

# Decision and reasons for decision

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* by Thriller Pty Ltd for an internal review of a decision by a delegate under section 44 to refuse part of an application under section 29 for a variation to conditions of existing late night (general) licence no. 31908879 for the premises trading as Metropolitan Hotel, located at 265 William Street, Melbourne

**Commission:** Mr John Larkins, Deputy Chair  
Mr James O'Halloran, Deputy Chair  
Mr Steven Brnovic, Commissioner

**Appearances:** Mr Daniel Robinson, Counsel for the Applicant  
Ms Lydia Taylor-Moss, Counsel Assisting the Commission

**Date of Hearing:** 7 July 2023  
**Date of Decision:** 16 August 2023  
**Date of Reasons:** 22 August 2023

**Decision:** The Commission has determined to set aside the decision of the Delegate and, in substitution, grant the application for a variation of the licence subject to the conditions set out in Appendix A

**Signed:**



**John Larkins, Deputy Chair**

## Background

### Original Application

1. On 20 October 2022, the Victorian Liquor Commission (**Commission**) received an application under section 29 of the *Liquor Control Reform Act 1998 (LCR Act)*<sup>1</sup> for the variation to conditions of existing late night (general) licence no. 31908879 (**Licence**) for the premises located at 265 William Street, Melbourne (**Premises**) trading as Metropolitan Hotel (**Original Application**).
2. Under the existing Licence, liquor could be supplied on the ground and first floors. The Applicant has recently redeveloped the Premises to increase the capacity on the existing ground floor and add a new second floor bar comprising internal and external terrace areas.
3. The existing Licence allowed for a maximum of 100 patrons on the ground floor and 200 patrons on the first floor. It specified the following trading hours:

*For consumption off the Premises:*

Sunday	Between 10am and 11pm
Good Friday and ANZAC Day	Between 12 noon and 11pm
On any other day	Between 7am and 11pm

*For consumption on the Premises:*

Sunday	Between 10am and 11pm
Good Friday and ANZAC Day	Between 12 noon and 11pm
On any other day	Between 7am and 7am on the following day except for the morning of Good Friday & ANZAC Day

4. The existing Licence also contained conditions relating to CCTV, crowd controllers, and in-house procedures for security arrangements and the service and supply of alcohol.
5. By the Original Application, the Applicant sought to vary the conditions of the Licence as follows:
  - (a) the red line plan be expanded to include internal and external areas on the second floor;

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<sup>1</sup> All references to legislation are references to the LCR Act unless stated otherwise.

- (b) the maximum patron capacities be changed to allow a maximum capacity of 535 patrons across the ground, first and second floors;
  - (c) the trading hours for the ground and first floors on any day other than Sunday, Good Friday or ANZAC Day be reduced from 7am to 5am; and
  - (d) trading on the second floor be permitted on any day other than Sunday, Good Friday or ANZAC Day from 7am until 3am on the following day in the internal area and from 7am until 1am on the following day in the external area.
6. In accordance with section 33 of the LCR Act, a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector<sup>2</sup> (together, **Victoria Police**) and the City of Melbourne (**Council**) on 20 October 2022. On 10 November 2022, the Council advised that it did not object to the Original Application. On 11 November 2022, Victoria Police also advised that it did not object to the Original Application.
7. The Council confirmed that a planning permit for “*Part demolition of a building, construction of buildings and works, and use for Office in accordance with the endorsed plans*” was amended on 6 October 2022 (**Planning Permit**). The Council also confirmed that the Applicant does not require a planning permit for the sale and consumption of liquor on the Premises and that the Premises benefits from existing use rights as a hotel.
8. The Applicant provided a copy of the Planning Permit with the Original Application. The Planning Permit contains restrictions on noise, patrons, live music and hours of operation for the second-floor terrace.

## Late night decision-making guidelines

9. When the Original Application was lodged on 20 October 2022, decision-making guidelines issued by the Minister for Consumer Affairs, Gaming and Liquor Regulation on 23 June 2021 titled “Applications for liquor licences to trade after 1.00 am” (**2021 Guidelines**)<sup>3</sup> were in force. The 2021 Guidelines are discussed at [42]–[45] below.

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<sup>2</sup> As to the meaning of “licensing inspector”, see section 3.

<sup>3</sup> *Decision-Making Guidelines Pursuant to Section 5 of the Victorian Commission for Gambling and Liquor Regulation Act 2011: Applications for liquor licences to trade after 1.00 am* (Victoria Government Gazette, No S 348, 29 June 2021).

10. On 28 June 2023, the Acting Minister for Casino, Gaming and Liquor Regulation issued new decision-making guidelines titled “Applications for liquor licences to trade after 1.00 am” (**2023 Guidelines**).<sup>4</sup> The 2023 Guidelines are discussed at [46]–[48] below.
11. In submissions lodged with the Original Application, Mr Erik Hopkinson of Hopkinson & Associates contended on behalf of the Applicant that the 2021 Guidelines did not apply to the Original Application because trading after 1am was already permitted at the Premises. In any event, Hopkinson & Associates lodged the documents required by the Commission for applications to which the guidelines applied — namely, supplementary forms (including an economic and social benefits form), a venue management plan and an economic and social benefit report prepared by URBIS Pty Ltd (**Urbis**). Updated versions of the supplementary forms and venue management plan were also subsequently filed on 16 and 28 November 2022.
12. On 8 December 2022, a delegate of the Commission advised Mr Hopkinson that the Premises was already at the limit of the 200-patron maximum permissible under the 2021 Guidelines and that no further increases should be granted. He gave Mr Hopkinson an opportunity to provide additional information outlining the Applicant’s reasoning as to why the Original Application would satisfy the 2021 Guidelines.
13. On 22 December 2022, Mr Hopkinson submitted that the 2021 Guidelines were not intended by the Government to be a direction to the Commission and that the reference to “200 persons” was not a limit of what was permissible under the 2021 Guidelines. He contended that the Commission, having regard to the guidelines, should determine applications on their merit in the context of whether: (a) the grant of the application would detract from or be detrimental to the amenity of the area in which premises to which the application relates are situated; and/or (b) the granting of the application would be conducive to misuse or abuse of alcohol. He reiterated that the Original Application did not seek to allow the Applicant to supply liquor after 1am given that a licence allowing post-1am trading already exists for the Premises.
14. Mr Hopkinson also provided a submission from Urbis. In addition to Mr Hopkinson’s submissions, Urbis contended that, if the new second floor was to be operated by a separate entity and retain the proposed maximum capacity of 195 patrons, the application would fit expressly within the 2021 Guidelines. Urbis emphasised that the

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<sup>4</sup> *Decision-Making Guidelines Pursuant to Section 172U(4) of the Liquor Control Reform Act 1998: Applications for Liquor Licences to Trade After 1.00 am* (Victoria Government Gazette, No S 356, 30 June 2023).

Original Application also sought to reduce the trading hours for the Premises, which it argued was a significant alcohol harm minimisation measure. Urbis noted that the Government had indicated that it would end the late night “freeze” guidelines.

15. On 5 April 2023, Mr Hopkinson submitted a patron egress plan and a written memorandum of advice from Mr Daniel Robinson of Counsel. Mr Robinson opined that the 2021 Guidelines, on their own terms, were not relevant to the Commission’s determination of the Original Application. He asserted that, even if the guidelines were thought to apply, the individual circumstances of this case provide ample justification for the Commission to exercise its discretion to approve the variation after having had proper, case-specific regard to the 2021 Guidelines as a relevant consideration.

## Delegate’s decision

16. On 14 April 2023, a delegate of the Commission (**Delegate**) granted the Original Application in part (**Original Decision**). The Delegate determined that the 2021 Guidelines applied to the Original Application because it sought to increase the patron capacities and add an additional area for the supply of liquor after 1am. She noted that the proposed maximum patron capacity of 535 and the current capacity of 300 patrons exceeded the 200-patron capacity required by the 2021 Guidelines. She also found that the economic and social benefit of granting the Original Application would not outweigh the impact that granting the application would have on alcohol misuse and abuse and community amenity, pursuant to the 2021 Guidelines. Consequently, the Delegate decided to grant the Original Application in part by extending the licensed area and increasing the maximum capacity prior to 1am.
17. The Delegate varied the Licence as follows:
  - (a) maximum overall capacity of 535 patrons until 1am and 300 patrons after 1am, with maximum capacities for each floor as follows:
    - (i) 140 patrons on the ground floor;
    - (ii) 180 patrons on the first floor;
    - (iii) 225 patrons on the second floor;
  - (b) trading hours on any day other than Sunday, Good Friday or ANZAC Day:
    - (i) on the existing ground and first floors, from 7am to 5am the day following;
    - (ii) on the new second floor, from 7am to 1am the day following; and

- (c) the Licensee must comply with the patron egress plan as provided by the Licensee and approved by Liquor Control Victoria.
18. In addition, the Delegate updated the CCTV conditions of the Licence to be more in line with the Commission's current standards.<sup>5</sup> These updates did not result in any operational change. The Delegate also varied trading hours for the ground and first floors in accordance with amendments to the LCR Act.<sup>6</sup>
19. The Delegate approved the amended red line plan and patron egress plan submitted by the Applicant.

## Application for Internal Review

20. On 27 April 2023, the Applicant applied for an internal review of the Original Decision **(Review Application)**.
21. In completing the Review Application, the Applicant, in the section headed "Reasons for review application", provided the following summary for applying for review of the Original Decision:
- Delegate granted a licence variation with more limited patron numbers and operating hours than sought in the application, namely:*
- maximum capacity of 300 patrons after 1am
  - for consumption on the licensed premises - level 2 - on any other day - between 7am and 1am the following morning.
- The applicant seeks the above maximum capacities and operating hours be approved as originally sought:*
- maximum capacity 535 patrons (no reduction from 1am)
  - consumption on the licensed premises - level 2 - on any other day - internal area between 7am and 3am the following morning; external area between 7am and 1am the following morning.
22. The Applicant subsequently also sought to amend the maximum capacities for each floor as follows:
- (a) 145 patrons on the ground floor;
  - (b) 195 patrons on the first floor; and
  - (c) 195 patrons on the second floor.

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<sup>5</sup> In addition to the conditions on the Licence, part 4 of the *Liquor Control Reform Regulations 2023* specifies standards for security cameras, video recorders and the quality of stored images.

<sup>6</sup> LCR Act, section 11A(2)(ba), as amended by *Liquor Control Reform Amendment Act 2021*, section 13(1) (operative 15 March 2022).

## Legislation and the Commission's task

### The Commission's internal review power

23. 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 Decision is a reviewable decision and the Applicant is an eligible person to apply for a review of that decision. The Review Application was made pursuant to section 153.
24. 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 Original Decision; or
  - (b) sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.<sup>7</sup>
25. In effect, the Commission on review stands in the shoes of the original decision maker and must make a fresh decision with respect to the Original Application. In this case, the Commission must decide whether to:
- (a) grant the Original Application and, if so, whether to do so subject to conditions;<sup>8</sup>  
or
  - (b) refuse to grant the Original Application.<sup>9</sup>

### Determination of an uncontested application

26. Under the LCR Act, an application for the variation of a licence may be contested or uncontested. The Original Application was uncontested, as no objections were received under division 5 of part 2 within the relevant period.<sup>10</sup>
27. Where an application is an uncontested application, pursuant to section 44(1):

*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).*

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<sup>7</sup> Section 157(2) to (5) further prescribes the manner in which the Commission is to undertake internal reviews.

<sup>8</sup> LCR Act, sections 44, 49 and 157.

<sup>9</sup> LCR Act, sections 44 and 157.

<sup>10</sup> LCR Act, section 3(1) (definition of "uncontested application").



28. Section 44(2) empowers the Commission to refuse to grant the Review Application on various grounds, including that the granting of the application would:
- (a) detract from or be detrimental to the amenity of the area in which the premises to which the application relates are situated (section 44(2)(b)(i)); or
  - (b) be conducive to or encourage harm (section 44(2)(b)(ii)).
29. For the purposes of the LCR Act, the amenity of an area is defined as being the quality that the area has of being pleasant and agreeable.<sup>11</sup> Factors that may be taken into account in determining whether varying a licence would detract from or be detrimental to the amenity of the area include:
- (d) *the possibility of nuisance or vandalism;*
  - (e) *the harmony and coherence of the environment;*
  - (f) *any other prescribed matters.*<sup>12</sup>

However, the definition of “amenity” for the purposes of the LCR Act is not limited by these factors.<sup>13</sup>

## Exercising the internal review power

30. Section 172D(3) requires the Commission, in exercising its internal review power, to have regard to the objects of the LCR Act. The objects of the LCR Act are set out at section 4(1) as follows:

*The objects of this Act are—*

- (a) *to contribute to minimising harm 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*

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<sup>11</sup> LCR Act, section 3A(1).

<sup>12</sup> LCR Act, section 3A(2). Until a legislative amendment in 2018, the following factors were also included as evidencing detriment to the amenity of the area: (a) the presence or absence of parking facilities; (b) traffic movement and density; (c) noise levels.

<sup>13</sup> LCR Act, section 3A(3).



(d) to regulate licensed premises that provide sexually explicit entertainment.

31. Section 4(2) 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.<sup>14</sup>*

32. Section 3(1) defines “harm” as follows:

**harm** means harm arising from the misuse and abuse of alcohol, including—

- (a) harm to minors, vulnerable persons or communities, including groups within communities; and
- (b) family violence; and
- (c) anti-social behaviour, including behaviour that causes personal injury or property damage.

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

- (a) must consider all the information, material and evidence before the original decision maker;<sup>15</sup> and
- (b) may consider further information, material or evidence.<sup>16</sup>

34. The Commission considers that, while the grounds of refusal outlined in section 44(2) are relevant considerations, the determination of an uncontested application is ultimately 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.

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

36. Section 172U(1) provides that the Commission must endeavour to perform its functions and exercise its powers without undue formality, and as expeditiously as practicable, as the requirements of the LCR Act and the proper consideration of the subject matter permit.

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<sup>14</sup> See further *Kordister Pty Ltd v Director of Liquor Licensing* (2012) 39 VR 92; [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).

<sup>15</sup> LCR Act, section 157(2).

<sup>16</sup> LCR Act, section 157(3).

## Conduct of an inquiry

37. Section 44(4) provides that the Commission may have regard to any matter it considers relevant and make any enquiries it considers appropriate. The Commission is not required to give any person an opportunity to be heard concerning the application.
38. Section 172W(3) provides that the Commission is not bound by the rules of evidence but may inform itself in any way it thinks fit, and is bound by the rules of natural justice.

## Ministerial decision-making guidelines

39. Pursuant to section 172U(4), the Minister may issue decision-making guidelines in respect of the regulation of liquor. Section 172U(3)(b) requires the Commission to have regard to any such guidelines when performing functions or exercising powers under the LCR Act or the regulations, including the internal review power.
40. Section 172U(3)(a) requires the Commission to comply with any directions of the Minister under section 172V. Relevantly, a direction cannot be given under section 172V in relation to the variation of a licence.<sup>17</sup>
41. Section 172D(1)(g) provides that it is a function of the Commission to ensure that Government policy in relation to liquor is implemented.

## 2021 Guidelines

42. On 23 June 2021, the Minister for Consumer Affairs, Gaming and Liquor Regulation issued the 2021 Guidelines under section 5 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011*<sup>18</sup> in relation to applications for liquor licences to trade after 1am within the municipalities of Melbourne, Stonnington, Yarra and Port Phillip (**inner Melbourne municipalities**).<sup>19</sup>
43. The 2021 Guidelines provide that the Commission is intended to have regard to those guidelines as follows:

*In order to restrict late-night liquor licences in the inner Melbourne municipalities, it is the intention of the Victorian Government that the commission have regard to these guidelines when considering whether the grant of an application would detract from or be detrimental to the amenity of the area in which premises to which the application relates*

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<sup>17</sup> LCR Act, section 172V(2)(b).

<sup>18</sup> The regulator of liquor in the State of Victoria prior to 1 January 2022 was the Victorian Commission for Gambling and Liquor Regulation. Between 1 January 2022 and 30 June 2022, the regulator was the Victorian Gambling and Casino Control Commission. Since 1 July 2022, the regulator has been the Victorian Liquor Commission. For convenience, these reasons refer to the regulator from time to time as the **Commission**.

<sup>19</sup> See [9] above.

*are situated, or that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.*

44. The 2021 Guidelines deal with three categories: (a) accommodation and licences allowing consumption on the premises; (b) premises that regularly provides live music entertainment; and (c) special events. It provides as follows in relation to the first category:

**Accommodation and licences allowing consumption on the premises**

A. *It is the policy of the Victorian Government that no new liquor licence or BYO permit shall be granted, or existing liquor licence or BYO permit relocated or varied by the commission to allow the supply of liquor after 1.00 am in the inner Melbourne municipalities, except where the commission is satisfied that:*

- (1) *the premises is, or will be, used as:*
  - (a) *an accommodation hotel, being a hotel whose primary purpose is providing accommodation and where the supply of alcohol is ancillary to that purpose; or*
  - (b) *a venue that supplies liquor for consumption on the premises provided that food is available at the venue at all times when alcohol can be supplied; and*
- (2) *the applicant can satisfy the commission that:*
  - (a) *it has in place, or will put in place, a Venue Management Plan in the form required by the commission; and*
  - (b) *the economic and social benefit of granting the licence or permit will outweigh the impact of the licence or permit on alcohol misuse and abuse and community amenity; and*
  - (c) *the patron capacity of the premises or proposed premises does not, or will not, exceed 200 persons.*

45. The 2021 Guidelines state that they apply to applications, including for the variation of a late night (general) licence, made to the Commission after 30 June 2021 and before midnight on 30 June 2023.

## 2023 Guidelines

46. On 28 June 2023, the Acting Minister for Casino, Gaming and Liquor Regulation issued the 2023 Guidelines under section 172U(4) of the LCR Act in relation to applications for liquor licences to trade after 1am within the inner Melbourne municipalities.<sup>20</sup>
47. The 2023 Guidelines provide that the Commission must have regard to those guidelines as follows:

*To manage potential harm from licences operating after 1.00 am in inner Melbourne municipalities, the Commission must have regard to these guidelines when considering whether to grant an application and whether it would detract from, or be detrimental to,*

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<sup>20</sup> See [10] above.

*the amenity of the area in which premises to which the application relates is situated, or that the granting of the application would be conducive to or encourage alcohol related harm.*

*These guidelines set out how the Commission must consider applications for licences seeking to trade after 1.00 am in inner Melbourne municipalities.*

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## **Matters that must be considered by the Commission in assessing applications**

*It is the policy of the Victorian Government that the Commission consider the following matters when determining licence applications that allow the supply of liquor after 1.00 am in inner Melbourne municipalities.*

*The matters set out below shall be considered by the Commission in the context of the risk profile of the application, including patron capacity of the venue, trading hours (for example, venues that close at 2.00 am and those that close 3.00 am or later) and compliance history.*

*In the case of an application to grant, relocate or vary a late night (general or on-premises) licence, the Commission must consider any existing licence conditions and may impose new licence conditions to manage the risk of alcohol-related harm and amenity loss.*

*In determining applications, the Commission must consider:*

1. *The ability of the applicant to manage noise and amenity loss, including —*
  - (a) *compliance of the application with relevant planning requirements including those that relate to trading hours, noise control and amenity issues; and*
  - (b) *history of adherence to all appropriate noise management requirements as outlined in the Environmental Protection Regulations 2021.*
2. *Where a variation is sought to change operating hours to late night, whether there is a satisfactory history of compliance with liquor laws, considering any —*
  - (a) *infringement penalties;*
  - (b) *findings of guilt for any offence under the [LCR Act];*
  - (c) *disciplinary action taken against the licensee by the Commission; and*
  - (d) *prior written warnings relating to an issue or behaviour at the venue.*
3. *Whether additional licence conditions may be required relating to the applicant's ability to manage the venue to minimise risks of harm from late-night trading, which must be proportionate to the venue's trading hours and compliance history, including the following —*
  - (a) *appropriate venue entry and exit arrangements to minimise crowding issues and manage queuing;*
  - (b) *appropriate lighting and supervision of venue entry and exit points;*
  - (c) *the introduction or expansion of security cameras;*
  - (d) *the provision of security personnel;*
  - (e) *providing a new or amended Venue Management Plan;*
  - (f) *responsible supply practices such as limiting the number of alcoholic drinks that can be purchased per order after 1.00 am and*
  - (g) *for venues deemed higher risk by the Commission, enhanced responsible service of alcohol requirements.*

4. *Whether the venue has a plan to prevent and respond to gender based violence, including sexual harassment, developed in consultation with staff or their representatives, which may include completion of training delivered by a WorkSafe accredited provider.*

48. The 2023 Guidelines state that they supersede the 2021 Guidelines and apply to applications made to the Commission on or after 1 July 2023.

## Other sections of the LCR Act relevant to this matter

### Late night (general) licences

49. Pursuant to section 11A(2) of the LCR Act, a late night (general) licence authorises the licensee to supply liquor on the licensed premises: during ordinary trading hours (as defined in section 3(1)) for consumption on and off the premises; between 11pm and 1am on the following day for consumption on the premises; and at any other times specified on the licence for consumption on or off the premises.
50. Section 15A(1)(c) provides that a late night licence does not authorise the supply of liquor at any time between 3am and 12 noon on ANZAC Day.

## Material before the Commission

51. The Commission on review had before it, and considered, all the materials relied upon by the Delegate. The Commission also received and considered the following materials:
  - (a) Original Decision and Reasons of the Delegate dated 14 April 2023;
  - (b) Review Application received on 27 April 2023;
  - (c) written submissions from the Applicant dated 4 July 2023; and
  - (d) evidence presented at the hearing of the Review Application on 7 July 2023.

## Hearing

52. A hearing was held in relation to the Review Application on 7 July 2023 (**Hearing**).
53. Mr Daniel Robinson of Counsel appeared on behalf of the Applicant.
54. Mr Roger Okalyi, general manager of the Premises, gave oral evidence in support of the Review Application.

## Reasons for decision on review

### Issues for determination on review

55. In deciding whether to exercise its discretion to affirm, vary or set aside the Original Decision and in turn grant or refuse the Original Application that is the subject of the Review Application, the Commission must determine the following key issues:
- (a) given that the Original Decision was made while the 2021 Guidelines were in force but were due to expire, and the Review Application now falls to be determined when the 2023 Guidelines are in force, the extent to which the Commission is required to, or should, consider and apply those Guidelines in this case;
  - (b) whether the Commission is satisfied that the requirements of the relevant decision-making guidelines are met;
  - (c) whether there are grounds for refusal under section 44(2), having regard to the relevant decision-making guidelines; and
  - (d) whether the grant of the Review Application would be contrary to the objects of the LCR Act, in particular the object of harm minimisation.<sup>21</sup>

### The extent to which the Commission should consider the 2021 Guidelines and the 2023 Guidelines

#### *Applicant's submissions*

56. In written submissions dated 4 July 2023, Mr Robinson submitted as follows on behalf of the Applicant:
- (a) The starting point is that, on both guidelines' own terms, it is the matters set out in the 2021 Guidelines that are to be specifically considered in the Review Application, notwithstanding that those guidelines have now been superseded. By stating that they “*apply*” by reference to the date an application was made rather than the date it is determined, each of the 2021 Guidelines and the 2023 Guidelines ensures that applicants are not unfairly taken by surprise by any disadvantageous changes to that policy (for example, the new expectation at

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<sup>21</sup> LCR Act, sections 4 and 172D(3).

paragraph 4 of the 2023 Guidelines for venues to have a plan to prevent and respond to gender-based violence).

- (b) The policy set out in the 2021 Guidelines is directed only at applications that will “allow the supply of liquor after 1.00 am” in the designated municipalities. The Review Application does not fall within this class of applications because it would not have the effect of *allowing* the supply of liquor after 1am. The Commission can still lawfully have regard to the 2021 Guidelines insofar as they are the expression of a general policy directed at limiting the service of liquor after 1am in circumstances identifiably similar to — even if not specifically inclusive of — the increased service of liquor in an existing premises within its existing hours.
- (c) Even if the Commission is instead of the view that the 2021 Guidelines are directed to the facts of the Review Application, it still lawfully can and should give the 2021 Guidelines reduced weight to the extent that the Review Application — as an existing premises operating within its existing hours — is, at most, on the periphery of relevant circumstances with which the 2021 Guidelines are really concerned.
- (d) The Commission should have qualified regard to both the 2021 Guidelines and the 2023 Guidelines. The Commission must have regard to the 2021 Guidelines, as expressly provided, to inform its consideration of the Review Application — but substantially qualified by their peripheral relevance to the circumstances of the Review Application, their status as superseded policy, and questions of expedition and practicality. The Commission should also have regard to the 2023 Guidelines, as a general expression of current government policy regarding applications substantively identical to this one — but substantially qualified by the fact they are expressly not intended to “*apply*” to this application.

## Consideration

57. When exercising its internal review power, the Commission must have regard to any decision-making guidelines issued by the Minister in respect of the regulation of liquor.<sup>22</sup> The Commission must also ensure that Government policy in relation to liquor is implemented.<sup>23</sup>

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<sup>22</sup> LCR Act, section 172U(3)(b).

<sup>23</sup> LCR Act, section 172D(1)(g).



58. As acknowledged by Mr Robinson, the starting point for determining whether the 2021 Guidelines or the 2023 Guidelines apply to the Review Application is the terms of those guidelines. The 2021 Guidelines state that they “*apply to applications made to the commission after 30 June 2021 and before midnight on 30 June 2023*” and the 2023 Guidelines state that they “*apply to applications made to the Commission on or after 1 July 2023*”.
59. Both guidelines further specify that they apply to an application for the grant, relocation or variation of several licence types, including a late night (general) licence, in the municipalities of Melbourne, Stonnington, Yarra and Port Phillip.
60. The Original Application (and the Review Application) is an application for the variation of a late night (general) licence located in the municipality of Melbourne which was made after 30 June 2021 and before midnight on 30 June 2023. The starting point is therefore that the 2021 Guidelines apply to the Review Application, notwithstanding that those guidelines have now been superseded.
61. The Commission notes that the 2021 Guidelines (and the 2023 Guidelines) refer to applications that “*allow the supply of liquor after 1.00 am*”. The Applicant argued that the Review Application does not fall within this class of applications because it is already permitted to supply liquor after 1am under the Licence, and that the 2021 Guidelines therefore do not apply to the Review Application.
62. The Commission considers that, because the Applicant will continue to be allowed to supply liquor after 1am under the Licence, the Review Application falls within the class of applications contemplated by the 2021 Guidelines and the 2023 Guidelines. In any event, the Review Application seeks to allow the Applicant to supply liquor after 1am in an expanded area and to an increased number of patrons. With this, comes further risks of alcohol-related harm and risks of detriment to amenity of the type sought to be addressed by the 2021 Guidelines and the 2023 Guidelines. To consider that the 2021 Guidelines and the 2023 Guidelines would not apply where a licence already authorises supply of liquor in one part of the premises, would be inconsistent with the purposes of the 2021 Guidelines and the 2023 Guidelines.
63. The Commission finds that these proposed variations constitute an application to allow the supply of liquor after 1am, within the meaning of the 2021 Guidelines and the 2023 Guidelines.

64. In addition to being Ministerial decision-making guidelines, the 2021 Guidelines and the 2023 Guidelines both state that they represent the policy of the Government in relation to applications to the Commission for licences to trade after 1am in the inner Melbourne municipalities. The Commission is therefore obliged by section 172D(1)(g) to ensure that this Government policy is implemented.<sup>24</sup>
65. Given that the 2023 Guidelines state that they supersede the 2021 Guidelines, and are directed towards harm-minimisation and reducing the risk of detriment to the amenity of the area, the Commission considers that it is bound to take the 2023 Guidelines into account as an expression of the Government's current policy regarding applications for licences to trade after 1am in the inner Melbourne municipalities.
66. Consequently, the Commission is required to have regard to the 2021 Guidelines as the decision-making guidelines effective at the date when the Original Application (and the Review Application) was made.
67. The Commission is also required to take into consideration the Government's current policy as embodied in the 2023 Guidelines.

## Whether the requirements of the relevant guidelines are met

### *Applicant's submissions*

68. In written submissions dated 4 July 2023, Mr Robinson submitted as follows on behalf of the Applicant:
  - (a) The 2021 Guidelines and the 2023 Guidelines are not a direction from the Minister. Rather, they are guidelines which express the Government's policy. The Commission's discretion will miscarry if it applies them as though they were rules. Whatever the guidelines have to say about any application must be considered as just one of many factors the Commission weighs in the balance in arriving at its ultimate determination, based upon the overriding imperative to advance the objects of the Act.
  - (b) The LCR Act, by requiring no more than that the Commission "*have regard to*" decision-making guidelines, leaves ample discretion for the Commission to have equal and countervailing regard to avoiding an outcome that turns on a pointless

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<sup>24</sup> See [41] above.

and wasteful formality such as resubmission of the same application to obtain a different effective lodgement date.

- (c) It is uncontroversial that the Review Application would not meet the various specific exemption criteria set out in the 2021 Guidelines, as it does not fall within the “live music entertainment” or “special events” exemptions in paragraphs B and C, and the patron capacity of the premises (both current and proposed) exceeds the 200-person limit for the exemption in paragraph A.
- (d) Nonetheless, there is a strong basis for the Commission to exercise its discretion to grant the Review Application having regard to the 2021 Guidelines. In particular:
  - (i) The Premises is an existing venue proposed to remain entirely within its current trading hours (indeed, to reduce them). Setting aside threshold questions about whether the 2021 Guidelines apply in such a case, it can certainly at least be said that is not within the core concern of a policy specifically directed at “*new*” late night trading from new venues or new hours of service, rather than existing operations of existing venues.
  - (ii) It is only by reason of the 200-person patron cap in sub-paragraph (2)(c) that the Review Application does not satisfy the exemption in paragraph A of the 2021 Guidelines. This matter is only a relevant consideration, not a threshold for approval. The configuration of the Premises is highly significant, as it is functionally split over three levels of the building — each with its own distinct ambience and offer, with limited physical and practical interconnectivity between floors. For that reason, it does not have the attributes and risk profile of a venue hosting more than 200 persons in one space. If they were not under the same licence with shared services, each floor could easily have been considered a separate venue, each hosting less than 200 persons.
  - (iii) The variation sought by the Review Application involves a reduction in the Premises’ existing Monday to Saturday trading hours, from a 24-hour venue to a 5am close. The proposed elimination of 5am–7am trading is a positive risk mitigation measure of greater countervailing magnitude than any likely impact arising from the second floor being open between 1am and 3am, resulting in a net benefit in terms of harm minimisation.

- (iv) All the salient characteristics of the individual venue itself — the ambience, offer, design and configuration of spaces, management, food service, size and location within the city — consistently and cumulatively characterise it as a “low risk” venue for late night alcohol-related harm.
- (e) Having regard to the 2023 Guidelines, the Commission ought to approve the Review Application because:
  - (i) With respect to paragraph 1(a), the Planning Permit aligns with what is proposed in the Review Application in relation to the maximum patron capacity (namely, 535 patrons) and the trading hours for the second-floor terrace (open until 1am). The one respect in which the Planning Permit currently differs from the proposed licence conditions is that the permit has a condition limiting patron numbers on the second-floor terrace to 50 people after 10pm, whereas the Licence would not specify a time-of-day patron limit. The Planning Permit may be amended following acoustic testing of the Premises’ real-world operation. Unless and until that happens, the Applicant will comply with the limit currently in the Planning Permit.
  - (ii) Regarding paragraph 1(b), the Premises only reopened to the public a few months ago. In that time, there have been no issues regarding adherence to the noise management requirements of environment protection legislation.
  - (iii) Paragraph 2 applies “*where a variation is sought to change operating hours to late night*”, which does not apply here. In any event, satisfactory history of compliance with liquor laws is not a matter of concern in this case (noting, again, that the Premises reopened only a few months ago).
  - (iv) The matters contemplated by paragraph 3 are, to the extent necessary, adequately addressed by the amenity and management conditions endorsed by the Delegate, and the venue management plan and approved patron egress plan provided with the Original Application.
  - (v) Paragraph 4 directs consideration to whether the venue has a plan to prevent and respond to gender-based violence. That is a new consideration in the 2023 Guidelines which the Applicant obviously could not have anticipated, and which the guidelines do not intend to be retrospectively required.

- (vi) The 2023 Guidelines expressly direct the Commission to consider all the specified matters “*in the context of the risk profile of the application*”. In this case, the Premises is a categorically “low risk” venue.
- (f) Consideration of the Review Application with regard to the decision-making guidelines is a limited part of the Commission’s task, which is primarily determined by the objects of the LCR Act. The Review Application strongly warrants approval on those general considerations.

## *Consideration of the 2021 Guidelines*

- 69. The 2021 Guidelines provide that, unless certain matters set out in paragraphs A, B or C are satisfied, no existing licence shall be varied to allow the supply of liquor after 1am in the inner Melbourne municipalities.
- 70. It was not in dispute that the Applicant could not satisfy the criteria set out in paragraphs B and C.
- 71. In relation to paragraph A, the Commission is satisfied on the material before it that food is available at the Premises at all times when alcohol can be supplied (paragraph A(1)(b)), and that the Applicant has in place a venue management plan in the form required by the Commission (paragraph A(2)(a)).
- 72. In an economic and social benefits form provided to the Delegate on 28 November 2022, the Applicant estimated that the grant of the Original Application would result in projected additional revenue of \$32,205 per week from food and drink sales. The Applicant also estimated that it would incur additional expenses of \$7,459 per week in relation to food and drink sales and additional employee expenses of \$9,485 per week. These estimates constitute a projected additional profit of \$15,261 per week.
- 73. The Applicant also submitted an economic and social benefit report prepared by Urbis that relevantly concludes:
  - (a) The venue will be low risk and therefore the request for late night trading should be approved.
  - (b) Based on the assessment of the Victorian Civil and Administrative Tribunal<sup>25</sup> and the conditions imposed in the Planning Permit, the application will not detract from or be detrimental to the amenity of the area in which the Premises is situated.

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<sup>25</sup> *Metro Pol Investment Pty Ltd v Melbourne City Council* [2019] VCAT 128.

- (c) The venue already has a liquor licence for late night trading. The proposal is therefore not introducing a new late night use, but upgrading and expanding the patron offer.
- (d) The Applicant seeks to reduce the allowable hours for the ground and first floors. This will be a positive mitigation measure against alcohol-related harms.
- (e) The proposed hours for the second floor are to 3am — therefore not operating 24 hours or the extended hours available at other parts of the facility.
- (f) There are limited maximum patron capacities for the venue overall (535 persons) and the second floor specifically (195 persons). Larger venues are considered to pose a greater risk of alcohol-related harm.
- (g) Food will be available at all times that the venue is open, with full meals available at lunch and dinner hours, and substantial snack and share menus available at all other times.
- (h) Crowding will be controlled through staffing as per the venue management plan, noting the layout does not allow easy mixing from one floor to the other.
- (i) The venue management plan provides for a strong managerial response to issues of patron intoxication and public drunkenness.
- (j) The Premises has been designed to minimise the potential for overcrowding and to provide strong sightlines for staff to allow patron management and surveillance.
- (k) The Premises has been designed to limit the potential for off-site amenity impacts (and comply with planning permit conditions).
- (l) The Premises is in proximity to public transport and taxi/uber services allowing people to disperse quickly.
- (m) The location is not within a cluster of late night venues.
- (n) The proposal does not include live music (which may be associated with increased levels of poor patron behaviour if the patrons do not enjoy the performance). Equally, the lack of live music means the potential for amenity impacts is reduced. The use of background music only on the second floor allows patrons to converse.

- (o) In line with the recommendations of an acoustic consultant, the external area of the second floor will only be available for a maximum of 50 patrons after 10pm as a clear noise mitigation measure.
  - (p) The theming of the venue (including food and drink price points) will appeal to mixed groups of patrons (and not be a focus for groups of younger clientele).
74. The Commission accepts the assessment provided by Urbis that the economic and social benefits of granting the application will outweigh the potential negative impact on alcohol misuse and abuse and community amenity (paragraph A(2)(b)).
75. As acknowledged by the Applicant, the patron capacity of the Premises (both under the existing Licence and if the Review Application were granted) exceeds 200 patrons (paragraph A(2)(c)).
76. Consequently, the Commission is satisfied that the Review Application meets all of the matters specified in paragraph A, except for the patron capacity (paragraph A(2)(c)). In all the circumstances of this application, including how patron capacity and movement is to be managed by the Applicant, the Commission does not give any significant weight to the 'patron capacity' consideration at paragraph A(2)(c).

### *Consideration of the 2023 Guidelines*

77. The 2023 Guidelines provide that, in determining applications that allow the supply of liquor after 1am, the Commission shall consider certain matters in the context of the risk profile of the application, including patron capacity of the venue, trading hours and compliance history.
78. The Commission is satisfied that the Applicant is able to sufficiently manage noise and amenity loss (paragraph 1). In particular:
- (a) The Review Application overwhelmingly aligns with the requirements in the Planning Permit. The only exception is that the Planning Permit limits patron numbers on the second-floor terrace to 50 people after 10pm, whereas the Licence does not contain this limitation. However, the venue management plan provided by the Applicant incorporates the post-10pm limitation for the terrace.
  - (b) Noting that the Premises has only reopened within the last few months, the Applicant does not have a history of non-compliance with the *Environmental Protection Regulations 2021*.



79. The Commission is satisfied that the Applicant has a satisfactory history of compliance with liquor laws at the Premises (again, noting that the Premises reopened only a few months ago) (paragraph 2).
80. The Commission considers that the existing conditions on the Licence incorporate adequate measures to minimise the risks of harm from late night trading, which are proportionate to the Premises' trading hours and compliance history (paragraph 3). In particular, the Commission notes that the Licence currently requires the Applicant to: comply with its patron egress plan; maintain security cameras; provide crowd controllers; and maintain in-house procedures for security arrangements and the service and supply of alcohol. In addition, the Applicant has lodged a comprehensive venue management plan which contains a crowd management plan, alcohol management plan, noise management plan, and rubbish removal and storage plan.
81. As the 2023 Guidelines were implemented after the Applicant lodged the Original Application and the Review Application, the Applicant has not already developed a plan to prevent and respond to gender-based violence (paragraph 4). However, at the Hearing, Mr Robinson indicated that the Applicant will prepare a gender-based violence prevention and response plan.
82. Accordingly, the Commission considers that taking into account all the matters in the 2023 Guidelines, the 2023 Guidelines do not weigh against the grant of this application.

## **Whether there are grounds for refusal under section 44(2), having regard to the relevant decision-making guidelines**

83. As stated above, section 44(2) empowers the Commission to refuse to grant the Review Application on various grounds, including that the granting of the application would:
  - (a) detract from or be detrimental to the amenity of the area in which the Premises are situated;<sup>26</sup> or
  - (b) be conducive to or encourage harm.<sup>27</sup>

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<sup>26</sup> LCR Act, section 44(2)(b)(i).

<sup>27</sup> LCR Act, section 44(2)(b)(ii), as amended by *Liquor Control Reform Amendment Act 2021*, section 28(1) (operative 25 August 2022). The Commission notes that, in determining this matter, it has considered each of the grounds set out in section 44(2).

84. Both the 2021 Guidelines and the 2023 Guidelines provide that the Commission must have regard to those guidelines when considering whether either of these grounds for refusal exist.<sup>28</sup>
85. The Commission notes that Victoria Police, the Council and members of the public did not lodge any objections in relation to amenity or harm.
86. For the reasons set out above, the Commission has had regard to the matters specified in paragraph A of the 2021 Guidelines and also in the 2023 Guidelines.
87. Despite the prescriptive language of the 2021 Guidelines (*“no new liquor licence or BYO permit shall be granted, or existing liquor licence or BYO permit relocated or varied ... except where the commission is satisfied”*), the Commission is not bound to refuse an application on the basis that it does not meet the requirements provided in the guidelines. Rather, the guidelines are an additional element that the Commission must have regard to when it is determining whether to exercise its discretion to grant or refuse an application.
88. The Commission is cognisant that the 2023 Guidelines require consideration of an applicant’s ability to manage the risk of harm and amenity loss.
89. In relation to patron capacity, the Commission notes that the Applicant proposes to stagger the maximum patron capacity of the Premises. If the Review Application is granted, 535 patrons will be allowed on the Premises until 3am, with a reduction to 340 patrons until 5am when the Premises will close.
90. The patron egress plan provided by the Applicant, and the evidence given by Mr Okalyi, demonstrates that the Premises is appropriately designed to allow for patrons to exit the Premises at 3am without needing to enter the ground or first floors. The Commission is satisfied that the Applicant will be able to adequately manage this staged reduction of patrons, which will limit the impact on the amenity of the area and mitigate risks of harm.
91. In accordance with the Planning Permit and the venue management plan, the Applicant will also reduce the number of patrons on the second-floor terrace to 50 people after

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<sup>28</sup> The 2021 Guidelines refer to whether the granting of the application would be conducive to or encourage “the misuse or abuse of alcohol”. This reflects the language of section 44(2)(b)(ii) as enacted. Sub-paragraph (ii) was amended on 25 August 2022 to now refer to “harm” instead of “the misuse or abuse of alcohol” (see [28] and note 27 above). The 2023 Guidelines refer to “alcohol-related harm”. Given “harm” is defined in section 3(1) to mean “harm arising from the misuse and abuse of alcohol” (see [32] above), the Commission considers it appropriate that the reference to “alcohol-related harm” in the 2023 Guidelines should be interpreted consistently with the definition of “harm” provided in the LCR Act.

10pm. Although this does not form a condition of the Licence — and does not limit the overall number of patrons allowed on the second floor — the trading hours endorsed on the Licence for the terrace will remain until 1am. The Commission considers that these measures will reduce the Premises' impact on the amenity of the area.

92. In addition, the Commission notes that, whilst seeking to increase the licensed area and patron numbers allowed until 3am, the Applicant has proposed that the Premises' trading hours for the ground and first floors be decreased from 7am to 5am. The Commission considers that the harm mitigation value from decreasing the trading hours for the ground and first floors is significantly greater than the risks of harm posed by increasing the licensed area and patron numbers for the second floor until 3am.
93. Having considered all of the material before the Commission — including the 2021 Guidelines and the 2023 Guidelines — the Commission finds that granting the Review Application would not detract from or be detrimental to the amenity of the area in which the Premises is situated, or be conducive to or encourage harm.

## Whether granting the application would be contrary to the objects of the LCR Act

94. Although the Commission is satisfied that that no grounds for refusal exist under section 44(2) of the LCR Act, the Commission must also consider if it should exercise its discretion to grant the variation of the Licence. Such a discretion must be exercised by the Commission with regard to any other relevant considerations, as well as with regard to the objects of the LCR Act, particularly the primary object of harm minimisation.<sup>29</sup>
95. With the imposition of the conditions in Appendix A, the Commission is satisfied that adequate controls will exist over the supply and consumption of liquor at the Premises and that any harm should be minimised. Accordingly, the Commission considers that the grant of the variation to the Licence in this instance would not be contrary to the LCR Act's object concerning harm minimisation.

## Decision on review

96. The Commission is satisfied that the Review Application meets all legislative requirements set out above. Accordingly, based on the reasons set out above, the

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<sup>29</sup> LCR Act, sections 4, 44(4) and 172D(3).

Commission is satisfied that granting the variation to the licence the subject of the Review Application is appropriate in the circumstances.

97. The Commission has therefore determined to set aside the Original Decision and grant the variation to the licence the subject of the Review Application subject to the conditions set out in Appendix A.

***The preceding 97 paragraphs are a true copy of the Reasons for Decision of Mr John Larkins (Deputy Chair), Mr James O'Halloran (Deputy Chair) and Mr Steven Brnovic (Commissioner).***

## Appendix A

### Type of licence

This licence is a late night (general) licence and authorises the licensee to supply liquor on the licensed premises for consumption on and off the licensed premises during the trading hours specified below. This licence does not authorise the licensee to only supply liquor for consumption off the licensed premises.

### 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 install and maintain a surveillance recording system able to clearly identify individuals, which shows time and date and provides continuous images of all entrances and exits, bars and entertainment/dance floor areas. The surveillance recording system must operate from 30 minutes before the premises is open to the public and until 30 minutes after closure. A copy of the recorded images must be available upon request for immediate viewing or removal by the Victoria Police, or a person authorised in writing by Liquor Control Victoria, and/or otherwise retained for at least one month. The position of the cameras will be to the satisfaction of the Licensing Inspector.

Signs, as described below, are to be displayed in all areas subject to camera surveillance. Such signs shall read:  
“For the safety and security of patrons and staff this area is under electronic surveillance”.

### Delivery of liquor

Liquor must not be delivered after 11pm on any day, or at any time on Good Friday or Christmas Day, or before 12 noon on ANZAC Day.

### Management conditions

- Where the premises trades between 1am and 6am crowd controllers licensed under the Private Security Act are to be employed at a ratio of 2 crowd controllers for the first 100 patrons and 1 crowd controller for each additional 100 patrons or part thereof.
- After 8pm on Friday and Saturday nights if there are 150 patrons or more present, a minimum of two crowd controllers licensed under the Private Security Act must be present at the licensed premises. One crowd controller is to be present outside the premises to monitor patrons arriving at or departing from the premises.
- The licensee must establish and maintain in-house procedures that detail the venue's:
  - Security arrangements; and
  - Policy on the service and supply of alcohol.
- Prior to commencing work at the premises for the first time, all staff involved in the selling, offering for sale or serving of liquor and all crowd controllers, must sign a register declaring that they have read and understood the in-house procedures.
- The register must record the name of the crowd controller or employee, the date the crowd controller commenced employment or the employee first sold, offered for sale or served

liquor, the date the crowd controller or employee read the in-house procedures and the crowd controller or employee's signature.

- The register and in-house procedures must be available for immediate inspection by Victoria Police or an authorised officer upon request.
- The management conditions of this licence will be subject to a review by the Commission upon the transfer of this licence.
- To the extent that a matter is not already dealt with in this licence, the licensee must comply with the Patron Egress plan as provided by the licensee and approved by Liquor Control Victoria.

## Gender-based violence prevention and response plan

By 2 October 2023, the licensee must have developed and implemented a plan to prevent and respond to gender-based violence, including sexual harassment, developed in consultation with staff or their representatives (the **Plan**).

By 9 October 2023, the licensee must submit a copy of the Plan to Liquor Control Victoria.

## Maximum capacities

Ground floor (145 patrons)	Level 1 (195 patrons)	Level 2 (195 patrons)
Overall capacity prior to 3am - 535 patrons		
Overall capacity after 3am - 340 patrons		

## Trading hours

### FOR CONSUMPTION OFF THE LICENSED PREMISES -

Sunday	Between 10am and 11pm
Good Friday & ANZAC Day	Between 12 noon and 11pm
On any other day	Between 7am and 11pm

### FOR CONSUMPTION ON THE LICENSED PREMISES -

#### Ground floor and Level 1 -

Sunday	Between 10am and 1am the following morning
Good Friday & ANZAC Day	Between 12 noon and 1am the following morning
On any other day	Between 7am and 5am the following morning except for the morning of Good Friday & ANZAC Day

#### Level 2 internal area -

Sunday	Between 10am and 11pm
Good Friday & ANZAC Day	Between 12 noon and 11pm
On any other day	Between 7am and 3am the following morning

#### Level 2 external area -

Sunday	Between 10am and 11pm
Good Friday & ANZAC Day	Between 12 noon and 11pm
On any other day	Between 7am and 1am the following morning