


## Decision and reasons for decision

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* by Airport Retail Enterprises Pty Ltd for an internal review of a decision by a delegate to refuse to grant an application for an on-premises licence for premises trading as Hungry Jack's, located at Terminal 1, Tenancy AS-15, Melbourne Airport, Tullamarine

<b>Commission:</b>	Ms Danielle Huntersmith, Chair Mr John Larkins, Deputy Chair Mr James O'Halloran, Deputy Chair Mr Steven Brnovic, Commissioner
<b>Appearances:</b>	Mr Peter J Haag, Counsel for the Applicant, instructed by Mr Terence O'Brien of Brand Partners Commercial Lawyers Ms Lydia Taylor-Moss, Counsel Assisting the Commission
<b>Date of Hearing:</b>	<b>26 September 2023</b>
<b>Date of Decision:</b>	<b>15 March 2024</b>
<b>Date of Reasons:</b>	<b>15 March 2024</b>
<b>Decision:</b>	The Commission has determined to affirm the decision of the Delegate and refuse the application
<b>Signed:</b>	 <b>Danielle Huntersmith, Chair</b>

## Background

### Original Application

1. On 2 February 2023, Airport Retail Enterprises Pty Ltd (**Applicant**) applied to the Victorian Liquor Commission (**Commission**) under the *Liquor Control Reform Act 1998* (**LCR Act**)<sup>1</sup> for an on-premises licence for the premises located at Terminal 1, Tenancy AS-15, Melbourne Airport, Tullamarine (**Premises**) trading as Hungry Jack's (**Original Application**).
2. The red line plan lodged by the Applicant (**Original Red Line Plan**) depicts the Premises as the service counters (food counter, coffee counter and bar counter), kitchen and other back-of-house areas. In the Original Red Line Plan, there are no seats or other customer areas within the defined red line area.
3. The Applicant sought to supply liquor to be consumed in an adjoining food court,<sup>2</sup> which it would share with adjacent Tenancy AS-14 trading as "Jiro Sushi Express" which is also operated by the Applicant. Before the Original Application was determined, the Applicant initially sought approval to allow unaccompanied minors on the Premises.<sup>3</sup>
4. The Applicant sought the following trading hours:

Sunday	Between 10am and 11pm
Good Friday and ANZAC Day	Between 12 noon and 11pm
On any other day	Between 5:30am and 11pm
5. The Applicant currently operates 12 other licensed premises at the Melbourne Airport, comprising eight restaurant and cafe licences, three on-premises licences with food court approval and one general licence.
6. In accordance with section 33 of the LCR Act,<sup>4</sup> a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector<sup>5</sup> (together, **Victoria Police**) and Australia Pacific Airports (Melbourne) Pty Ltd (**Airport-Lessee Company**) on 17 February 2023. On 27 February 2023, Victoria Police advised that it

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

<sup>2</sup> As to food court approval, see section 9(1)(c). See [30] below.

<sup>3</sup> As to underage approval, see section 120(2)(e). See [34] below.

<sup>4</sup> As modified by *Airports (Control of On-Airport Activities) Regulations 1997* (Cth), schedule 1, part 2.

<sup>5</sup> As to the meaning of "licensing inspector", see section 3(1).

did not object to the Original Application. The Airport-Lessee Company also did not object to the Original Application.

7. On 23 February 2023, Mr Bruce Lowe of PAJ Liquor Licensing provided the following submission on behalf of the Applicant in relation to the requested food court approval:

*The venue does not have any seating available for patrons within the venue. There are numerous seats available within the Food Court Centre. The Food Court is to [be] 'shared; between this venue, Jiro Sushi, and Hungry Jacks. Demarcation will take place by using screening across the front the Food Court. The licence requires all persons involved in the sale of liquor to have completed the RSA and it is staff responsibilities to manage the Food Court. The area is relatively small and can be monitored by staff.*

*The venue will serve beer, wine and spirits within the Food Court area.*

8. On 3 March 2023, Mr Lowe provided a copy of a letter to the Applicant from Ms Jodie Townley, Franchise Business Leader, Hungry Jack's central management. The letter confirms that Hungry Jack's gives the Applicant authority to serve alcohol at the Premises, subject to the responsible service of alcohol and the implementation of Hungry Jack's policies and procedures.

9. On 8 March 2023, Mr Lowe provided a further submission:

*The premises will not have any underage persons (or any one else) entering the licensed area, as there are no seats allocated for the restaurant or any place outside the counter that is authorised. Only behind the counter is authorised.*

*I have recently obtained two liquor licenses for the food court within 108 Bourke St, Melbourne and an area at the airport and was not asked about people attending the food court. I can understand that the seating area of the restaurant requires an Underage authority but not somewhere that doesn't have patrons attending the restaurant.*

*The fact that it is named Hungry Jacks Within the Airport [sic] and sells hamburgers and drinks, does not necessarily mean that persons attending the restaurant cannot buy a beer with their hamburger (assuming they are over 18 years)*

*Minors may enter the non authorised area (the cashiers) but will not enter the licensed area. You have asked for the owners (Hungry Jacks) to provide a letter stating they may serve liquor which has been provided and now I am required to advise the underage patrons that may attend the licensed area, this will not happen.*

*I have never had to advise the Underage authority within a Food Court area that may be frequented by underage patrons.*

*The manager and staff are present behind the counter and can monitor the area and customers that attend the premises and it should be noted that there are no seats within the premises. They have the RSA and individual training and will monitor who they sell liquor to.*

*The only details that have impacted this application is the fact that the premises has a business name as Hungry Jack Within the Airport [sic].*

## Original Decision

10. On 10 May 2023, a delegate of the Commission (**Delegate**) refused to grant the Original Application because the application was not made in accordance with the objects of the LCR Act (**Original Decision**).
11. The Delegate was not satisfied that permitting the supply of liquor from a Hungry Jack's premises would contribute to the responsible development of the liquor and hospitality industries and be in line with community expectations.
12. The Delegate was also not satisfied that permitting the supply of liquor would contribute to the minimisation of harm in light of the Applicant's responses regarding their strategies to approach the issue of unaccompanied minors on the Premises.

## Application for Internal Review

13. On 2 June 2023, the Applicant applied for an internal review of the Original Decision (**Review Application**). The Applicant provided the following reasons for applying for review of the Original Decision:
  - (a) The Delegate erred in characterising a liquor licence as a precedent. Every liquor licence application must be considered on its merits.
  - (b) The Delegate misconstrued the words "The manager"<sup>6</sup> to mean "a manager" holding an RSA may be on the licensed premises to monitor the sale and supply of liquor.
  - (c) The Delegate erroneously concluded that the architecture of the Premises will enable unaccompanied minors to enter upon the licensed premises at the point of sale.
  - (d) The Delegate erroneously concluded that persons under the age of 18 will have control of the supply and consumption of liquor.
  - (e) The Delegate erroneously concluded that minors and an unidentifiable class of individuals will be served liquor contrary to the law.

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<sup>6</sup> See [9] above.

## Legislation and the Commission's task

### The Commission's internal review power

14. 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.
15. 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>
16. 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

17. Under the LCR Act, an application for the grant 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>
18. 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").

19. Section 44(2) empowers the Commission to refuse to grant the Review Application on various grounds, including that the granting of the application would be conducive to or encourage harm.<sup>11</sup>

### Exercising the internal review power

20. 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.*

21. 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>12</sup>

22. 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*

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<sup>11</sup> LCR Act, section 44(2)(b)(ii).

<sup>12</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).

(c) *anti-social behaviour, including behaviour that causes personal injury or property damage.*

23. In exercising the internal review power, the Commission:
  - (a) must consider all the information, material and evidence before the original decision maker;<sup>13</sup> and
  - (b) may consider further information, material or evidence.<sup>14</sup>
24. 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.
25. Under section 49, the Commission may impose any condition it thinks fit on the grant of an application.

### Conduct of an inquiry

26. 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.
27. 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

#### On-premises licences

28. Pursuant to section 9(1)(a), an on-premises licence authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises: during ordinary trading hours (as defined in section 3(1)); between 11pm on any particular day until 1am on the following day; and during a period before ordinary trading hours if specified on the licence.

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<sup>13</sup> LCR Act, section 157(2).

<sup>14</sup> LCR Act, section 157(3).

29. “Ordinary trading hours” for an on-premises licence is defined in section 3(1) to mean:
- (i) *the hours between 7 a.m. and 11 p.m. on each day, other than Sunday, Good Friday or ANZAC Day; and*
  - (ii) *the hours between 10 a.m. and 11 p.m. on Sunday; and*
  - (iii) *the hours between 12 noon and 11 p.m. on Good Friday and ANZAC Day.*
30. Section 9(1)(c) provides that an on-premises licence authorises the licensee to supply liquor in an open container for consumption in a food court next to, or near, the licensed premises, if specially authorised by the Commission (**Food Court Approval**).
31. Section 3(1) defines “food court” to mean “an area set aside on a retail premises for the consumption of food or drink by the customers of premises used for the sale of food or drink that are next to, or near, the area”.

### Allowing minors on licensed premises

32. Division 2 of part 8 of the LCR Act (section 119 to section 125) sets out a number of offences relating to underage drinking.
33. Under section 120(1), a licensee commits an offence if a person under the age of 18 years is on licensed premises and is not:
- (a) in the company of a responsible adult; or
  - (b) on the premises for the purpose of partaking of a meal; or
  - (c) in the case of a licence under which accommodation is provided, a resident of those premises.
34. Section 120(2) provides some exceptions to this offence, including that a person under the age of 18 years may be present on licensed premises:
- (a) in accordance with the approval of the Commission and any conditions to which that approval is subject (section 120(2)(e)); or
  - (b) if the licence is a restaurant and cafe licence (section 120(2)(d)(ii)).

### Material before the Commission

35. 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 10 May 2023;
  - (b) Review Application received on 2 June 2023;
  - (c) email communication received from Mr Terence O'Brien on behalf of the Applicant on 28 June 2023 and attached photographs;
  - (d) email communication received from Mr O'Brien on behalf of the Applicant on 24 July 2023;
  - (e) email communication received from Mr O'Brien on behalf of the Applicant on 1 August 2023;
  - (f) email communication received from Mr O'Brien on behalf of the Applicant on 23 August 2023;
  - (g) affidavit of Mr John Chapman affirmed on 6 September 2023;
  - (h) affidavit of Mr David Yallouz affirmed on 8 September 2023;
  - (i) affidavit of Mr O'Brien sworn on 8 September 2023;
  - (j) email communications received from Mr O'Brien on behalf of the Applicant on 12 September 2023;
  - (k) email communication received from Mr O'Brien on behalf of the Applicant on 19 September 2023;
  - (l) affidavit of Mr Nik Malesevic affirmed on 22 September 2023;
  - (m) submissions and evidence presented at the hearing of the Review Application on 26 September 2023;
  - (n) written submissions on behalf of the Applicant dated 3 October 2023; and
  - (o) alternative red line plan received on 4 October 2023.
36. The Commissioners viewed the Premises variously on 8 August, and 24 and 27 November 2023.

### Hearing

37. A hearing was held in relation to the Review Application on 26 September 2023 (**Hearing**). Mr Peter Haag of Counsel appeared on behalf of the Applicant, instructed by

Mr Terence O'Brien of Brand Partners Commercial Lawyers. Mr David Yallouz, general manager food & beverage operations for the Applicant; Mr John Chapman, chief executive officer of the Applicant; and Mr Nik Malesevic, franchise business leader for Hungry Jack's Australia, gave evidence for the Applicant.

### Mr Yallouz's evidence

38. Mr Yallouz stated that the Premises "from the outset is a totally different venue from a normal Hungry Jacks".<sup>15</sup> That was said to be because:
- (a) The Premises is located in the upgraded Terminal 1 at Melbourne Airport, which is a high-end environment.<sup>16</sup>
  - (b) The Premises is located airside in a safe environment. Customers have passed through security, there is CCTV in the venue and the adjacent concourse, and security officers and police walking nearby.<sup>17</sup>
  - (c) The signage is not the typical yellow and red signage, it is a very high-end fit-out and there is no mention of Hungry Jack's.<sup>18</sup>
39. Mr Yallouz stated that the Applicant branding the Premises as "HJ's" separated it from an average Hungry Jack's in recognition that there might be a public expectation that an average Hungry Jack's should not have a liquor licence.<sup>19</sup>
40. Mr Yallouz said that the food at HJs is the same as Hungry Jack's, although pricing is more expensive at HJ's because of its location at the airport. He accepted that there are similarities between HJ's and Hungry Jack's in terms of the logos, slogans, same uniforms and "Jack's Cafe". Mr Yallouz said that food packaging at the Premises was the same as in other Hungry Jack's stores, including for children's meals.<sup>20</sup>
41. Mr Yallouz stated that, from what he has seen, people at the airport, especially those flying domestically, do not have time to sit and drink a lot of alcohol. He said that, in 13 years working for the Applicant, he has never seen an intoxicated person at the airport.<sup>21</sup>

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<sup>15</sup> Hearing transcript, page 11, line 19 to line 20.

<sup>16</sup> Hearing transcript, page 11, line 19 to page 12, line 7.

<sup>17</sup> Hearing transcript, page 11, line 19 to page 12, line 7.

<sup>18</sup> Hearing transcript, page 12, line 9 to line 18.

<sup>19</sup> Hearing transcript, page 40, line 5 to line 27.

<sup>20</sup> Hearing transcript, page 41, line 22 to page 43, line 12; page 55, line 24 to line 33.

<sup>21</sup> Hearing transcript, page 12, line 30 to line 38; page 23, line 24 to line 28.

42. Mr Yallouz gave evidence on the Applicant's responsible service of alcohol systems. He said that the Applicant will employ an RSA marshal on the floor, in addition to a duty manager, assistant manager, and food and beverage attendants, who will all be RSA compliant. He also said that staff could call food and beverage managers (such as Mr Yallouz), airport security officers who are stationed 20 metres away and the airport coordination centre if needed. He stated that all staff will have RSA training, including in relation to minors, and that there will be ongoing spot quizzes. He said the Applicant's managers are very experienced.<sup>22</sup>

43. Mr Yallouz described the role of the RSA marshal as follows:

*So obviously monitoring alcohol consumption in the venue, seeing what people are drinking; speaking to customers, if necessary; speaking to staff, if necessary; monitoring the flow of patrons moving in and out of the venue at the entry point; monitoring, in case minors do come in unaccompanied as well; intoxication, if anyone is showing signs; monitoring the amount of consumption; liaising with Melbourne — sorry, liaising with security, if need be, or the coordination centre if it gets that far, or security, or [Victoria Police], if it gets that far; liaising with me, liaising with my food and beverage managers; and liaising with, obviously, the most importantly the staff in the venue and the bar person or people as well.*

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*[T]hey won't have another manager role. And we'll need more than one, obviously, because of the seven-day operation and the length of hours. So we'll have a number of our staff put into this position on a full-time basis. So they won't be serving fries, and they won't be serving in the bar: they'll be monitoring the floor and monitoring the door and monitoring all those points I just mentioned previously.<sup>23</sup>*

44. Mr Yallouz said that the Applicant did not employ RSA marshals in its other venues. He said that the HJ's RSA marshal would govern the entire food court area, which encompasses Jiro Sushi as well.<sup>24</sup>

45. Mr Yallouz stated that patrons will only be able to order alcohol at the bar point of sale area; they will not be able to order alcohol at the free-standing automated kiosks or at the food and drink point of sale or the cafe area. He said that only alcohol could be ordered from the bar. He said that only one staff person will be required in the bar to start. He further said that, if more staff were required in the bar going forward, one person would take an order, make the drink and hand it over, to allow the Applicant to know

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<sup>22</sup> Hearing transcript, page 13, line 1 to line 24; page 14, line 15 to line 42; page 23, line 16 to line 23.

<sup>23</sup> Hearing transcript, page 20, line 27 to line 35; page 21, line 1 to line 5.

<sup>24</sup> Hearing transcript, page 53, line 1 to line 16.

who is drinking what and how much.<sup>25</sup> He confirmed that patrons could order alcohol without food, just like “any bar at the airport”.<sup>26</sup>

46. Mr Yallouz said that unaccompanied minors would be asked for ID at the door by the RSA marshal if it was perceived they were under 18 and that there would be signage outside the Premises advising minors could not enter the Premises. He also said that minors would have to be accompanied by an adult to order a burger, as set out in the Applicant’s standard operating procedures for the Premises. He stated that minors were currently permitted to be unaccompanied on the Premises as the Applicant does not have a licence and that there had been an extremely limited number of unaccompanied minors. He confirmed that Jiro Sushi does not have an underage permission and that the same signage advising minors could not enter the Premises was currently displayed in the venue, but not outside.<sup>27</sup> The Commission notes that this evidence is inconsistent with the evidence of Mr Chapman (see paragraph 54 below), who said that there was an error in the standard operating procedures for this premises, and in fact unaccompanied minors could be present and order meals by themselves either from the kiosks or at the food counter.
47. Mr Yallouz stated that the Applicant has removed all toys from any packs. He said that, if need be, they give customers an upgrade of drink or fries to satisfy any disappointment for not getting a toy and that there had not been any major complaints. He confirmed that no children’s meals will be advertised behind the counter, although they will be available for purchase. He said that toys were removed on a permanent basis.<sup>28</sup>
48. Mr Yallouz gave evidence as to the layout of the Premises. He stated that the kiosks and a screen above the kiosks temporarily depicts the Hungry Jack’s logo and this will be changed to depict the letters “HJs” in a bun if the licence is granted. He said that about five tables placed in an area with a different fit-out were for the adjoining Premises, Jiro Sushi, which the Applicant also operates. He stated that the drinks and glassware would differ for the Premises and Jiro Sushi so staff will know which venue the products have come from. He said that the Applicant has complete control over the food court area pursuant to its lease, including power to exclude any persons at the Applicant’s

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<sup>25</sup> Hearing transcript, page 13, line 28 to line 35; page 53, line 17 to page 54, line 10.

<sup>26</sup> Hearing transcript, page 22, line 27 to line 31.

<sup>27</sup> Hearing transcript, page 44, line 8 to page 50, line 1.

<sup>28</sup> Hearing transcript, page 15, line 14 to line 18; page 16, line 31 to page 17, line 5; page 50, line 2 to page 51, line 1.

discretion. He said that the RSA marshal and staff will have power to supervise the entire food court area.<sup>29</sup>

49. Mr Yallouz confirmed that the Original Red Line Plan does not include any area in the food court and that patrons would not enter the red line area.<sup>30</sup>
50. Mr Yallouz confirmed that, if the licence was granted, it would state that the Applicant was trading as “Hungry Jack’s”.<sup>31</sup>

### Mr Chapman’s evidence

51. Mr Chapman gave evidence that the Applicant’s initial proposal to the Melbourne Airport was for a standard Hungry Jack’s. He said that, when that proposal was rejected, he reimagined his plans to include the supply of liquor and the branding of the Premises as “HJ’s” instead of “Hungry Jack’s”. He said that the Premises not looking like a Hungry Jack’s was the most critical element for Melbourne Airport.<sup>32</sup>
52. Mr Chapman said that he thought the Applicant had designed an outlet that does not present like a local fast-food outlet at a shopping centre. He stated that he wanted people to recognise the Premises as a Hungry Jack’s store, albeit a different kind of Hungry Jack’s store. He agreed that the HJ’s logo was evocative of the Hungry Jack’s logo, and said that the slogans on the walls of the Premises were used in some other Hungry Jack’s stores and that “Jack’s Cafe” had been introduced in about 80% of Hungry Jack’s stores.<sup>33</sup>
53. Mr Chapman stated that the Applicant planned to serve customers who are dining in food on unmarked plates and drinks in unmarked glassware instead of the traditional paper packaging. He said that this was partially to do with liquor licensing, partially for environmental reasons and partially so that the area looks better. He clarified that customers would still be able to order takeaway which would be served in standard Hungry Jack’s packaging. He said that the Applicant was not providing toys on a trial basis and that he had no intention of providing toys regardless of the success of the Review Application.<sup>34</sup>

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<sup>29</sup> Hearing transcript, page 27, line 1 to page 28, line 17; page 31, line 2 to line 14; page 32, line 11 to page 34, line 17; page 35, line 16 to page 36, line 33.

<sup>30</sup> Hearing transcript, page 52, line 7 to line 15.

<sup>31</sup> Hearing transcript, page 52, line 16 to line 22.

<sup>32</sup> Hearing transcript, page 62, line 17 to page 63, line 14.

<sup>33</sup> Hearing transcript, page 68, line 34 to line 37; page 79, line 4; page 85, line 23 to page 86, line 34.

<sup>34</sup> Hearing transcript, page 63, line 36 to page 64, line 16; page 74, line 3 to page 75, line 18.

54. Mr Chapman said that the direction in the Premises' standard operating procedures that minors must be accompanied was an error on his behalf. He said that unaccompanied minors would be served in the same way as other customers. He said that the following safeguards would be in place to ensure minors did not consume alcohol on the premises: all staff would have RSA training; all employees would be over the age of 18 due to airport security requirements; there would be an RSA marshal; the Applicant would follow standard protocols and procedures attached to liquor licensing laws; and food could not be ordered at the same point of sale as alcohol. He said that unaccompanied minors airside at an airport were generally unusual and that minors who were flying unaccompanied were generally segregated from other passengers, not just wandering around the terminal. He later accepted that it was possible that minors may come onto the Premises unaccompanied, even if they were not travelling unaccompanied.<sup>35</sup>
55. Mr Chapman stated that the Applicant held a sub-lease for the food court area, including the area within the Jiro Sushi premises. He said that the Applicant had the capacity to exclude customers who are behaving in an unsatisfactory way from that whole area.<sup>36</sup>
56. Mr Chapman said that he had no intention of introducing alcohol at the Applicant's Hungry Jack's franchise at Sydney Airport because that outlet is in a food court environment that has multiple outlets around it, and those businesses were not designed to monitor and accept alcohol in them.<sup>37</sup>

### Mr Malesevic's evidence

57. Mr Malesevic described Hungry Jack's as a quick-service restaurant. He said that their high-use customers are generally 18- to 35-year-old males.<sup>38</sup>
58. Mr Malesevic said that there were brand standards concerning how Hungry Jack's franchises can look and he did not see Hungry Jack's Australia approving another restaurant that looks like the HJ's store. He confirmed that Hungry Jack's Australia did not require the Premises to display Hungry Jack's slogans. He stated that some stores have playgrounds.<sup>39</sup>

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<sup>35</sup> Hearing transcript, page 64, line 19 to page 66, line 27; page 73, line 23 to line 26.

<sup>36</sup> Hearing transcript, page 66, line 28 to line 35.

<sup>37</sup> Hearing transcript, page 77, line 28 to line 37.

<sup>38</sup> Hearing transcript, page 90, line 14 to line 16; page 94, line 23 to page 95, line 5.

<sup>39</sup> Hearing transcript, page 90, line 28 to page 91, line 14; page 95, line 11 to line 14; page 97, line 3 to line 17.

59. Mr Malesevic said that the Premises would not look like any other Hungry Jack's store if all the normal Hungry Jack's logos were removed. However, he stated that the menu items were distinctive enough that customers would know that the Premises was a Hungry Jack's store and agreed that customers may see the HJ's logo and think the Premises is a Hungry Jack's store. He acknowledged that the slogans on the walls of the Premises and "Jack's Cafe" were in other stores. He said that most of the standard packaging used at the Premises contains the Hungry Jack's logo. He stated that Hungry Jack's Australia would not specifically advertise for HJ's and that the Premises would participate in the same promotions as other Hungry Jack's stores.<sup>40</sup>
60. Mr Malesevic said that he had not heard of anyone else wanting to introduce liquor at a Hungry Jack's store. He stated that he could not see other Hungry Jack's stores seeking to supply liquor.<sup>41</sup>
61. Mr Malesevic confirmed that Hungry Jack's had not received any negative customer feedback during the trial period of not providing toys with kids' meals at the Premises and that he did not see any reason that Hungry Jack's Australia would revoke the Applicant's permission not to give toys.<sup>42</sup>

### **Applicant's submissions**

62. At the Hearing, Mr Haag submitted on behalf of the Applicant that there was a synergy between the commercial interests of the Applicant, Melbourne Airport and Hungry Jack's on one hand, and the advancement of the objects of the LCR Act on the other hand. In particular, he said that those entities have a vested interest in compliance with the law, which was reflected in the organisational arrangements for monitoring the responsible service of alcohol as well as the lease requiring compliance with the law.<sup>43</sup>
63. Mr Haag contended that the Applicant's concept for the Premises is to be viewed as a discrete operation within a unique setting in Terminal 1 at Melbourne Airport, which stands apart from ordinary fast-food outlets. That was said to be because the Premises formed part of the upgrade of Terminal 1, which sought to elevate the general perception of the nature and quality of the services provided at that terminal in terms of aesthetics,

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<sup>40</sup> Hearing transcript, page 95, line 30 to page 96, line 31; page 101, line 11 to line 31.

<sup>41</sup> Hearing transcript, page 89, line 16 to line 19; page 90, line 19 to line 27.

<sup>42</sup> Hearing transcript, page 89, line 30 to line 35; page 91, line 17 to page 92, line 12.

<sup>43</sup> Hearing transcript, page 2, line 30 to line 37; page 3, line 18 to page 4, line 12.

operations and the brands offered. Mr Haag argued that the high turnover of clientele at the airport also distinguishes the Premises from typical licensed premises which encourage customers to linger.<sup>44</sup>

64. Mr Haag acknowledged that licensing an ordinary fast-food premises, such as a standard Hungry Jack's, may conflict with some of the objects of the LCR Act, such as responsible development of the liquor industry and community expectations. He submitted that the Premises were purposefully different (visually, operationally and experientially) from other Hungry Jack's restaurants and fast-food operations because the Premises are a high-end store located airside at the Melbourne Airport.<sup>45</sup>
65. Mr Haag made a distinction between the community of travellers at the airport and the broader community. He submitted that community expectations as to what was available at Hungry Jack's on the airside of the airport security barrier was distinguishable from community expectations as to what would be available at Hungry Jack's in the community.<sup>46</sup>
66. Mr Haag contended that granting a licence for the Premises would not be a precedent to grant a licence to other Hungry Jack's stores.<sup>47</sup>

### Written submissions

67. The Applicant was provided an opportunity to lodge written submissions following the Hearing in relation to whether section 9 of the LCR Act permits the grant of an on-premises licence where no liquor will be supplied for consumption on the Premises.<sup>48</sup>
68. The Applicant submitted that an on-premises licence with Food Court Approval was the only applicable licence for the supply of liquor for consumption in a food court area during the hours sought by the Applicant. It contended that the other licence type which allows for Food Court Approval — namely, a late night (on-premises) licence — was inappropriate because the Applicant proposed to supply liquor until 11pm. It also contended that a general licence was not appropriate because it would permit roaming consumption of liquor in the Melbourne Airport.

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<sup>44</sup> Hearing transcript, page 2, line 37 to page 3, line 18.

<sup>45</sup> Hearing transcript, page 4, line 14 to page 5, line 36; page 6, line 27 to page 7, line 8; page 104, line 27 to page 106, line 41.

<sup>46</sup> Hearing transcript, page 102, line 12 to line 44.

<sup>47</sup> Hearing transcript, page 103, line 28 to line 45.

<sup>48</sup> As to section 9, see [28]–[30] above.



69. The Applicant argued that section 9(1)(c) is not intended to require the supply of liquor for consumption on the Premises as a pre-condition to authorisation for supply of liquor for consumption in a food court.
70. In any event, the Applicant submitted that supply for consumption on the Premises would occur during the ordinary course of business in the following circumstances:
- (a) patrons consuming their alcoholic drink at the bar; for instance, passengers in transit who want to stretch their legs during the stopover in Melbourne and do not want to sit after a flight;
  - (b) bar staff tasting liquor for freshness and suitability for supply prior to supplying to customers; for instance, tasting open bottles of wine to determine whether they have spoiled, and tasting tap beer where there has been an issue with the beer system pouring properly or a customer says that the beer does not taste right and the staff member needs to taste the beer to ensure fitness for service;
  - (c) tasting alcohol that has been the subject of a quality complaint, or a complaint that an order was not properly met (for example, where the varietal of wine served is in dispute); and
  - (d) staff consuming a non-gratuitous “knock off” drink at half-price staff discount at the conclusion of their shift in the back-of-house area.
71. The Applicant provided an alternative red line plan in the event the Commission rejects the Applicant’s submissions (**Alternative Red Line Plan**). That red line plan encompasses a table and 10 seats directly in front of the bar counter.

## Reasons for decision on review

### Issues for determination on review

72. 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) whether the Review Application meets the requirements in section 9;

- (b) whether granting the Review Application would be conducive to or encourage harm,<sup>49</sup> or contribute to harm minimisation;<sup>50</sup>
- (c) whether granting the Review Application would facilitate the development of a diversity of licensed facilities reflecting community expectations;<sup>51</sup> and
- (d) whether granting the Review Application would contribute to the responsible development of the liquor, licensed hospitality and live music industries.<sup>52</sup>

73. Each of these issues are discussed in turn.

### Whether the Review Application meets the requirements in section 9

74. As set out above, section 9 provides that an on-premises licence authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises and may authorise the licensee to supply liquor in an open container for consumption in a food court next to, or near, the licensed premises, if specifically authorised by the Commission.<sup>53</sup>
75. Having regard to the text, context and purpose of section 9, the Commission considers that an on-premises licence must authorise the supply of liquor for consumption on the licensed premises, whereas the supply of liquor for consumption in a food court is at the Commission's discretion. Consequently, in the Commission's opinion, the grant of an on-premises licence requires that there must be a possibility for some patrons to be able to consume liquor on the premises.
76. Based on the Original Red Line Plan, the Commission is not satisfied that patrons consuming liquor at the bar constitutes consumption on the Premises. That is because the Original Red Line Plan encompasses the service counters (food counter, coffee counter and bar counter), kitchen and other back-of-house areas, but excludes where patrons stand at the service counters. Similarly, the Commission is not satisfied that staff consuming a non-gratuitous "knock off" drink in the back-of-house area would entail the Applicant supplying that liquor to staff for consumption on the Premises, in

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<sup>49</sup> LCR Act, section 44(2)(b)(ii). The Commission notes that, in determining this matter, it has also considered each of the grounds set out in section 44(2).

<sup>50</sup> LCR Act, sections 4(1)(a) and 172D(3).

<sup>51</sup> LCR Act, sections 4(1)(b) and 172D(3).

<sup>52</sup> LCR Act, sections 4(1)(c) and 172D(3). The object relating to sexually explicit entertainment in section 4(1)(d) is not relevant to this Review Application.

<sup>53</sup> See [28]–[30] above.

circumstances where ordinary patrons are not able to consume any liquor on the Premises.

77. Finally, the Commission is not satisfied that staff tasting any liquor for quality assurance purposes would entail the Applicant supplying that liquor to staff, within the meaning of section 3(1).<sup>54</sup>
78. For the above reasons, the Commission finds that section 9 does not permit an on-premises licence to be granted in respect of the Original Red Line Plan. The Commission accepts that the Alternative Red Line Plan is permissible and will determine the Review Application on the basis of the Alternative Red Line Plan.

**Whether granting the Review Application would be conducive to or encourage harm, or contribute to harm minimisation**

79. An application may be refused if granting the application would be conducive to or encourage harm.<sup>55</sup> In addition, the Commission must exercise its discretion whether or not to grant a licence with regard to the objects of the LCR Act, particularly the primary object of harm minimisation.<sup>56</sup>
80. The Commission considers the Applicant's application for an on-premises licence with Food Court Approval to be artificial for the following reasons:
- (a) The Premises comprises the whole of Tenancy AS-15 leased by the Applicant, which includes the area within the proposed red line plan as well as some or all of the proposed food court. Any part of the proposed food court which does not fall within the Premises, falls within the adjoining Tenancy AS-14 which is also leased by the Applicant. Accordingly, the Applicant exclusively controls the proposed "food court" and the eateries next to it, including power to exclude any persons at its discretion.<sup>57</sup>
  - (b) Although the proposed food court has been fitted out to distinguish it from the seating placed within the red line plan for Jiro Sushi, that fit-out incorporates multiple "HJ's" logos and Hungry Jack's slogans. This gives the appearance of the proposed food court being HJ's premises.

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<sup>54</sup> Supply is defined in section 3(1) to include "sell, offer or expose for sale, exchange, dispose of and give away".

<sup>55</sup> LCR Act, section 44(2)(b)(ii).

<sup>56</sup> LCR Act, sections 4 and 172D(3).

<sup>57</sup> Hearing transcript, page 31, line 5 to line 14; page 66, line 28 to line 35. See [48], [55] above.

- (c) The Original Red Line Plan does not include any area for patrons to consume liquor. While the Alternative Red Line Plan carves out a space where patrons could consume liquor, it is not clear how the Applicant would prevent unaccompanied minors from crossing into this area.
81. Further, the Commission finds that it cannot authorise the Applicant to supply liquor in an open container for consumption in the proposed food court pursuant to section 9(1)(c).<sup>58</sup> That is because, for the reasons set out at paragraphs 80(a) and (b) above, the proposed food court forms part of the Premises. It is therefore not “next to, or near,” the Premises consistent with section 9(1)(c) and the definition of “food court” in section 3(1).<sup>59</sup>
82. In any event, if the proposed food court satisfies section 3(1), granting Food Court Approval over the area instead of including it within the Premises would lessen the Applicant’s obligations under the LCR Act in respect of that space. This is so even if the Applicant intends to employ an RSA marshal to monitor the area. For this reason, the Commission is not satisfied that granting Food Court Approval would ensure that adequate controls existed over the supply and consumption of liquor within the Applicant’s leased area.
83. Minors have an elevated risk of harm from the misuse and abuse of alcohol. This is recognised by the LCR Act in the definition of harm<sup>60</sup> and in the dedication of an entire division to offences relating to underage drinking, including the offence of allowing minors on licensed premises.<sup>61</sup> The risks posed to minors include the possibility that they will purchase liquor from the Applicant (primary supply), that they will obtain alcohol from adult patrons (secondary supply) and that they will be exposed to risks associated with being unsupervised in an adult environment.
84. The Commission accepts that the Applicant has proposed sufficient measures to mitigate the risks associated with the primary supply of alcohol to minors at the Premises.
85. While the proposed service of liquor at the Premises has been separated from the service of food and other drinks, there is no proposed separation between areas where

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<sup>58</sup> See [30] above.

<sup>59</sup> See [31] above.

<sup>60</sup> LCR Act, section 3(1). See [22] above.

<sup>61</sup> LCR Act, part 8, division 2. See [32]–[34] above.

alcohol would be consumed and where food and non-alcoholic drinks would be consumed (i.e., there are no barriers identifying the red line area and assisting in the control of the licensed area to prevent unaccompanied minors from entering). Even if the Alternative Red Line Plan is endorsed, the Applicant has not offered any physical barriers or procedures for ensuring that minors do not enter the red line area. For this reason, the Commission is not satisfied that the Applicant will have in place adequate controls to prevent the secondary supply of liquor to minors or the exposure of minors to an alcohol environment.

86. The risks of harm to minors from the misuse and abuse of alcohol is increased for an on-premises licence compared to a restaurant and cafe licence. That is because the predominant activity carried out at all times on restaurant and cafe licensed premises is the preparation and serving of meals to be consumed on the licensed premises.<sup>62</sup> By contrast, as acknowledged by Mr Yallouz, if the Applicant were granted an on-premises licence for the Premises, patrons could order alcohol without food, just like “any bar at the airport”.<sup>63</sup>
87. Hungry Jack’s is an iconic fast-food brand with particular appeal to underage persons. As conceded by Mr Haag for the Applicant, licensing an ordinary fast-food premises, such as a standard Hungry Jack’s store, may conflict with some of the objects of the LCR Act.<sup>64</sup> The Commission considers it would also expose minors to an increased risk of harm.
88. The Commission acknowledges that the Premises has been fitted out such that it does not have the traditional appearance of a standard Hungry Jack’s store. Nonetheless, the Premises offers an identical menu to other Hungry Jack’s stores in the same takeaway packaging, using the same slogans, the same uniform, a very similar logo and the same branding for its cafe (“Jack’s Cafe”).<sup>65</sup> Indeed, Mr Chapman stated that he wanted people to recognise the Premises as a Hungry Jack’s store,<sup>66</sup> and Mr Yallouz confirmed that the licence, if granted, would state that the Applicant was trading as “Hungry

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<sup>62</sup> Section 9(1)(a).

<sup>63</sup> Hearing transcript, page 22, line 27 to line 31. See [45] above.

<sup>64</sup> Hearing transcript, page 4, line 14 to page 5, line 36. See [64] above.

<sup>65</sup> Hearing transcript, page 41, line 22 to page 43, line 12; page 55, line 24 to line 33; page 75, line 12 to line 18; page 86, line 1 to line 34; page 95, line 30 to page 96, line 31; page 101, line 11 to line 31. See [40], [52]–[53], [59] above.

<sup>66</sup> Hearing transcript, page 79, line 4. See [52] above.

Jack's".<sup>67</sup> For these reasons, the Commission is satisfied that the Premises will be recognisable as a Hungry Jack's, have an appeal (particularly to minors) based on the Hungry Jack's brand, and the distinction in branding the Premises as "HJ's" does not diminish the risks of harm to minors presented by the licensing of a fast-food premises such as a Hungry Jack's store.

89. Even if changes were to be made to remove some logos and branding, it remains that the Premises is recognisable and attractive as a Hungry Jack's store. Its location, "airside" at the Airport and so most likely to be patronised by persons in transit, does not change the fact that it will likely still be frequented by children and families or any person who may want a Hungry Jack's-type serving.
90. In addition, the Commission does not accept the Applicant's submission that the airport environment somehow reduces the risk of risky drinking. The Commission considers that there may be elevated levels of drinking at the airport. For example, passengers are travelling on different schedules and may be travelling to or from different time zones. Further, passengers who are on holidays may be more inclined to drink more or at different times to their usual routine. The elevated levels of adult patrons drinking at the airport may increase the risk to minors of secondary supply and exposure to adult drinking environments. There is a particular risk of normalising the consumption of alcohol at any time during the day, which may lead to inappropriate attitudes towards alcohol consumption and future risky drinking behaviours.
91. The Applicant has sought extended trading hours, commencing at 5:30am on any day other than Sunday, Good Friday and ANZAC Day. These hours would further increase the risk of harm.
92. For the above reasons, the Commission is not satisfied that granting an on-premises licence for the Premises (with or without Food Court Approval) is consistent with its obligation to consider harm minimisation. In other words, the Commission considers that granting the Review Application may be conducive to or encourage harm.

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<sup>67</sup> Hearing transcript, page 52, line 16 to line 22. See [50] above.

**Whether granting the Review Application would facilitate the development of a diversity of licensed facilities reflecting community expectations**

93. The Commission must exercise its discretion whether or not to grant a licence with regard to the object of the LCR Act of facilitating the development of a diversity of licensed facilities reflecting community expectations.<sup>68</sup>
94. As stated above, Mr Haag for the Applicant conceded that licensing an ordinary fast-food premises, such as a standard Hungry Jack's, may conflict with some of the objects of the LCR Act, such as responsible development of the liquor industry and community expectations.<sup>69</sup> However, he argued that community expectations are different on the airside of the airport security barrier.
95. The Commission considers this Hungry Jack's, albeit branded for the most part as "HJ's", is recognisable as a Hungry Jack's (intentionally as per the Applicant's evidence). The Commission considers that, like any other Hungry Jack's, the Premises will be frequented by many different people including families and unaccompanied minors who will go there to order food as they would at any other Hungry Jack's. Those unaccompanied minors may include passengers under the age of 18 who are flying without an adult, as well as those who are flying with an adult and who go to get food without that adult. In addition, the Commission notes that an airline ticket is not required to pass through the security barrier at Terminal 1 of the Melbourne Airport and consequently the airside is effectively open to all members of the public.
96. The Commission therefore considers that the community expectations in relation to this Hungry Jack's are the same as in relation to any other Hungry Jack's. Specifically, the Commission does not accept the proposition that community expectations in this regard are different on the airside of the airport security barrier. The Commission considers that the community would reasonably expect that a fast-food premises, with appeal to minors, such as Hungry Jack's, regardless of its location (airside or landside) would not serve alcohol. Accordingly, the Commission is not satisfied that granting the Review Application would facilitate the development of a diversity of licensed facilities reflecting community expectations.

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<sup>68</sup> LCR Act, sections 4(1)(b) and 172D(3).

<sup>69</sup> Hearing transcript, page 4, line 14 to page 5, line 36. See [64] above.

### **Whether granting the Review Application would contribute to the responsible development of the liquor, licensed hospitality and live music industries**

97. Finally, the Commission must exercise its discretion whether or not to grant a licence with regard to the object of the LCR Act of contributing to the responsible development of the liquor, licensed hospitality and live music industries.<sup>70</sup>
98. For the reasons discussed above in relation to harm and community expectations, the Commission considers that granting the Review Application would not contribute to the responsible development of the liquor and licensed hospitality industries.

### **Decision**

99. In all the circumstances, having regard to all the materials before it, the Commission is satisfied that it is appropriate to exercise its discretion to refuse to grant the Applicant a licence on the basis that granting the Review Application would be conducive to or encourage harm and would be contrary to the objects of the LCR Act.

### **Decision on review**

100. Based on the reasons set out above, the Commission is not satisfied that granting the Original Application the subject of the Review Application is appropriate in the circumstances.
101. The Commission has therefore determined to refuse to grant the Review Application and affirm the Original Decision.

***The preceding 101 paragraphs are a true copy of the Reasons for Decision of Ms Danielle Huntersmith (Chair), Mr John Larkins (Deputy Chair), Mr James O'Halloran (Deputy Chair) and Mr Steven Brnovic (Commissioner).***

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<sup>70</sup> LCR Act, sections 4(1)(c) and 172D(3).