

Decisions and reasons for decision

In the matter of two applications under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to vary the late night (general) licence held by Claren Group Pty Ltd in respect of the premises known as Freddie Wimpoles, located at 125 Fitzroy Street, St Kilda.

Commission: Ms Helen Versey, Deputy Chair
Mr Andrew Scott, Commissioner
Mr Des Powell AM, Commissioner

Date of Hearing: 5 May 2021

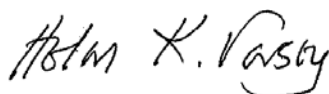
Date of Decision: 9 July 2021

Date of Reasons: 9 July 2021

Appearances: Mr Andrew and Ms Nicola Crouch, the First Applicants
Mr Gary Smith, the Second Applicant
Mr Martin Towey, LGS Legal on behalf of the Licensee
Mr Cameron Warfe, Counsel Assisting the Commission

Decision: The Commission has determined to set aside the decision of the Delegate and, in substitution, refuse to grant the variation application.

Signed:



Helen Versey

Deputy Chair

Background

1. Freddie Wimpoles is a late night bar located on part of the ground floor of 125 Fitzroy Street, St Kilda (the **Premises**) in a mixed use establishment known as the George Building.
2. On 20 November 2019, Claren Group Pty Ltd (the **Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) under the *Liquor Control Reform Act 1998* (the **LCR Act**)¹ to vary late night (general) licence no. 31920952 (the **Licence**) for the Premises (**Variation Application**).
3. The Licence provides for the supply of liquor until 3 am on Thursday, Friday and Saturday nights. The Variation Application sought to amend a condition prohibiting any entertainment after 1 am to permit the provision of such entertainment at background music levels. The Variation Application also sought to remove the condition that “*no discotheque or other venue for dancing is permitted*”.
4. The Variation Application included:
 - a. a completed application form for variation to an existing licence or permit, under cover letter dated 22 October 2019;
 - b. a copy of the Commission internal review decision from a previous variation application dated 20 February 2019;
 - c. a copy of the statement of display dated 1 January 2020;
 - d. a copy of the red-line area for the Premises; and
 - e. patron data for post 1 am on Thursday, Friday and Saturday nights for the period 4 July 2019 to 4 January 2020.
5. On 20 November 2019, in accordance with section 33(1) and (2) of the LCR Act respectively, a delegate of the Commission (**Delegate**) provided a copy of the Variation Application to Victoria Police and to the City of Port Phillip (**Council**). On 18 December 2019, Victoria Police informed the Commission that it did object to the Variation Application. By the date of the delegate’s decision, no response had been received from the Council.
6. Victoria Police objected to the Variation Application on both amenity and misuse and abuse of alcohol grounds. It considered that the Variation Application had the potential to change the character and popularity of the Premises and would lead to increased music and patron noise as well as increased consumption of alcohol post 1 am in an otherwise residential building.
7. On 28 February 2020, Victoria Police provided written submissions in support of its objection, which included historic licensing records for the Premises, as well as 12 statements from 10 residents and owners of apartments within the George Building. Victoria Police also relied on evidence of a number of incidents occurring at, and immediately outside, the Premises between December 2018 and February 2020, indicating the current adverse impact on the amenity of the area and misuse and abuse of alcohol which would be exacerbated by the grant of the Variation Application.
8. On 19 and 22 December 2019 respectively, the Delegate received amenity-based objections from residents of the George Building, Andrew & Nicola Crouch and Gary Smith. In summary, these residents stated that:
 - a. the current operation of the Premises causes considerable amenity issues for residents of the George Building including excessive noise and disturbance leading to sleep deprivation and alleged consumption of alcohol and drug taking by patrons of the Premises on the common property of the George Building;
 - b. management at the Premises had a poor attitude in managing the noise issues and concerns of local residents; and

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

- c. the proposed condition was imprecise and unenforceable.
9. On 3 January and 27 February 2020, the Licensee made submissions to the Commission in response to the concerns raised by Victoria and the residential objectors. The Licensee also provided copies of:
 - a. a planning property report;
 - b. an acoustic report from Renzo Tonin & Associates, dated 19 October 2018; and
 - c. a security report from Dr Tony Zalewski, dated 30 October 2018.
10. In response to Victoria Police's submission, the Licensee rejected the suggestion that the Variation Application would lead to the misuse and abuse of alcohol, noting that the Licensee already has the right to supply liquor until 3 am. The Licensee also relied on the installation of a noise monitor and limiter and submitted that this had mitigated the risk of noise breaching SEPP N-2 levels.
11. In response to the submissions of the residential objectors, the Licensee submitted that the biggest cause of noise between 1am and 3am was location-based noise and not noise specifically emanating from the Premises. The Licensee said that as a consequence of the installation of the limiter, acoustic testing showed that the Premises was compliant with SEPP N-2.
12. Further, the Licensee proposed additional conditions to be imposed on the Licence including, pursuant to its Venue Management Plan, the employment of a roving crowd controller on days with post 1 am trade, and setting the noise monitor and limiter at the appropriate SEPP N-2 level.
13. On 3 March 2020, Victoria Police also provided a DVD containing surveillance footage from CCTV located within the George Building. The footage showed patrons of the Premises on common property of the George Building engaged in drinking and alleged drug taking. The Licensee submitted that the cause of any mischief appearing on the CCTV footage was not the operation of the Licensee's venue.
14. The Delegate considered that the Variation Application is different to the previous variation application, in that it seeks only to permit entertainment at background music levels post 1am, rather than at levels up to SEPP N-2. In summary, the Delegate found that:
 - a. granting the Variation Application would not lead to any significant change in the operating profile at the Premises or result in unreasonable amenity impacts;
 - b. while accepting that the general operation of the Premises did impact the residents at the George Building (and heritage restrictions limited the scope of rectification works), any amenity issues could be addressed through conditions imposed on the Licence; and
 - c. of the 10 incidents since December 2018 relied upon by Victoria Police, only one was related to the supply of music and seven were related to incidents of crowd misbehaviour requiring the Licensee's staff to contact Victoria Police for assistance.
15. On 22 July 2020, the Delegate granted the Variation Application and imposed the conditions relating to background music, venue management plan, a roving crowd controller and the noise monitor and limiter as proposed by the Licensee (**Original Decision**).

Application for Internal Review

16. On 19 August 2020, the Commission received an application from Mr and Ms Crouch (**First Applicants**) for internal review of the Original Decision that included an application for a stay of the operation of the Original Decision.² On 19 August 2019, the Commission received a further internal review application from Mr Smith (**Second Applicant**).

² In accordance with section 160(1)(b) of the LCR Act

17. The Commission proceeded to deal with the two applications for internal review from the First Applicants and the Second Applicant (together, the **Applicants**) jointly (**Review Application**).
18. In making the Stay Application, the First Applicants sought to delay the effects of the Original Decision until such time as the Review Application was determined. The Commission sought submissions regarding the Stay Application from the Licensee and, having regard to these submissions, determined not to grant the Stay Application. The Commission concluded that on balance, there was unlikely to be any prejudice suffered by the wider community if the stay was not granted and it was not appropriate to exercise its discretion to grant a stay.

Legislation and the Commission's task

The Commission's internal review power

19. The Review Application is made under section 153 of the LCR Act. The Original Decision is a reviewable decision and the Applicants are eligible persons under Division 2 of Part 9 of the LCR Act to apply for review of that decision.
20. Pursuant to section 157(1) of the LCR Act, the specific task for the Commission with respect to the Review Application is to make a fresh decision that:
 - a. affirms or varies the reviewable decision; or
 - b. sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.
21. Under the LCR Act, an application to vary a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, a contested application relevantly includes "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174)*"³.
22. As the local residents and Victoria Police objected to the Variation Application it is a contested application.
23. In effect, the Commission, on internal review, stands in the shoes of the original decision maker and makes a fresh decision with respect to the Variation Application. The Commission must either:
 - a. grant the application (and may do so subject to conditions)⁴; or
 - b. refuse to grant the application⁵.
24. In doing so, it must consider all the information, material and evidence before the original decision maker⁶. It may also consider further information, material or evidence as part of making its decision⁷.
25. 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. During the conduct

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

⁴ Section 44, 49 and 157 of the LCR Act

⁵ Section 44 and 157 of the LCR Act

⁶ Section 157(2) of the LCR Act.

⁷ See section 157(3) of the LCR Act.

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.

Exercising the internal review power

26. 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.”⁸

27. 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.

28. 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.”

29. 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

30. 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.”

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

32. Relevantly, section 44(2)(b) of the LCR Act provides the following grounds for refusal –

“(i) 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;

⁸ There are no objects specified in the VCGLR Act itself.

(ii) *that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol;*"

33. Section 3A provides that, for the purposes of the LCR Act, the amenity of an area is the quality that the area has of being pleasant and agreeable. The factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area include those listed at section 3A(2) –

(d) *the possibility of nuisance or vandalism;*

(e) *the harmony and coherence of the environment; and*

(f) *any other prescribed matters*⁹.

34. Section 3AA of the LCR Act provides a list of factors which may be taken as evidence constituting detraction from or detriment to the amenity of area (including noise disturbance to occupiers of other premises – as discussed above). Those factors include:

a. violent behaviour;

b. drunkenness;

c. vandalism;

d. using profane, indecent or obscene language;

e. using threatening, abusive or insulting language;

f. behaving in a riotous, indecent, offensive or insulting manner;

g. disorderly behaviour;

h. causing nuisance;

i. noise disturbance to occupiers of other premises;

j. obstructing a footpath, street or road;

k. littering.

35. Section 47(4) of the LCR Act provides that before granting or refusing a contested application, the Commission may:

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

(b) *may make any enquiries the Commission considers appropriate; and*

(c) *must give the applicant and each objector a reasonable opportunity to be heard.*"

36. The Court of Appeal of the Victorian Supreme Court has made it clear in *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325 (**Kordister**) that harm minimisation is a fundamental principle of the LCR Act, and can properly be regarded as "*the primary regulatory object of the Act and therefore the primary consideration in liquor licensing decisions*"¹⁰. 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*".¹¹

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

⁹ Section 3A(2) used to include three additional factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area: (a) presence or absence of parking facilities, (b) traffic movement and density and (c) noise levels until these factors were repealed by the *Liquor and Gambling Legislation Amendment Act 2018*.

¹⁰ See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

¹¹ See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

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

Material before the Commission

39. The Commission on review had before it, and considered, all materials received by the Delegate.

40. The Commission also received and considered the following materials:

a. Original Decision and reasons for decision of the Delegate, dated 22 July 2020;

From the First Applicants:

b. Review Application dated 19 August 2020 with accompanying submission;

c. a copy of the relevant planning permit for the Premises;

d. submission in support of Stay Application, dated 19 August 2020;

e. further submission regarding the removal of the dancing condition and advertising of upcoming events at the Premises, dated 22 March 2021;

f. two emails to the Commission regarding ongoing complaints involving the Premises and the Licensee's past compliance history, both dated 2 May 2021;

From the Second Applicant:

g. Review Application dated 19 August 2020 with accompanying submission;

From Victoria Police:

h. email to the Commission confirming Victoria Police maintains its objection to the Variation Application, dated 3 September 2020;

From the Licensee:

i. submission in response to the Stay Application, dated 25 August 2020; and

j. further submission, dated 10 May 2021, attaching:

i. an updated Venue Management Plan, dated 10 May 2021; and

ii. an email from the Council confirming that it had not received any complaints regarding the Premises since October 2019.

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

a. the decision and reasons for decision of the Commission (differently constituted) dated 20 February 2018 with respect to a 2017 variation application by the Licensee that was refused;

b. a pre-hearing inspection and compliance history report for the Premises, dated 28 April 2021.

Public hearing

42. Following delays caused by the COVID pandemic, the Commission listed the Review Application for public hearing on 5 May 2021. The Commission heard oral evidence from the Applicants and the following witnesses on behalf of the Licensee:

a. Mr Liam Ganley, director of the Licensee;

b. Ms Myfanwy Smith, general manager at the Premises; and

c. Mr Peter Harris, sound engineer of Renzo Tonin & Associates.

43. Despite initially indicating that it maintained its objection to the Variation Application, Victoria Police did not play an active role at the public hearing. A submission from the Licensee's solicitor indicated that Victoria Police was content with how the matter had progressed and had no issues with the grant of the Variation Application if the conditions proposed by the Licensee were imposed on the Licence.

Reason for decision on review

Issues for determination on review

44. 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 issues to be determined by the Commission are whether the proposed variation would:
- a. detract from, or cause detriment to, the amenity of the area in which the Premises are situated; and
 - b. be conducive to, or encourage, the misuse or abuse of alcohol.
45. 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

46. The Commission must determine whether the grant of the Variation Application would detract from or be detrimental to the amenity of the area in which the Premises are located, which may give rise to a ground of refusal under sections 47(2) and 44(2).
47. The two critical amenity impacts raised by the Applicants and Victoria Police in this matter were:
- a. the detriment to the area associated with increased music noise; and
 - b. the detriment to residents at the George Building relating to patron management, in particular patron noise and behaviour relating to the common property.

Increased music noise impact

48. In the past, "noise levels" was a specific factor listed in section 3A(2) of the LCR Act that the Commission may take into account when determining whether a grant or variation of a licence would detract from or be detrimental to the amenity of an area. Since that time, an amendment to the LCR Act removed "noise levels" as a factor (along with reference to parking facilities and traffic movement) to reduce duplication between the planning and liquor processes.¹²
49. The Commission notes that the impact on music noise levels of the proposed variation being two additional hours of music (even at background music levels) does not appear to have been considered in any planning process undertaken by the Council. Therefore, the Commission is of the view that in this case, it is still appropriate to consider the potential amenity impacts associated with the Variation Application.
50. As a preliminary issue, the Applicants raised the issue of the Delegate's removal of the prohibition on dancing at the Premises, noting that it had not been expressly part of the original Variation Application. The Applicants sought to have this condition reimposed on the Licence. The Licensee stated that while it did not oppose this entirely, it submitted that the nature of some events occurring in the afternoon and early evenings involved some dancing, such as country-themed music on Sunday afternoons. As such, the Licensee proposed a condition be imposed on the Licence that "no dancing is to occur after 10pm on any night", which would be sufficient to restrict

¹² Explanatory Memorandum at clause 29, Second Reading Speech at 928.

the Premises from operating as a late-night dance venue while permitting some dancing at times that will have minimal impact on the amenity of the area.

51. With specific reference to music noise, the Applicants submitted that they (together with other residents of the George Building) have been impacted by excessive music noise emanating from the Premises. In this regard, the Applicants pointed to non-compliance by the Licensee in the past and submitted that it is likely that such music issues will continue to impact the amenity of the area.
52. In reply, the Licensee submitted that it has taken effective steps to minimise the impact of music noise on the residents. The Licensee stated that it has had a noise limiter in place since 2018, and submitted that issues of non-compliance in the past will not be repeated.
53. Mr Harris gave evidence that in his opinion the Licensee would be compliant with its SEPP N-2 condition with the noise limiter in operation. This has been evidenced by the fact that there have been no noise complaints made since October 2019.
54. While accepting that music noise issues have not been experienced since the installation of the noise limiter, the Applicants submit that this is not sufficient to wholly deal with this issue. For instance, they suggest that the noise limiter will not be effective if music is not played through it (i.e. if a band uses their own speakers). They also insisted that the noise limiter should be located in a locked box to prevent unauthorised access by staff or others.
55. Further, Mr Smith submitted that a noise limiter is not faultless, it is only a tool and it relies on a “culture of management” which is lacking at the Premises.
56. With regard to the integrity of the noise limiter, Mr Harris gave evidence that:
 - a. the noise limiter is password-protected with a PIN code, also installed a cage over the device to prevent unauthorised changes;
 - b. all speakers, sensor microphones and other equipment remain unchanged and unmoved since installation in 2018; and
 - c. there were management protocols in place to ensure all equipment was routed through the limiter and the provision of in-ear feedback monitors means that bands do not use their own speakers or other devices.
57. Mr Harris confirmed that the noise monitor would record any instances of noise exceeding the permitted amount, whether played through the limiter or not. However, Mr Harris conceded that he had not reviewed the data in the past 18 months, and only attends the Premises to calibrate the noise limiter when requested to do so by the Licensee on an ad hoc basis.
58. In closing submissions, the Licensee stated that it would accept a condition requiring the noise limiter to be calibrated by a qualified sound engineer on an annual basis.
59. The Commission considers that granting the Variation Application would result in an increased level of music noise, being that the Licensee would be permitted to play music at background music level for longer, being between 1am and 3am on Thursday, Friday and Saturday nights. However, the Commission is satisfied that the installation and compliant operation of the noise limiter has been an effective measure to ensure that the Licensee complies with its obligations in this regard, and that the addition of background music only during the requested hours would not, by itself, result in an unreasonable impact to the amenity of the area.

Patron management and access to common property

60. In relation to patron noise, the Applicants submitted that even if the music noise does not impact amenity, the increased hours for music is likely to result in increased patronage at the Premises and a further exacerbation of existing patron noise which will now occur until closer to 3am than 1am. Mr Crouch submitted that increased patron noise will not happen every day but the “propensity for it to occur after 3 o’clock is greatly enhanced”. Ultimately, the Applicants submitted that this increased risk will not be appropriately managed by the Licensee.

61. The Licensee submitted that since operating under the new licence conditions since the Original Decision, its experience has been that while it has been able to retain existing patrons for a little longer on those nights, it has not seen a general growth in the overall number of patrons at the Premises. However, the director of the Licensee accepted that it was difficult to determine the real consequence of the additional music hours on patron numbers given the residual impact of COVID restrictions within Melbourne.
62. Mr Crouch made submissions that the Commission should consider this matter not only on the current patron numbers or risk of amenity impact (that have been impacted by COVID), but also consider the impact if (or when) the Premises is able to return to full operation. This, he said, is likely to result in overall higher patron numbers at the Premises during the late-night hours on Thursday, Friday and Saturday nights.
63. In response, the general manager of the Licensee gave evidence that its customer base was slightly older and of the "later-night beer-drinking crowd". Ms Smith stated that it was mostly craft beer enthusiasts, noting that the average price of a pint of beer was \$16, although noting that there were lower prices during happy hour in the late afternoon periods. Ms Smith gave evidence that the Premises provided an offering to hospitality workers after their shift, with some patrons attending after being at other venues in the area.
64. Overall, the Licensee accepted that it had a responsibility for its patrons at the Premises, including while on the common property and also when leaving the Premises. The Licensee submitted that it has clear and effective procedures to ensure patrons depart the Premises in a responsible and timely fashion.
65. The Applicants raised concerns with the history of patrons from the Premises accessing the common property of the George Building, namely the stairwell leading from the Premises to the residential apartments above.
66. Access to certain common property is currently required to access the common toilet facilities in the George Building. The Applicants proposed that the Licensee could install its own toilets within the Premises to significantly reduce patron access to common property. In any event, the Applicants submitted that as a tenant, the right to use the common toilets comes with a responsibility to manage its patrons using those facilities.
67. The Licensee submitted that one toilet is on the Licensee's leasehold, while the other toilet is used under licence as common property. The Licensee also submitted that even if toilets were installed in the Premises, access through the common property to exits would still be required for emergency egress and the Licensee would still be required to manage patron access for this purpose.
68. The Applicants stated that the common area can be crowded when toilets are busy (particularly so later at night), with groups of patrons bringing their drinks to, and congregating in, areas which residents use to access the building. The Applicants also alleged that patrons used the rear door to exit the building or for smoking. The Applicants allege that existing problems demonstrate that the Licensee is not capable of, or willing to, control its patrons and therefore, these problems will be exacerbated if the Variation Application is granted.
69. In essence, the objections of the Applicants relate to associated concerns of security and safety relating to the increased risk of patrons accessing the residential areas of the George Building, as well as the unavoidable intermingling with patrons when entering or exiting their residences.
70. The director of the Licensee gave evidence that he holds weekly meetings with the general manager to discuss the operation of the Premises, including any security or amenity incidents that may have occurred. Mr Ganley also gave evidence that the Licensee maintains an incident register, and he was unaware of any incidents occurring in the common property area over the past 18 months.
71. As a part of this, the Licensee put forward a number of proposed conditions that it submitted the Commission could impose on the Licence should the Variation Application be granted. One such condition was the requirement for a roving crowd controller on the days the Premises trades past

1am. Consistent with their submissions before the Delegate, the Applicants sought that the condition require a static crowd controller in the vicinity of the common property in order to immediately respond to any unreasonable patron behaviour.

72. The Licensee submitted that a roving crowd controller was suitable, on the basis that the roving crowd controller as well as staff (general manager, duty managers, etc) observed the common property and stairwell as part of their duties. In this regard, the general manager gave evidence that the roving crowd controller would check the common property area every 25-30 minutes, managers would also check the area in between those times to check the toilets and access the stock room approximately every 20-25 minutes.
73. Despite this, the Commission notes the CCTV footage provided as part of this application, which evidenced an occasion where patrons accessed the stairwell area and remained there for prolonged period (one incident in February 2020 for approximately 1 hour and 15 minutes).
74. The Licensee also submitted that the Venue Management Plan provided specific detail of the responsibility of its crowd controllers to monitor this area. Under section 12.8 of the Venue Management Plan, crowd controllers are responsible for:
- “Regular patrols of the communal zone which leads to toilets*
 - o This includes patrol of the stair case and 1st floor landing*
 - o Inspection registers to be completed daily while performing inspections”*
75. In relation to the proposed conditions submitted by the Licensee, the Applicants submitted that the Licensee had lost the presumption of compliance with the proposed conditions in light of its prior non-compliance with its Licence and its general attitude towards complaint management.
76. In reply, the Licensee submitted that it had improved its compliance culture at the Premises. The general manager stated that she was present during the most recent inspection by VCGLR inspection, which found that the Licensee was complying with its obligations at the time of the inspection.
77. The Licensee also gave evidence that its staff are trained on their obligations and contributions to manage amenity issues, including a requirement to comply with its customer code of conduct. However, when asked if staff were provided with a copy of the Venue Management Plan, the general manager stated that staff were not provided a copy of the Venue Management Plan because “they’re not in a management position”.
78. The Applicants submitted that the Licensee has poor engagement with the residents of the George Building and does not take complaints seriously. Mr Smith gave evidence that the Licensee had not personally engaged with him in an attempt to remedy his concerns.
79. The Licensee submitted that it sought to engage residents through the body corporate. This included sending a letter by email for distribution by the body corporate seeking input as to whether the new conditions arising out of the Original Decision were effective. The director of the Licensee gave evidence that due to the numerous changes to residents and other businesses in the George Building, it was more effective to communicate through the body corporate than directly with residents.
80. In relation to potential physical changes to the Premises, the Commission acknowledges that there are some limitations imposed by Heritage Victoria which prohibits additional security doors being installed in the affected area. In those circumstances, the Commission must consider what reasonable steps and actions the Licensee must take in order to manage the potential impact of its patrons accessing this common property on the amenity of the areas.
81. Similarly, the Commission accepts that the Licensee does not have the legal right to install CCTV in that area, and in any event the Commission understands that the body corporate has CCTV installed to monitor this area. While this may result in the Licensee not being able to actively monitor the CCTV footage as part of its patron management strategy, CCTV footage would be available from the body corporate as evidence of any incidents or non-compliance with the

conditions of the Licence. In this regard, the Commission encourages the Licensee and the body corporate to coordinate their efforts in order to minimise the impact of this limitation.

82. However, the Commission remains concerned with regard to the Licensee's attitude in relation to managing amenity impacts that could arise from the Variation Application. While accepting that the installation of the noise limiter is a positive step, the Commission finds that the Licensee has not taken a proactive approach to minimising the impacts of its operations on the residents of the George Building, and has not adequately handled the complaints and concerns raised by the Applicants in this matter. Even though the Licensee accepted that it had responsibility for its patrons while on the common property, the Commission finds that the Licensee relies on the complex operating environment of the Premises as an excuse for the impact on residents, without taking all reasonable steps to minimise this impact.
83. The Commission accepts that the George Building is a complex physical environment within which the Licensee is required to operate. However, such circumstances require that the Licensee ought to have a more sophisticated and institutionalised approach to risk management, which was not demonstrated to the Commission during this process. Ultimately, the Commission agrees with the Applicants that granting the Variation Application is likely to exacerbate the existing amenity concerns in relation to patron management and the interaction with residents on the common property. As such, the Commission has taken into account the Licensee's capacity to adequately deal with this increased risk, and is not satisfied that the Licensee has demonstrated this.
84. In summary, the Commission considers that while the Variation Application will not result in excessive music noise, there is a significant risk that granting the Variation Application will result in an increased patronage at the Premises during high-risk late-night hours which could exacerbate the existing patron-related amenity impacts that continue to impact on the residents of the George Building. This includes the potential for increased patron noise, as well as issues relating to the behaviour of patrons on the common property which has a detrimental impact on the residents at the George Building. The Commission is not satisfied that the Licensee has demonstrated that it has given due consideration to the potential for negative impacts on the amenity of the area when operating the Premises, nor that its approach to risk management or complaint handling in the past is sufficient to manage any increased risk resulting from the grant of the Variation Application.
85. Consequently, the Commission finds that granting the Variation Application will, on balance, detract from, or be detrimental to, the amenity of the area. In light of the evidence before the Commission regarding the compliance history and management experience, the Commission is not satisfied that the conditions proposed by the Licensee relating to the use of the Premises would effectively mitigate and minimise any potential negative impact with respect to amenity.

Conducive to or encourage the misuse or abuse of alcohol

86. Although not pursued at the public hearing, the Commission refers to Victoria Police's original objection that granting the Variation Application would be conducive to or encourage the misuse or abuse of alcohol.
87. The Commission finds that the Licensee is already authorised to supply liquor between 1am and 3am on Thursday, Friday and Saturday nights. The Commission also notes that the Licensee now has an improved Venue Management Plan in place which could assist it to minimise any potential risk of harm associated with the misuse and abuse of alcohol by providing additional controls over the supply of liquor across all its trading hours.
88. The Commission finds that there is the risk that the provision of an additional two hours of amplified music at background music levels between the hours of 1 am and 3 am has the potential to attract additional patrons, or retain existing patrons for longer during these hours, and thus increase, the consumption of alcohol at the Premises during these high-risk times. Nevertheless, the Commission has had regard to the change in position of Victoria Police in relation to this impact and considers that the updated Venue Management Plan and proposed conditions that would accompany any variation to the Licence are adequate and appropriate to mitigate such risk.

89. Consequently, the Commission is satisfied that the impact of granting the Variation Application would not be conducive to or encourage the misuse or abuse of alcohol at the Premises.

Other considerations

90. In determining this Review Application, the Commission has had regard to the objects of the LCR Act, in particular harm minimisation. In light of the above findings, the Commission finds that the objects of facilitating the development of a diversity of licensed facilities reflecting community expectations and contributing to the responsible development of the liquor, licensed hospitality and live music industries are outweighed in these circumstances by the object of ensuring that the supply of liquor contributes to, and does not detract from, the amenity of community life.

Decision on review

91. Based on the reasons detailed above, and having regard to the objects of the LCR Act, the Commission has determined to set aside the Original Decision and, in substitution, refuse to grant the Variation Application.

The preceding 91 paragraphs are a true copy of the Reasons for Decision of Ms Helen Versey, Deputy Chair, Mr Andrew Scott, Commissioner, and Mr Des Powell AM, Commissioner.