

# Decision and reasons for decision

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* by Mr Tony Chong and Ms Gloria Chong for an internal review of a decision by a delegate to grant an application by Zeppelin Kitchen Pty Ltd for a restaurant and cafe licence for the premises trading as Zeppelin Kitchen, located at 368 Bay Street, Brighton

<b>Commission:</b>	Mr John Larkins, Deputy Chair Mr James O'Halloran, Deputy Chair Ms Thu-Trang Tran, Commissioner
<b>Appearances:</b>	Mr Tony Chong and Ms Gloria Chong, Applicants Mr Michael Chong, a representative for the Applicants Mr Terence Kallenbach, Director of the Licensee Ms Lydia Taylor-Moss, Counsel Assisting the Commission
<b>Date of Hearings:</b>	<b>15 May, 11 July 2023</b>
<b>Date of Decision:</b>	<b>28 August 2023</b>
<b>Date of Reasons:</b>	<b>28 August 2023</b>
<b>Decision:</b>	The Commission has determined to affirm the decision of the Delegate and refuse the application
<b>Signed:</b>	



**John Larkins, Deputy Chair**

## Background

### Original Application

1. On 20 September 2022, Zeppelin Kitchen Pty Ltd (**Licensee**) applied to the Victorian Liquor Commission (**Commission**) under the *Liquor Control Reform Act 1998 (LCR Act)*<sup>1</sup> for a restaurant and cafe licence for the premises located at 368 Bay Street, Brighton (**Premises**) trading as Zeppelin Kitchen (**Original Application**).
2. The Licensee leases the Premises where it has operated a cafe since 2017. The Premises is located in Commercial 1 Zone.
3. The reason for the Original Application was so that the Licensee could supply liquor for customers to consume on the Premises as a complement to its meal offerings. Alcohol will not be offered for takeaway.
4. The Premises comprises an internal dining area, footpath dining area and rear courtyard dining area, with a kitchen area and toilet facilities inside.
5. The proposed trading hours for the supply of liquor were:

*Rear courtyard:*

Sunday to Wednesday	Between 7.30am and 6pm
Thursday to Saturday	Between 7.30am and 10pm

*Remainder of the Premises:*

Good Friday and ANZAC Day	Between 12 noon and 1am the following morning
On any other day	Between 7am and 1am the following morning

6. The Licensee sought a maximum patron capacity of 84 patrons, which includes a maximum of 32 patrons in the rear courtyard. This was based on a planning permit issued by the Bayside City Council (**Council**) on 9 August 2022 in respect of the Premises (**Planning Permit**).
7. In accordance with section 33, a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector (together, **Victoria Police**) and the Council on 30 September 2022. On 14 October 2022, the Council indicated that it did not object to the grant of the Original Application. On 26 October 2022, Victoria Police also indicated that it did not object to the grant of the Original Application.

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

8. On 25 October 2022, the Commission received an objection to the Original Application, pursuant to section 38, from Mr Tony Chong and Ms Gloria Chong (**Applicants**). The rear of the Applicants' property is separated from the courtyard of the Premises by a laneway. The Applicants asserted that granting the Original Application would detract from or be detrimental to the amenity of the local area on the following bases:
  - (a) patron and music noise in the courtyard and laneway;
  - (b) safety concerns arising from increased traffic in the laneway late at night;
  - (c) a lack of privacy due to a deck which looks into their property; and
  - (d) the Licensee held a function in the courtyard around Christmas 2021 which impacted the amenity of the area.
  
9. On 15 November 2022, Mr Terence Kallenbach, the sole director of the Licensee, submitted in response to the Applicants' objections:
  - (a) In 2021, an enhanced courtyard at the rear of the Premises was constructed with the full support and approval of the Council and with all required planning approvals and permits in place. Planning approvals took into account the impact of the proposed construction and the use of the decking on the amenity of the surrounding area.
  - (b) The courtyard structure has been clad in screening to provide sun shading, to prevent sightlines to neighbouring properties and to provide acoustic treatment. The speakers for music within the courtyard are purposely mounted so that they face away from the residences to the rear, and background music is played at a controlled level that is inaudible outside of the Premises. Shade cloths cover the entirety of the decking and provide further acoustic treatment.
  - (c) The laneway to the south of the Premises provides access and utility for all of the nearby commercial operations. The laneway provides access to Australia Post and to Male Street, so it is commonly used for public thoroughfare.
  - (d) The Licensee has signage in place at the rear of the Premises to designate the location of the Premises for deliveries. The signage is not intended to promote pedestrian access from the rear.
  - (e) The Premises is first and foremost a food business. The Original Application is a natural extension of the Licensee's existing restaurant and cafe business.

- (f) The Premises is located in a commercial zone. The Premises is the only hospitality business in the immediate vicinity that does not have a liquor licence.
  - (g) The courtyard of the Premises aligns with the Applicants' rear garden at a considerable distance from their residence.
  - (h) Planning approval for a liquor licence was granted by the Council after it took into account the impact on the amenity of the surrounding area and an objection by the Applicants.
  - (i) The Original Application seeks to utilise the courtyard in a limited manner: only three nights per week and only until 10pm on those nights.
  - (j) The Original Application does not propose to change the number of patrons currently able to be accommodated by the Premises.
  - (k) The function hosted at the Premises in December 2021 was a private birthday party for Mr Kallenbach's stepdaughter. All resident neighbours (including the Applicants) were notified in advance that the Premises would be hosting a family function. No alcohol was sold at the function, and any that was consumed was done so in sensible moderation. The function concluded by 10pm and the ambient music was stopped.
10. On 23 December 2022, the Delegate decided to grant the Original Application under section 47 (**Original Decision**). In relation to the Applicant's objection, the Delegate considered that the main concern was the use of the courtyard. In this regard, the Delegate took into consideration that the Licensee only sought to have evening trade three nights per week until 10pm. The Delegate also took into account that the Premises is located in a commercial zone; Victoria Police and the Council did not object to the grant of the Original Application on amenity grounds; and the licence is for restaurant and cafe use and therefore does not present the same risks of damage to amenity associated with that of a bar or nightclub.

## Application for Internal Review

11. On 18 January 2023, the Applicants applied for internal review of the Original Decision (**Review Application**). They also sought a stay of the Original Decision.
12. In completing the Review Application, the Applicants provided the following reasons for the Review Application:

- (a) The Licensee built the deck in the courtyard without a planning or building permit, which was retrospectively approved by the Council. The Licensee would not be in a position to exploit the Premises to this extent had it adhered to the law in the first instance.
  - (b) The screening to the rear of the deck is cheaply constructed with no acoustic properties.
  - (c) Music played in the courtyard is clearly audible in their kitchen with the windows and doors closed. Music has commenced at this volume at 7am, which the Licensee explained to the Applicants was for the benefit of its staff.
13. On 26 January 2023, the Licensee provided submissions resisting the stay application.
14. On 27 January 2023, the Commission decided not to stay the Original Decision. The primary reason for refusing the stay was that granting a stay would not cease the operation of the business from the Premises. However, it would prevent the Licensee from supplying liquor anywhere on the Premises (including inside the Premises). The stated prejudice by the Applicants was in relation to the noise related to the supply of liquor in the courtyard.

## Legislation and the Commission's task

### The Commission's internal review power

15. Division 2 of part 9 governs internal review applications. Under section 152, the decision made by the Delegate in the Original Decision is a reviewable decision and the Applicants are eligible persons to apply for a review of that decision. The Review Application was made pursuant to section 153.
16. 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>2</sup>

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

17. 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>3</sup> or
  - (b) refuse to grant the Original Application.<sup>4</sup>

## Determination of a contested application

18. Under the LCR Act, an application for the grant of a licence may be contested or uncontested. The Original Application was contested, as an objection was received under division 5 of part 2 within the relevant period.<sup>5</sup>
19. Where an application is a contested application, pursuant to section 47(1):
- Subject to Division 3, the Commission must, after the period for making an objection under Division 5 has expired, including any extension of time granted for making an objection, grant or refuse a contested application.*
20. Section 47(2) provides that the Commission may refuse to grant a contested application on any of the grounds set out in section 44(2) and section 44(3) applies accordingly.
21. Pursuant to section 44(2), the Commission may refuse to grant an application on certain grounds, including 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.<sup>6</sup>
22. 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>7</sup> Factors that may be taken into account in determining whether granting 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>8</sup>

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<sup>3</sup> LCR Act, sections 47, 49 and 157.

<sup>4</sup> LCR Act, sections 47 and 157.

<sup>5</sup> LCR Act, section 3(1) (definition of “contested application”).

<sup>6</sup> LCR Act, section 44(2)(b)(i).

<sup>7</sup> LCR Act, section 3A(1).

<sup>8</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.

However, the definition of “amenity” for the purposes of the LCR Act is not limited by these factors.<sup>9</sup>

## Exercising the internal review power

23. Sections 172D(3) and 172U(3)(b) require the Commission, in exercising its internal review power, to have regard to the objects of the LCR Act and any decision-making guidelines in respect of the regulation of liquor issued by the Minister. 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*
- (d) *to regulate licensed premises that provide sexually explicit entertainment.*

24. 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>10</sup>*

25. 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.*

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<sup>9</sup> LCR Act, section 3A(3).

<sup>10</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).

26. In exercising the internal review power, the Commission:
  - (a) must consider all the information, material and evidence before the original decision maker;<sup>11</sup> and
  - (b) may consider further information, material or evidence.<sup>12</sup>
27. The Commission considers that, while the grounds of refusal outlined in section 44(2) are relevant considerations, the determination of a contested application is ultimately to be made pursuant to sections 47(1) and 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.
28. Under section 49, the Commission may impose any condition it thinks fit on the grant of an application.

## Conduct of an inquiry

29. Section 47(3) provides that the Commission may have regard to any matter it considers relevant and make any enquiries it considers appropriate. The Commission must give the applicant and each objector a reasonable opportunity to be heard.
30. 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.

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

### Restaurant and cafe licences

31. Pursuant to section 9A(1), a restaurant and cafe licence authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises where the predominant activity carried out at all times on the premises is the preparation and serving of meals to be consumed on the licensed premises (**Predominant Activity Requirement**).
32. Section 9A(3)(a) further provides that a restaurant and cafe licence is subject to the condition that “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”.

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<sup>11</sup> LCR Act, section 157(2).

<sup>12</sup> LCR Act, section 157(3).



33. Moreover, section 9A(1)(a) provides that a restaurant and cafe licence authorises the licensee to supply liquor during ordinary trading hours (as defined in section 3) and between 11pm on any particular day until 1am on the following day for consumption on the premises.

## Material before the Commission

34. The Commission on review had before it, and considered, all the materials before the Delegate. The Commission also received and considered the following materials:
- (a) Original Decision and Reasons of the Delegate dated 23 December 2022;
  - (b) Review Application received 18 January 2023;
  - (c) email communication from the Applicants received on 8 May 2023, enclosing an objection to a planning permit application lodged by the Licensee in respect of the Premises and two email chains between the Council, the Applicants and Mr Michael Chong;
  - (d) written submissions of the Licensee received from Mr Kallenbach on 8 May 2023;
  - (e) written statement of Mr E Keith Jones dated 12 May 2023;
  - (f) submissions presented at the hearing of the Review Application on 15 May 2023;
  - (g) email communication from Mr Kallenbach received on 7 June 2023;
  - (h) email communication from Ms Chong received on 4 July 2023;
  - (i) email communication from Mr Kallenbach received on 11 July 2023, forwarding an email chain between Mr Kallenbach and the Council dated July 2022; and
  - (j) submissions presented at the hearing of the Review Application on 11 July 2023.
35. The Commissioners viewed the Premises on 10 March 2023 (**View**).

## Hearings

36. Hearings were held in relation to the Review Application on 15 May 2023 (**First Hearing**) and 11 July 2023 (**Second Hearing**). The Applicants attended the hearings with their son, Mr Michael Chong, who lives with them. Mr Kallenbach attended the hearings on behalf of the Licensee. Evidence was not given under oath at the hearings.

## First Hearing, 15 May 2023

37. At the First Hearing, Ms Chong stated that the Applicants can hear all the conversations that take place in the courtyard and, on one particular weekend, she could hear music in her kitchen. She said that all the courtyard needed was some acoustic soundproofing. She acknowledged that, since the Review Application had been lodged, the Licensee had been “very quiet” and it had been “heaven”.<sup>13</sup> She said that she was worried that the acoustic levels would return to their previous levels once the Review Application is determined.
38. Mr Michael Chong confirmed that the Applicants only have an objection to the courtyard. He stated that the Applicants had no problems from the three or four other licensed premises which were in the same area. He said the Applicants want the Licensee to be successful, but the sound emanating from the Premises was a nuisance. He stated that the Applicants are against the Licensee having a beer garden going until 1am or a function centre going very late. He said that the Applicants could not see any restrictions stopping the Licensee from doing these activities.
39. Mr Tony Chong stated that he was concerned about safety from patrons using the laneway adjoining the Premises and the Applicants’ property.
40. Mr Kallenbach stated that he had requested restricting trade in the courtyard to the latest closing time of 10pm on three nights a week because he thought that it was fair and reasonable. He said that he had no intention of using the space for events or parties and that he could not have live music there.
41. Mr Kallenbach described the amplifier system in use at the Premises. He stated that the amplifiers are controlled by a splitter which indicates the maximum volume level for each area (including the courtyard). He said that he chose the maximum volume level to be suitable for background listening only.
42. Mr Kallenbach stated that, before the COVID-19 pandemic, he applied for a building permit for the courtyard, which included a retractable roof and sound protection, but the application was objected to and he withdrew it. He said that he subsequently sought approval for the current structure during the pandemic because the site is covered by a heritage overlay. He stated that putting up acoustic barriers or roofing to the structure requires further planning approvals.

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<sup>13</sup> Hearing Transcript, 15 May 2023, page 6, line 8 to line 9.

43. Mr Kallenbach said that he would be happy to get an independent acoustic expert to record the sound levels. Mr Michael Chong confirmed that the Applicants would be content for the acoustic expert to access their property to do so. The Commission scheduled a second hearing to allow the Licensee to obtain an acoustic report.
44. Following the First Hearing, Mr Kallenbach advised the Commission by email on 7 June 2023 that the Licensee would not be obtaining an acoustic report for two reasons. The first reason was that, because the courtyard was not operational in colder months, the acoustic experts he had approached were of the view that a report in winter would not provide a reflection of the activity that is likely during spring or summer. The second reason was that the cost of obtaining an acoustic report was not affordable for a small business like the Licensee's.
45. By email dated 4 July 2023, in response to Mr Kallenbach's email of 7 June 2023, Ms Chong stated that she had no confidence that the Licensee intends to address the Applicants' concerns. She said that the Applicants strongly object to a liquor licence for the courtyard of the Premises as it is not suitable and will severely impact the amenity of the Applicants' residence and wellbeing.

## Second Hearing, 11 July 2023

46. At the Second Hearing, Ms Chong stated that the noise from the courtyard was intolerable. She said that installing acoustic treatments would be a "win-win situation"<sup>14</sup> and that, if this could not be done, the only other solution was to limit the trading hours in the courtyard or limit alcohol from being served in the courtyard.
47. Mr Kallenbach stated that the Licensee commenced serving alcohol in March 2023, three months after its licence (**Licence**) was granted, to ensure it could be compliant with the onerous requirements of the LCR Act. He said that, because the courtyard structure is not waterproof or heated, it has been shut since April 2023 and will remain shut until September 2023 at the earliest.
48. Mr Kallenbach said that the Original Application recognised the mixed-use nature of the surrounding areas, balanced with the Licensee's own commercial aspirations, by self-imposing a restriction of opening until 10pm in the courtyard on three nights a week. He stated that the Licensee could not operate the courtyard as a beer garden under the Licence; did not seek to establish a party environment in the courtyard or use it for

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<sup>14</sup> Hearing Transcript, 11 July 2023, page 6, line 38.

private functions; and was not seeking to put live music or highly amplified music out there.

49. Mr Kallenbach stated that he could easily put another 10 seats in the courtyard if he chose to, but he likes the fact that it is spacious and putting another 10 seats there would put a lot of stress on his staff.

## Reasons for decision on review

### Issues for determination on review

50. In making its decision on review, the Commission must determine the following central issues:
- (a) firstly, whether the Commission is satisfied that the Predominant Activity Requirement is met;<sup>15</sup>
  - (b) secondly, whether the grant of a restaurant and cafe licence would detract from or be detrimental to the amenity of the area in which the Premises are situated;<sup>16</sup> and
  - (c) thirdly, whether the grant of a restaurant and cafe licence would be contrary to the objects of the LCR Act, in particular the object of harm minimisation.<sup>17</sup>
51. Each of these issues are discussed in turn.

### Whether the Predominant Activity Requirement is met

52. In applying for a restaurant and cafe licence, the Licensee must satisfy the Commission that the Predominant Activity Requirement is met — that is, that the predominant activity will at all times be the preparation and serving of meals to be consumed on the licensed premises.<sup>18</sup>
53. In the Original Application form, the Licensee relevantly stated as follows:

*Zeppelin Kitchen is first and foremost a food business. It is our intention that alcohol will be offered predominantly with food and not as a stand alone item. We do not seek to establish ourselves as a bar operation. Alcohol available for consumption will form a limited inventory and complement our meal offerings. Alcohol will not be offered for take*

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<sup>15</sup> LCR Act, section 9A(1).

<sup>16</sup> LCR Act, sections 44(2)(b)(i) and 47(2).

<sup>17</sup> LCR Act, sections 4 and 172D(3). The Commission notes that, in determining this matter, it has also considered each of the grounds set out in section 44(2).

<sup>18</sup> LCR Act, section 9A(1). See [31] above.

*away. All alcohol service will comply with the requirements of the [Commission]. In this regard, the liquor licence application is a natural extension of our business.*

...

*We recognise that the permit allows a maximum of 84 patrons at any one time, and that the sale and consumption of alcohol may only occur with seated table service and in conjunction with food service. This is inline with our focus on being a food business.*

54. In submissions to the Delegate dated 14 November 2022 and to the Commission on review received on 8 May 2023, Mr Kallenbach reiterated that the Premises is first and foremost a food business.
55. At the Second Hearing, Mr Kallenbach acknowledged that the courtyard could not be operated as a beer garden under the Licence.
56. Having considered all the materials before it, the Commission is satisfied that the Predominant Activity Requirement is met.

## Whether granting the application would detract from or be detrimental to the amenity of the area

57. An application may be refused under sections 47(2) and 44(2) if the grant of the licence would detract from or be detrimental to the amenity of the area in which the premises are situated.
58. The Applicants objected to the Original Application and the Review Application on the basis of amenity concerns, particularly regarding the noise from patrons and music in the courtyard.
59. Historically, “noise levels” was one of the factors listed in section 3A(2) that the Commission may take into account when determining whether the grant of a licence would detract from or be detrimental to the amenity of an area.
60. In 2018, an amendment to the LCR Act removed “noise levels” as a factor (along with references to parking facilities and traffic).<sup>19</sup> However, it is noted that the Minister’s second reading speech<sup>20</sup> and explanatory memorandum<sup>21</sup> in relation to this matter indicate that the rationale for removing these factors from section 3A(2) was to reduce duplication between the liquor licence and planning permit processes.<sup>22</sup> The removal of

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<sup>19</sup> *Liquor and Gambling Legislation Amendment Act 2018*, section 29 (effective 18 July 2018).

<sup>20</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 2018, 927 (Marlene Kairouz, Minister for Consumer Affairs, Gaming and Liquor Regulation) (**Second Reading Speech**).

<sup>21</sup> Explanatory Memorandum, Liquor and Gambling Legislation Amendment Bill 2018, 27 March 2018 (**Explanatory Memorandum**).

<sup>22</sup> Second Reading Speech, 928; Explanatory Memorandum, clause 29.

these factors is not intended to limit the Commission's ability to grant a licence that has conditions relating to parking, traffic or noise levels if it sees fit on the basis of its consideration of amenity.<sup>23</sup>

61. The Commission notes that the Council granted the Planning Permit to the Licensee, which allows the sale and consumption of liquor where there is a restaurant and cafe licence for the Premises. In advising the Commission that it did not object to the Original Application, the Council confirmed that it considered potential amenity impacts as part of the Licensee's application for the Planning Permit.
62. The Commission considers it appropriate to assess concerns regarding noise-related amenity so it can be satisfied that the amenity of the area would not be negatively impacted upon by the grant of the application. Having said that, because noise issues would have been considered by the Council as a part of the planning process, the Commission may place less weight on noise amenity concerns to reduce any possible duplication between the liquor licence and planning permit processes.
63. The Licence contains the following condition relating to music:
- (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 as part of a function that is held in an area of the premises that is set aside for the exclusive use of persons who have booked a table in that area and their guests, and is attended only by those persons and their guests.*
64. The Planning Permit includes the following condition (condition 7):
- No sound amplification equipment or loudspeakers are to be used for the purpose of announcement, broadcast, playing of music or similar purpose in the rear outdoor area.*
65. During the Second Hearing, Mr Kallenbach produced a copy of an email from the Council dated 21 July 2022 which provided the following explanation of condition 7 of the Planning Permit:
- Condition 7 of the planning permit relates to sound amplification equipment and loudspeakers and the context of the condition is to ensure that no excessively loud music is played within the rear outdoor area.*

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<sup>23</sup> Explanatory Memorandum, clause 29.

*I can confirm that this condition will not restrict the playing of background music and you will be able to ... continue playing background music within the rear outdoor area.*

66. The submissions lodged by Mr Kallenbach on 8 May 2023 included an analysis of sound levels he had recorded. Mr Kallenbach concluded that the sounds emitted from the courtyard are not the primary contributors to noise beyond the cafe and that the Applicants' concerns of noise have no basis. As stated above, the Licensee did not obtain an independent acoustic report.
67. At the hearings, the Applicants indicated that their primary concerns were around the courtyard operating as a beer garden or a late night function centre. The Commission notes that the Licence is a restaurant and cafe licence and the Predominant Activity Requirement has been met.<sup>24</sup> As such, the service of liquor on the Premises is only an additional activity. Further, under the trading hours currently permitted on the Licence, the courtyard must close at 6pm on Sunday to Wednesday (four nights a week) and 10pm on Thursday to Saturday (three nights a week).
68. The Commission accepts that, based on the interpretation in the Council's email of 21 July 2022, the Planning Permit allows music to be played in the courtyard. However, the Commission remains unconvinced that, on a strict interpretation of the wording of condition 7 of the permit, any use of amplification is permitted in the courtyard for the "playing of music" whether the level of such music is background or otherwise. The Commission brought this matter to the attention of Mr Kallenbach in the course of the Second Hearing,<sup>25</sup> but otherwise considers it to be an issue for the Council to resolve with Mr Kallenbach.
69. Mr Kallenbach submitted that the speakers in the courtyard have been purposely mounted to face away from residences and that an audio splitter is installed which sets the music at background level. This is consistent with the Commissioners' observations at the View.
70. The Commission notes that the Licensee supplied liquor in the courtyard between March and April 2023, and has plans to reopen the courtyard in September 2023 at the earliest. The Applicants acknowledged that, during the two months that the Licensee supplied liquor, the courtyard was "very quiet". This confirms that the courtyard can be operated in a way that does not cause undue detriment to the amenity of the area.

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<sup>24</sup> See [52]–[56] above.

<sup>25</sup> Hearing Transcript, page 11, line 16 to page 12, line 18.

71. At the Second Hearing, the Commission outlined the enforcement processes that are available to the Commission to ensure compliance with the Licence and the LCR Act. These enforcement processes include complaints and disciplinary actions. The Commission emphasised the very serious consequences if breaches are proven. Enforcement processes are also available to the Council to ensure compliance with the Planning Permit.
72. The Commission notes that the conditions of the Licence currently impose very significant restrictions on the operation of the courtyard:
  - (a) The maximum patron capacity is limited to 32 patrons, although there is space for at least 10 more patrons.
  - (b) Evening trade in the courtyard is only permissible three nights a week (Thursday to Saturday) and must end by 10pm. The courtyard must close by 6pm four nights a week (Sunday to Wednesday). By contrast, the remainder of the Premises may operate until 1am every night.
73. The Commission considers that the restrictions imposed by the Licence, together with the Planning Permit conditions, achieve a balance between the Applicants' rights as residents and the Licensee's commercial interests. This is especially so having regard to the Premises' location in a commercial zone. Ultimately, the Commission finds that the conditions imposed by the Delegate appropriately mitigate the risk of unreasonable noise impacting the amenity of the area.
74. The Commission invites the Licensee to consider obtaining an acoustic report in spring or summer once the courtyard has reopened as the report can provide a degree of assurance to the Licensee and the Applicants.

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

75. Although the Commission is satisfied that no grounds for refusal exist under sections 47(2) and 44(2), the Commission must still exercise its discretion whether or not to grant a restaurant and cafe 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>26</sup>
76. The Commission notes that Victoria Police did not raise any concerns in relation to harm.

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<sup>26</sup> LCR Act, sections 4, 47(3) and 172D(3).



77. With the imposition of the conditions made by the Delegate and reproduced in Appendix A, the Commission is satisfied that adequate controls 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 a licence in this instance would not be contrary to the LCR Act's object concerning harm minimisation.

## Decision on review

78. The Commission is satisfied that the Original Application meets all legislative requirements set out above. Accordingly, based on the reasons set out above, the Commission is satisfied that granting the licence the subject of the Original Application is appropriate in the circumstances.
79. The Commission has therefore determined to affirm the Original Decision and refuse the Review Application.

***The preceding 79 paragraphs are a true copy of the Reasons for Decision of Mr John Larkins (Deputy Chair), Mr James O'Halloran (Deputy Chair) and Ms Thu-Trang Tran (Commissioner).***

## Appendix A

### Type of licence

This licence is a restaurant and cafe 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 & cafe conditions

This licence is subject to the following conditions:

- (a) the predominant activity carried out at all times on the 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 as part of a function that is held in an area of the premises that is set aside for the exclusive use of persons who have booked a table in that area and their guests, and is attended only by those persons and their guests.

### 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.

### Maximum capacities

Rear Courtyard (32 patrons)      Overall maximum (84 patrons)

### Trading hours

Rear Courtyard -

Sunday to Wednesday      Between 7.30am and 6pm

Thursday to Saturday      Between 7.30am and 10pm

Trading hours on ANZAC Day must not commence before 12noon and must cease no later than the finishing times specified above.

In the remainder of the premises -

ANZAC Day      Between 12noon and 1am the following morning

On any other day      Between 7.30am and 1am the following morning

### Approvals/consents

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 Liquor Commission and shown on the approved plan during the hours specified under "Trading Hours" for consumption on those premises.

Victorian Liquor Commission