



DECISION AND REASONS FOR DECISION

In the matter of an application by Holey Moley Australia Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision refusing to grant a variation to an on-premises licence in respect of the premises trading as Holey Moley, situated at Shop 121-124 & 127, Crown Casino, Southbank.

Commission:

Ms Deirdre O'Donnell, Deputy Chair

Mr Des Powell AM, Commissioner

Ms Danielle Huntersmith, Commissioner

Date of Hearing:

9 April 2021

Date of Decision:

7 September 2021

Date of Reasons:

7 September 2021

Appearances:

Mr Daniel Robinson of Counsel, instructed by BSP Lawyers,
for the Applicant

Mr Paul Davies as Counsel Assisting the Commission

Decision:

The Commission has determined to set aside the decision of the Delegate and, in substitution, vary the licence.

Signed:

A handwritten signature in black ink, appearing to read 'D O'Donnell'.

Deirdre O'Donnell PSM

Deputy Chair



REASONS FOR DECISION

BACKGROUND

1. Holey Moley Australia Pty Ltd (**the Applicant**) holds an on-premises liquor licence no. 32351897 (**the Licence**) issued under the *Liquor Control Reform Act 1998* (**the Act**),¹ which applies to the premises located at Shop 121-124 & 127, Crown Casino, Southbank (**the Premises**), trading as Holey Moley.
2. The Licence permits the supply and consumption of liquor on the Premises between the following trading hours:

Good Friday and ANZAC Day	Between 12 noon and 1 am the following day
On any other day	Between 10 am and 1 am the following day
3. On 13 November 2019, the Applicant applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) to vary the Licence by increasing the trading hours on Friday and Saturday nights until 2 am. All other conditions of the licence were to remain unchanged (**the Application**).
4. In accordance with section 33(3), a copy of the Application was served on Victoria Police (**Police**) and the Melbourne City Council (**Council**). Victoria Police advised the Commission that it did not object to the grant of the Application. No objection was received from the Council in response to the Application.

Decision of the Delegate

5. An authorised delegate of the Commission (**the Delegate**) assessed the Application and determined that it was necessary to consider the decision-making guidelines titled “Applications for liquor licences to trade after 1.00 am” dated 16 July 2015 (**the Guidelines**)², when deciding to grant or refuse the extension to the trading hours at the Premises. On 1 July 2019, the Guidelines were extended for another two years, until 30 June 2021, by the Honourable Marlene Kairouz, the then Minister for Consumer Affairs, Gaming and Liquor Regulation.
6. On 29 January 2020, the Application was refused by the Delegate (**the Original Decision**) on the basis that it did not meet the requirements of the Guidelines. The Delegate stated in his reasons for decision that the Premises is not a venue that offers live music entertainment, rather, the predominant activity at the Premises was considered to be indoor golf, escape rooms and the provision of karaoke entertainment. The Delegate therefore determined that the

¹ All references to legislation are references to the *Liquor Control Reform Act 1998* unless stated otherwise.



Premises did not fall under a category of venue that is required under paragraph B (1) of the Guidelines.

7. The Delegate further determined that he was not satisfied that the grant of the application would provide an economic and social benefit that outweighs the potential detrimental impact to the amenity of the area in which the Premises is located.

Application for internal review

8. On 25 February 2020, the Applicant applied for an internal review of the Delegate's decision to refuse the Application (**the Review Application**).
9. On 21 July 2021, the Commission wrote to the Applicant for the avoidance of doubt to inform it that, in the event the Review Application was granted, this would also result in a variation of licence category, from an on-premises licence to a late night on-premises licence. The Commission provided the Applicant with an opportunity to confirm that it still wished to proceed with the Review Application in those circumstances.
10. On the same day, the Applicant responded to the Commission and confirmed that it still wished to proceed with the Review Application.

LEGISLATIVE FRAMEWORK AND THE TASK BEFORE THE COMMISSION

Legislative Framework

11. Under the Act, an application to vary a licence may be contested or uncontested. Pursuant to section 3(1), an uncontested application relevantly includes "*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)*".³
12. Given that no objection was received by the Commission under Division 5 of Part 2 of the Act, the Application was, and remained, an uncontested application.
13. The Review Application is made pursuant to section 153 of the Act. The Original Decision made by the Delegate is a reviewable decision and the Applicant is an eligible person under Division 2 of Part 9 of the Act.

² See paragraphs 23 and 24 of these reasons for further information on the Guidelines.

³ Conversely, a "contested 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 any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174)*".



14. On receipt of an application for internal review under section 153, the Commission 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.
15. 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 Application. In doing so, it must consider all the information, material and evidence before the original decision maker.⁴ It may also consider further information, material or evidence as part of making its decision.⁵

Conduct of an inquiry

16. 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 are:
 - (a) section 33 of the VCGLR Act, which provides, inter alia:
 - “(1) *The Commission may conduct an inquiry for the purposes of performing its functions or duties, or exercising its powers under this Act, gambling legislation or liquor legislation.*
 - ...
 - (3) *When conducting an inquiry for the purposes of performing its functions under section 9(1)(a), (b), (c) or (d) the Commission is taken to be a board appointed by the Governor in Council and Division 5 of Part I (including section 21A) of the Evidence (Miscellaneous Provisions) Act 1958, as in force immediately before the repeal of that Division, applies accordingly.*”
 - (b) section 25(3) of the VCGLR Act, which provides:
 - “*In performing a function or duty the Commission—*
 - (a) *except when exercising a power under Division 5 of Part I of the Evidence (Miscellaneous Provisions) Act 1958, is not bound by the rules of evidence but may inform itself in any way it thinks fit;*
 - (b) *is bound by the rules of natural justice.*”
 - (c) section 44(4) of the Act, which provides that before granting or refusing an uncontested application under subsection (1), the Commission may:
 - “(a) *in respect of an uncontested application, have regard to any matter the Commission considers relevant; and*
 - (b) *may make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.*”

⁴ Section 157(2).

⁵ See section 157(3).



Determination of an uncontested application

17. Where an application is an uncontested application, pursuant to section 44(1):

“Subject to Division 3, the Commission must grant or refuse an uncontested application at any time after the expiry of the period for objection under Division 5 (or that period as extended under section 174).”

18. In exercising its discretion to either grant or refuse an uncontested application under section 44(1), the Commission must have regard to the objects of the Act and any Ministerial decision-making guidelines issued pursuant to section 5 of the VCGLR Act.

19. 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.”⁶

20. The objects of the 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.”*

21. Section 4(2) further provides 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.”

22. 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 of that Act.

23. On 16 July 2015, the Minister for Consumer Affairs, Gaming and Liquor Regulation (**the Minister**) issued the Guidelines under section 5 of the VCGLR Act in relation to the grant of

⁶ There are no objects specified in the VCGLR Act itself.



liquor licences trading beyond 1 am within the municipalities of Melbourne, Stonnington, Yarra and Port Phillip. The Guidelines were revoked and replaced by the Guidelines dated 27 June 2019, that apply to applications made to the Commission after 30 June 2019 and before midnight on 30 June 2021.

24. In respect to the grant or variation of a late night (on-premises) licence for trading beyond 1 am in the affected municipalities, the Guidelines requires that:

“Accommodation and licences allowing consumption on the premises

A...

- (1) *the premises is, or will be, used as:*
 - a. *an accommodation hotel, being a hotel whose primary purpose is providing accommodation and where the supply of alcohol is ancillary to that purpose; or*
 - b. *a venue that supplies liquor for consumption on the premises provided that food is available at the venue at all times when alcohol can be supplied; and*
- (2) *the applicant can satisfy the commission that:*
 - (a) *it has in place, or will put in place, a Venue Management Plan in the form required by the commission; and*
 - (b) *the economic and social benefit of granting the licence will outweigh the impact of the licence on alcohol misuse and abuse and the community amenity; and*
 - (c) *the patron capacity of the premises or proposed premises does not, or will not, exceed 200 persons.”*

Live Music Entertainment

B...

- (1) *the premises is, or will be, used as a venue that regularly provides live music entertainment; and*
- (2) *the applicant can satisfy the commission that:*
 - (a) *it has in place, or will put in place, a Venue Management Plan in the form required by the commission; and*
 - (b) *the economic and social benefit of granting the licence or permit will outweigh the impact of the licence or permit on alcohol misuse and abuse and community amenity; and*
 - (c) *the patron capacity of the premises or proposed premises does not, or will not, exceed 500 persons at any time; and*
 - (d) *the impact of the venue on harm and amenity is low.*

...”

25. The Commission considers that the Guidelines are a relevant consideration in determining the Review Application and that the Commission must have regard to the Guidelines.
26. It was submitted by the Applicant that the Review Application seeks to extend trading hours within the public bar / performance area and within some private karaoke rooms from 1 am to



2 am on Friday and Saturday nights only. It was further submitted by the Applicant that the proposal is in accordance with both Paragraph A and Paragraph B of the Guidelines. That is:

- The Premises is a venue with food available at the venue at all times when liquor can be supplied (Paragraph A of the Guidelines); or, and in the alternative,
- The Premises is a venue that regularly provides live music entertainment (Paragraph B of the Guidelines).

It was the Applicant's submission that the proposal sufficiently meets the additional requirements under both Paragraphs A and B.

27. The Applicant submitted that, in the statement of reasons, the Delegate erred in finding that the venue must have provision of live music as its 'core business or function' and that the Guidelines do not contain any such language that would invite the Commission to construe Paragraph B(1) more narrowly than it has been written. It was therefore the Applicant's submission that, for the purposes of the Application, and in order to satisfy paragraph B(1), the Commission need only be satisfied that the Premises provides 'live music entertainment' and does so 'regularly'.
28. The Applicant has in place for the Premises a Venue Management Plan in the form required by the Commission.
29. With respect to Paragraph A(2)(b) of the Guidelines, the Applicant engaged Ratio consultants to prepare an economic and social impact assessment that relevantly concludes:
 - (a) The minor increase in operational hours will be negligible in the context of the complex, and therefore the amenity impacts will be similarly negligible;
 - (b) The benefits of the proposal include increased employment, expenditure, supply contracts and tourist expenditure;
 - (c) Patron egress will be safe given the access to late-night transport services;
 - (d) The quality of the venue is attractive to visitors and tourists;
 - (e) The venue management plan provides adequate measures to ensure orderly patron behaviour and compliance with the reduction in patron capacity;
 - (f) The application will not result in detrimental amenity outcomes;



(g) The application will have a positive result on cultural and recreational impacts; (and)

(h) The application complies with the Guidelines, including with respect to the impact of the venue on harm and amenity.

30. The Applicant submitted that it would ensure patron capacity is reduced from 400 to 200 patrons from 1 am, through operational and management practices, including closing the following facilities prior to 1 am:

- i. One of the mini-golf courses;
- ii. At least five of the ten private karaoke rooms; and
- iii. All four escape rooms.

This will ensure that the capacity of the Premises after 1 am will not exceed 200 patrons. This submission was not a part of the material put before the Delegate in the original application.

31. Pursuant to section 44(2) of the Act and relevantly for this Review Application, the Commission may refuse to grant an uncontested application on any of the following grounds, where it considers the Application would:

“... detract from or be detrimental to the amenity of the area in which the premises to which the application relates are situated (section 44(2)(b)(i));

... be conducive to or encourage the misuse or abuse of alcohol (section 44(2)(b)(ii)).”

32. For the purposes of the Act, the amenity of an area is defined as being the quality that the area has of being pleasant and agreeable.⁷ Pursuant to section 3A(2) and (3), a list of non-exhaustive factors that may be taken into account in determining whether a proposed grant, variation or relocation would detract from or be detrimental to the amenity of the area include:

“...

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

33. Pursuant to section 3AA, the Act further provides that for the purposes of that Act:

“... evidence of any of the following factors, which may occur inside, or a place outside a licensed premises that is sufficiently proximate to, that premises, are taken to constitute evidence of detraction from, or detriment to, the amenity of the area in which the licensed premises is situated—

- (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;*

⁷ Section 3A(1).



- (h) *causing nuisance;*
- (i) *noise disturbance to occupiers of other premises;*
- (j) *obstructing a footpath, street or road;*
- (k) *littering.”*

34. The Act does not define the meaning of the term “*misuse or abuse of alcohol*”, nor specify factors that constitute evidence of that which would be “*conducive to or encourage the misuse or abuse of alcohol*”.
35. Where an application is granted, the Commission may impose any condition it thinks fit on the grant of an application, including a condition that the grant is not effective until any requirements specified in the grant have been met.⁸ Section 16 of the Act provides that it is a condition of every licence and BYO permit (other than a pre-retail, limited and major event licence) that the use of the licensed premises does not contravene the planning scheme that applies to the licensed premises under the *Planning and Environment Act 1987 (Vic)*.

MATERIAL BEFORE THE COMMISSION & PUBLIC HEARING

36. The Commission, on review, had before it and considered all of the information, material and evidence before the Delegate, including:
- (a) an application to vary an existing licence or permit dated 21 October 2019
 - (b) a Late Night Liquor Licence Supplementary Forms Kit, dated 21 October 2019
 - (c) Submissions On Behalf of The Applicant, prepared by BSP Lawyers, dated 15 January 2021
 - (d) Social & Economic Impact Assessment prepared by Ratio Consultants, dated 15 January 2021
 - (e) Holey Moley, Jukes Karaoke & Red Herring Crown House Policy, received 8 April 2021
 - (f) Witness statement of Niall O’Doherty, Chief Performance Officer of Funlab Group dated 8 April 2021
 - (g) Witness statement of Sarah Jayde Macdonald, Venue Manager of Holey Moley, Jukes Karaoke and Red Herring at Crown Casino dated 8 April 2021
 - (h) Document – response to the Commissioner’s further queries, received 21 April 2021
 - (i) a Venue Management Plan, dated 22 May 2019
 - (j) a copy of the Holey Moley Crown Melbourne food menu, received 8 April 2021; and

⁸ Section 49.



(k) a VCGLR Compliance History Report.

37. The Commission also had regard to the Delegate's Statement of Reasons.
38. On 9 March 2021, a site visit was arranged at the Premises attended by the Commissioners and Counsel Assisting to observe the Premises which was also attended by Venue Manager Ms Sarah MacDonald and Chief Performance Officer Mr Niall O'Doherty.
39. On 9 April 2021, the Commission conducted a public hearing to consider the Review Application. The Applicant was represented by Mr Daniel Robinson, and Ms Sarah MacDonald and Mr Niall O'Doherty gave evidence for the Applicant.

DETERMINATION OF THE REVIEW APPLICATION

40. In detailing the reasons for its determination of this Review Application, the Commission addresses the issues before it by reference to two general questions:
 - (a) first, whether the Commission is satisfied that the relevant requirements of the Guidelines are met; and
 - (b) secondly, having regard to the Guidelines, whether the Commission considers it should grant or refuse the Review Application given the grounds for refusal set out in the Act, and the objects of the Act.

Are the relevant requirements of the Guidelines met?

41. In considering whether or not the Commission is satisfied that the relevant requirements of the Guidelines are met by the Application, the Commission finds that the Premises is a multi-faceted indoor recreation and entertainment venue, and does not provide accommodation. Hence, the Premises is not a venue that falls within the scope of Paragraph A(1)(a) of the Guidelines. Based on the material put forward by the Applicant, the first issue to be addressed is whether the Premises is, or will be, used as:
 - (a) a venue that regularly provides live music entertainment (Paragraph (1)(b)); or alternatively
 - (b) a venue that supplies liquor for consumption on the premises provided that food is available at the venue at all times when liquor can be supplied (Paragraph (1)(c)).

Live music entertainment



42. The business operates three distinctive areas, being:
 - (a) Holey Moley miniature indoor golf;
 - (b) Jukes Piano and Karaoke Bar; and
 - (c) Red Herring Escape Rooms.

43. The peak times in Jukes Piano Bar are after 8:00pm on Fridays and Saturdays and this accords with the ordinary times when live music is provided on the Premises. Live music is a point of difference between the Premises and other bars. Mr O'Doherty explained to the Commission that, "...live entertainment, the way we envision it... is professional live entertainers bringing the crowd along on the journey and them getting involved." The concept for Jukes, specifically the piano bar, is to bring the fun of private karaoke rooms into the main bar space, allowing people to unwind and engage with each other.

44. Professional entertainers are sourced through "Musos", a gig-booking website / app, that connects professional entertainers to venues. Staff may also perform as a complementary addition to the professional entertainers and patrons are also encouraged to join in with singing provided. However, Mr O'Doherty explained to the Commission at the hearing that it is "More akin to a concert when the artist may open the chorus up to the crowd to sing and then takes back ownership".

45. Live music commences in Jukes from between 7 and 8 pm on Friday and Saturday nights and continues until half an hour before closing time. The Applicant submitted that if the Application was granted, the Applicant would commit to only trading past 1 am if the Premises is regularly providing live music entertainment by engaging a professional musician(s) in the form of a pianist or similar.

46. Upon questioning by the Commission, Mr O'Doherty noted that if the Application was granted, "we will bring back live entertainment in a different format, not with a purpose of engaging customers as soon as we want, (but) more like a quiet piano bar... and have a pianist in there playing a slightly different set of music which is still live entertainment..."

47. The Applicant submitted that in its view the Premises regularly provides live music entertainment in accordance with the Guidelines and that this is an aspect of the business that will be further developed and enhanced moving forward.



48. In determining this issue, the Commission considered the wording that is used in the Guidelines and the Act. While the Guidelines references “live music entertainment”, a term that is statutorily undefined, the Act utilises the term “live music event”, which is defined in section 3 as:

“an event at which takes place the creation or manipulation of sound for artistic, cultural or religious purposes, and which is performed to an audience.”

49. “Regularly” is undefined by both the Guidelines and the Act. Tribunal consideration of the term ‘regularly’ has focussed on its ordinary meaning of ‘a normal, habitual or planned occurrence, that happens often’.
50. In order to satisfy the Commission that it regularly provides live music entertainment, the Commission is of the view that an applicant must demonstrate that there is a bona fide intention of the venue to provide live music for the enjoyment of guests. This is to be contrasted with providing a musician to play at background level in a large venue, if the patrons would not be able to hear the musician.
51. The Commission does not consider that the difference between “event” and “entertainment” is relevant to this matter, as the predominant issue that the Commission must determine is whether the Applicant ‘regularly’ provides live music entertainment. Accordingly, the Commission considers it appropriate to interpret ‘regularly’ in the Guidelines consistently with the ordinary meaning given in paragraph 49 and, on that basis, is satisfied that the premises will be used as a venue that regularly provides live music entertainment for the purposes of Paragraph B(1) of the Guidelines.
52. It follows from the Commission’s determination that the venue regularly provides live music entertainment, that the Applicant then meets the live music entertainment exemption under Paragraph B(1) of the Guidelines. The Commission must now consider whether the remaining criteria under paragraph B(2) of the Guidelines have been met and notes that it does not need to consider whether the requirements of Paragraph A of the Guidelines have been met.

Venue management plan

53. Paragraph B(2)(a) of the Guidelines further requires an applicant to provide a venue management plan in a form required by the Commission. Following the Commission’s comments at the hearing, the Applicant submitted a copy of its Venue Management Plan (dated 22 May 2019) as part of the Review Application. The Venue Management Plan included strategies on dealing with the issues that were identified during the inquiry, being:
- (a) the Licensee’s approach to responsible service of alcohol;



- (b) hours of operation and late trading;
- (c) security and crowd control arrangements; and
- (d) Amenity of Neighbourhood.

The Commission is satisfied that the Applicant has a sufficiently detailed Venue Management Plan in place.

Economic and social benefits

54. In the Original Decision, the Delegate found that the economic and social benefits of approving the Application did not outweigh the negative impacts of the misuse and abuse of alcohol and community amenity; therefore failing to meet the requirement as set out in Paragraph B(2)(b) of the Guidelines.
55. The Applicant, for the purposes of the Application, engaged Ratio Consultants to prepare an assessment that relevantly concludes that:
- (a) The minor increase in operational hours will be negligible in the context of the complex, and therefore the amenity impacts will be similarly negligible;
 - (b) The benefits of the proposal include increased employment, expenditure, supply contracts, and tourist expenditure;
 - (c) Patron egress will be safe given the access to late-night public transport services;
 - (d) The quality of the venue is attractive to visitors and tourists;
 - (e) The Venue Management Plan provides adequate measures to ensure orderly patron behaviour, and compliance with the reduction in patron capacity;
 - (f) The application will not result in detrimental amenity outcomes;
 - (g) The application will have a positive result on cultural and recreational impacts; and
 - (h) The application complies with the Guidelines, including with respect to the impact of the venue on harm and amenity.
56. Based on the evidence from Ratio Consultants it is the Applicant's submission that the economic and social benefit of granting the licence or permit will outweigh the impact of the



licence or permit on alcohol misuse and abuse and community amenity, and that the impact of the venue on harm and amenity is low, thereby satisfying Paragraph B(2)(b) of the Guidelines.

57. The Commission accepts the assessment provided by Ratio Consultants that the economic and social benefits of granting the application will outweigh the potential negative impact on alcohol misuse and abuse and community amenity.

Patron capacity

58. A final requirement of the Guidelines as provided in Paragraph B (2)(c) is that, where the Commission is satisfied the premises is, or will be, used as a venue that regularly provides live music entertainment, the premises in question must not have a maximum patron capacity that exceeds 500 persons. The Commission notes that the Premises currently has an overall maximum patron capacity of 400 persons as specified on the Licence.
59. In addition, the Applicant in respect of the Review Application has proposed to limit the total patron capacity of the premises to 200 patrons after 1:00am on Friday and Saturday. This was not a factor that formed part of the material before the Delegate in the original application.
60. Further, Ms Macdonald indicated at the hearing that security will track the venue's capacity at all times and activities such as Holey Moley miniature golf and some of the karaoke rooms will close. Ms Macdonald said that Holey Moley and Red Herring escape rooms, 'have their own entrances and can very much be sectioned off, especially with this new curtain being installed... we have a lot of flexibility and how we manage that capacity and we currently do anyway. I don't think that we would have any issues in getting to that number (200) and maintaining that...'
61. Following the hearing and in response to further enquiries by the Commission about how the Applicant would operationalize capacity management, as per Ms Macdonald's evidence, the Applicant submitted:
- (a) External Security Crowd Controllers are on the premises from 5pm until 30 minutes after close on Friday and Saturday evenings.
 - (b) A minimum of 3 guards are present at these times and are positioned at the Jukes and Holey Moley entries as well as a guard roaming the premises.
 - (c) During this time the guards continually monitor the ingress and egress of all patrons via counters that are linked, which provides capacity numbers at all times.



(d) At 12:30am on Friday and Saturday evenings, the curtain between the Holey Moley and Jukes Bar will be drawn and the roaming guard will be static at the curtain, preventing patrons from internal movement between the two zones.

(e) From 12:30am the following activities will be closed: Holey Moley Bar, one (1) 9-hole Mini Golf Course, five (5) Karaoke Rooms, and the Escape Rooms.

If there are too many patrons in the premises to operate both Holey Moley and Jukes after 1:00am, then:

(f) At 12:30am at the Holey Moley bar, last drinks will be called and the Holey Moley bar will be closed from 1am.

(g) From 12:30am the Holey Moley entrance will be used as egress only, and at 1am the Holey Moley entry will be closed entirely.

(h) Between 12:30am and 1:00am no new patrons will be able to play a game of Holey Moley, this ensures that by 1am the Holey Moley Bar and Mini Golf course are vacated entirely.

(i) From 12:30am the Jukes entry will be the only entrance and capacity will be limited to a maximum of 200 patrons.

(j) The Jukes Bar itself, when operated alone, due to its size does not accommodate greater than 200 patrons, and consequently it is always possible to reduce the patron capacity to 200 patrons by closing the remaining activities in the premises.

(k) Staff and security will be aware of bookings for the Mini Golf Course or Karaoke Rooms which could affect patron capacity after 1am and will be able to then limit walk-ins accordingly to ensure that the patron capacity is not exceeded.

62. Accordingly, the Commission finds that the requirements of Paragraph B 2(c) of the Guidelines have also been met. In this case, the Commission is satisfied that the capacity of the wider premises will not exceed 500 patrons. The Commission also notes the intention of the Licensee is to not exceed 200 patrons after 1am. It is noted, however, that the physical separation between Holey Moley Bar, the 9-hole Mini Golf Course, five Karaoke Rooms, and the Escape Rooms, in addition to the Jukes entry being the only entrance point from 12:30am, are a key aspect to acceptance by the Commission of the Licensee's ability to reduce numbers to 200 patrons from 1am. The Commission would be unlikely to have confidence in the Licensee's ability to reduce patron capacity to 200 or less after 1am (i.e. to meet the patron capacity



requirement of the Guidelines) where the specific area continuing to trade was not distinctly separable from the wider premises, as the Commission has previously determined⁹. In conclusion, the Commission finds that all of the requirements of Paragraph B of the Guidelines have been met and accordingly the granting of the variation sought by the Review Application would be consistent with the Guidelines.

Provision of food

63. On the basis of the Commission's above findings, the Commission does not need to determine whether the Premises complies with the requirement that food is available at the venue at all times when alcohol can be supplied for the purposes of Paragraph A(1)(b) of the Guidelines. However, the Commission refers to and relies on its above findings relating to the provision of food as part of the Licensee's submission.
64. Having met the exemption, it remains for the Commission to decide whether to exercise its discretion to vary the existing licence, having regard to the objects of the LCR Act and the impact of the venue on harm and amenity.

Should the Commission grant or refuse the Review Application, given the grounds for refusal set out in the Act, and the objects of the Act?

65. The role of the Commission on review is to stand in the shoes of the original decision-maker and make a fresh decision. Pursuant to section 9(4) of the VCGLR Act, the Commission must take into account any decision-making guidelines issued by the Minister when performing its functions or duties or exercising its powers under the gambling legislation or the Act.
66. However, the Commission is not bound to refuse an application on the basis that it does not meet the requirements provided in the decision-making guidelines. Rather, the decision-making guidelines are an additional element that the Commission must give regard to when it is determining whether to exercise its discretion to grant or refuse an application. In exercising this discretion, the Commission must consider relevant grounds for refusal, as well as the objects of the Act as provided in section 4(1), particularly the object of harm minimisation.
67. To this end, the Commission considered that the Premises is located within the Crown complex and provides a multi-faceted entertainment and recreation venue where live music occurs on Thursday, Friday and Saturdays and there is emphasis placed on patrons participating in

⁹ In the matter of the Open Door Pub Co. Pty Ltd for premises known as the Duke of Wellington Hotel (Deputy Chair Kennedy, Commissioners Powell and O'Donnell), (Liquor-internal review) [2015] VCGLR 46 (10 December 2015).



various activities whilst also being provided with a substantial food offering (and seated dining options) when liquor is being served. The VCGLR's Compliance History Report further supports this view, in that no complaints or breaches are recorded against the Premises for any amenity-related or regulatory compliance issues.

68. The Commission accepts that there is a risk that an extension to trading hours granted to any licensed premises to operate beyond 1 am will give rise to potential issues associated with impacts on amenity and the misuse or abuse of alcohol, such as anti-social behaviour and alcohol fuelled violence. The VCGLR's Compliance History Report again demonstrates that there have been no breaches identified at the Premises which relate to drunken or disorderly patrons.
69. Further, having regard to the objects of the Act, the Commission must not base its determination regarding the potential risks associated with the misuse and abuse of alcohol on site-specific evidence alone. It must also have regard to general evidence of harm and locality evidence. Moreover, in considering the risks of misuse and abuse of alcohol, it is not simply an issue of whether the Premises is responsible for anti-social behaviour, but rather, whether late-night trading at the Premises would, in fact, contribute to the harm that arises from the misuse and abuse of alcohol. In this matter, the Commission is aware that neither the Council nor the Police objected to the Application at first instance or during the Review Application.
70. Further, the Commission considers that the approval of the Application would benefit the community by facilitating the responsible development of the liquor and licensed hospitality industries, reflecting community expectations as provided in the Act. The venue provides an attractive option for visitors and tourists, due to its proximity to public transport and given that it is part of the Crown Melbourne complex.
71. Finally, the Commission is satisfied that the Premises regularly provides live music entertainment in accordance with the Guidelines and that the Applicant is in a position to put in place relevant measures to limit the total patron capacity of the premises to 200 patrons after 1:00am on Friday and Saturday, as set out in paragraph 60.

DECISION

72. For the reasons stated above, the Commission has determined to set aside the decision of the Delegate, grant the Review Application and vary the Licence to permit the supply and consumption of liquor on the Premises between the following trading hours:



Good Friday and ANZAC Day

Between 12 noon and 1 am the following day

Sunday to Thursday

Between 10 am and 1 am the following day

Friday and Saturday

Between 10 am and 2 am the following day

The preceding seventy two (72) paragraphs is a true copy of the Reasons for Decision of Ms Deirdre O'Donnell (Deputy Chair), Mr Des Powell AM (Commissioner) and Ms Danielle Huntersmith (Commissioner)