

## Decision and reasons for decision

In the matter of an application by Jenna Nichols and Rosy Clarkson under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to grant a variation to trading hours regarding a renewable limited licence for the premises known as Cluden Cricket Club, located at the William Reserve, 80 William Street, Brighton.

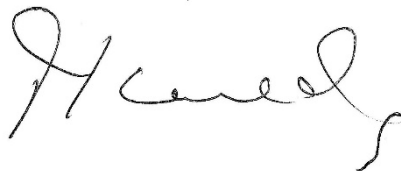
**Commission:** Mr Ross Kennedy PSM, Chair  
Ms Deirdre O'Donnell, Deputy Chair  
Mr Des Powell AM, Commissioner

**Date of Decision:** 16 July 2021

**Date of Reasons:** 16 July 2021

**Decision:** The Commission has determined to vary the decision of the Delegate and to grant the application for a renewable limited licence subject to the conditions at Appendix A.

**Signed:**



**Ross Kennedy PSM**  
Chair

## Background

1. On 23 December 2019, Cluden Cricket Club Inc (**Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) to vary a renewable limited licence (**Variation Application**) under the *Liquor Control Reform Act 1998* (**LCR Act**) for the premises located at the William Reserve, 80 William Street, Brighton, trading as Cluden Cricket Club (**Premises**). The Variation Application sought to vary the licence trading hours as follows:
  - a. Existing trading hours for the original licence
    - i. Tuesday and Thursday between 5pm and 9pm
    - ii. Saturday between 3pm and 9pm
    - iii. The supply and consumption of liquor in the external areas is restricted to Saturday only and must cease no later than 6pm.
  - b. Variation to trading hours

Internal area –

    - i. Tuesday and Thursday between 5pm and 9pm
    - ii. Saturday between 1pm and 11pm
    - iii. Sunday between 1pm and 7pm.

External area –

    - iv. Tuesday between 5pm and 8 pm (only when matches are played)
    - v. Thursday between 5pm and 8pm
    - vi. Saturday between 1pm and 8pm
    - vii. Sunday between 1pm and 7pm.

In summary, the Licensee sought four (4) additional trading hours on Saturday and the ability to supply liquor on a Sunday.

2. The Licensee also sought to vary the Commission-approved plan or depiction of the Premises (**red-line area**), as the existing club rooms had been demolished and rebuilt as part of the Bayside City Council (**Council**) redevelopment of the reserve.
3. A copy of the Variation Application was served on both Victoria Police and Council on 23 December 2019, in accordance with section 33(3) of the LCR Act. Victoria Police did not object to the Variation Application.
4. On 9 January 2020, the Council informed the Commission that a review of Council records indicated that Council had not issued a planning permit for the variation to the hours of trading and the increase of the red-line area, which would be required under the Bayside Planning Scheme. In addition, the Council notified the Commission that the Council would consider amenity-based impacts as part of a relevant planning permit application, and until Council had considered such an application it reserved the right to object to granting the Variation Application on the basis it might detract from or be detrimental to the amenity of the area.
5. In accordance with section 34 of the LCR Act, the Licensee displayed a public notice advertising the Variation Application at the Premises for 28 days from the date determined by the

Commission (**Display Period**). During the Display Period, the Commission received 20 objections from local residents to the Variation Application. The residential objectors raised similar concerns, which in summary included the following:

- a. the club has a history of breaching the liquor licence;
- b. longer trading hours will deter local residents and children from visiting the park;
- c. there will be excessive noise late at night in a quiet residential area;
- d. longer drinking hours will increase visibility of alcohol consumption;
- e. inappropriate messaging to youth about the connection between alcohol and sport;
- f. patrons will have the opportunity to consume more alcohol resulting in unsightly drunken behaviour, alcohol-related anti-social behaviour and vandalism;
- g. additional lighting is too bright for nearby residential properties;
- h. there is a risk the club rooms will become a function venue allowing for more frequent drinking and alcohol-related behaviour; and
- i. the narrow street makes it difficult to navigate cars, longer trading hours will result in cars parked on the street for longer periods of time.

6. On 10 February 2020, the Licensee responded to the objections raised, stating in summary:

- a. Cluden is a family-oriented club which runs a cricket programme seven days a week in the summer months that serves all in the broader community across Brighton and surrounding areas;
- b. during summer months, players prefer to be outside to be social and reflect on the day's play, an 8pm finish time allows players to share one or two drinks;
- c. the purpose of the Variation Application was to accommodate the club's ability to operate during senior matches until the end of play and to conduct club-only functions as well as a few fundraising events, not to expand the volume or quantity of alcohol consumption;
- d. the club does not intend to use the full allotment of hours each week, rather, the extensions are to allow the club flexibility to cater for events during the year;
- e. the club has 18 personnel with RSA training to enforce responsible service of alcohol and who are aware of the consequences for the club if the liquor licence is not complied with;
- f. the club has a faultless record with no reports of noise disturbances as provided by the police report;
- g. the social room is not a function room, and it is not available for hire; the Council is the building owner with the club being the nominated summer tenant;
- h. the licence has a condition that music must not be above background level;
- i. level of traffic around the area will remain the same, outside of a few events held by the club;
- j. the red-line plan is restricted to the front veranda and the pavilion, it does not include nearby tiered seating, carpark, playground or any other part of the reserve;
- k. other licensed sporting venues rarely make an attempt to limit children's exposure to alcohol; and
- l. the club strongly refutes the submissions that the club has a history of breaching its licence, as there have been very few concerns raised, which were as a result of outside clubs drinking on the Premises not in accordance with the licence, and the club has addressed this and endeavoured to adhere to obligations.

7. On 20 March 2020, the Delegate determined to grant the Variation Application (**Original Decision**).

## Application for Internal Review

8. On 25 March 2020, the Commission received an application for internal review from Jenna Nichols (one of the residential objectors to the Variation Application) and on 1 April 2020 a second application for internal review was received from Rosy Clarkson (also a residential objector to the Variation Application).
9. On 2 April 2020, the Commission joined the second application with the initial application and proceeded to consider both applications for internal review from Jenna Nichols and Rosy Clarkson (**Applicants**) together (**Review Application**).
10. On 2 April 2020, the Commission was notified by the residential objectors to the Variation Application (**Objectors**), that they maintained their objection to the Variation Application.

## Legislation and the Commission's task

### The Commission's internal review power

11. Division 2 Part 9 of the LCR Act governs internal review applications. The Original Decision is a reviewable decision under section 152, and the Applicants are eligible persons to apply for a review of that decision. The Review Application is made under section 153 of the LCR Act.
12. Pursuant to 157(1) of the LCR Act, the task before 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.
13. 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 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 the Division for those objections (or that period as extended under section 174)”.*
14. As the Review Application is brought by the Applicants who objected to the Variation Application, the Review Application is a contested application.
15. Accordingly, the Commission on internal review stands in the shoes of the original decision maker and must make 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>1</sup> or
  - b. refuse to grant the application.<sup>2</sup>
16. In doing so, the Commission must consider all the information, material and evidence that was before the original decision maker.<sup>3</sup> The Commission may also consider further information, material or evidence in making a decision.<sup>4</sup>

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<sup>1</sup> Sections 44, 49 and 157 of the LCR Act.

<sup>2</sup> Sections 44 and 157 of the LCR Act.

<sup>3</sup> Section 157(2) of the LCR Act.

<sup>4</sup> See section 157(3) of the LCR Act.

## Exercising the internal review power

17. Section 9(3) of the *Victorian Commission for Gambling and Liquor Regulation Act (VCGLR Act)* provides:

*“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>5</sup>.*

18. 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.

19. 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.”*

20. 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.”*

## Determination of a contested application

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

*“Subject to Division 3, the Commission must, after the period for making an objection under Division 5 has expired, including any extension of time granted for making an objection, grant or refuse a contested application.”*

22. 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).

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<sup>5</sup> There are no objects specified in the VCGLR Act itself.

23. 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;”*
24. 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>6</sup>
25. 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. 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.*
26. Factors which were raised by the Applicants and Objectors that do not relate to the amenity of the area were not considered by the Commission in the assessment of the Review Application.
27. 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*
  - (b) *make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.”*
28. 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 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>7</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>8</sup>
29. 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.

<sup>6</sup> Section 3A(2) previously included 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*.

<sup>7</sup> See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

<sup>8</sup> See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

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

## Conduct of an inquiry

31. Section 34 of the VCGLR Act provides that subject to that Act, gambling legislation or liquor legislation, the Commission may conduct any inquiry in any manner it considers appropriate. Relevant provisions governing the conduct of an inquiry by the Commission in this matter include:

- a. section 33 of the VCGLR Act, which provides, inter alia:

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

...

*(3) When conducting an inquiry for the purposes of performing its functions under section 9(1)(a), (b), (c) or (d) the Commission is taken to be a board appointed by the Governor in Council and Division 5 of Part 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.”*

## Material before the Commission

32. The Commission on review had before it, and considered, all materials received by the Delegate. In addition, the Commission received and considered the following:

- a. Original Decision and reasons of the Delegate, dated 20 March 2020;
- b. Application for Internal Review submitted by Ms Jenna Nichols;
- c. Application for Internal Review and supporting submissions, submitted by Ms Rosy Clarkson;
- d. Notice of Victorian Civil and Administrative Tribunal (**VCAT**) determination regarding an application to appeal the Council’s planning permit for the Premises;
- e. Approved Council Planning Permit dated 11 August 2020 (**Planning Permit**), setting out the following hours as approved for the Premises:
  - i. Internal hours –  
Tuesday and Thursday 5pm to 9pm  
Saturday 3pm to 9pm  
Sunday 3pm to 8pm
  - ii. External hours –  
Tuesday and Thursday 5pm to 8pm  
Saturday 3pm to 8pm  
Sunday 3pm to 7pm
  - iii. Special hours –

The sale and serving of alcohol may occur for extended hours on a maximum of three (3) occasions between 1 October and 31 March for special events associated with the club. These hours are as follows:

Internal hours –

Saturday 1pm to 10pm

Sunday 1pm to 7pm.

- f. Compliance history report for the Premises, prepared by Compliance officers at the Commission, dated 8 March 2021;
  - g. Additional written submissions from Ms Clarkson via email dated 22 January 2021, addressing the approved Council Planning Permit with the hours of operation for the Premises and attaching her previous submissions on the Review Application;
  - h. Further written submissions from the Licensee dated 2 March 2021 in which the Licensee proposed a revised scope of hours from the Variation Application (**Revised Hours**) which comply with the hours permitted by the Council for the Premises;
  - i. Final written submissions from the Objectors, received between 21 January 2021 and 29 January 2021.
33. With the consent of the Applicants and the Licensee, the Commission decided that a public hearing was not required and determined the matter on the papers.

## Reasons for decision on review

### Issues for determination on review

34. 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 in this matter is whether the proposed variation would detract from or cause detriment to the amenity of the area in which the Premises are situated.
35. 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.

### Amenity

36. The Commission must determine whether the grant of the Variation Application with the Revised Hours 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 for refusal under sections 47(2) and 44(2) of the LCR Act.
37. The Commission notes that the Council has previously advised that detriment to the amenity of the area is considered as part of the process for a planning permit application and that any variation to trading hours and the red-line area for the Premises requires a planning permit application. Following this advice to the Commission, on 11 August 2020, the Council issued a Planning Permit for the Premises, approving trading hours for the Premises as set out at paragraph 32e above. The Council did not provide any further information or objection to the Review Application.
38. The Commission is of the view that the Council has turned its mind to the potential impact of the extended trading hours and whether these would be detrimental to or detract from the amenity of the area. The Commission considers that, in undertaking an assessment for the Planning Permit, the Council addressed amenity concerns by effectively reducing the hours granted by the Delegate in the Variation Application.



39. In an email dated 2 December 2020, in response to receiving notification of the Planning Permit amendment to trading hours for the Premises, Ms Clarkson requested that the Commission amend the licence trading hours to reflect the decision of the Council, which the Licensee subsequently agreed to (see paragraph 43 below).
40. On 21 January, after receiving notification from VCAT of the determination of an appeal to the Council Planning Permit, the Commission notified the Applicants, the Objectors and the Licensee and invited all parties to make any further written submissions on the outcome of the VCAT appeal and ultimately the Planning Permit trading hours.
41. On 22 January, Ms Clarkson provided the Commission with her previous written submission as well as her email dated 2 December 2020 for the record, as her final submissions on the matter.
42. On 29 January 2021, Ms Nichols informed the Commission that she did not wish to provide any further submissions on the matter.
43. The Licensee provided further written submissions to the Commission dated 2 March 2021 in which the Licensee proposed to amend the scope of the Variation Application in order to comply with the Council's permitted hours for the Premises (**the Revised Hours**). The Licensee explained that the extended hours sought by the Licensee are to allow for increased community cricket teams now playing at the Premises. The Licensee also put forward the view that any noise impacts from the Revised Hours would be negligible and would not cause an unreasonable impact on the amenity of the area. The Licensee further stated that it would comply with the licence conditions and ensure adherence to its obligations as a licensee.
44. Between 22 January 2021 and 29 January 2021, the Objectors provided final written submissions to the Commission regarding their views about the Planning Permit decision. Most Objectors, in summary, stated that they were comfortable with the imposition of the Planning Permit hours (the Revised Hours) on the licence as it was a reduction in hours from the Original Decision. Some objectors maintained the hours were not reduced enough and the red-line area was too broad.
45. The Commission notes there are a number of conditions on the licence which would appropriately manage a number of the amenity concerns raised by the Applicants and Objectors. This includes:
  - a. music must be played at background noise level inside and no music is permitted outside,
  - b. the Premises must have signs to remind patrons to keep noise to a minimum,
  - c. the Licensee must have barriers for external liquor consumption areas, and
  - d. liquor must not be supplied during junior sports or junior activities at the Premises.
46. At the request of the Licensee, the Commission agreed to compile an internal compliance history and inspection report. The report provided the following relevant information:
  - a. in October 2014, the Commission received a complaint from a member of the public about players and members consuming alcohol outside of the licensed area and outside of the authorised trading hours;
  - b. investigations were undertaken; and
  - c. improvements were observed by compliance inspectors as well as the complainant, and the matter was finalised in February 2015.
47. The Commission was of the view that the compliance history report demonstrated that complaints received were appropriately dealt with. The Commission also noted that no further complaints had been received regarding detriment to the amenity of the area.
48. On 10 March 2021, the Licensee was provided with a copy of the compliance history report and invited to make any further submissions. On 11 March 2021, the Licensee informed the Commission that no further submissions would be made.
49. On 10 March 2021, the Applicants were provided a copy of the Licensee's submissions dated 2 March 2021 and informed that the internal compliance history report would be considered by the Commission in making a determination on the Review Application. The Applicants were invited to

make any final submissions on the matter, and the Commission requested the Applicants' consent to the matter being determined on the papers. No further submissions were made by the Applicants.

50. On carefully considering all information before it, the Commission is of the view that, in this case, granting the Variation Application with the Revised Hours would not detract from or cause detriment to the amenity of the area in which the Premises are situated. The Commission is satisfied that relevant conditions on the licence and the approved trading hours as considered by the Council for the Planning Permit are sufficient measures to mitigate any risk to the detraction from or detriment to the amenity of the area.

### **Objects of the Act**

51. In determining this Review Application, the Commission has had regard to the objects of the LCR Act, in particular harm minimisation.
52. The Commission has also considered whether granting the Variation Application would be conducive to, or encourage, the misuse or abuse of alcohol.
53. The Commission notes the Licensee's evidence that there have been no alcohol-related complaints or disturbances recorded by the police or Council, and that the internal compliance history report does not indicate any compliance issues.
54. Based on the information provided to the Commission, the Commission is of the view that the increase in trading hours should not contribute to any increase in alcohol-related harm.

### **Decision on review**

55. 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 in regard to the trading hours for the Premises, as detailed in Appendix A.

***The preceding fifty-five (55) paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy PSM (Chair) Ms Deirdre O'Donnell (Deputy Chair) and Mr Des Powell AM (Commissioner).***

# Appendix A

## Type of licence

This licence is a renewable limited licence and authorises the licensee to supply liquor on the licensed premises to a member of the club or a guest of the member 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.

## Club requirements

The rules of the club shall comply with Schedule 1 of the *Liquor Control Reform Act 1998*.

## Period of licence – section 50(2)

The licence is only in force during October to March inclusive.

## Special conditions

- (a) The supply of liquor must not take place whilst junior sports or junior activities are being conducted.
- (b) All music in the internal area of the pavilion must be played at background level at all times. No music is to be played in the external area of the licensed premises.
- (c) The licensee must place a sign at the exit of the pavilion reminding patrons to keep noise to a minimum as they leave the premises and car park in order to respect nearby residents.
- (d) Liquor supplied may only be served in plastic containers or cans.
- (e) When supplying liquor in the external area of the licensed premises, the licensee must have in place a physical barrier which clearly delineates the licensed area from the non-licensed areas. The licensee must affix a sign to the barrier stating that “alcohol must not be taken past this point”.

## Trading hours

### Internal hours –

Tuesday and Thursday 5pm to 9pm

Saturday 3pm to 9pm

Sunday 3pm to 8pm

### External hours –

Tuesday 5pm to 8 pm (only when matches are played)

Thursday 5pm to 8pm

Saturday 3pm to 8pm

Sunday 3pm to 7pm

Special hours –

The sale and serving of alcohol may occur for extended hours on a maximum of three (3) occasions between 1 October and 31 March for special events associated with the club. These hours are as follows:

Internal hours –

Saturday 1pm to 10pm

Sunday 1pm to 7pm.

## **Approvals/consents**

Section 120(2)(e) Persons under the age of 18 years are permitted on the licensed club premises other than in the company of a responsible adult in relation to preparation for and participation in sporting events only during the trading hours above. This approval does not include social activities but does include presentation functions.