



DECISION AND REASONS FOR DECISION

In the matter of an application by Minardi Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to vary a late night (on-premises) licence in respect of the premises trading as the Colonial Hotel, located at 585 Lonsdale Street, Melbourne.

Commission:

Ms Helen Versey, Deputy Chair

Ms Danielle Huntersmith, Commissioner

Mr Des Powell AM, Commissioner

Date of Decision:

18 June 2021

Date of Reasons:

18 June 2021

Counsel Assisting:

Mr Cameron Warfe

Decision:

The Commission refuses to grant the Review Application and varies the decision of the Delegate.

Signed:

A handwritten signature in black ink that reads "Helen Versey".

Helen Versey

Deputy Chair



REASONS FOR DECISION

BACKGROUND

1. The Colonial Hotel is located at 585 Lonsdale Street, Melbourne (the **Premises**) and operates as a restaurant and bar in the Melbourne CBD. Minardi Pty Ltd (the **Licensee**) holds a late night (on-premises) licence no. 32206791 (the **Licence**).
2. On 20 December 2019, the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) on its own initiative commenced the process for a variation of the Licence under section 58 of *Liquor Control Reform Act 1998* (the **LCR Act**)¹ for the Premises (the **Variation**).
3. Following notification to and receipt of submissions from the Licensee, a delegate of the Commission (the **Delegate**) determined on 19 February 2020 to vary the conditions of the Licence by amending the conditions set out below (the **Original Decision**). On 20 February 2020 the Licensee applied to the Commission for review of the Original Decision.

THE VARIATION

4. The Variation was initiated following receipt of an internal memorandum from the Commission's Compliance Division recommending variation to the conditions on the Licence, dated 2 December 2019 (the **Memorandum**). In summary, the Memorandum sets out that:
 - (a) The Compliance Division of the Commission received eight complaints of overcrowding at the Premises following an event held on 13 September 2019. On that night, a guest DJ was performing on the top level of the Premises, with a significant number of patrons attending during that time. It was alleged that emergency egress, if required, would have been adversely impacted.
 - (b) Following a review of CCTV footage from that event, the Compliance Division considered that although the overall maximum capacity for the Premises was not breached, there remained a health and safety risk given the lack of maximum capacities for each floor at the Premises.

¹ All references to legislation are references to the LCR Act unless stated otherwise.



5. On 20 December 2019, the Delegate gave the Licensee written notice of the proposed Variation. The Variation proposed to vary the conditions of the Licence by amending the overall patron capacity of 900 patrons to the following:

Ground Floor 280 patrons, First Floor 220 patrons, Second Floor 400 patrons, Overall 900 patrons

6. On 27 December 2019, the Licensee's solicitor sought further information from the Delegate regarding the proposed variation. Further information was provided by the Delegate on 30 December 2019, including the basis for the above calculations being from an initial breakdown of the overall capacity at the time it was originally imposed on the Licence in September 1994.
7. On 19 February 2020, the Licensee submitted that the original calculations were now outdated, however confirmed with the Delegate that the Licensee would not be providing any further material in response to the proposed variation.
8. Based on the material available, the Delegate determined to vary the Licence on 19 February 2020 by amending the conditions as referred to in paragraph 5 above.

APPLICATION FOR INTERNAL REVIEW

9. On 20 February 2020, the Licensee applied to the Commission for review of the Original Decision (**Review Application**). The Licensee also sought a stay of the Original Decision as the new maximum capacities would severely impact events that had been planned to be conducted at the Premises in the near future. On 2 March 2020, the Commission determined to stay the application of the Original Decision pending the outcome of the Review Application.
10. The Licensee submitted information addressing the reasons for the Review Application, which can be summarised as follows:
 - (a) the alleged overcrowding on 13 September 2019 was not caused by the event itself, but was contributed to by high demand for and delays in using the ATM located on the 2nd floor;
 - (b) the Premises have three staircases between the floors and there is continual movement of patrons throughout the three levels, which diminishes the chances of overcrowding as it is relatively easy for patrons to move between all three levels using the three staircases; and



(c) imposing maximum capacities on the floors may require restricting use of these staircases, which would create an increased burden on the Licensee to monitor patron movement through crowd controllers at entry and egress points.

11. In June 2020, the Commission sought an updated patron capacity report from an independent building surveyor at the City of Melbourne. A report was received on 26 June 2020 (**Council Report**). In conclusion, the Council Report set out the overall maximum capacity for the Premises as 780 patrons and capacities for each of the floors at the Premises as follows:

Ground Floor 305 patrons, First Floor 215 patrons, Second Floor 260 patrons, Overall 780 patrons

12. A copy of the Council Report was provided to the Licensee for comment on 6 July 2020. The Licensee provided a response on 7 July 2020, stating that:

(a) the Council Report was based on deem to satisfy provisions of the building code and not performance based, as well as based on architectural plans held by Council which could “date back decades”; and

(b) the author of the Council Report did not inspect the premises.

13. Between approximately September 2020 and March 2021, there was correspondence between the Commission and the Licensee’s solicitor seeking to the progress the matter. Ultimately, the Commission granted the Licensee additional time to file material, initially due on 7 September 2020, with extensions granted to 7 November 2020 and then to 19 March 2021. However no new material was filed.

14. On 7 June 2021, the Commission wrote to the Licensee’s solicitor and the director of the Licensee to advise that if a response was not received by 11 June 2021, the Commission would proceed to determine the Review Application on the basis of the material before it without conducting a public hearing.

15. As at the date of this decision, the Commission has not received a response from the Licensee (through its solicitor or its director or otherwise).

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission’s internal review power



16. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the decision made by the Delegate in the Original Application is a reviewable decision and the Applicant is an eligible person to apply for the review of that decision. The Review Application was made pursuant to section 153 of the LCR Act.
17. 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.
18. 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 either:
- (a) grant the application, and if so, whether to do so subject to conditions³; or
 - (b) refuse to grant the application⁴.

Exercising the internal review power

19. 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 LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act⁵.
20. The objects of the LCR Act are set out at section 4(1) and provide that:

The objects of this Act are—

- (a) *to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—*

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

³ LCR Act, sections 44, 49 and 157.

⁴ LCR Act, section 44 and 157.

⁵ VCGLR Act, section 9(3) and (4).



- (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) of the LCR 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 alcohol.⁶

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

- (a) must consider all the information, material and evidence before the original decision maker⁷;
- (b) may consider further information or evidence⁸; and
- (c) may, in respect of uncontested applications on review, have regard to any matter the Commission considers relevant, make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.⁹

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 LCR Act and therefore the primary consideration in liquor licensing decisions (although not to the exclusion of the other objects).

⁷ LCR Act, section 157(2).

⁸ LCR Act, section 157(3).

⁹ LCR Act, section 44(4).



23. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
24. The Commission considers that while the grounds of refusal outlined in section 44(2) of the LCR Act are relevant considerations, the determination of an uncontested application is ultimately to be made pursuant to section 44(1) and section 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.

Conduct of an inquiry

25. 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.
26. 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.”

MATERIAL BEFORE THE COMMISSION

27. The Commission on review had before it and considered all the materials and evidence before the Delegate, which included:



(a) the Memorandum, dated 2 December 2019; and

(b) the Original Decision, dated 19 February 2020.

28. The Commission also considered the Review Application, the Council Report, and various submissions from the Licensee received via email.

DETERMINATION OF THE REVIEW APPLICATION

Issues for determination on review

29. In determining this Review Application, it is necessary for the Commission to consider whether to affirm, vary or set aside the Original Decision¹⁰. In doing so, the Commission must determine whether the Review Application should be granted or refused, having regard to the objects of the LCR Act. The Commission has a discretion under section 44(1) of the LCR Act to grant or refuse the Review Application, as stated in paragraph 24.

30. The purpose of the licence variation process was to address a concern regarding overcrowding at the Premises. This concern arose from an incident that occurred on 13 September 2019, which highlighted the potential for significant overcrowding at the Premises if a substantial proportion of the overall capacity of 900 patrons attempting to access one of the three floors at any one time. In that sense, the Commission considers that varying the Licence to provide for maximum capacities for each of the three floors was appropriate to address the health and safety concern of overcrowding at the Premises.

31. The Commission notes the submission of the Licensee regarding the patron numbers imposed by the Delegate, in that they were derived from calculations made in 1994. As such, the Commission sought and received the Council Report in order to obtain more contemporaneous calculation upon which to determine appropriate patron capacities for each of the floors.

32. The Council Report concluded that, taking into account calculations based on floor area and available exits on each of the floors, appropriate maximum capacities for each of the floors were Ground Floor 305 patrons, First Floor 215 patrons, Second Floor 260 patrons, Overall 780 patrons.

¹⁰ LCR Act, section 157(1)(a)-(b).



33. The Commission provided a copy of the Council Report to the Licensee for comment, and notes the Licensee's submissions in relation to its accuracy. However, the Commission notes that the Licensee has not sought to provide its own independent evidence in relation to patron capacity at the Premises, and in the absence of any evidence to the contrary, the Commission accepts the Council Report as providing a reasonable and independent assessment of the most appropriate patron capacities for each of the floors and overall at the Premises.

34. After having regard to the objects of the LCR Act, particularly the harm minimisation object,¹¹ the Commission has determined to refuse to grant the Review Application.

DECISION ON REVIEW

35. Based on all of the matters set out above, the Commission on review has decided to vary the Original Decision and vary the Licence pursuant to section 58 of the LCR Act by:

(a) removing following condition from the Licence:

MAXIMUM CAPACITY

900 patrons

(b) adding the following condition to the Licence in accordance with the Council Report:

MAXIMUM CAPACITIES

Ground Floor 305 patrons, First Floor 215 patrons, Second Floor 260 patrons,

Overall 780 patrons

36. Consequently, the Commission refuses to grant the Review Application and varies the decision of the Delegate.

The preceding thirty-six (36) paragraphs are a true copy of the Reasons for Decision of Ms Helen Versey (Deputy Chair), Ms Danielle Huntersmith (Commissioner) and Mr Des Powell (Commissioner).

¹¹ LCR Act, section 4(1)(ii).