

Decision and reasons for decision

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to grant a restaurant and cafe licence to YATOJO Pty Ltd, in respect of the premises proposing to trade as The Kyn Torquay, 41 The Esplanade, Torquay.

Commission: Ms Deirdre O'Donnell, Deputy Chair
Mr Des Powell AM, Commissioner
Mr Andrew Scott, Commissioner

Date of Hearing: 10 September 2021
Date of Decision: 30 November 2021
Date of Reasons: 17 December 2021

Appearances: Mr Martin Towey, LGS Legal, for the Applicants
Mr John Larkins of Counsel for the Licensee
Ms Lilli Owens-Walton, Counsel Assisting the Commission

Decision: The Commission has determined to vary the decision of the delegate and grant the restaurant and cafe licence subject to the conditions set out in Appendix A.

Signed: 

Deirdre O'Donnell
Deputy Chair

Background

1. On 20 August 2020, YATOJO Pty Ltd (**Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) for a restaurant and cafe licence in respect of the premises proposing to trade as The Kyn Torquay, 41 The Esplanade, Torquay (**Premises**) (**Original Application**).
 2. The Original Application included:
 - a. Application for a restaurant and cafe licence, dated 20 August 2020;
 - b. Australian Securities and Investment Commission (**ASIC**) Current and Historical Company Extract for the Licensee, dated 18 August 2020;
 - c. Liquor Licence Questionnaires for the directors Thomas McGrath, Joshua Friend and Yasmin Burton, dated 20 August 2020;
 - d. ASIC Record of Registration for Business Name – The Kyn Torquay, dated 17 August 2020;
 - e. Declaration of Associates for the Licensee and directors, dated 20 August 2020;
 - f. Red line plan of the Premises;
 - g. Correspondence from Surf Coast Shire Council (the **Council**) including:
 - i. confirmation that a planning permit is required to sell and consume liquor at the Premises, dated 24 August 2020;
 - ii. Planning permit, dated 19 December 2007 and amended 30 October 2014; and
 - iii. letter regarding an error in the planning permit and attaching a corrected permit, dated 6 February 2021;
 - h. Certificates of completion of Responsible Service of Alcohol (**RSA**) courses by the directors Yasmin Burton and Joshua Friend;
 - i. Declaration of the right to occupy the Premises, dated 20 August 2020;
 - j. Statement of display, dated 1 October 2020; and
 - k. Amenity submission containing photos of the Premises under construction, dated 15 October 2020.
 3. On 21 August 2020, in accordance with section 33(2) of the *Liquor Control Reform Act 1998* (the **Act**) the Commission served a copy of the Original Application on the Council. On 24 August 2020, the Council informed the Commission that it did not object to the Original Application.
 4. On 21 August 2020, in accordance with section 33(1) of the Act, the Commission served the Original Application on the Chief Commissioner of Victoria Police (**Victoria Police**). On 31 August 2020 Victoria Police advised that it did not object to the Original Application.
 5. During the public objection period (25 August – 22 September 20), the Commission received several objections from local residents (**Objectors**), who submitted that the grant of the Original Application would detract from or cause detriment to the amenity of the area in which the Premises, and their homes, are located.
 6. On 7 December 2020, the Commission was notified by the Licensee that the entire Premises had burned down the previous day, which would delay their plans to open the Premises if and when the Licence was granted.
- On 3 March 2021, the Licensee supplied an email from Council confirming that a new planning permit would not be required for repair work following fire, provided it is on a like-for-like basis.
7. On 17 June 2021, a delegate of the Commission (**Delegate**) granted the Original Application (**Original Decision**) subject to a condition that the restaurant and cafe licence is not effective until the building works are completed and the Commission has provided confirmation of the effectiveness of the Licence. On 25 August 2021, the Licensee submitted a notification that building works were completed and the occupancy permit. On 2 September 2021, the Licence was granted effective by the Commission.

Application for Internal Review

8. On 8 July 2021, a group of the Objectors comprising Kate Williams¹, Maureen Parlange and Philip Whelan (the **Applicants**) applied for internal review of the Original Decision (**Review Application**) and also requested a stay of the Original Decision until the Review Application had been determined (**Stay Application**).
9. On 21 July 2021 both Victoria Police and Council advised that they maintained their respective positions of 'no objection' to the application for a restaurant and cafe licence the subject of the Review Application.

Stay Application

10. The Stay Application sought to stay the operation of the Original Decision pending determination of the Review Application. This would have had the effect of preventing the Licensee from proceeding with plans to open the Premises until the Commission determined the Review Application.
11. On 26 July 2021, the Commission determined to refuse the Stay Application (**Stay Decision**).

Legislation and the Commission's task

The Commission's internal review power

12. Division 2 of Part 9 of the Act governs internal review applications. Under section 152, the decision made by the Delegate in the Original Application is a reviewable decision and the Objectors are an eligible person to apply for the review of that decision. The Review Application was made pursuant to section 153 of the Act.
13. Pursuant to section 157(1), 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 appropriate².
14. In effect, the Commission on review stands in the shoes of the original decision maker and must make a fresh decision with respect to the Original Application. In this case, the Commission must decide whether to:
 - a. grant the restaurant and cafe licence, and if so, whether to do so subject to conditions³; or
 - b. refuse to grant the restaurant and cafe licence⁴.

Determination of a contested application

15. Where an application is a contested application, pursuant to section 47(1) of the 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.

¹ On 8 September 2021, Kate Williams withdrew her internal review application. Maureen Parlange and Philip Whelan continued with the Review Application

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

³ The Act, sections 44, 49 and 157.

⁴ The Act, section 44 and 157.

16. Section 47(2) of the Act provides that the Commission may refuse to grant a contested application on any of grounds set out in section 44(2) and section 44(3) applies accordingly.

17. Section 44(2)(b) of the Act provides the following ground for refusal –

in any case – (i) that the granting of the application would be detrimental to the amenity of the area in which the premises to which the application relates are situated.

18. Section 3A of the Act provides the following definition of amenity:

(1) *For the purposes of this Act, the amenity of an area is the quality that the area has of being pleasant and agreeable.*

(2) *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—*

* * * * *

(d) the possibility of nuisance or vandalism;

(e) the harmony and coherence of the environment;

(f) any other prescribed matters.

(3) *Nothing in subsection (2) is intended to limit the definition of amenity.*

19. Section 3AA provides the following as to evidence constituting detraction from or detriment to amenity of area:

For the purposes of this 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; (h) causing nuisance; (i) noise disturbance to occupiers of other premises; (j) obstructing a footpath, street or road; (k) littering.

20. Section 47(3) of the 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*

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

Exercising the internal review power

21. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (VCGLR Act) requires the Commission, in exercising its internal review function, to have regard to the objects of the Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act⁵.

22. The objects of the Act are set out at section 4(1) and provide that:

The objects of this Act are—

⁵ Section 9(3) and (4) VCGLR Act.

(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.

23. Section 4(2) of the Act 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 alcohol⁶.

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

- a. must consider all the information, material and evidence before the original decision maker⁷; and
- b. may consider further information or evidence⁸.

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

26. Under section 49 of the Act, the Commission may impose any condition it thinks fit on the grant of an application.

Conduct of an inquiry

27. Section 34 of the VCGLR Act provides that, subject to that Act, gambling legislation or liquor legislation, the Commission may conduct an inquiry in any manner it considers appropriate.

28. During the conduct of an inquiry, section 25(3) of the VCGLR Act provides that the Commission is not bound by the rules of evidence, however must comply with the rules of natural justice.

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

⁷ The Act, section 157(2).

⁸ The Act, section 157(3).

Material before the Commission

29. The Commission on review had before it all the information and material before the Delegate who made the Original Decision.
30. The Commission on review also had before it and considered:
- a. the Review Application, dated 8 July 2021⁹;
 - b. the Original Decision, dated 17 June 2021;
 - c. submissions by the Applicant:
 - i. in support of the Stay Application and Review Application, dated 8 July 2021 attaching:
 1. planning permit 07/0572B for the Premises, issued on 19 December 2007, amended on 20 October 2014 and corrected on 6 February 2015;
 2. letter to an acoustic engineer requesting an independent acoustic report showing the amenity impact of the Premises once it is trading, dated 29 August 2021 and a response from the engineer dated 31 August 2021; and
 3. letter to the Commission requesting an adjournment of the public hearing date until after the Premises had commenced trading (**Adjournment Request**), dated 30 August 2021;
 - ii. letter to the Commission submitting that the Licence is ineffective because the Licensee failed to satisfy the conditions of the Licence and apply to the Commission by 1 September 2021 for the Licence to be made effective¹⁰, dated 2 September 2021;
 - iii. letter dated 8 September 2021, advising the Commission that:
 1. Ms Williams had withdrawn her participation in the Review Application and that the remaining Applicants were Maureen Parlange, Philip and Mary Barry¹¹;
 2. the Licensee and the Applicants request that a condition be endorsed on the licence¹² pursuant to section 58¹³ of the Act (**Joint Proposal**); and
 3. if the Commission accepts the Joint Proposal, the Applicants will withdraw the Review Application and a related application to the Victorian Civil and Administrative Tribunal (**VCAT**).
 - d. information from Objectors to the Original Application:

⁹ There is a typographical error in the Review Application where the form is dated '08/07/2020'. The typographical error is evident because the Review Application was lodged after the Original Decision was made by the delegate on 17 June 2021, for an application that was lodged on 20 August 2020.

¹⁰ At the time Mr Towey checked the VCGLR website, the Commission had not yet had an opportunity to review the notification of completion of building works and supporting documents from the Licensee to make the licence effective. That notification had been received by the Commission on 25 August 2021. The Licence was made effective on 2 September 2021.

¹¹ The Commission was advised that Philip Barry is also known as Philip Whelan. As Philip Whelan was an objector to the Original Application, his application on review is valid. Mary Barry did not make any objection to the Original Application therefore her review application was not valid.

¹² The proposed condition to be imposed was: *Outdoor Dining Area: No patrons are permitted in the rear area marked 'outdoor dining' on the approved plan of 17 June 2021 after 10pm on any day, save for the periods 27 December to 27 January and Easter Thursday to Easter Sunday in any year. For the avoidance of doubt, this condition does not apply to the 'covered outdoor dining' area on the approved plan of 17 June 2021.*

¹³ Section 58 of the Act provides: '(1) The Commission, at its own initiative, may vary a licence or BYO permit in accordance with this section. (2) A variation under this section may include - ... (d) the imposition of a new condition on the licence or permit;...'

- i. On 29 July 2021, Natalie & Fergus McColl advised that they did not maintain their objection to the application in light of the amendments to the operating hours as incorporated in the Licence as a result of the Original Decision which reduced the proposed operating hours¹⁴. Notably, the closing time on Friday and Saturday nights was reduced from 1am to 11pm;
 - ii. on 30 July 2021, Bill Boerkamp advised that with the reduced operating hours etc he had withdrawn his objection and was happy to support the application;
 - iii. on 3 August 2021, Timm McErvale confirmed his objection to the application; and
 - iv. on 15 September 2021, Timm McErvale responded to the Commission’s invitation for Objectors to comment on the Joint Proposal and advised that back gates had been added to the north/western corner boundary fence which he considered could be problematic late at night during the holiday periods.
- e. submissions by the Licensee:
- i. objecting to the Stay Application, attaching a menu for the Premises and the resume of the Head Chef, received 23 July 2021;
 - ii. objecting to the Adjournment Request, dated 3 September 2021; and
 - iii. providing a copy of the Licence, granted effective by the Commission on the previous day, dated 3 September 2021.

Public hearing

- 31. On 6 September 2021, in response to the Adjournment Request, the Commission notified the parties that it had determined to proceed with the hearing by videoconference on the date scheduled, being 10 September 2021.
- 32. On 9 September 2021, the Commission advised the parties that it would not exercise its own initiative power under section 58 of the Act to vary the Licence in accordance with the Joint Proposal outside of the review process. The Commission agreed to amend the Review Application to incorporate the contents of the Joint Proposal and the matter proceeded as the “Amended Review Application” from this point. See paragraphs 37 to 45 for further information about the Joint Proposal including the Commission’s findings.
- 33. Accordingly, on 10 September 2021, the Commission held a public hearing via remote videoconference in relation to the Amended Review Application (**Hearing**). At the Hearing, the parties confirmed that they did not intend to “prosecute” the issue of the Commission’s refusal to determine this matter by its own initiative under section 58.

Reasons for decision on review

- 34. In making its decision on review, a key consideration for the Commission is whether the grant of the Licence would detract from or be detrimental to the amenity of the area in which the Premises are located and whether the Licence should be granted having regard to the objects of the Act.

¹⁴ The operating hours in the Original Application were: *Internal and front courtyard: Monday – Sunday: 8am – 11pm, Friday – Saturday: 8am – 1am the following day. Rear garden: Monday – Sunday 8am – 11pm.* The Licence granted the following trading hours: *ANZAC Day: Between 12 noon and 11pm. On any other day – between 10am and 11pm.*

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

35. The Applicants submitted that the grant of the Licence will detract from or cause detriment to the amenity of the area in which the Premises are located. In summary, the Applicants made the following written submissions in support of this position:
- a. the subject site is inappropriate for the proposed use, particularly due to:
 - i. the intensity and scale of the proposed use with its proposed hours of operation and outside seating arrangements; and
 - ii. the inappropriate level of traffic, light and noise given the function of the street is a 'lower order commercial street';
 - b. the Premises is more like a tavern than a restaurant;
 - c. the Premises is immediately next door to residences;
 - d. local residents are not aware of any noise attenuation works that have been completed and there appears to be an absence of a sound engineer report;
 - e. the proposed hours will impact the environment, health, sleep and stress levels of residents in the surrounding area considering:
 - i. the maximum internal capacity of 49 patrons, but overall maximum capacity of 120 patrons; and
 - ii. a proposal to impose a requirement for a noise monitor and limiter be installed was inadequate;
 - f. the proposal will increase the already significant cumulative negative impact of licensed premises on the area;
 - g. there are concerns that alcohol will be consumed in the courtyard after 11:00pm, which will generate noise;
 - h. noise will be generated from waste/rubbish disposal from the Premises;
 - i. the Licensee did not provide an adequate alcohol, noise, amenity and patron management plan.
36. The Licensee submitted that the grant of the Licence would not detract from or cause detriment to the amenity of the area in which the Premises are located. In summary, the Licensee relied on the following in support of its position:
- a. the Licensee is an experienced operator who has operated several licensed venues in Torquay and Geelong over the past 15 years and maintained an impeccable record during that time;
 - b. the Licensee has a thorough understanding of the difference between the 'restaurant and cafe' and tavern licence types, having operated both types of venues, and it intends to operate the Premises according to the conditions of a restaurant and cafe licence;
 - c. the menu and employment of a high-end chef and an emphasis on food, with the service of alcohol as an accompaniment, further supports the Premises being a 'restaurant' and not a 'tavern'; and
 - d. the conditions on the Licence already protect the amenity of the area and reflect concessions made by the Licensee during the process of the Original Application, where opening hours were reduced to allay the concerns of Objectors.

The Joint Proposal

37. On 8 September 2021, a Joint Proposal was submitted by the parties leading to the Amended Review Application. The Joint Proposal represented an agreement between the parties regarding

suitable opening hours and conditions to be imposed on the Licence for the Premises, which the parties sought the Commission to endorse pursuant to section 58 of the Act.

38. Section 58 of the Act is as follows:

(1) *The Commission, at its own initiative, may vary a licence or BYO permit in accordance with this section.*

(2) *A variation under this section may include—*

...

(d) the imposition of a new condition on the licence or permit;

39. As stated in paragraph 32, the Commission determined not to exercise its own initiative power under section 58. Instead, the Commission has had regard to the contents of the Joint Proposal when considering whether to grant or refuse the Licence the subject of the Review Application and any conditions on the Licence that may be appropriate.

40. To make the decision on review, the Commission has considered the Joint Proposal in the Amended Review Application to impose the following condition on the Licence:

Outdoor Dining Area

No patrons are permitted in the rear area marked 'outdoor dining' on the approved plan of 17 June 2021 after 10pm on any day, save for the periods 27 December to 27 January and Easter Thursday to Easter Sunday in any year.

For the avoidance of doubt, this condition does not apply to the 'covered outdoor dining' area on the approved plan of 17 June 2021.

41. After the Hearing, the Commission invited the other Objectors to the Amended Review Application to make a submission regarding the Joint Proposal and received one response from Mr McErvale on 15 September 2021 (see paragraph 30.d.iv).

42. The Commission notes one concern that is apparent from the Applicants' submissions regarding the risk of detracting from or detriment to the amenity of the area, which is associated with outdoor dining for up to 71 patrons (according to the patron capacities on the licence).

43. The Commission finds that the Joint Proposal appears to represent a middle ground between:

- a. the Applicants' concerns regarding the potential for detracting from or detriment to the amenity of the area in which the Premises are located, particularly that which is associated with outdoor dining after 10:00pm; and
- b. the Licensee's commercial desire to trade during the hours permitted by the Licence particularly during holiday periods when trade noticeably increases.

44. The Joint Proposal provides that the outdoor dining area will be effectively closed from 10:00pm for most of the year, whilst allowing the Licensee to continue to trade until 11:00pm inside. The Commission finds that this measure will reduce any adverse impact on the amenity of the area, particularly for those locals who are permanent residents in the area and live near the Premises.

45. The Commission finds that it is satisfied that granting the Licence, subject to the condition proposed in the Joint Proposal, adequately addresses the concerns raised by the Applicants and the Objectors and that the granting of the Licence subject to this condition will not detract from or be detrimental to the amenity of the area in which the premises are situated.

Whether the Licence should be granted having regard to the objects of the Act

46. The Applicants submitted that the Licence would fail to meet the objects of the Act, specifically section 4(a) '*to contribute to minimising harm arising from the misuse and abuse of alcohol...*', however did not put forward evidence or submissions to support this assertion.

47. The Applicants submitted that they had safety concerns with the supply of alcohol at the Premises and the 'unlit' surrounds. The Applicants noted that the surrounding laneways could potentially encourage undesirables to loiter.
48. In determining the Review Application, the Commission has had regard to the objects of the Act, and in particular, harm minimisation. The Commission has considered whether granting the liquor licence application the subject of the Amended Review Application would be conducive to, or encourage, the misuse or abuse of alcohol. Having regard to the lack of evidence before it regarding the potential for harm arising from the misuse and abuse of alcohol, and the Licensee's experience in managing similar licensed restaurant and cafe venues in Torquay, the Commission considers that granting the Application would not pose an unacceptable risk that would justify the Commission exercising its discretion to refuse to grant the Licence.

Decision on review

49. The Commission has determined to vary the decision of the Delegate and grant the application for a restaurant and cafe licence, subject to the conditions set out at Appendix A.

The preceding 49 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell, Deputy Chair, Mr Des Powell AM, Commissioner and Mr Andrew Scott, Commissioner

Appendix A

Type of licence

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

Restaurant and café conditions

This licence is subject to the following conditions:

- (a) The predominant activity carried out at all times on the premises must be the preparation and serving of meals at all times for consumption on the licensed premises; and
- (b) Tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending the premises at any one time; and
- (c) The licensee must not permit –
 - (i) the live performance of any musical works; or
 - (ii) the playing of any recorded musical works –

on the premises at higher than background music level at any time outside ordinary trading hours.

Condition (c) does not apply to music performed or played on the licensed premises outside ordinary trading hours as part of a function that is held in an area of the premises that is set aside for the exclusive use of persons who have booked a table in that area and their guests, and is attended only by those persons and their guests.

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 by this licence.

Special conditions

No live music or amplified recorded music shall be provided in the rear courtyard, garden and external areas.

No patrons are permitted in the rear area marked 'outdoor dining' on the approved plan of 17 June 2021 after 10pm on any day, save for the periods 27 December to 27 January and Easter Thursday to Easter Sunday in any year.

For the avoidance of doubt, this condition does not apply to the 'covered outdoor dining' area on the approved plan of 17 June 2021.

Maximum capacity

120 Patrons

Trading hours

ANZAC Day	Between 12 noon and 11pm
On any other day	Between 10am and 11pm