

Decisions 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 refuse to vary the on-premises licence held by Baba Levantine Trading Company Pty Ltd in respect of the premises known as The B.East Burgers, located at 80 Lygon Street, Brunswick East.

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

Date of Hearing: 19 May 2021
Date of Decision: 22 July 2021
Date of Reasons: 22 July 2021

Appearances: Mr Martin Towey, LGS Legal on behalf of the Licensee
Sergeant Jay Rattigan, on behalf of Victoria Police
Mr Cameron Warfe, Counsel Assisting the Commission

Decision: The Commission has determined to set aside the decision of the Delegate and, in substitution, grant the application to vary the on-premises licence in accordance with Appendix A.

Signed:



Helen Versey
Deputy Chair

Background

1. The B.East Burgers is a casual dining venue located at 80 Lygon Street, Brunswick East (the **Premises**).
2. On 30 October 2019, Baba Levantine Trading Company 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 on-premises licence no. 32289448 (the **Licence**) for the Premises (**Variation Application**).
3. The Licence provides for the supply of liquor until 1 am on each night of the week, with a condition that only background music is permitted to be played on the Premises after 11pm. The Variation Application sought to remove this condition from the Licence, thereby permitting music to be played at all operating times at greater than background music levels.
4. The Variation Application included:
 - a. a completed application form for variation to an existing licence or permit, under cover letter dated 25 October 2019;
 - b. a copy of the red-line area for the Premises; and
 - c. a copy of the planning permit issued by the Moreland City Council (**Council**) for the Premises dated 27 May 2005 (**Planning Permit**).
5. On 30 October 2019, in accordance with section 33(1) of the LCR Act, a delegate of the Commission (**Delegate**) provided a copy of the Variation Application to Victoria Police. On 23 November 2019, Victoria Police informed the Commission that it did not object to the Variation Application.
6. On 30 October 2019, in accordance with section 33(2) of the LCR Act, the Delegate provided a copy of the Variation Application to the Council. On 18 November 2019, the Council informed the Commission that it did not object to the Variation Application.
7. On 18 November 2019, the Licensee provided submissions and additional material in support of the Variation Application, including:
 - a. A venue management plan (**Venue Management Plan**); and
 - b. Various planning permits for the Premises issued by the Council between 2002 and 2008 (**Historic Planning Permits**).
8. On 22 November 2019, the Delegate wrote to the Licensee requiring it to re-display the public notice for a new period as it had not originally been displayed in accordance with the LCR Act. The Delegate also noted that the Commission intended to impose a maximum patron capacity of 110 patrons for the Premises as part of the Variation Application.
9. In response, the Licensee submitted that as the Planning Permit provided for a maximum of “110 seats” at the Premises and the Licensee was required to provide seats for at least 75% of its patrons, the maximum patron capacity for the Premises (if to be imposed by the Commission) should be 147 patrons. The Licensee also provided the following additional material:
 - a. an updated red line plan for the Premises, pursuant to a request from the Commission under section 101A of the LCR Act;
 - b. a patron capacity report prepared by NCC Performance Solutions dated 28 February 2020, supporting a maximum patron capacity of 146 patrons; and
 - c. an updated notice of public display dated 4 March 2020.

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

10. The Delegate sought information from the VCGLR's Compliance Division regarding the compliance history at the Premises. The Compliance Division provided a summary document that:
 - a. set out a small number of non-compliance events since 2016;
 - b. referred to an investigation in 2019 following a complaint of excessive music noise occurring on multiple nights at or around 1am, which was ultimately found to be unsubstantiated by Compliance officers; and
 - c. indicated that discussions had been held with the Licensee during 2019 regarding whether its operation at the Premises was consistent with the restaurant and café conditions on the Licence.
11. On 22 April 2020, the Delegate refused the Variation Application on the basis that granting the Variation Application would not protect the amenity of the area in which the Premises was located (**Original Decision**). The Delegate also indicated that had he granted the Variation Application, he would have imposed a maximum patron capacity of 110 patrons.

Application for Internal Review

12. On 20 May 2020, the Commission received an application from the Licensee for internal review of the Original Decision (**Review Application**).
13. Although Victoria Police did not initially object to the Variation Application, it subsequently requested to be joined as a party in the Commission's consideration of the Review Application. Subsequently, at the time of the hearing, Victoria Police indicated that it no longer objected to the Review Application and did not seek to be joined as a party. However, Victoria Police requested to be permitted to ask questions of the Licensee during the Review Application. With the consent of the Licensee, the Commission permitted Victoria Police to be involved in the Review Application to the extent requested. As such, the Commission considers that Victoria Police did not become a party to the Review Application.

Legislation and the Commission's task

The Commission's internal review power

14. The Review Application is made under section 153 of the LCR Act. The Original Decision is a reviewable decision and the Licensee is an eligible person under Division 2 of Part 9 of the LCR Act to apply for review of that decision.
15. 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.
16. Under the LCR Act, an application to vary a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, an uncontested application relevantly includes "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174)*".²

² Conversely, a "contested 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 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)*".

17. 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)³; or
 - b. refuse to grant the application⁴.
18. In doing so, it must consider all the information, material and evidence before the original decision maker⁵. It may also consider further information, material or evidence as part of making its decision⁶.
19. 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 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

20. 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.”⁷

21. Accordingly, in exercising its discretion to either grant or refuse an uncontested application under section 44(1) of the LCR Act, the Commission must have regard to the objects of the LCR Act.

22. 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.”

³ Section 44, 49 and 157 of the LCR Act

⁴ Section 44 and 157 of the LCR Act

⁵ Section 157(2) of the LCR Act.

⁶ See section 157(3) of the LCR Act.

⁷ There are no objects specified in the VCGLR Act itself.

23. 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 an uncontested application

24. Where an application is an uncontested application, pursuant to section 44(1) of the LCR Act:

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

25. The Commission may refuse to grant an uncontested application on any of grounds set out in section 44(2).

26. 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;”

27. 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 matters⁸.

28. 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.

29. Section 44(4) of the LCR Act provides that before granting or refusing an uncontested application, the Commission:

⁸ 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*.

- “(a) ... may 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.”

30. 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”⁹. 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”.¹⁰
31. The Commission considers that, while the grounds of refusal outlined in section 44(2) are relevant considerations, the ultimate determination of an uncontested application is to be made pursuant to sections 44(1) and 157(1) at the discretion of the Commission with reference to the objects of the LCR Act.
32. 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

33. The Commission on review had before it, and considered, all materials received by the Delegate.
34. The Commission also received and considered the following materials:
- Original Decision and reasons for decision of the Delegate, dated 22 April 2020;
 - Review Application dated 20 May 2020 with accompanying submission;
 - email to the Commission from Victoria Police seeking to be joined as a party to the Review Application, dated 27 May 2020;
 - email to the Commission confirming the Council has no objection to the Variation Application, dated 2 June 2020;
 - further submission from the Licensee, dated 7 February 2021; and
 - post-hearing submission, dated 27 May 2021, attaching an updated Venue Management Plan, undated.
35. The Commission also had before it and considered a pre-hearing inspection and compliance history report for the Premises, originally dated 23 June 2020 and updated on 24 April 2021.

Public hearing

36. Following delays caused by the COVID pandemic, the Commission listed the Review Application for public hearing on 19 May 2021. The Commission heard oral evidence from the following witnesses on behalf of the Licensee:
- Mr Maslyn Salt, director of the Licensee; and
 - Mr Jarrod Moore, operations manager at the Premises.

⁹ See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

¹⁰ See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

Reason for decision on review

Issues for determination on review

37. By its submission dated 7 February 2021, the Licensee confirmed that the Variation Application only sought to amend the conditions of the Licence to permit music above background music levels on Thursday, Friday, Saturday and the eve of public holidays.
38. 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, a key issue to be determined by the Commission is whether the proposed variation would detract from, or cause detriment to, the amenity of the area in which the Premises are situated.
39. 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

40. 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 section 44(2).
41. The Premises is located on a commercial strip of Lygon Street, with residential areas existing behind the commercial premises, including new multi-storey residential developments in the immediate area.
42. The Licensee submitted that it holds varied events at the Premises as entertainment for its dining patrons. These events include music nights, trivia nights, and food-themed events (e.g. chilli festival).
43. At the Hearing, the Director of the Licensee stated that when there is music playing at the Premises, the following precautions are followed:
 - a. the Premises operates two sound systems (one for background music and one for music events), with the larger sound system only being operated by sound technicians associated with bands or other entertainers;
 - b. a sound technician takes measurements at the front and rear of the Premises, as well as across the street, to ensure compliance with the existing amenity conditions on the Licence;
 - c. the external doors and windows are closed at 10.30pm; and
 - d. the Premises only opens onto Lygon Street, with no rear courtyard facing residential areas.
44. In addition to music noise, there are other amenity concerns that may arise if the Variation Application is granted. This includes behavioural issues arising from increased alcohol consumption and possible amenity impacts when patrons are departing the Premises. In this regard, the Licensee submitted that:
 - a. it had systems in place to manage a safe venue that minimised the risk of intoxication;
 - b. staff are trained regarding their responsibilities (including senior staff completing the William Angliss licensee training course) and staff processes are routinely reviewed to ensure effectiveness;
 - c. the core offering of food (approximately half of the menu) and *ad hoc* food specials would remain available at all times the Premises supplied liquor;
 - d. signage was in place to remind patrons to “respect our neighbours”;
 - e. crowd controllers were employed for events likely to attract larger number of patrons;

- f. there were good lines of communication with neighbouring businesses to manage any patron issues collaboratively; and
 - g. there was a culture of responding to incidents and complaints through its weekly management meetings that discuss safety issues or amenity concerns, and use of a complaints register by staff.
45. The precautions and processes identified above are also generally included in the updated Venue Management Plan. The Licensee submitted that, if the Variation Application was granted, it was willing for conditions to be imposed on the Licence requiring compliance with the Venue Management Plan.
46. The Commission noted the prior compliance history at the Premises, including a complaint regarding music noise which was received and investigated by the VCGLR in 2019. The Director was not able to recall the specifics of this incident, but gave evidence of the general approach he takes when dealing with any complaints received at venues he is associated with. This includes seeking to immediately confirm the details of the complaint, reassuring the complainant (if known) that action will be taken, conducting a review of the incident to ascertain the root cause, taking appropriate action to rectify the issue and preventing future recurrence. This process is also reflected in the Venue Management Plan.
47. In relation to the prior general compliance history at the Premises, the Licensee submitted that the 2016 infringement notice was subsequently withdrawn. The Licensee also submitted that little weight should be placed on the warning letters and compliance discussions as these do not prove an event of non-compliance.
48. The Commission does not accept this submission. The Commission considers that a warning letter is a legitimate enforcement outcome when a VCGLR Compliance Inspector considers that a breach has occurred but has determined that the circumstances of the breach do not warrant more serious action.
49. In any event, the Commission considers that while there have been incidents of non-compliance at the Premises in the past, these incidents have been isolated in their nature and do not indicate a systemic compliance issue at the Premises. The Commission is satisfied that the processes outlined in the Licensee's updated Venue Management Plan will contribute to an increased compliance culture at the Premises and minimise the risk of licence breaches that may give rise to amenity concerns for residents in near proximity to the Premises.
50. In summary, the Commission considers that the Variation Application will not result in excessive music noise at the Premises, and there is also no significant risk that granting the Variation Application will result in or exacerbate current patron-related amenity impacts. The Commission is satisfied that the Licensee has demonstrated that it has considered and mitigated the risk of negative impacts on the amenity of the area when operating the Premises, which is reflected in the processes outlined in the Venue Management Plan. The Commission considers that it is appropriate to include the conditions proposed by the Licensee in relation to compliance with its Venue Management Plan to ensure these processes are implemented effectively by the Licensee.

Other considerations

Discretion whether to grant or refuse Variation Application

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 considers that granting the Variation Application will contribute to the responsible development of liquor industry. The Director gave evidence that the Premises had originally operated as a Turkish restaurant and changed to its current operating model in response to what it saw as market trends and local demand. The Licensee also had an early focus on new menu items of a vegetarian and vegan offering, and provided a diversity of entertainment in support of local performers. The Commission accepts the Licensee's submission that granting the Variation Application would further support and contribute to meeting the demand for innovative and diverse events.

53. As outlined above, the Commission does not consider that granting the Variation Application will lead to adverse impacts on the amenity of the area in which the Premises is located. Further, 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 will be supported through the grant of the Variation Application.
54. Consequently, the Commission has determined to grant the Variation Application.

Compliance with planning permit

55. The Commission finds that granting the Variation Application will not breach existing planning permissions in relation to the Premises. The variation to the music conditions as proposed by the Licensee will remain consistent with the conditions of the planning permit, which the Commission notes does not include prescriptive conditions relating to entertainment noise (outside of general amenity conditions).
56. The Licensee submitted that the Premises operates as a restaurant that provides live music as entertainment, and is not a tavern or a live music venue. The Director of the Licensee gave evidence that 60-70% of revenues at the Premises come from food. The Licensee also submitted that the existing restaurant conditions limited vertical consumption and thereby negated the need for more onerous licence conditions, such as CCTV and crowd controller conditions.
57. Despite the above, the Director conceded that he hoped that this would decrease as a result of the Variation Application, meaning that increased revenues would primarily come from additional alcohol sales.
58. The Commission accepts the Licensee's submissions that it operates under an on-premises licence, and there is no mandatory requirement for restaurant and café conditions to be imposed in these circumstances. As such, the Commission considers that the Licensee operates in a higher risk category (which comes with associated benefits and responsibilities) which is reflected in the higher annual renewal fee payable by the Licensee.
59. The Commission notes that one consequence of granting the Variation Application is that the Licence will no longer be subject to the full suite of "restaurant conditions" at all times, being the predominant activity condition, the 75% tables and chairs condition, and restriction on music outside ordinary trading hours.
60. Consequently, the Commission is of the view that the Licensee will not be able to rely on any exemption to requirements of on-premises licences where restaurant conditions are in place. By way of example, the Licensee will not enjoy additional NYE hours until 3am as provided for under the definition of "ordinary trading hours" in section 3 of the LCR Act, and will also be subject to increased signage requirements under section 102 of the LCR Act. However, as the permitted use for the Premises under the relevant planning scheme will remain that of a restaurant, the Commission notes that the Licensee will still enjoy the exemption under section 120(2)(d)(i) from operation of section 120(1).
61. The Commission expects that the Licensee will comply with any additional obligations arising from this consequence.

Maximum patron capacity

62. As originally flagged by the Delegate, the Commission considers that it is appropriate to impose a maximum patron capacity for the Premises.
63. The Delegate indicated that he would impose a maximum capacity of 110 patrons, which appeared to align with the current planning permissions for the Premises. The Licensee submitted that the planning permit provided for maximum for 110 seats, not 110 patrons.
64. The Licensee also provided a Patron Capacity Report which confirmed that 146 patrons could safely be accommodated at the Premises. The Commission accepts, and relies on, this report.

65. In all the relevant circumstances, the Commission considers that it is appropriate to impose a maximum patron capacity of 146 patrons. This would provide for the Licensee to have a maximum of 110 seated patrons as authorised under the planning permit and accords with the existing restaurant conditions on the Licence.

Decision on review

66. 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, grant the Variation Application subject to the conditions set out in Appendix A.

The preceding 66 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.

Appendix A

Type of licence

This licence is an on-premises 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 conditions

This licence is subject to the following conditions:

- (a) the predominant activity carried on on the licensed premises must be the preparation and serving of meals 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 on a Thursday, Friday, Saturday and eve of Public Holiday.

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.

Venue Management Plan

The licensee must take all reasonable steps to conduct and supervise all aspects of the management of the premises in accordance with the Venue Management Plan, as amended from time to time.

The Venue Management Plan must be retained on the premises in the possession of the licensee, nominee, manager or other person in charge.

The Venue Management Plan must be available to an authorised member of Victoria Police or a Gambling and Liquor Inspector if requested.

Maximum patron capacity

Overall maximum: 146 patrons

Trading hours

Sunday Between 10 a.m. and 1 a.m. the following morning.

Good Friday & Anzac Day	Between 12 noon and 1 a.m. the following morning.
On any other day	Between 9 a.m. and 1 a.m. the following morning.

Approvals/Consents

Section 9(1)(b)/9A(1)(b) Off Site Catering. The licensee is authorised to supply liquor in the course of catering for social receptions or social functions on premises other than the licensed premises during the hours specified under "Trading Hours" for consumption on those premises.

Section 9(1)(b)/9A(1)(b)/11A(3)(b) Footpath/External Area. The licensee is authorised to supply liquor on premises, other than the licensed premises, authorised by the Victorian Commission of Gambling and Liquor Regulation and shown on the approved plan during the hours specified under "Trading Hours" for consumption on those premises.