commercial area like High Street Thornbury, however the reduction in amenity as a result of the Premises is too great to bear. Mr Hughes submitted that he has no problem with the other licensed venues in the immediate precinct, but that this one venue was causing a disproportionate level of disruption.
59. The Applicants indicated their concern over the Licensee's lack of a plan for operation of the Premises under the expanded licence. They submitted that considering the existing amenity issues caused by the Premises and the attitude of the Licensee to addressing these issues, allowing the Licensee an expanded red-line area in which to service a greater number of patrons until a later hour would inevitably detract from or cause detriment to the amenity of the area in which the Premises are located.
60. Both the Applicants said that it is very clear the music noise is coming from the Premises as opposed to one of the other licensed premises in the area, and that the reduced amenity due to excessive parking in the street is similarly attributable to the Premises because it always coincided with an event at the Premises. The Applicants said that these events are only one or twice a week, but if that were to increase as permitted by the Original Decision, that would not be tolerable.
61. Throughout the course of the Review Application, there was considerable discussion between the Applicants and the Licensee and its representatives about the operation of the Premises and its impact on the amenity of the area. There was also significant liaison between the parties regarding

the contents of the Venue Management Plan. These discussions lead to some proposed conditions being put forward by the Licensee that the Applicants felt would address their concerns. This is discussed further at paragraph 68 below.

*View of Council*

62. In the Review Application, the Council confirmed its view set out in paragraphs 6 to 8 above with respect to the Variation Application. Further, the Council submitted in summary:

- (a) there had been 7 noise complaints from Mr Hughes and 2 noise complaints from other residents between 5 March 2013 and 14 June 2019, a number of which referred to attempts being made to contact the venue regarding the noise levels and that either these calls were not answered or inadequate responses were provided by the person who took those calls; and
- (b) there has been a lack of engagement by the operator in containing and mitigating venue noise in the late-night period and a loose interpretation of the licence and permit obligations in relation to noise emissions; and
- (c) given the unresolved protracted and ongoing noise issues created by the venue, the Council contended that any change of the nature proposed by the Review Application should only be entertained when existing noise issues have been appropriately contained to Council's satisfaction.

*View of Licensee*

63. The Licensee acknowledged that noise was a problem and to that end, had engaged an acoustic consultant on numerous occasions. The Licensee also submitted that it had implemented physical changes to the Premises to reduce noise leakage.

64. The Licensee's director Mr Kumar gave evidence to the Commission in the Hearing confirming that the Licensee and its representatives consulted with the Applicants in relation to the content of the various iterations of its Venue Management Plan throughout the Review Application.

65. Mr Kumar also gave evidence that he understands the importance of implementing the provisions of the Venue Management Plan at the Premises. Further he confirmed he takes the role of responding to, and dealing with, complaints seriously as demonstrated by the fact it is his personal number that has been provided as the hotline for residents to contact in the event of an issue at the Premises. Mr Kumar noted that any complaints received in relation to the Premises would be raised at management meetings, but where the complaints were of an urgent nature he would be able to deal with them personally at the time of the complaint.

66. The Licensee engaged a noise consultant called “Noise Consulting” and provided a copy of their report dated 4 March 2020 to the Commission. The Licensee confirmed by letter that it would follow the recommendation of its noise consultant as to the model of noise limiter to be installed, and the fact that a separate noise limiter would be installed in both the first floor theatre and the ground floor front bar. The noise consultant confirmed that the noise limiters provides separate noise limits for different time periods and can approximate the frequency based SEPP N-2 night limits.
67. As a part of the Venue Management Plan the Licensee committed to the sound limiter being installed prior to reopening and agreed it will retain the records of the sound limiter until any relevant complaint has been investigated and dealt with.

*Proposed Conditions and Venue Management Plan*

68. Significant effort was made by all parties to identify the issues with how the Premises has operated and to address the concerns of the Applicants with respect to the future operation of the Premises under the varied licence resulting from the Original Decision.
69. As a part of this, the Licensee put forward a number of sets of proposed conditions that it submitted the Commission should impose on the Licence should the Review Application result in the variation to the Licence being granted. The final version of these proposed conditions were those provided to the Commission on 3 June 2020 (**Proposed Conditions**). The Licensee also put forward numerous versions of a venue management plan that set out how the Premises would operate, the final version of which was received by the Commission on 2 July 2020 (**Venue Management Plan**).
70. Also arising out of discussions between the parties, the Licensee proposed an amendment to the hours of operation and patron numbers it was seeking on Internal Review from that which was sought in the Original Application. These amended hours and patron numbers were set out in the Venue Management Plan as follows:

THORNBURY THEATRE

1096 patrons during the following trading hours:

Sunday	10 am – 10.30 pm
Monday – Thursday	7 am – 11 pm
Friday – Saturday	7 am – 12 midnight
Good Friday & ANZAC Day	12 noon – 10:30 pm

416 patrons during these hours:

Sunday	10.30 pm – 11 pm
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Monday – Thursday            11 pm – 1 am the following morning  
Friday – Saturday            12 midnight – 1 am the following morning  
Good Friday & ANZAC Day 10.30 pm – 11 pm

NEW BAR at FRONT of 851-859 HIGH STREET THORNBURY

180 patrons during the following trading hours

Monday – Sunday            12 noon – 1 am  
Good Friday & ANZAC Day 12 noon – 11 pm

71. The Licensee's representatives confirmed on 28 September 2020 that the patron capacity sought for the overall venue was 1096 with no more than 180 of these in the Front Bar at any time.
72. The Proposed Conditions refer to the requirement that the Licensee comply with the Venue Management Plan. The Applicants confirmed their agreement to these Proposed Conditions and Venue Management Plan.
73. The Proposed Conditions included provision for the following:
- (a) the requirement to comply with the Venue Management Plan that contains various commitments by the Licensee, including:
    - (i) that it will provide a dedicated number to which complaints can be made and confirmation this phone number is a mobile phone number that will be with a Duty Manager for two hours before and after an event;
    - (ii) that it will provide a direct email address for the director of the Licensee to be contacted; and
    - (ii) the requirement to record complaints in the Complaints register, to respond to complaints as soon as possible and to discuss complaints at Management meetings.
  - (b) the limitation of background level only noise in the new red-line area on the ground floor of the Premises and a patron capacity limit in that area of 180 patrons;
  - (c) the first floor theatre may have above background level noise but only up until 11pm and there must be a noise limiter installed to ensure compliance with SEPP N-2 requirements at all times;
  - (d) the limitation that the first floor auditorium/theatre will only operate on three days per week where it had previously been able to operate on every day of the week.
74. The Commission considers it appropriate to impose the Proposed Conditions with some minor amendments to the wording to ensure consistency and enforceability.

***Commission's view regarding detriment to amenity of the area***

75. In conclusion, the Commission considers that whilst the Variation Application will result in an increase in in the red line area of the Premises to incorporate the ground floor area, and an increase in patron numbers permitted on the Premises at certain hours, the detailed content in the Venue Management Plan and the imposition of appropriate conditions on the Licence will assist in the prevention of detriment to the amenity of the area in which the Premises is situated.
76. The Commission notes the evidence of the Director agreeing to take personal responsibility for dealing with any contact made by the Applicants and local residents relating to the operation of the Premises and any impact it may be having on the amenity of the area.
77. The Commission also considers that the Proposed Conditions are appropriate to address matters that can be related to the operation of an on-premises licence that hosts functions. It is noted that these Proposed Conditions and the Venue Management Plan were the subject of much discussion with the Applicants throughout the Review Application and that the Applicants agree that these are appropriate to be included as conditions of the Licence. Further, the Commission considers that the inclusion of the Licence condition requiring the Venue Management Plan to be adhered to at all times is an important factor in limiting to an appropriate level any impact on amenity caused by the operation of the Premises.
78. The Applicants submit that the grant of the licence to the Licensee will exacerbate the existing parking issues in vicinity of the Premises. While accepting that the availability of parking around the Premises may be an issue at certain times, the Commission notes that this is not unusual for areas around retail and shopping strips on key lateral roads. Further, the Commission finds that the Premises is an existing licensed venue, as was the ground floor premises, therefore the variation to the Licence is unlikely to significantly increase the demand for parking. Ultimately, the Commission considers that this concern is more appropriately dealt with under the relevant planning scheme (a position consistent with the amendments to the definition of 'amenity' referred to at paragraph 54 above).The Commission noted at the Hearing that the Council has the ability to address parking issues and this could be subject of further discussion with the Council.
79. Taking into account all of the evidence, the Commission determines that the grant of the Variation Application would be unlikely to result in, or contribute to, parking issues in the vicinity of the Premises, and therefore does not give rise to undue amenity concerns.
80. The Commission is satisfied that the Licensee has demonstrated that it has given due consideration to the potential for negative impacts on the amenity of the area when operating the Premises, in

light of the evidence presented before the Delegate and at the Hearing before the Commission. The Commission expects that the conditions of the Licence will be adhered to by the Licensee which includes the requirement to comply with all the obligations set out in the Venue Management Plan.

81. In summary, the Commission finds that, subject to the conditions outlined in Appendix A, the grant of the variation to the Licence will not, on balance, detract from, or be detrimental to, the amenity of the area. The Commission also considers that the conditions outlined in Appendix A relating to the use of the Premises mitigate and minimise any potential negative impact with respect to amenity.

#### ***Other considerations***

82. In determining this Review Application, the Commission has had regard to the objects of the LCR Act, in particular harm minimisation. The Commission has also considered whether granting the Licence would be conducive to, or encourage, the misuse or abuse of alcohol. The Commission notes that there have been no responsible service of alcohol or crowd control incidents at the Premises. In this regard, the Commission also notes that there is an existing Licence condition with respect to crowd controllers and considers it appropriate to retain this condition.

#### **DECISION**

83. Based on the reasons detailed above, and having regard to the objects of the LCR Act, the Commission has determined to vary the Original Decision and grant the Variation Application subject to the conditions set out in Appendix A.

***The preceding 83 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell, Deputy Chair, Ms Helen Versey, Deputy Chair, and Mr Des Powell AM, Commissioner***

## Appendix A

### TYPE OF LICENCE

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

### AMENITY

The licensee shall not cause or permit undue detriment to the amenity of the area to arise out of or in connection with the use of the premises to which the licence relates during or immediately after the trading hours authorised under this licence. The licensee shall ensure that the level of noise emitted from the licensed premises shall not exceed the permissible noise levels for entertainment noise as specified in the State Environment Protection Policy (Control of Music Noise from Public Premises) No.N-2.

### SPECIAL CONDITIONS

Crowd controllers licensed under the Private Security Act, are to be employed at a ratio of 2 crowd controllers for the first 100 patrons over 416 patrons (ie between 416 and 516 patrons) and 1 crowd controller for each additional 100 patrons or part thereof. One crowd controller is to be present outside the premises to monitor patrons arriving at and departing from the premises. Crowd controllers are to be present from 30 minutes before the start of the entertainment being provided, until 30 minutes after closure.

The licensee must install signage at all exits, with the words in prominent capital letters, to the effect of "Please respect or neighbours and leave the area quietly".

#### Venue Management Plan

- (i) The Licensee must have in place at all times a Venue Management Plan as approved from time to time by the Commission.
- (ii) The Licensee must take all reasonable steps to conduct and supervise all aspects of the management of the premises in accordance with the Venue Management Plan.
- (iii) The Venue Management Plan must be retained on the premises and accessible by the Licensee, Nominee, Manager or other person in charge.
- (iv) The Venue Management Plan must be provided to the Commission within 21 days of inclusion in the conditions on the Liquor Licence and must be available to an authorised member of Victoria Police or representative of the Commission if requested
- (v) The Venue Management Plan must include a provision requiring retention of sound limiter records for 30 days. Those sound limiter records are to be made available on request by an authorised member of Victoria Police, the Council, or representative of the Commission.

#### Sound Limiters

- (i) The sound limiter installed in the first floor auditorium/theatre area is to allow music above background music in the auditorium/theatre area up to 11.00 pm only, with the levels set to ensure compliance with SEPP N2 at all times.
- (ii) A sound limiter is to be installed by the Licensee and will be set to ensure background music at all times in the front bar including when the windows onto High Street are open during the operation of that area.
- (iii) The sound limiters must be operational at all times and records retained for 30 days. Those sound limiter records are to be made available on request by an authorised member of Victoria Police, the Council, or representative of the Commission.



First floor Auditorium/Theatre

- (i) The auditorium/theatre area shall operate on no more than three days per week.

Ground Floor Front Bar

- (i) Food is to be available at all times of operation of the front bar.
- (ii) Background music only is permitted in the front bar.
- (iii) The front bar is to not to operate any later than 1.00 am.

MAXIMUM CAPACITIES AND TRADING HOURS

Overall maximum of 1096 patrons with no more than 180 patrons in the Front Bar at any time

THEATRE (first floor and ground floor)

1096 PATRONS DURING THE FOLLOWING TRADING HOURS

Sunday	Between 10 am and 10.30 pm
Monday to Thursday	Between 7 am and 11 pm
Friday & Saturday	Between 7 am and 12 midnight
Good Friday & ANZAC Day	Between 12 noon and 10.30 pm

416 PATRONS DURING THE FOLLOWING TRADING HOURS

Sunday	Between 10 .30 pm and 11 pm
Monday to Thursday	Between 11 pm and 1 am the following morning
Friday & Saturday	Between 12 midnight and 1 am the following morning
Good Friday & ANZAC Day	Between 10:30 pm and 11 pm

TRADING HOURS – Theatre

Sunday	Between 10 am and 11 pm
Good Friday & Anzac Day	Between 12 noon and 11 pm
On any other day	Between 7 am and 1 am the following morning.

FRONT BAR (ground floor) –180 patrons

TRADING HOURS

Monday - Sunday	Between 12 noon – 1 am
Good Friday & Anzac Day	Between 12 noon and 11 pm