

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1995/2008  
PERMIT APPLICATION NO. PL04/1136.01

### CATCHWORDS

*Planning and Environment Act 1987 s 77; Yarra Planning Scheme cl 52.27; Corner Hotel, Richmond – application to extend hours and patron numbers; consideration of impact on amenity of the surrounding area; consideration of cumulative impact of existing and proposed licensed premises, hours of operation and patron numbers on amenity of area; application of policy to existing premises; relevance of broader state policy; assessment methodology for considering cumulative impact; management procedures and patron behaviour outside premises and/or beyond control of applicant; noise; retrospective approval for minor works within heritage area; limitations on site inspection to consider behavioural issues.*

<b>APPLICANT</b>	Swancom Pty Ltd T/as Corner Hotel
<b>RESPONSIBLE AUTHORITY</b>	Yarra City Council
<b>RESPONDENTS</b>	I. Quick, Dr P. Stahle, A. Leodakis & ors
<b>SUBJECT LAND</b>	Corner Hotel, 57-61 Swan Street, Richmond
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Mark Dwyer, Deputy President Elizabeth Bensch, Member
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	24 – 27 March (inclusive) & 30 March 2009
<b>DATE OF DECISION</b>	10 June 2009
<b>CITATION</b>	

### ORDER

- 1 The application to review the decision of the responsible authority to refuse to amend Planning Permit PL04/1136 to extend the operating hours and increase patron numbers for the licensed premises at the Corner Hotel, 57-61 Swan Street, Richmond is refused. The decision of the responsible authority is affirmed, and no amendment to Planning Permit PL04/1136 is granted.
- 2 The application to review the decision of the responsible authority to refuse to grant a permit for buildings and works, comprising an already completed extension to the second storey dining room, is allowed. The decision of the responsible authority is set aside, and a permit is granted and directed to be issued for the land at 57-61 Swan Street, Richmond in accordance with the endorsed plans and subject to the following condition:

- 1 Plans to the satisfaction of the responsible authority showing the already completed works must be submitted to and approved by the responsible authority. When approved the plans will be endorsed and will form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must show:
  - (a) the exact extent of the works to relocate the wall between the dining room and beer garden on the 1<sup>st</sup> floor of the building, and
  - (b) the layout of the male and female toilets on the 1<sup>st</sup> floor of the building.

**Mark Dwyer**  
**Deputy President**

**Elizabeth Benz**  
**Member**

**APPEARANCES:**

For the Applicant

Mr Lloyd Bryant of counsel, instructed by Priority Planning Pty Ltd. He called the following witnesses:

- Mr A. J. Warren, licensing consultant.
- Mr G. Barnes, acoustic consultant of Acoustical Advisory and Consulting Services.
- Mr T. Northeast, licensee of the Corner Hotel and
- Mr D. Hancox, traffic engineer of TTM (Victoria) Pty Ltd.

A witness statement from Mr M. Flanagan, building surveyor of Metro Building Surveying Services Pty Ltd was tendered, but he was not called to give evidence.

For the Responsible Authority	<p>Mr J. Larkins of counsel, instructed by Maddocks lawyers. He called the following witnesses:</p> <ul style="list-style-type: none"> <li>• Ms H. Austin, Ms C. Pelham-Thorman, Mr S. Managh, Mr M. Tanner, Ms K. Barefoot, Ms H. Stone. (Witness statements were also filed from Ms L. Martin and Ms H. Rothschild, but they were not required to be called).</li> <li>• Inspector D. McWhirter, licensing inspector with the Victoria Police</li> <li>• Ms M. Cooper, social planner, of Urbis Pty Ltd.</li> <li>• Mr R. Burton, acoustic consultant of Burton Acoustic Group</li> </ul>
For the Respondents.	<p>Mr I. Quick, Dr P. Stahle, and Mr A. Leodakis appeared in person. An interpreter was provided by the Tribunal to assist Mr Leodakis. Some other objectors filed written submissions, but did not appear. The Tribunal has also considered those submissions.</p>

## INFORMATION

Description of Proposal	<p>(1) To amend Planning Permit PL04/1136 for an increase in operating hours to the existing hotel and an increase in patron numbers. The applicant seeks:</p> <ul style="list-style-type: none"> <li>• to amend condition 4 to allow the hours of operation of the beer garden to be extended from 11.30 pm to 3.00 am (the following day) 7 days a week, and</li> <li>• to amend condition 5 to increase the maximum number of patrons from 750 to 1300 patrons.</li> </ul> <p>(2) To obtain approval for buildings and works (including partial demolition) for a small extension to the second storey dining room.</p>
Nature of Application	<p><i>Planning and Environment Act 1987 s 77 – refusal to amend and/or grant permit.</i></p>

Zone and Overlays	Business 1 Zone Heritage Overlay
Permit Triggers (subject to discussion in our Reasons)	Clause 34.01-4 Buildings and works (B1Z) Clause 43.01 Buildings and works (HO) Clause 52.27 – Licensed premises Clause 63.05 – Existing uses
Relevant planning scheme policies include the following:	<p>State Planning Policy Framework –</p> <ul style="list-style-type: none"> <li>• Clauses 11 (Goals &amp; Principles) and 12 (Metropolitan Development).</li> <li>• Clause 15.05 (Noise Abatement), Clause 15.11 (Heritage), Clause 17.01 (Activity Centres), Clause 17.02 (Business), Clause 18.02 (Car Parking and Public Transport), Clause 19.03 (Design and Built Form).</li> </ul> <p>Local Planning Policy Framework –</p> <ul style="list-style-type: none"> <li>• Clause 21.05 (Retailing and Activity Centres), Clause 21.05-7 (Heritage Conservation), Clause 22.09 (Licensed Premises Policy)</li> <li>• Note: Also potentially relevant are the proposed amendments to Clause 22.09 contained in Amendment C84, which has been adopted by the Council, but is not yet approved.</li> </ul>
Land description	<p>Corner Hotel, 57-61 Swan Street, Richmond</p> <p>The site is located on the north side of Swan Street, between Botherambo, Wangaratta, and Stuart Streets in Richmond.</p> <p>The site is an irregular shaped parcel of land having a frontage of 14.6 metres to Swan Street, 30.4 metres to Botherambo Street, 9.5 metres to Wangaratta Street and 30.5 metres to Stuart Street respectively.</p> <p>The two storey Corner Hotel with roof terrace (beer garden) occupies the southern portion of the site. The northern portion of the site accommodates 26 car parking spaces for the use of hotel patrons.</p>

## REASONS

### Introduction

- 1 This application relates to the Corner Hotel in Swan Street, Richmond. The Corner Hotel operates in part as a traditional licensed hotel premises, but is perhaps best known as an iconic live music venue showcasing local and international music events. The operators of the hotel, Swancom Pty Ltd (trading as the Corner Hotel) (**Swancom**), seek to review the refusal by Yarra City Council (**Council**) to grant an amendment to Planning Permit PL04/1136. In particular, Swancom seeks:
  - to amend condition 4 of the existing permit to allow the hours of operation for the beer garden on the top level to be extended from 11:30 pm to 3 am (the following day) 7 days a week;
  - to amend condition 5 of the existing permit to increase the maximum number of patrons from 750 to 1300 patrons; and
  - to gain approval for buildings and works (including partial demolition) for a small extension to the dining room into the existing beer garden area.
- 2 The Council had refused to amend the permit and/or authorise the building works on the following grounds:
  - a The proposal would adversely affect the residential amenity of the surrounding area.
  - b The proposal is inconsistent with principles of orderly and proper planning.
- 3 It is not clear to us that, in reaching its decision to refuse the application, the Council had fully turned its mind to the relatively minor and uncontroversial buildings and works component of the application. We will deal with that matter separately in these reasons.
- 4 It is clear from the Council material that the Council's decision was primarily directed to the proposed extension of hours and patron numbers at the hotel, and the majority of the hearing before us (and these reasons) are also concerned with that matter. In this regard, a key issue in the proceeding is the interpretation and extent of application of the decision guidelines now specified for licensed premises in cl 52.27 of the Yarra Planning Scheme. These include a requirement that a planning decision maker must consider, as appropriate, the impact of the hours of operation or the number of patrons on the amenity of the surrounding area, and the cumulative impact of existing licences and the proposed licence on the amenity of the area.
- 5 It is fair to reflect that state and local planning policy for licensed premises is in somewhat of a state of flux at present. As will be seen, despite a broad government policy seeking to address community issues of alcohol use and

abuse<sup>1</sup> and to better co-ordinate planning and licensing applications in dealing with local amenity impacts, we are somewhat critical of the state and local government response thus far in providing planning decision makers with the appropriate tools and guidance to deal with the issues in practice.

- 6 To an extent, Swancom is a victim of its own popularity, its location and the timing of this application. Equally, however, Swancom has done little to assist its own cause in that it presented no substantive material or evidence to deal with the existing and emerging state and local planning policy regime and the specific external amenity issues raised by its application. Indeed, it appeared to us to present a case more akin to a liquor licensing application rather than making any real attempt to address the key *planning* issues.
- 7 Whilst we have determined to refuse the extension of hours and patron numbers in the circumstances of this application, we would not wish our decision to be interpreted as an indication that there should be never be any extension of hours or patron numbers at the Corner Hotel. We have discussed in these reasons some of the circumstances that may be relevant to any future application.

## **BACKGROUND & PRELIMINARY MATTERS**

### **Subject site and locality**

- 8 The site at 57-61 Swan Street, Richmond is occupied by a two storey rendered brick building “The Corner Hotel” containing a public bar/lounge and live music venue on the ground floor, with an open air beer garden and recently renovated dining room on the upper level. A 26-space carpark is located to the north of the building for the use of hotel patrons. The site is adjacent to the Richmond Train Station and elevated rail lines.
- 9 The site is within the Swan Street ‘major activity centre’, although the precinct in the immediate vicinity of the site appears to us to be in a state of decline with a number of closed retail premises. Although not a dedicated ‘entertainment’ precinct for planning purposes, there are a large number of licensed premises in the immediate area. Opposite the site are the Richmond Club Hotel, Bar 9T4 and the Post Office Hotel. Further to the east along Swan Street are the Precinct Hotel, Holliava, and a number of licensed restaurants and cafes as well as the Vaucluse Hotel. Other nearby licensed premises include the London Tavern on the corner of Lennox Street and Richmond Terrace (approx. 300 metres to the north) and the Cricketers Arms Hotel on Punt Road (approx. 400 metres to the northwest).

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<sup>1</sup> Including in particular “*Restoring the Balance - Victoria’s Alcohol Action Plan 2008-2013(May 2008)*”

- 10 To the immediate north and northwest of the Corner Hotel are a number of warehouses within a Mixed Use Zone. Several have been converted for residential use, and there is other residential infill in the immediate area. The area to the north and northeast is predominantly residential, within a zoned Residential 1 Zone. The nearest residential properties are in Lennox Street, with the rear boundaries abutting Botherambo Street. Indeed the closest residential property is within 18 metres of the Corner Hotel.

### **Relevant planning scheme provisions**

- 11 The site itself is located in a Business 1 Zone. Pursuant to cl 34.01-4 of the Yarra Planning Scheme a permit is required to construct or carry out works in this zone. The relevant purpose of the Business 1 Zone is:
- To encourage the intensive development of business centres for retailing and other complementary commercial, entertainment and community uses.
- 12 A hotel is a Section 2 use in the Business 1 Zone. However, the hotel also has existing use rights, stemming from the initial operation of a hotel on the site since 1871, with live music since at least the 1940's. The application of the zone controls is therefore also affected by cl 63.05 and 63.12 of the Yarra Planning Scheme.
- 13 A Heritage Overlay (HO332) also covers the site, being an overlay schedule that applies broadly to the Richmond Hill precinct. Pursuant to cl 43.01-1, a permit is required to demolish a building, or to construct or carry out works.
- 14 Clause 52.27 of the Yarra Planning Scheme applies to licensed premises. This 'particular provision' introduces a separate permit trigger and is central to our decision in this proceeding.
- 15 We are required to consider, as appropriate, relevant policies in the state and local planning policy framework, and we have referred in the 'information section' of our decision to a number of potentially relevant policies in the Yarra Planning Scheme. We have considered these, and will refer further in these reasons to those policies we consider most relevant to our decision – in particular, cl 22.09 comprising the Council's local 'Licensed Premises Policy'.

### **Site inspection**

- 16 As part of our deliberations, we inspected the site and its locality. This included an accompanied site visit with representatives of the parties on 30 March 2009, and an 'unannounced' and unaccompanied night inspection on 24 April 2009.
- 17 Site inspections are common in planning matters before the Tribunal, and often a necessary or valuable adjunct to planning decision-making – particularly in the assessment of physical, spatial or built form issues, but also in the assessment of matters such as neighbourhood character. In this case, however, we were urged by the Council and objectors to undertake a

night inspection at and in the vicinity of the hotel. This was, in part, to assess management procedures and patron behaviour at the hotel and immediately outside the hotel, as well as the behaviour generally of people visiting and moving between licensed premises in the Swan Street precinct and through the adjacent residential area.

- 18 An unaccompanied site inspection to consider behavioural issues is more problematic than one to consider physical issues. The behaviour may differ on any given day or night, and no one inspection will necessarily be indicative of what is 'normal' or common. In this regard, we consider that the Tribunal should use such an inspection primarily for the purpose of enabling it to understand the evidence and issues raised in the proceeding. Despite being an expert tribunal able to inform itself as it sees fit, the Tribunal is bound by principles of natural justice and procedural fairness. It should therefore be wary about relying on the results of its inspection as a substitute in place of the evidence, or to gather or rely upon other extraneous evidence, without raising its findings with the parties and giving the parties a further opportunity to canvass those matters. A sense of proportion must however be retained. It will not ordinarily be necessary to provide that further opportunity where the purpose of the inspection is to decide between conflicting evidence. Equally, it will not ordinarily be necessary to provide the further opportunity unless the inspection reveals a matter of significance not dealt with by the parties, and which is a significant influence on the Tribunal in reaching its decision<sup>2</sup>.
- 19 Counsel for the responsible authority and Swancom generally agreed with this approach. In this proceeding, we heard a great deal of evidence and submissions about the management of the hotel (generally positive), the behaviour of patrons, and the impacts of licensed premises in the Swan Street precinct generally on the amenity of surrounding residential areas. We have decided this matter based on that evidence, assisted in our understanding by the site inspections.
- 20 For the record, on the night of our unaccompanied inspection, there was a sell-out crowd at the Corner Hotel with a high-profile band playing, and the hotel was full to capacity after about 11pm, with a small queue forming outside. The nearby Precinct Hotel appeared to be reasonably full with live entertainment and a small queue for entry. The outside licensed area of the Post Office Hotel was quite busy, but other licensed venues such as Bar 9T4 and the London Tavern had a much smaller patronage. The Richmond Club Hotel was closed for renovations, and there was no night event at the MCG. We are not convinced that our night inspection on a rainy Friday night in April is necessarily indicative of what we might see on a summer

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<sup>2</sup> Generally following *Weir Family Supermarket (Warracknabeal) Pty Ltd v Liquor Licensing Commission* [1991] VR 305 at 347-349 per Gobbo J, and the cases cited therein – in particular, *Scott v Numurkah Corporation* (1954) 91 CLR 300 at 313, *Griffiths v Shire of Hastings* (1979) 59 LGRA 142 at 156-157 per Beach J, and *Torrington Investments Pty Ltd v Shire of Bulla* (1981) 57 LGRA 181 at 185 per Brooking J.

night when more people are generally ‘out and about’, or when other nearby licensed venues are also full. We are also not sure it is necessarily indicative of what we might see if there were also multiple events at the sports and entertainment precinct in Jolimont, such as at the MCG or Rod Laver Arena. Despite this, we found the site inspection useful in understanding the evidence. We saw elements of behaviour that accorded with the evidence and submissions before us, and nothing of significance that ran counter to that evidence.

### **Charter of Human Rights**

- 21 The Council raised with us the issue of the *Charter of Human Rights and Responsibilities Act 2006*. The Charter recognises human rights that local government, as a public authority under the Charter, must take into consideration when making decisions, developing local laws and policies, and in providing services. In the circumstances of this case, those rights were submitted by the Council to comprise:
- the right to privacy, under s 13 of the Charter – in particular, the right of residents living near to the Corner Hotel to privacy from the impacts of excessive noise; and
  - property rights under s 20 of the Charter – in particular, the right of Swancom not to be deprived of its property rights.
- 22 We agree with the Council that the Tribunal is also bound by the Charter in a case of this nature – i.e. exercising its review jurisdiction on a planning application. The other parties did not contest this. However, in considering the Charter, we also agree with the Council that:
- Whilst excessive noise from the hotel *might* amount to a breach of the privacy of nearby residents under the Charter, the planning regulatory framework and associated guidelines for assessing sleep disturbance caused by noise, are sufficient, in combination, to create an ambit of intended regulatory discretion within which some interference with the right to privacy is not unlawful. Moreover, the opportunity to implement reasonable sound attenuation measures as part of a conditional approval allows for a proportionate and reasonable response, such that the interference with the right is not arbitrary.
  - Whilst the refusal of the application *might* arguably interfere with Swancom’s broader property rights, s 20 of the Charter only provides that a person must not be deprived of property “other than in accordance with law”. Here, Swancom is not deprived of any legal or proprietary interest in the land, or the ability to use or develop its land in accordance with the relevant planning framework. The imposition of reasonable restrictions on the use or development of the land under that regulatory framework is in accordance with the law, and neither unlawful nor arbitrary.

- 23 It follows that, although we have properly had regard to the Charter, we do not consider that it imposes any impediment to the decision we have reached in this proceeding.

### **BUILDINGS AND WORKS COMPONENT**

- 24 We turn now to the relatively straightforward buildings and works component of the application, which is complicated in this case more by process than outcome.
- 25 Swancom seeks approval for buildings and works (including partial demolition) for a small extension to the dining room into the existing beer garden area. The works comprise the relocation of a set of glazed doors between the existing dining room on the first floor and the beer garden.
- 26 The complicating factors of process are:
- Swancom applied for the buildings and works approval as part of its application to amend an existing use permit. The works do not arise directly from that use permit and, technically, a separate application for a new permit should have been sought.
  - It only became apparent to us at the accompanied site inspection that the works have already been undertaken. Perhaps more surprisingly, this also only became apparent to the Council once raised by us at that inspection. Neither the application nor Council report had noted that what was being sought was retrospective approval.
  - The Council report for this proposal had dealt with the buildings and works component in just 4 lines within a report of 18 pages, and had noted no concern. It did not however address relevant decision guidelines. Moreover, it ultimately purported to refuse the application (without referring to the buildings and works component) in combination with the application to extend hours and patron numbers, even though the works were unrelated and not dependent on that extension.
- 27 Because the hotel enjoys existing use rights, a permit is technically required for the buildings and works component under cl 63.05 of the Yarra Planning Scheme. However, this does not add materially to the control regime in this case, given that the use is a Section 2 use and the Business 1 Zone and the Heritage Overlay provisions still apply and both also require a permit for buildings and works.
- 28 At the hearing, the Council indicated it now supported the approval of the buildings and works component. The works are of a very minor nature, cannot be seen from Swan Street, and do not impact on any heritage values. The Council and Swancom therefore requested that the Tribunal exercise its discretion to amend the application insofar as necessary to characterise it as

being a separate application for a new permit for the buildings and works, and to direct the grant of such permit. The other parties did not oppose this course.

- 29 Having considered the relevant scheme provisions, and having inspected the site and the already completed works, we agree that the works are very minor. They do not impact at all on the heritage values of the Richmond Hill precinct, being the relevant Heritage Overlay schedule (HO332), nor the significance, character or appearance of any relevant heritage place. As the works do not create any additional floor area, no additional car parking requirement is generated. We therefore consider it appropriate to amend this component of the application to comprise an application for a new permit, and to direct the grant of that permit subject to the single condition (requiring an updated plan) outlined in our order.

## **APPLICATION TO EXTEND HOURS AND PATRON NUMBERS**

### **(1) BACKGROUND, PLANNING SCHEME PROVISIONS & POLICY**

- 30 We turn now to the main component of the application. As indicated, Swancom seeks to amend its existing Planning Permit PL04/1136 in two respects:
- to amend condition 4 to allow the hours of operation for the beer garden to be extended from 11:30 pm to 3 am (the following day) 7 days a week; and
  - to amend condition 5 to increase the maximum number of patrons from 750 to 1300 patrons.

It should be noted that the existing Planning Permit PL04/1136 already allows the downstairs licensed premises to operate until 3 am, but sets the overall patron limit of 750 patrons and the requirement for trading to cease in the beer garden at 11:30 pm. Swancom's existing general licence under the *Liquor Control Reform Act* 1998 contains similar restrictions.

- 31 Because the hotel enjoys existing use rights, cl 63.05 of the Yarra Planning Scheme would allow the existing use to continue provided any condition or restriction to which the use was subject continues to be met. However, the use is also still a Section 2 use in the Business 1 Zone, and Swancom does not need to rely solely on those limited existing use rights. It is able to modify the existing use conditions or restrictions and augment the use rights, if authorised under the *Planning and Environment Act* 1987 and the relevant provisions of the Yarra Planning Scheme. This matter therefore falls for decision under the broader planning scheme provisions, rather than pursuant to cl 63.05.
- 32 Rather than seek a new permit for use, Swancom has properly sought to amend its existing Planning Permit PL04/1136. The process and outcome is

not materially different. Under Division 1A of Part 4 of the *Planning and Environment Act 1987* (and in particular s 73), the Act applies to an application to amend a permit *as if* it were an application for a new permit. The provisions of the Yarra Planning Scheme that would require or apply to a new permit therefore apply equally to an application to amend the permit. These are essentially triggered in this case by the zone control in the Business 1 Zone (cl 34.01), and the ‘particular provision’ dealing with Licensed Premises (cl 52.27). Both require a permit for use.

### **The Council’s case in summary**

33 The Council’s case before us was twofold<sup>3</sup>:

- The Council considered that Swancom’s proposal is not supported by state policy directing increased residential development to the Swan Street major activity centre, and contrary to local policy directing entertainment uses to locations specifically identified as being entertainment activity areas.
- The Council submitted that the proposal will lead to unreasonable adverse impacts on the amenity of the surrounding area, by adding to already considerable problems being experienced by residents - in particular including noise, anti-social behaviour, vandalism, litter, violence or perceptions of violence, and car parking deficiencies.

### **Council’s aspirations for the Swan Street precinct**

34 In relation to the first of the two key issues raised by the Council, we consider that it perhaps misstates the complete issue from a planning policy perspective. It is true that the Corner Hotel is not in a dedicated ‘entertainment precinct’, but rather is in a ‘specialty retail area’<sup>4</sup> with a retail function and identity for Swan Street identified as “*community and local convenience level shopping, specialist retailing (seconds fashion), service function through office activity*”<sup>5</sup>. It is also true that there is state policy support for increased residential use in and around the activity centre, and in the Mixed Use Zone immediately to the north and north west of the Corner Hotel.

35 However, cl 11 of the State Planning Policy Framework requires a planning decision maker to integrate the range of policies and balance competing objectives in favour of a decision that promotes net community benefit and sustainable development. In this regard, the following factors are also relevant:

- The site is in a Business 1 Zone with a stated purpose to encourage intensive development for retailing “*and other complementary*”

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<sup>3</sup> Council submission, Part 2, at [1]-[3]

<sup>4</sup> *Retail & Activity Centres Framework Plan* at cl 21.05 of the Yarra Planning Scheme.

<sup>5</sup> From *Activity Centres Strategy (City of Yarra, 1996)*, referred to in the Council’s MSS at cl 21.05 of the Yarra Planning Scheme.

*commercial, entertainment and community uses*” (our emphasis). State planning policy encourages retail and entertainment developments in activity centres, including strip shopping centres (cl 17.01) and seeks the aggregation of retail, entertainment, office and other commercial uses as a basis for accessible and efficient infrastructure use (cl 17.02).

- The Council’s Municipal Strategic Statement identifies, as a major issue affecting its activity centres, tensions between maintain local strip shopping centres and developing ‘regional’ entertainment functions, and encourages land use within defined roles for individual centres. However, it offers no clear basis for the implementation of any strategy to achieve this<sup>6</sup>. Indeed, Council’s adopted new Municipal Strategic Statement (awaiting approval by the Minister) creates as a reference document a report that acknowledges the Swan Street activity centre as an entertainment precinct<sup>7</sup>.
- Clause 22.09 (Council’s local ‘Licensed Premises Policy’) acknowledges that the majority of licensed premises in the Yarra Council area exist in clusters in commercially zoned areas. Clause 22.09 expressly discourages licensed premises in residential, mixed use and industrial zones, but only offers a policy that they be regulated in a business zone.

36 We are somewhat sympathetic to the Council’s planning aspirations for this area of Richmond, both for higher density residential development and for the reinvigoration of the Swan Street precinct for local retailing. The area is one of transition from ‘rag trade’ warehouses to residential and mixed-use development. However, the reality is that the Swan Street precinct in the immediate vicinity of the Corner Hotel also remains and has developed as a *de facto* entertainment precinct with a very high cluster of late night entertainment venues. It is perhaps, based on the police evidence before us, the highest such cluster outside of the Melbourne Council area. Within this cluster of entertainment venues, the Corner Hotel already exists as a large popular venue, attracting people to the area given its reputation as a live and vibrant music venue. We do not see this changing in the short to medium term. Indeed, this late night entertainment may be an attraction to some new residents to the area, and the submissions before us suggested that the Corner Hotel’s patronage includes a large ‘local’ population.

37 It follows that we do not consider that the policies and objectives encouraging more residential use in the area and/or discouraging entertainment uses in a notional local retail area, *by themselves*, provide a sufficient basis to refuse this application for an amendment to an existing

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<sup>6</sup> See cl 21.05. There appears nothing relevant in the ‘Implementation of Strategies’ section for this MSS element. Clause 22.04 (Retail Centres Policy) also contains a policy encouraging offices, recreation and entertainment uses to locate outside core retail areas shown in the MSS, but without any implantation strategy.

<sup>7</sup> ‘A Good Night for All’ – report of the Inner City Entertainment Precincts Taskforce (February 2005) (ICEPT report)

permit. This is particularly the case when balanced with the practical reality of what exists already in the Swan Street precinct and other relevant activity centre policies. The existence of entertainment facilities in activity centres and/or dealing with newly created residential interfaces are not of themselves determining or disqualifying factors and, in most cases, are capable of being managed in planning terms.

- 38 We agree with the evidence of Ms Maxine Cooper (whose evidence we will deal with in more detail later in these reasons) that, generally, thriving activity centres are characterised by a *diversity* of land uses, and that a large cluster of licensed venues that dominates the function of the activity centre can erode this diversity and vitality. It is therefore a valid planning objective to attempt to avoid the ‘saturation’ or domination of one type of activity in an activity centre to the detriment of others.
- 39 The issue for us in this case is therefore squarely one of the cumulative and amenity impacts that have stereo-typed the Swan Street precinct as a late night entertainment precinct, and thus prevented the opportunity to achieve a genuine and balanced mixed use and activity centre precinct serving a variety of purposes, including retail, office, residential, community *and* entertainment uses<sup>8</sup>. The policy issues raised by the Council cannot therefore be resolved in isolation from these amenity considerations.
- 40 We turn therefore to the Council’s second key issue – i.e. that the proposal will lead to unreasonable adverse impacts on the amenity of the surrounding area, particularly having regard to cl 52.27 of the Yarra Planning Scheme and the Council’s local policy in cl 22.09.

### **Clause 52.27 - Licensed Premises**

- 41 Clause 52.27 of the Yarra Planning Scheme provides, in part, as follows:

#### **Permit Required**

A permit is required to use land to sell or consume liquor if any of the following apply:

- A licence is required under the *Liquor Control Reform Act 1998*.
- A different licence, or class of licence, is required from that which is in force.
- The hours of trading allowed under any licence are to be extended.

- 42 It was common ground that the application to extend the trading hours for the beer garden to 3 am fell within this clause (clearly, under the third dot point). There was however an issue as to whether the application to extend patron numbers also directly triggered the operation of this clause (under the first dot point). We believe it does, for the following reasons:
- As indicated above, the Act and planning scheme are intended to operate in relation to an application to amend a use as if it were an

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<sup>8</sup> cf ICEPT report at p42

application for a new use permit. If Swancom seeks to overcome the restrictions of its current existing use rights, limited by its existing permit and cl 63.05, it must comply with the planning scheme (as it now applies) on this basis, just as it did when obtaining its existing permit.

- The triggering event for a permit under cl 52.27 should be widely and purposively construed<sup>9</sup>. An express purpose of cl 52.27 is to ensure that the impact of licensed premises on the amenity of the surrounding area is considered. Moreover, the words that precede the three dot points in the 'Permit Required' part of cl 52.27 (i.e. as set out above) are relevant to the those dot points. By reference to these words, it is clear that the permit trigger is intended to apply to the whole use of the land to sell or consume liquor under a licence, not just a limited aspect of the use.
- The decision guidelines for cl 52.27 refer expressly to the impact of patron numbers – this carries with it the necessary implication that patron numbers form part of the overall use of licensed premises intended to be covered by the permit trigger.
- Just as an amendment to the planning permit is required for the extended patron numbers, an amendment to the liquor licence will also be required. A licence (albeit amended) is required for the purpose of the first dot point in cl 52.27.

43 We therefore consider that cl 52.27 applies to both the extended hours and the extension of patron numbers. We also believe that Swancom has implicitly accepted this interpretation by bringing its application in the manner it has – i.e. applying for a permit amendment for both the extended hours and the extension of patron numbers.

44 The decision guidelines under cl 52.27 that therefore apply are as follows:

**Decision Guidelines**

Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:

- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The impact of the sale or consumption of liquor permitted by the liquor licence on the amenity of the surrounding area.
- The impact of the hours of operation of on the amenity of the surrounding area.
- The impact of the number of patrons on the amenity of the surrounding area.
- The cumulative impact of any existing and the proposed liquor licence, the hours of operation and number of patrons, on the amenity of the area.

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<sup>9</sup> See also *Ryan v Port Phillip CC* [2006] VCAT 1923 at [46], adopting *Bomvic Pty Ltd v Yarra CC* [2004] VCAT 1961

- 45 We will deal with these decision guidelines at some length below, including relevant policy and the issue of amenity impact and cumulative impact. We might add that, even if cl 52.27 did apply only to extended hours and not directly to extended patron numbers (despite our views), a not dissimilar outcome still arises under the Business 1 Zone where a permit for use as a hotel is required, and where a second permit ‘trigger’ thus applies. The relevant decision guidelines there, including by reference to cl 34.01-1, cl 65 and local policy, would still clearly raise a consideration of any impact on amenity created by an increase in patron numbers. The only material difference would be that ‘cumulative impact’ is not an express decision guideline under that approach.
- 46 Swancom also argued that the decision guideline referring to cumulative impact did not apply in this case because there is no permit application to be considered, and because its wording suggests it only applies where a further (new) licence is proposed. We might add that counsel for Swancom put this second argument somewhat rhetorically rather than forcefully<sup>10</sup>. In any event, we disagree. As indicated above, the provisions of the planning scheme apply equally to an application for an amendment to a permit as if it was for a new permit. Moreover, in context, we consider that the reference to cumulative impact of existing and “the proposed licence” should be read in this case as a reference to the “proposed amended licence”.
- 47 As will be seen, however, whilst we consider ‘cumulative impact’ to be highly relevant to our decision, it is by no means the sole determining factor in this case. The other decision guidelines, and our overall planning assessment, also raise broader issues of impact on the amenity of the surrounding area that are also relevant to our decision.

### **Background to cl 52.27**

- 48 Using modern principles of statutory interpretation, it is useful to look at the background to cl 52.27 to assist in determining its purpose and the basis upon which it should be applied in this case.
- 49 Clause 52.27 is a statewide provision that has existed in Victorian planning schemes for some time, dealing specifically with licensed premises. However, cl 52.27 was significantly amended by Amendment VC47 in 2008 to include an additional purpose – to ensure that the impact of the licensed premises on the amenity of the surrounding area is considered – and to introduce the decision guidelines we have set out earlier. Prior to this amendment, we are not aware that any decision guidelines existed under cl 52.27<sup>11</sup>.

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<sup>10</sup> Swancom written submission at [53]-[55].

<sup>11</sup> The background material for Amendment VC47 confirms this. We think the Council was in error in submitting to us that Amendment VC47 only introduced the decision guideline for ‘cumulative impact’. It introduced all 5 of the decision guidelines now in force.

- 50 The Explanatory Report for Amendment VC47 indicates that the changes to cl 52.27 sought to help address cumulative impact issues resulting from clusters of entertainment venues, through planning assessments of licensed premises proposals. The changes were also referenced to cl 11.03-6 of the state planning policy framework, in seeking to support the maintenance of communities with adequate and safe physical and social environments for their residents, and to address the views of relevant agencies through the Inner City Entertainment Precinct Taskforce (**ICEPT**) process.
- 51 We were referred at some length to the ICEPT report '*A Good Night For All (February 2005)*' that had formed part of the basis for Amendment VC47, and which is also a reference document for Council's adopted MSS embodied in Amendment C84. This is a comprehensive discussion paper and report drawing on wide consultation and international experience, and addressing a wide range of options for improving safety and amenity in inner city entertainment precincts. The Swan Street precinct is an identified entertainment precinct in the ICEPT report. Insofar as it is relevant in this proceeding, the report highlights the lack of a holistic approach, or lack of good co-ordination, between planning and liquor licensing applications. Planning applications have not in the past dealt adequately with broader social or off-site impacts given that licensing applications purport to deal with amenity issues arising from alcohol use and abuse. However, liquor-licensing applications have in the past been considered on a case-by-case basis, and have not dealt with saturation levels in a given area or the cumulative impacts of multiple licensed venues on local amenity.
- 52 The ICEPT report discusses possible controls on hours of operation and patron numbers. In relation to the latter, it notes that a more meaningful benchmark might be introduced to establish patron numbers, rather than relying on building regulations, floor area, toilets and fire exits<sup>12</sup>, and that restricting patron numbers in some areas may be useful to address amenity issues. It also notes that size of individual venues may be important. Five venues of 100 patrons may, for example, have a very different impact to one venue of 500 patrons.
- 53 In particular, the ICEPT report also discusses cumulative impact in some detail<sup>13</sup>. It notes that a challenge remains to identify appropriate benchmarks to measure cumulative impact, but that the mix of venues will be a key factor. A late night 'vertical bar' will, for example, have a very different impact to a seated restaurant closing at 11 pm.
- 54 The ICEPT report then promoted a series of inter-related options that, in effect, recommend that a requirement to consider cumulative impact and related amenity issues be dealt with through planning schemes. Amendment VC47 and the changes to cl 52.27 are the current manifestation of that recommendation.

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<sup>12</sup> ICEPT report at p43. Cf Swancom's evidence by reference to these issues, discussed further below.

<sup>13</sup> ICEPT report at pp 42-59 in the main report, and pp8-9 of the summary report

55 In *Restoring the Balance - Victoria's Alcohol Action Plan 2008-2013* (May 2008), the state government referred to the ICEPT recommendations and acknowledged that the VPP's had been amended to introduce new amenity-based decision guidelines that would:

- Ensure that the cumulative impact of both existing and proposed licensed premises is a valid amenity consideration for planning permit applications
- Clarify that councils can consider amenity factors associated with licensed premises including hours of operation and patron numbers.<sup>14</sup>

56 Although the basis for the introduction of the new provisions in cl 52.27 is therefore relatively clear, the way in which the decision guidelines ought to be applied in practice is far less clear. In particular:

- The ICEPT report had also recommended in 2005 (as Option 7) that the state government “*develop a standard statewide framework for inclusion in local planning policies to define cumulative impact benchmarks and the criteria by which this can be measured. It may consider existing and past trends in type and mix of licensed premises, reported crime and perceptions of safety, transport availability, proximity of residential use (actual and planned), public safety initiatives, and enforcement resources.*” We are not aware that this framework has yet been developed. Indeed, the evidence was that it had not been.
- The ICEPT report had also recommended in 2005 (as Option 9) that local government use the local planning policy framework to develop a location-specific local policy to manage the cumulative impact of licensed premises. It stated: “*The policy would clearly define the benchmark by which cumulative impact would be measured and provide the rationale upon which decisions to refuse applications is made. It would have particular regard to the impact of specific types and mix of licensed premises.*” We are not aware that any such policy has yet been developed, and certainly none exists for the Swan Street precinct in Richmond.
- *Victoria's Alcohol Action Plan 2008-2013* contains an action item (as Item 3.9) to undertake a review in regard to the mechanism by which maximum patron numbers are determined. We are not aware that this review has yet been undertaken.

57 It appears that the government has introduced express decision guidelines via cl 52.27, requiring a consideration of the impacts of licensed premises, hours of operation and patron numbers on the amenity of the surrounding area, but has failed to provide the recommended benchmarks governing how these guidelines should be applied in practice. *Victoria's Alcohol*

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<sup>14</sup> *Victoria's Alcohol Action Plan 2008-2013* at para 3.11

*Action Plan 2008-2013* states that the ICEPT recommendations “will continue to be implemented”<sup>15</sup>. That in our view is a priority task if planning decision makers (including this Tribunal) are to be expected to properly apply the decision guidelines consistently and to their intended effect, and if there is also to be a reasonable level of certainty for the operators of licensed premises and the community.

### **Clause 22.09 – Council ‘Licensed Premises Policy’**

58 The Yarra Planning Scheme has for some time contained a local planning policy dealing with licensed premises. Clause 22.09 states that it applies to all land for the consideration of applications for new licensed premises and for the extension of existing licensed premises, where a permit is required pursuant to clause 52.27. It is readily apparent that:

- The policy is triggered by a permit requirement under cl 52.27;
- The policy is intended to apply to the extension of existing licensed premises, not just to new permits

Clause 22.09 therefore clearly applies in this case. It is however a local *policy* to be balanced with other policies and objectives. Unlike cl 52.27, it is not a separate *control* provision.

59 The policy basis for cl 22.09 notes the clustering of entertainment venues and the tension that exists between licensed premises and residential and other commercial land uses. It draws upon a *Residential Interface Study, 2001* to which we were also referred. The objectives of the policy seek, amongst other things, to effectively manage licensed premises to protect the amenity of surrounding areas. The objectives also seek to provide active daytime street frontages in retail strips, whilst providing reasonable opportunities for the trading of licensed premises and entertainment uses.

60 Clause 22.09 deals specifically with amenity, hours, patron numbers, car parking, and the requirement for a noise and amenity action plan. In particular:

- The operation of licensed premises is to have minimal impact on the amenity of the area in relation to noise, hours of operation and/or car parking demand.
- Licensed premises must operate in a manner that provides for the safety of patrons, the public and nearby owners and occupiers of land.
- The location of the premises, its use, nature of surrounding uses and hours of operation, its zoning and the zoning of surrounding land can be considered in the determination of the hours of operation of licensed premises. Trading after 11 pm is not supported adjacent to residential areas unless the responsible authority is satisfied that the use will not adversely affect the amenity of the area.

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<sup>15</sup> At p35

- The maximum number of patrons permitted on the licensed premises at any one time is limited to the safe and amenable operating capacity of the premises, and potential adverse amenity effects on surrounding uses.
- Car parking for licensed premises is not to detrimentally impact on the functioning of local traffic networks and/or car parking availability.
- New licensed premises are not generally supported in Residential, Mixed Use or Industrial zones. In Business zones, licensed premises should not trade after 1 am (or after 11pm where there is a residential abuttal) unless the responsible authority is satisfied that minimal detriment will be caused to the surrounding area by way of noise emissions, patrons arriving and leaving, and the availability and location of car parking.
- A noise and amenity plan must contain measures to address noise sources, management procedures for staffing and training, hours of operation, lighting and security issues, waste management and “any other measures to be undertaken to ensure minimal amenity impacts from the proposed licensed use”.

61 Through Amendment C84, the Council proposes to update its Municipal Strategic Statement and local planning policy framework, including cl 22.09. Amendment C84 was exhibited in 2006, and was the subject of panel reports in 2007 and 2008. A modified version of Amendment C84 was adopted by the Council on 15 April 2008 and submitted to the Minister for Planning for approval the same day. More than a year later, the Amendment is still awaiting approval. We were told that the delay relates to ‘activity centre’ issues, and that there is no apparent concern with the Amendment insofar as it might be relevant to this case. Indeed, the new licensed premises policy in cl 22.09 was supported by the panel, subject to minor changes. It is therefore of concern to us that the Minister has apparently delayed for over a year the introduction of a planning scheme amendment that would clarify and update the Council’s local policy, particularly where the issue of planning for late night inner city licensed premises and entertainment venues is at the forefront of public debate.

62 Despite this, by reason of s 84B(2)(g) of the *Planning and Environment Act* 1987 and the oft-quoted principle in *Lyndale & Black Pty Ltd v M.M.B.W.*<sup>16</sup>, we are still able to consider the adopted Amendment C84 as a ‘seriously entertained planning proposal’ deserving of some weight. In particular, we note the following:

- The proposed cl 22.09 would expressly apply to all applications for the extension of hours and patron numbers.
- Policies in relation to hours of operation and patron numbers have been strengthened, albeit in our view in a relatively minor way.

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<sup>16</sup> [1983] 1 PABR 207

- A new Interface Uses Policy is included (in proposed cl 22.05)
- Following panel recommendations, the required noise and amenity action plan should also address cumulative impact issues, and the ICEPT report is to become a reference document in the new Municipal Strategic Statement to assist with the background to issues that can arise in considering permit applications.

63 Unfortunately, given the delays with Amendment C84 since its exhibition in 2006, even the proposed cl 22.09 provides somewhat limited assistance on some key issues arising in this case. The proposed cl 22.09 remains broadly based, and does not refer to specific precincts in the municipality such as the Swan Street precinct. Moreover, it provides none of the specific benchmarks or guidelines recommended in the ICEPT report or *Victoria's Alcohol Action Plan 2008-2013* to assist planning decision makers. The 'new' policy may therefore be somewhat out of date before it is approved. From our review, the new policy simply retains 'motherhood' statements – for example, that the number of patrons “must not adversely affect the amenity of the area”.

#### **Council local law**

- 64 One additional 'regulatory' issue was brought to our attention that we consider is deserving of comment. The Council has in the past had a local law, similar to some other municipalities, allowing it to control the consumption of alcohol in public places and streets. We were told by objectors that the Council had never declared the Swan Street precinct or adjoining area for the purpose of the local law within its 10-year life, and the local law lapsed in 2008.
- 65 A consequence of this 'absence' of control by local law is that patrons moving between licensed premises in the Swan Street precinct, or passing through the adjoining residential area to and from licensed premises, often carrying a can or stubby of alcohol with them (known colloquially as a 'traveller'). We also saw this on our night inspection. This adds to adverse amenity impacts in a variety of ways – e.g. additional alcohol consumption less able to be controlled by individual licensed premises, rowdy behaviour and drinking in residential streets, tossing of cans and bottles once consumed etc.
- 66 Swancom contended that the re-introduction and enforcement of this local law, and its application to the Swan Street precinct, would be the single-most effective response to concerns about residential amenity arising from licensed premises and alcohol consumption generally. It argued this in the context that the Council (and Tribunal) should not refuse Swancom's planning application on broad amenity grounds outside of Swancom's control when there were other available steps within Council's power to address those amenity issues.

67 We do not necessarily share Swancom's view that the local law is, *by itself*, is something of a 'silver bullet' that will resolve the broader cumulative amenity impacts created by the Swan Street precinct. However, we are sympathetic to Swancom's underlying concern that there are other tools within the armoury of state and local governments that are not being effectively utilised to address amenity impacts. There would seem some merit in the use of local laws as part of an overall strategy. We note that, towards the end of the hearing, the Council indicated it was considering the re-introduction and use of the local law for the Swan Street precinct.

## **(2) ASSESSMENT METHODOLOGY FOR CUMULATIVE IMPACT**

68 One of the decision guidelines in cl 52.27 requires us to consider, as appropriate, the *cumulative* impact of any existing and the proposed liquor licence, the hours of operation and number of patrons, on the amenity of the area. Given the density and mix of licensed premises in the Swan Street entertainment precinct, and the evidence of their combined impact on amenity, we consider it is 'appropriate' to consider cumulative impact in this proceeding (in addition, of course, to the other decision guidelines).

69 Lest it be thought otherwise, we might add at the outset that we do not consider that the absence of express reference to cumulative amenity in a planning scheme provision or decision guideline necessarily excludes a consideration of cumulative impact as a potentially relevant amenity consideration in a planning matter. That may depend on the context of a particular planning application. Here, however, it is an express consideration so there can be no debate.

70 In the absence of any benchmarks having been set to measure and cumulative impact for the purpose of the decision guidelines in cl 52.27, we have endeavoured to draw together material from the ICEPT report and other background material, the evidence of Ms Maxine Cooper of Urbis (on behalf of the Council), and the submissions of the parties, to create an appropriate methodology for the assessment in this case. Our assessment criteria also follow, in part, and expand upon the methodology and criteria proposed in this case by the Council.

71 We should say that we found the social planning assessment of Ms Cooper to be very helpful to our decision-making role. In particular, Ms Cooper and her firm had undertaken a review of the relevant planning scheme provisions, reviewed background and policy documents, researched other relevant material and data (including overseas experience), inspected the precinct late at night, undertaken an audit of licensed premises in the area, undertaken a resident survey and analysis, and undertaken stakeholder interviews. Some relevant matters stemming from this material, in relation to potential assessment methodology, include the following:

- A highlighting of the disconnect between liquor licensing and planning applications, identified in the ICEPT report, and leading to an often ineffective response to amenity issue.
- Interstate research and findings on cumulative impact, such as the research from Sydney local government areas conducted by the NSW Bureau of Crime Statistics and Research in 2006 (**BOSCAR report**)<sup>17</sup> that found a very strong correlation between outlet density and crime statistics such as assault, and a statistically significant relationship (but less definitive) to property damage and drunkenness. The BOSCAR report suggests that outlet density above 22 licensed premises per 10,000 head of population face the highest crime-related problems.
- A finding that as distance from licensed premises increases, neighbourhood problems such as property damage decrease.
- International research and findings on cumulative impact, such as the report *Managing the Night-Time Economy: Best Practice Guidelines* (report of the Greater London Authority)<sup>18</sup>. This research would suggest that consideration of saturation levels for licensed premises in an area requires a consideration of impacts rather than an arbitrary assumption based on the number of licensed premises in any given area, and offers some criteria by which that might be considered, such as the type of premises, ratio of seating to standing, provision of food, diversification of the area's night time economy etc).
- Research by Ealing Council is also discussed, with that UK Council measuring saturation levels by reference to closing hours (spread and location), footfall (volumes, queues and anti-social behaviour) and transport (parking, public transport, cabs), with a need to continuously update this material to reflect changes over time.
- Particular issues associated with what has become known in Australia and the UK as 'vertical bars' or 'vertical drinking'. A 'vertical bar' is characterised as being predominantly stand-up drinking, with limited or no seating, and often in crowded venues. A consequence of this is that patrons have nowhere to put down their drink, and research suggests they drink more and are more likely to have altercations or exhibit drunken behaviour<sup>19</sup>.
- A discussion of the impacts of late trading hours, crowded venues, violence, crime, and noise, anti-social behaviour and property damage<sup>20</sup>.

72 In our view, we consider an assessment of cumulative impact of licensed premises on the amenity of the area should address and/or have regard to the following issues, the outcomes of which will differ from case to case:

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<sup>17</sup> referenced in Ms Cooper's witness statement, in particular at pp 26 & 29-30.

<sup>18</sup> referenced in Ms Cooper's witness statement at p 30.

<sup>19</sup> See discussion in Ms Cooper's witness statement, in particular at p27

<sup>20</sup> See discussion in Ms Cooper's witness statement, in particular at pp 27-29

**1. What is the relevant area?**

- (a) What is the specific precinct or area within which the licensed premises is located? Is the area a dedicated entertainment precinct?*
- (b) What is the extent of the nearby or surrounding area within which the amenity impacts should be considered, have regard to the pattern of settlement and development (existing and proposed) and the extent of any sensitive uses?*

**2. What is the density of licensed premises within the area?**

- (a) Are there more than 22 licensed premises per 10,000 head of population?*
- (b) Are there more than 10 licensed premises within 500 metres?*

(Note: There may be other possible benchmarks for considering density. Note also that density is not in itself a determinant of ‘saturation’ . )

**3. What is the mix and type of existing licensed premises in the relevant area?**

- (a) Does the Council or responsible authority already have particular benchmarks or data for licensed premises in the relevant area?*
- (b) What are the trading hours for existing licensed premises? What proportion are late-night venues? Do the closing hours coincide, or is there a spread of closing hours?*
- (c) What is the size of existing licensed premises?*
- (d) What are the patron numbers for individual premises, and overall within the relevant area?*
- (e) Is the area characterised by larger venues, or a large number of smaller venues?*
- (f) Is queuing outside the licensed premises common? Is it common for venues to be full or crowded?*
- (g) Does the licensed premises, or the area generally, cater to a specific clientele or demographic? Do the licensed premises, or the area generally, serve a predominantly local population, or is it a regional attraction?*
- (h) What is the ratio of seating to standing? Are the premises predominantly for ‘vertical’ drinking, or are other services/activities available?*
- (i) Does the licensed premises offer drink promotions?*
- (j) Is entertainment is offered? What type of entertainment – live bands, amplified, rock, jazz, dancing etc? What time does it start/finish?*
- (k) Are meals served or is food available? What time does it start finish?*

*(l) What form of transportation is available? For public transport, what time does it finish? For taxis, is there a dedicated taxi rank?*

*(Note: There may be other possible benchmarks for considering the mix and type of premises relevant to a particular area.)*

**4. What is the existing level of amenity in the relevant area?**

*(a) What is the zoning of the relevant area? What uses are encouraged or discouraged? Are there any relevant overlays or other planning scheme provisions?*

*(b) Are there sensitive uses (e.g. residential) within or adjacent to the relevant area? What is the level or density of these sensitive uses? Are they encouraged or discouraged uses in the relevant area?*

*(c) Are there any special attributes of the area that are relevant (e.g. in or nearby to a tourist precinct, proximate to major sporting venues etc).*

*(d) Having regard to the above, what is the reasonable expectation for amenity in the relevant area given existing and proposed patterns of zoning, development and use?*

*(e) What are the patron movement and dispersal patterns relevant to the sensitive uses nearby?*

*(f) What form of transportation is available? Does access to transport require patrons from licensed to move into or through adjacent areas?*

*(g) Are complaints already being generated about the amenity impacts of licensed premises? What is the nature and extent of these?*

*(h) Is there cogent evidence of particular issues of concern – e.g. anti-social behaviour, noise, property damage etc?*

*(i) Is there cogent evidence that these concerns arise from any specific licensed premises, or occur at times attributable to patrons departing or moving between licensed premises (i.e. relevant to trading hours) or arise from overall numbers of people being in the area (i.e. relevant to patron numbers?)*

*(j) What are the local crime statistics related to licensed premises?*

*(k) What enforcement resources are available?*

*(l) What other public safety initiatives (if any) exist?*

*(m) What other options exist to address/improve local amenity? Are these being used effectively?*

*(Note: There may be other possible benchmarks for considering the existing level of amenity relevant to a particular area.)*

5. *If any of the three ‘primary’ considerations of density of licensed premises, mix and type of licensed premises and/or existing amenity levels, is triggered as being of concern in the relevant area, the proposed new or amended licensed premises should then be assessed against the existing ‘status quo’ situation to determine whether the impacts of the proposal are acceptable, or whether the proposal will adversely impact on the existing situation to an unacceptable level. This will necessarily be an objectively based and qualitative exercise, involving the balancing of relevant factors. Without limiting these factors, the factors will commonly include the following:*
- (a) *Has the relevant area reached a saturation level (or near saturation level) for a particular type of licensed premises, having regard to the mix and type of premises, the existing level of amenity, and known existing impacts?*
  - (b) *Is the proposal adding to existing licensed premises, or introducing new licensed premises?*
  - (c) *How will the proposed or amended licensed premises fit within the existing mix and type of licensed premises, and the existing level of amenity?*
  - (d) *What are the likely impacts of the proposal, having regard to the mix and type of premises, the existing level of amenity, and known existing impacts? Specifically, what are the impacts of trading hours? What are the impacts of any additional patron numbers?*
  - (e) *Will the proposal add to the existing mix and type of licensed premises in a manner more likely to improve or worsen the existing level of amenity?*
  - (f) *Will the proposal add something new or different to diversify the offer in licensed premises in the relevant area? (e.g. depending on the area and circumstances, a small seated licensed restaurant may have very different impacts to a large ‘vertical drinking’ bar)*
  - (g) *Does the proposal offer any benefits in amenity terms, to counter-balance against any adverse impacts?*

73 As is evident from this assessment methodology, the three key considerations are the density of licensed premises in an area, the mix and type of licensed premises, and existing amenity levels. The level of detail of the assessment of cumulative impact on amenity should be proportionate to the level of concern raised by these considerations. For many applications, an initial review of these three considerations will lead to a straightforward outcome that cumulative impact is not of significant concern for that application. There will however be other cases where the location of the licensed premises, by reference to these three considerations, clearly triggers the need for a more detailed assessment. The density, mix and type of licensed premises in the Swan Street precinct, combined with poor

existing amenity levels in the immediately surrounding area, means that this is a case deserving of a detailed assessment of cumulative impact.

### (3) ASSESSMENT OF THIS APPLICATION

#### Amenity

- 74 In assessing this application, the parties invited us to first attempt to define what is meant by ‘amenity’ in a planning context, and specifically for the purposes of cl 52.27. As with many courts and tribunals before us, we decline that invitation other than to make some general observations relevant to this case.
- 75 Swancom referred us to the *Liquor Control Reform Act 1998*, which purports to describe amenity as “the quality that an area has of being pleasant and agreeable”<sup>21</sup>. Without limiting this definition, that Act notes factors that may be taken into account in considering whether the grant or variation of a licence may be detrimental to amenity include parking facilities, traffic movement and density, noise, the possibility of nuisance or vandalism, and the harmony and coherence of the environment<sup>22</sup>. Given the different purposes, objectives and emphasis of liquor licensing and planning legislation, we are wary about relying upon a definition in the *Liquor Control Reform Act 1998* for *planning* purposes, although it is perhaps of some broad general assistance in a case such as this.
- 76 Indeed, in *Zerbe v City of Doncaster and Templestowe*<sup>23</sup>, it was stated that:
- Amenity is an elusive but invaluable concept in town planning. The amenity of a neighbourhood is a complex of many attributes. It goes much further than mere “pleasantness” and “agreeableness”. In town planning terms, it embraces all the features, benefits and advantages inhering in the environment in question.
- 77 Amenity has also been equated with the planning objective “to secure a pleasant, efficient and safe working, living and recreational environment”<sup>24</sup>.
- 78 It follows that ‘amenity’ is an important but nebulous concept, the assessment of which will depend on a particular location and its surroundings, and the facts and circumstances of a particular matter. Amenity is not in our view a term that can or should be defined or codified for planning purposes.
- 79 In any event, we do not consider that in this matter we are in a finely balanced situation where any strict definition of ‘amenity’ is critical to our determination. Our views on the poor level of existing amenity in the Swan Street precinct and surrounding area, caused by the existing licensed premises, are evident from the evidence we discuss below. Here, in

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<sup>21</sup> *Liquor Control Reform Act 1998* s 3A(1)

<sup>22</sup> *Liquor Control Reform Act 1998* s 3A(2)

<sup>23</sup> (1984) 2 PABR 101, particularly at 110 per Senior Member Morris (as he then was).

<sup>24</sup> *Planning and Environment Act 1987* s 4(1)(c)

balancing the merits of the proposal before us, the significant and consistent evidence from residents, business occupiers, the police and Ms Cooper's survey material leads us clearly and objectively to a view that the extension of hours and patron numbers at the Corner Hotel (as currently proposed) will cause adverse amenity impacts on the surrounding area, both specifically and cumulatively.

### **The evidence from residents and objectors on amenity impacts**

80 The Council called evidence from six lay witnesses. Three objectors also made submissions, and other affidavit evidence and submissions were also filed. We agree with the Council that this material provides clear and cogent evidence of regular and serious adverse amenity impacts being sustained by local residents and business occupiers over a long period, caused by patrons attending licensed premises in the Swan Street precinct. These adverse impacts have worsened over the past 5 years, which can be attributed to an increase in late night venues operating in the precinct. The impacts occur most weekends, and some weeknights, and are worse during major sporting or music events in the sports and entertainment precinct in Jolimont. The amenity impacts include the following:

- Patron and music noise from within licensed venues.
- Patron noise external from licensed venues. This includes noise from rowdy patrons using Lennox Street (and, to a lesser extent, Botherambo Street) to move from the London Tavern in Lennox Street to the later trading licensed premises in Swan Street after the London Tavern closes at around 12 midnight. It also includes noise from patrons exiting licensed venues and moving through the residential streets to the north, either to their parked cars or towards Bridge Road.
- Urination, defecation and vomiting in public streets.
- Litter and waste, including bottles, broken glass and syringes being left or thrown in public streets.
- Occasional trespass into front gardens, including urination and property damage, and leaving or throwing litter, bottles, broken glass and syringes in private property.
- Property damage to fence palings and street trees.
- Graffiti
- Violence or perceived threats to safety.
- Non-residents using limited resident-only car spaces.

81 Swancom did not materially contest many of these issues, although its response (through cross-examination and its own submissions and evidence) provided the following counter-balance:

- Those witnesses who were able to express a view on the issue all conceded that the Corner Hotel was in their view generally well managed, and not the primary source of noise or the primary cause for complaint.
- The witness evidence and objections were directed to the adverse amenity impacts from licensed premises in the Swan Street precinct *generally*, and not directed specifically to the Corner Hotel or its operators.

82 We are satisfied that the evidence of local residents and business occupiers supports a clear finding that the combination of late night trading and the high number of licensed venues and patron numbers in the Swan Street precinct is already leading to adverse and unacceptable amenity impacts on the surrounding area. Our late night inspection confirmed much of the evidence and submissions albeit, as we have indicated, at a reduced level given the weather and time of year of our inspection. Whilst we saw no violence, we saw at least some evidence of the other amenity issues complained of, or the consequences of them. Equally, on our night inspection of the Corner Hotel itself, we found the hotel to be well managed both internally and in the immediate vicinity of the entrance from Swan Street.

83 The overall concern for the residents is that an additional 550 patrons at the Corner Hotel, with potentially an additional 350 of them in the beer garden with extended trading hours until 3 am, will make an already poor situation much worse. They foresee worse amenity impacts associated with additional patrons exiting venues and looking for transport home, and/or moving between the venues, in period after 2 am when there is no public transport and insufficient available taxis. We share this concern.

### **The police evidence from Inspector McWhirter**

84 The direct evidence from residents and business occupiers was bolstered in this case through direct evidence being called by the Council from Inspector Dean McWhirter, the divisional licensing inspector for the Yarra Police Services area.

85 Inspector McWhirter gave evidence from his experience in the area of a clear connection between alcohol and violence, public order offences, theft and property damage. He provided statistics that showed an increase in assaults related to licensed premises in the municipality, and an increase in assaults and thefts from cars in the immediate area around Swan Street. Inspector McWhirter agreed that the Corner Hotel was reasonably well managed, but the problems he outlined arose independently of the competency of the hotel management. The main problem was people outside the licensed premises and/or moving between licensed premises. Most assaults occurred when people were leaving premises between 10pm and 2am. There was also a natural flow of people to the Swan Street

precinct after major sporting and entertainment events at the MCG or Rod Laver Arena.

- 86 Inspector McWhirter also gave evidence as to the limited capacity of the police to deal with increased demands resulting from an increase in patronage and extended licensed trading hours in the area generally. There was a sustained and enduring increase in the number of people drawn to the Swan Street precinct for longer periods on a more occasions during the year. In the last several years, the numbers of licensed premises related assaults had increased substantially, with an increase of approximately 25% increase in 2008/2009 over the previous year. Inspector McWhirter indicated a belief that an increase of 550 patrons to the area (if the Corner Hotel application was approved) would have an immediate and long-lasting impact on the general crime rate in and around Swan Street area. Even if the increase were only 250, it would still have an adverse amenity impact.
- 87 Inspector McWhirter expressed a view that licensing issues were usually resolved by conciliation, and the police offered no objection to a 1am licence for the beer garden, provided there was no live or amplified music.

#### **The social planning evidence of Ms Maxine Cooper (Urbis)**

- 88 As indicated earlier, the Council called expert evidence from Ms Maxine Cooper from Urbis. She had been engaged by the Council's lawyers to provide an independent assessment of the social planning issues associated with the proposal and, in particular:
- The extent and magnitude of the social effects and amenity impacts directly associated with the Swan Street precinct; and
  - The Corner Hotel proposal, in the context of the cumulative amenity impacts of the licensed venues located within the Swan Street precinct.
- 89 Apart from the general evidence of Ms Cooper that we have used to assist in informing our views on the methodology and criteria for assessing cumulative impact, Ms Cooper also undertook such an assessment. As we have indicated, this included a review of the relevant planning scheme provisions, background and policy documents, an inspection of the precinct late at night, as well as a resident survey and analysis, and stakeholder interviews.
- 90 Ms Cooper concluded that the number of licensed premises in the Swan Street precinct had increased at the same time as a marked increase in residential development. Given the Swan Street area was not a designated entertainment precinct (in planning terms), considerable tensions had arisen. Whilst there were still no agreed benchmarks for measuring cumulative impact, Ms Cooper was of the opinion that the Swan Street precinct had reached a 'saturation point'. She considered that, given the assessment of existing amenity impacts, the Corner Hotel proposal would exacerbate the already eroded amenity of residents, and have implications for incidents of violence, property damage, anti-social behaviour and other

amenity impacts. Considered in the context of a planning scheme and policy regime that now strengthens the importance of amenity-based decisions, Ms Cooper considered it would be inappropriate to amend the existing Corner Hotel planning permit to increase trading hours or patron numbers.

- 91 We agree generally with Ms Cooper's assessment, in the context of the particular proposal before us.
- 92 For the record, we indicate that we disagree with Ms Cooper's material in one respect. She relied (at p31 of her report) upon a Court of Appeal decision in *Macedon Ranges SC v Romsey Hotel Pty Ltd*<sup>25</sup> for authority as to how 'amenity' might be considered, including the need to consider the subjective views of the community. In our view, the Court's comments in the Romsey Hotel decision arose from the particular *Gambling Regulation Act 2003* before that Court, where they were required to consider detriment to community well-being. This led, in turn, to the Court allowing as a relevant consideration the general community opposition to a gaming proposal. Subjective perceptions of community members are not relevant in the same way in the different legislative framework of the *Planning and Environment Act 1987*, where social and planning impact is considered on a more objective basis. This is consistent with the view expressed recently by DP Gibson in *Minawood Pty Ltd v Bayside CC*<sup>26</sup>. A copy of the *Minawood* decision was given to the parties at the hearing, and Swancom's counsel also referred us to a similar view in a licensing context in *Black v Liquor Licensing Victoria*<sup>27</sup>.
- 93 We do not consider Ms Cooper's apparent reliance on the Romsey Hotel decision to undermine her evidence or conclusions in this case, given the strength of other objectively based material she relied upon in forming her overall professional opinion.

### **Swancom's evidence and response**

- 94 As we indicated in our introductory comments, Swancom presented no substantive material or evidence to deal with the existing and emerging state and local planning policy regime, and appeared to us to present a case more akin to a liquor licensing application rather than addressing some of the key *planning* issues.
- 95 In terms of a general response to noise and amenity, Swancom provided a draft Noise & Amenity Action Plan, as required by cl 22.09. It certainly deals with internal management procedures, noise, security, lighting etc , as required by cl 22.09, and was accompanied by detailed operating procedures prepared by Mr Anthony Warren (a licensing consultant specialising in hotel management, and a former police officer) as part of his

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<sup>25</sup> [2008] VSCA 45

<sup>26</sup> [2009] VCAT 440

<sup>27</sup> [2000] VCAT 459

expert report and evidence. We acknowledge that these issues are very important and Mr Warren's material, in particular, was thorough in providing the framework for a venue management plan, security operations manual, RSA briefing, security instructions, venue inspection list, risk assessment and induction list, and an emergency management plan. Some of these initiatives are already in place. However, equally, these issues are not really a matter of controversy in this proceeding, nor should they be. They should be expected as 'best practice' for any large hotel operation, and not offered as a sweetener to encourage a successful permit application. Nonetheless, all of the evidence is that the Corner Hotel is reasonably well managed at present. We have no reason to doubt this, including, as a result of our night inspection and hearing the evidence of Swancom's director Timothy Northeast. We accept that Swancom is capable of implementing internal management procedures to deal with additional patron numbers.

- 96 However, the issue in this proceeding is not the internal procedures of the Corner Hotel, or even the amenity impacts at the hotel entrance capable of being controlled by paid security personnel. This material, in our view, only forms part of what is now required in the consideration of broader amenity impacts on the surrounding area. Considered in isolation, the proposed noise and amenity plan has an unduly narrow focus in the context of this proceeding.
- 97 We appreciate the difficulty faced by an applicant such as Swancom in dealing with possible saturation levels in the precinct and/or broader amenity issues beyond its immediate control. However, we believe the those considerations are triggered by this application in *this* precinct, given the location of the Corner Hotel in the Swan Street precinct, the past and existing amenity issues already apparent in the surrounding area, and the extent of what is proposed. Swancom has failed to address this.
- 98 Equally, Swancom contended that maximum patron numbers were simply a function of the safe capacity of the building having regard to floor area, fire exits and numbers of toilets. It produced an expert report by Metro Building Surveying (updated after the hearing) that indicated, on this basis, that the capacity of the building was 1300 patrons – this therefore forming the basis for the actual increase sought in the application. This 'building capacity' evidence was not of any particular controversy (and the Council did not require the author of the report to be called), but the evidence again has an unduly narrow focus in the context of this proceeding. Clause 52.27 now expressly requires consideration to be given to the impact of patron numbers on the amenity of the surrounding area, including the cumulative impact of patron numbers. In addition to information on safe building capacity, the adopted cl 22.09 also seeks that patron numbers not affect the amenity of the surrounding area. As indicated earlier, the ICEPT report also notes that a more meaningful benchmark is needed to establish patron numbers, rather than relying on building capacity. Swancom has not addressed these issues, nor dealt at all with the correlation between patron

numbers and external amenity impacts. We think this especially important in this case, where the increase sought is substantial – from 750 to 1300 patrons – and where the evidence is that this will make the Corner Hotel by far the largest licensed premises in the Swan Street precinct and in the area generally.

- 99 Swancom also provided an empirical car parking assessment, through the report and evidence of Mr Damien Hancox of TTM Consulting. This assessment suggested that there was commonly sufficient parking availability in the precinct although, under cross-examination, Mr Hancox conceded that there were no major events in the sports and entertainment precinct in Jolimont at the time of his survey. Mr Hancox also conceded some non-compliance with resident permit parking, but gave evidence that for issues arising after 10 pm on busy nights, there was ability for the parking management regime to be altered to address this, by increasing and better enforcing resident permit parking. He acknowledged however that local traders were opposed to this.
- 100 In our view, if parking congestion alone was the issue in this case, we think it probably capable of resolution and management. The determining issues here are far broader. From an overall transport perspective, the issue of public transport is also important to our consideration. The proposal for extended hours for the beer garden would extend the trading time for that area beyond the time when public transport operates in the area, with a notional additional 350 patrons from the beer garden (and an additional 550 overall) potentially using this area until 3am and adding to the amenity impacts at that time when they seek a way home.
- 101 Swancom had provided a town planning report with the initial application in August 2007. It was prepared by Priority Planning Pty Ltd, who also lodged the application on Swancom's behalf and who has since acted as Swancom's representative in the matter. That report does contain an assessment of the proposal against the Council policy in cl 22.09, although we were not taken through that assessment, nor had the 2007 report been updated, nor was the author called to give evidence on it.
- 102 The planning report contended that residents living close to commercial uses and zones cannot expect the same level of amenity as that on offer within the core of a residential zone<sup>28</sup>. That may be so, but the principle is still one of *relative* amenity. As the planning report itself concedes, at a residential and commercial interface, the operator of a commercial use must also expect and accept certain constraints on its activities, having regard to the adjoining and nearby residential uses, that it would not necessarily be troubled with if in the core of a commercial zone. The application of this principle does not therefore assist Swancom to overcome the evidence here;

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<sup>28</sup> Following *Logie v Campaspe SC*, referred to in *Bomvic Pty Ltd v Yarra CC* [2004] VCAT 1916. Swancom also relied on *Olmecs Bakery and Café Pty Ltd v Yarra CC* [2006] VCAT 547 that had in turn followed *Keghlan v Mornington Peninsula SC* [2000] VCAT 2538. Notably, all of these cases were decided before the changes to cl 52.27 for licensed premises.

namely that there is already a very poor level of amenity that will likely get worse if the application for extended hours and patron numbers is supported.

- 103 Swancom's planning report essentially relied on the Corner Hotel's being in a major activity centre, its lack of an *active* interface with a residential area with the entry points being from Swan Street, and the ability to meet EPA noise standards (for entertainment noise), as sufficient to address Council policy discouraging trading of licensed premises after 11pm where adjacent to residential areas. We consider this assessment superficial, but it also misses the point. There has been no attempt to update the planning assessment, or to provide any independent assessment, to deal with the specific decision guidelines now existing under cl 52.27 where the broader impacts on the amenity of the surrounding area must be considered.
- 104 Swancom made much of a relatively recent decision of the Tribunal to approve a new licensed premises in the Swan Street precinct, despite Council opposition based on cumulative impact. That decision, *Kamari & Associates Pty Ltd v Yarra CC*<sup>29</sup>, was a short on-the-spot decision of a planning member allowing a licensed premises with a 100 patron limit, and with 3am trading only on Friday and Saturday nights. The issue of cumulative impact is not mentioned in the brief written reasons that followed the oral decision. It does not appear that the Council called evidence, and there is no evidence of any police objection, or indeed any objector parties before the Tribunal. The member noted that the premises were not on a corner site where patrons might congregate or cause amenity impacts close to residential areas (unlike the Corner Hotel). Moreover the member noted that the premises was limited to background music and would have "a very different character to the mainly much larger live music venues", and the patron numbers "were not excessively large compared to the other late night venues which may cater for many hundred of patrons". Implicitly, the member considered that the *type* of licensed premises and numbers were important factors in the decision. This accords (at least in part) with the assessment approach we have recommended, and distinguishes the *Kamari* approval from the present application. Having said this, we are somewhat sympathetic to Swancom's concern of the potential for unfair treatment if its application is refused and others are granted through an inconsistent response to the new decision guidelines in cl 52.27. This reinforces the necessity for appropriate benchmarks to be set quickly in accordance with the ICEPT report recommendations, both generally and for the Swan Street precinct.
- 105 Swancom also mounted an attack on what is known as the 'availability theory' – i.e. that the increased availability of alcohol through increased outlets, hours or patron numbers will automatically exacerbate anti-social behaviour and alcohol-related harm. It was submitted that no court or

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<sup>29</sup> [2008] VCAT 1968

tribunal in Australia had yet formally accepted that theory based on probative evidence, nor made a determination based on such a theory. We do not know if that is correct or not, but we think the argument misconceives the nature of this case, and is perhaps more of a liquor licensing matter where harm minimisation is a core issue. We must have regard to the decision guidelines in cl 52.27 that require us to consider the impacts (including cumulative impacts) on the amenity of the surrounding area.

- 106 We consider that the clear policy shift now embodied in cl 52.27 means that the *planning* considerations related to amenity impacts are now intended to better consider the impacts of anti-social behaviour created by patrons from licensed premises on the amenity of the surrounding area, where it is appropriate to do so. There is an attempt, at least in part, to address the disconnect between liquor licensing and planning applications where this issue has sometimes ‘fallen between the cracks’, and the new planning approach may lead to some overlap and better coordination between liquor licensing and planning applications in the future. Despite this closer relationship, we consider the planning considerations remain somewhat different to those raised by harm minimisation (in a liquor-licensing context) and/or the availability theory generally. We do not need to decide the merits of the ‘availability theory’ here.

#### **Additional issues and comments arising from assessment criteria**

- 107 Drawing together the evidence and submissions, we agree with the Council, and with the evidence of Ms Cooper, that the Swan Street precinct is already at, or close to, saturation levels in terms of late-night entertainment venues, based on existing levels of amenity and existing known impacts. The Swan Street precinct has a high density of late-night bar/hotel venues offering ‘vertical drinking’ (albeit some such as the Corner Hotel offering live entertainment). The precinct already has well over the 22 licensed venues per 10,000 population in the area, identified in the NSW BOSCAR report as a relevant benchmark<sup>30</sup>. We were provided with folders of material detailing the planning permit and licence conditions for most other licensed venues in the precinct, and we have had specific regard to the mix and type of those facilities, as well as records of complaints (albeit with the Corner Hotel having a much lower level of complaint compared to some other licensed premises).
- 108 In saying the Swan Street precinct has reached, or nearly reached, a saturation level in this manner, we should add that we do not consider saturation to be an ‘absolute’ across all forms of licensed premises in a particular area. It does not follow that no further licensed premises (or changes to the trading conditions of existing licensed premises) should be allowed at all. A saturation level for larger late-night entertainment venues

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<sup>30</sup> Across Yarra CC area generally, there are 92.85 licensed premises per 10,000 residents.

would not necessarily preclude a permit being granted, for example, (if indeed a permit is required) for a seated licensed restaurant closing at midnight, or for a seated jazz club catering to a different clientele. Each proposal will require the criteria to be assessed according to particular facts and circumstances.

109 However, we consider the clustering and dominance of late-night bar/hotel venues is the primary cause of existing amenity impacts in the immediate area around the Swan Street precinct, and the primary barrier to the Council achieving its aspirations (in planning terms) for a more diversified activity centre and mixed-used precinct. We have already detailed the evidence of residents, business occupiers, police and the Council in support of this view. Adding another 550 patrons to one of these venues until 3am will in our view ‘tip the balance’ even more unfavourably to the point of being unacceptable.

110 We agree with the Council that the issue is not one of internal management by the Corner Hotel. It may well be that the hotel can effectively internally manage an additional 550 patrons, given its past management record within its existing 750 patron maximum. The real concern is the impact of those 550 patrons once they depart the hotel, or for the others who might be attracted to the venue and cannot gain entry once capacity is reached. In particular, in addition to the evidence of specific adverse amenity impacts already discussed:

- The dispersal of an additional 550 patrons from the venue is compounded by the fact that there are a group of nine venues in the immediate area already trading until 1 am or 3 am. Late night venues trading until after midnight within this cluster already account for 3,728 patrons, with 1,640 exiting at around 1am and 1,360 exiting at around 3am. This does not include the possible 728 patrons who exit the London Tavern in Lennox Street at around 12 midnight, many of whom then move to Swan Street<sup>31</sup>.
- With an additional 550 patrons at 3am, this means that there could be between 1500 and 2000 patrons present in the area and seeking transport within the period around 3 am. Available public transport by train or tram ceases or becomes severely limited around 12:30pm, and there are limits to taxi availability notwithstanding a dedicated and Council ‘controlled’ rank near to the Corner Hotel. Car parking is predominantly in the nearby residential streets. The evidence before us is that this is when some of the worst behaviour and amenity impacts occur, as patrons seek taxis or return late to their own cars.
- We agree with the Council that, as the (already) largest venue in the precinct based on permitted patron numbers<sup>32</sup>, and one already trading

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<sup>31</sup> Source: Ms Cooper’s witness statement, and references therein.

<sup>32</sup> Not all the licensed premises in the precinct have limits on patron numbers. High risk venues (as defined for liquor licensing) such as the Corner Hotel are required to have patron number limits.

until 3am on its ground floor level, it is unrealistic to claim that the Corner Hotel is not already one of the contributors to the existing levels of adverse amenity in the surrounding area. Adding another 550 patrons will exacerbate this.

- In terms of cumulative impact, the Corner Hotel is perhaps also a victim of its location and success. Its reputation as a music venue means that it is a 'regional' venue drawing patrons to the area. It is an attractor (described by the Council as a 'honey pot', rather than 'the local'). Although it may be well managed internally, it is by default a core contributor to the amenity impacts that have arisen through its drawing power for other bars and licensed venues in the precinct, as patrons move from the Corner Hotel to those other venues, and then exit into the streets and surrounding area. Adding another 550 patrons and an extension of beer garden trading until 3am will exacerbate this.
- Given the live music 'band room' within the Corner Hotel has a capacity of 600 patrons, and is often full within the existing 750 patron maximum, the additional 550 patrons will not have access to that live entertainment. 350 of these 550 would be in the upper level beer garden where no amplified music would be allowed. This has the potential to change the profile of the Corner Hotel to a large late-night bar/hotel, where more than half the patrons have no access to the entertainment, less than half have access to seating, and most are there to use it simply as another drinking venue. The Corner Hotel cannot therefore rely on its existing profile as an iconic live music venue to differentiate it from the cumulative impact of the other late-night venues in the precinct. [We might add that, when the band room is operating to its 600 patron capacity, it is also very much a crowded 'vertical bar' with virtually no seating. This was evident at our inspection].
- The Richmond Arms Hotel, with a patron limit of 360 patrons, has been closed for some time due to fire damage, but will reopen shortly. There is a concern by residents that the impacts of this hotel have not been assessed as part of the consideration of existing amenity levels, and its re-opening will exacerbate already poor amenity.

### **Nett Impact**

111 We agree with Swancom that in considering amenity impacts to the surrounding area, and in particular cumulative impacts, we should consider the nett impact. Not all amenity impacts that we are required to consider under cl 52.27 are necessarily adverse, and we should also consider any positive outcomes for amenity.

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Swancom submitted (through the evidence of Mr Warren) that some of the premises without patron limits, such as the Holliava or Post Office Hotel, have the potential to cause the greatest degree of difficulty.

- 112 Here, there are potentially some positive outcomes. Swancom argued that, key amongst these, is the ability to use the beer garden after 11:30pm for smokers, so as to provide a smoking area off the public realm (i.e. to avoid smokers congregating on the pavement in Swan Street at the hotel entrance). We were told this was one of the reasons for the initial application having been made, shortly following the changes to the *Tobacco Act* 1987 in 2007 requiring all enclosed licensed premises to be smoke free.
- 113 We agree with Swancom that the Swan Street footpath is not an ideal arrangement for smokers for a venue such as the Corner Hotel that is certainly not small-scale<sup>33</sup>. There is the potential for conflict with pedestrians and those queuing for entry, although the footpath in this area is relatively wide and a safety barrier has been erected to avoid patron spillover onto the road.
- 114 However, we are not convinced that the benefit is necessarily as great as Swancom makes out, nor justifies the extent of the amendment it seeks to its existing permit. The licence at present requires that “trading must cease at 11:30pm in the beer garden on any day”. The parties were agreed that the term “trading” in this context was perhaps a matter of some ambiguity and debate. Although it clearly prevents the serving of alcohol, does it prevent patrons using the beer garden for smoking after 11:30pm if no alcohol is served, or able to be consumed there? Could patrons from the downstairs licensed area access the beer garden now for a smoke in the same way they access Swan Street? Even if they can’t at present, couldn’t this be clarified by a more modest change to the permit and licence? Why is it necessary to allow up to 350 patrons to access the beer garden til 3am *and* to be served alcohol there, if the convenience of smokers is the prime motivation? And if the beer garden is operating to capacity late at night, does it really provide a smoking venue for the remaining 950 patrons downstairs (i.e. the balance of the 1300 sought through this application and up 200 from the current overall maximum 750)? There may be even more forced onto Swan Street than at present. We are not called upon to answer all of these questions, but we are a little cynical about the extent to which the convenience of smokers is a key driver of this application. These questions will need to be addressed in any future application.
- 115 We understand that a key driver of the application is to provide an additional and ambient venue within the Corner Hotel to ‘capture’ those leaving the enclosed (and far less ambient) entertainment area on the ground level once the late night entertainment concludes there. From a purely commercial perspective, this is quite understandable. At present, without the potential use of the beer garden, many patrons leave the Corner Hotel for other nearby licensed premises operating until 3am once the entertainment finishes, and Swancom loses this trade even though its downstairs area can trade until 3am. We are less convinced with

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<sup>33</sup> cf *Maisano v Port Phillip CC* [2007] VCAT 62

Swancom's argument stemming from this; namely that there is some town planning benefit in providing additional capacity to keep those patrons longer at the Corner Hotel and thus limiting the movement of those patrons on to the street and/or between licensed premises where they might cause adverse amenity impacts. We are also not convinced that providing additional and well-managed licensed premises capacity in the Swan Street precinct will create a benefit by limiting those on the street generally and/or moving between licensed premises where they might cause adverse amenity impacts. In our view, the reality is that additional capacity at the Corner Hotel for up to 550 patrons until 3am will simply mean that many more people overall will be attracted to the area as a late night entertainment precinct, and many more people will be exiting licensed premises at 3am than at present.

- 116 It follows that we consider the claimed benefits of the proposal to be minimal, and certainly not sufficient to outweigh the likely adverse amenity impacts in a balancing of net impact.

### **Amenity impact generally**

- 117 Quite apart from *cumulative* impact, we note that Clause 52.27 also requires us to have regard, specifically, to the impact of the sale or consumption of liquor permitted by the liquor licence, the hours of operation and number of patrons, on the amenity of the surrounding area. We may therefore consider the impacts of this proposal for the Corner Hotel in isolation from the other licensed premises in the Swan Street precinct. This is perhaps a more 'traditional' planning assessment of licensed premises, but one that now also has a focus on surrounding amenity.
- 118 Had we considered the matter on this basis alone, without reference to *cumulative* impacts, we would still have refused this application. The proposed internal management procedures provide some support for the proposed arrangements. However, even looking at the Corner Hotel in isolation, and its individual impacts on the amenity of the surrounding area:
- Swancom provided an insufficient planning assessment as to how these broader amenity impacts could be managed. As we have already indicated, we consider it unrealistic to claim that the Corner Hotel (as an already large venue) is not already a cause of some of the existing adverse amenity impacts. An increase in patron numbers from 750 patrons to 1300 patrons would make the Corner Hotel a very large venue, and exacerbate those impacts. Swancom would need to undertake a proper planning assessment to justify any increase, and we doubt an increase to this level could be justified on the evidence before us.
  - The internal management procedures still cannot control adverse external amenity impacts for the additional 550 patrons, particularly when those patrons depart the premises late at night. Many of the issues relevant to cumulative impact are therefore still relevant to the Corner

Hotel even if it is looked at alone – i.e. lack of public transport after 12:30 pm, limited taxi availability, cars primarily parked in residential streets, likely continuing anti-social behaviour in nearby residential streets, potential change in profile of the Corner Hotel from a music venue to a large drinking venue etc.

## Noise

- 119 A key amenity impact from licensed premises is noise. It is one of the most common causes for complaint, and worthy of separate comment in our assessment.
- 120 Our view is that music and entertainment noise from within the Corner Hotel is already reasonably managed and is not a major cause for complaint. The live music ‘band room’ already has reasonable attenuation measures in place, and the main ‘escape’ of noise (if any) is to the west in the vicinity of the Richmond railway line where no amenity impacts arise. On the night of our inspection, with a highly amplified band playing inside the Corner Hotel, the sound was barely audible a block or so away in the residential area. In fact, the noise from patrons in the outside area of the Post Office Hotel (directly opposite, in Swan Street) was far more audible. In any event, entertainment noise is regulated under relevant state environment protection policy (*SEPP N2*), and music noise from the band room does not really arise as an issue in the context of this application. The band room forms part of the licensed premises already able to trade until 3am, and it has a building capacity constraint of 600 patrons and will not directly benefit from the increased patron numbers elsewhere in the hotel.
- 121 350 of the increased numbers (i.e. the capacity of the upper level beer garden) would however be in an elevated open area with trading until 3am (rather than 11:30pm as at present), immediately adjacent to a residential area. The nearest residence is only 18 metres away, in Botherambo Street to the north-east. Late night patrons consuming alcohol and enjoying themselves in groups in an open environment will often exhibit elevated, exuberant or rowdy behaviour or language, even if not exhibiting drunkenness or anti-social behaviour. Whilst we consider some acoustic control is possible, we agree with the Council that it unrealistic to expect this noise to be kept to a gentile conversational level<sup>34</sup>. As we have indicated, on our site inspection, noise from the outside licensed area of the Post office Hotel was far more audible than the internal areas of any of the licensed premises.
- 122 As part of this debate concerning the extension of hours and patron numbers, two competing proposals (respectively by Swancom and the Council) were put forward for the possible acoustic treatment to the beer garden/dining area adjacent to Botherambo Street. The works both

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<sup>34</sup> Following *Sargood Properties Pty Ltd v Melbourne CC* [2007] VCAT 1192 at [47]. It “strains credibility to expect such exemplary patron behaviour”.

comprised an acoustic wall or barrier to deal with patron noise (i.e. loud talking and general ‘crowd’ noise) if patrons were allowed to use the beer garden later at night when background noise levels were low. We heard expert evidence from two acoustic engineers. Given we have refused the application for the extension of hours and patron numbers, it is unnecessary to finally determine this issue. However, for the benefit of the parties in any future application, we might say that:

- We generally preferred the evidence of Mr Rob Burton (for the Council) on the extent of noise to nearby residential areas from up to 350 patrons in the beer garden. We found the evidence of Mr Geoffrey Barnes (for Swancom) less ‘refined’ in its analysis and likely to understate noise levels.
- We agree with both acoustic engineers that there are acceptable noise attenuation options to ameliorate the impacts of patron noise from the beer garden, and to bring nighttime levels within relevant guidelines to protect nearby residents from sleep disturbance.
- As a matter of preference, we consider that an acoustic barrier close to the source of the noise is likely to provide the most appropriate solution. Given this, we do not necessarily consider that ‘zoning’ the beer garden to restrict use close to the Botherambo Street side would have a significant effect on noise levels emanating from the beer garden, as this Botherambo Street side is the area where the noise will theoretically be best attenuated by an acoustic barrier. This however requires further investigation in any future application.

123 As will be apparent from the discussion on cumulative amenity above, the other significant noise issue in this case is unwanted noise interference generated by on-street behaviour, such as those standing around outside or moving between venues, queuing, leaving venues and taxi ranks, standing outside fast-food venues, returning to parked cars in residential areas when departing late at night. A key problem here already is the closure of the London Tavern in Lennox Street at around 12 midnight, with many patrons then moving south through the residential area along Lennox Street (and, to a lesser extent, Botherambo Street) to the later licensed Swan Street venues. This will not change. However, what would change is the significant audible noise that would develop from an additional 550 patrons exiting the Corner Hotel late at night, many seeking to return to parked cars in the residential area, or congregating on street corners in Swan Street close to residential areas whilst seeking out fast food or a taxi. This on-street noise is not regulated by any state environment protection policy and is therefore a matter of general amenity. We consider this change to be adverse. By itself, this additional noise may not be sufficient to warrant refusal of Swancom’s application, although we have seen insufficient evidence of a proper investigation or external management regime from Swancom or the Council. However, in combination with the other amenity impacts we have

discussed, this patron noise is sufficiently adverse and unacceptable to warrant a refusal. More work potentially needs to be done on precinct parking plans and crowd dispersal and transportation generally, if this issue is to be satisfactorily resolved.

### **A COMPROMISE ?**

- 124 Midway through the hearing, Swancom indicated a potential ‘compromise’ position through which it would accept a condition for extended hours for the beer garden to 1am (rather than 3am), and an increase in patron numbers to 1100 (rather than to 1300) with a maximum of 350 patrons in the beer garden and upper level.
- 125 Swancom did not seek to formally amend its application. To do so would likely have triggered an application by other parties for an adjournment and/or costs, or for notice of the change to be publicly advertised, as other parties including the Council had already largely completed their presentations when the compromise was tabled. Given this, and whilst we have had regard to the compromise and discuss it further below, we have still decided the application that is formally before us.
- 126 We consider that Swancom’s compromise contained within it an implicit concession that its original application was unlikely to succeed, largely for the reasons we have outlined above. However, Swancom still offered no formal *planning* basis for the compromise, nor any indication as to why or how the compromise better met the planning provisions and policy framework relevant to the application. It provided no real indication as to what the impacts might be of the specific compromise hours and numbers offered, and how those impacts might differ from either the status quo position or the numbers in the formal application before us. The compromise seemed to be simply a commercially motivated compromise, rather than resulting from any detailed planning analysis or any acknowledgement of the ‘new’ planning regime now applying to licensed premises.
- 127 Despite this, some form of compromise proposal may well have merit. We note that when Ms Cooper was asked (without notice) of her opinion on the compromise proposal, she indicated she was not aware of it and if assessed against relevant criteria it would likely still fail, but that it was not necessarily a bad compromise. We consider however that any modified proposal requires a fresh application rather than by planning ‘on the run’. It should be supported by a proper planning and/or social assessment dealing with potential off-site amenity and cumulative impacts, and other relevant matters.
- 128 We note that at least one Council officer (but not the Council itself) had suggested a compromise in an internal referral report during the consideration of the initial application, with a suggested increase in patrons

to 950 (i.e. an increase of 200 patrons, rather than 550), and extended hours in the beer garden until 12.30am on Friday and Saturday nights. We also note that the police, through Inspector McWhirter, had indicated no opposition to a 1am closure (and no music) in the beer garden.

- 129 Having heard the evidence and submissions in this case, we think any compromise capable of being supported at this stage would likely be closer to the Council officer/police recommended levels than that proposed by Swancom. However, we express no concluded view on this. As we have made clear, whilst it may seem tempting to endorse some form of quick compromise, we believe the decision guidelines in cl 52.27 and Council policy in cl 22.09 require a more sophisticated planning assessment and amenity impact analysis.

### CONCLUSIONS

- 130 We are faced with a difficult proposition, in that the application before us is a *planning* application. However, apart from the social planning evidence from Ms Maxine Cooper, there has been no real expert planning evidence before us – in particular, from the applicant Swancom. We find this surprising given the importance attached by the main parties to this application, and its potential as a guideline for the consideration of cumulative impact for licensed premises.
- 131 In our view, limited assistance can be drawn from some of the state and local planning provisions at present Available background documents provide some background to the industry and the issues surrounding the use and abuse of alcohol, but do not (yet) provide a clear planning framework to balance the competing issues of the clustering and mix of licensed venues, late night operating hours, and the off-site amenity impacts to the surrounding residential areas.
- 132 We have in the preceding reasons raised a number of failings by state and local government to provide benchmarks and guidance, or to utilise other measures, to assist in dealing with the impacts of licensed premises (cumulatively and individually) on the amenity of the surrounding areas. It is difficult for a planning decision maker to operate clearly and consistently in such a ‘vacuum’, although we have endeavoured to apply the decision guidelines in cl 52.27 and the local policy in cl 22.09 (such as they exist), as well as other relevant planning scheme provisions and relevant considerations, to the circumstances of this case, based on the evidence and submissions before us.
- 133 Our conclusion is that the application to extend hours and patron numbers fails, when the various competing policies and objectives are balanced in a consideration of net community benefit and sustainable development. We consider that the application fails in particular because of the failure by Swancom to address the likely worsening of adverse amenity impacts to

residents in the surrounding area that would result from extended hours or patron numbers.

- 134 We accept that the Corner Hotel is generally well run, and has an iconic status as a live music venue. It is, to some extent, a victim of its own popularity because it is one of the key attractors of people to the area, and thus a major contributor to the overall numbers of visitors to licensed premises in the precinct, and therefore the cumulative impact they create. The extent of the increased hours sought for the beer garden, together with the additional numbers sought (i.e. from 750 to 1300 at just this venue), is simply too much in terms of this impact.
- 135 It follows that the Council's refusal of the application should be affirmed and no amendment of the permit should be granted.
- 136 Should Swancom be prepared to undertake a proper planning assessment, that takes into account the emerging state and local planning policy framework for licensed premises, and that provides support for a more limited change to hours and patron numbers for the Corner Hotel, a compromise outcome may be capable of being approved in the future.
- 137 Whilst it is not for us to make formal recommendations outside of the specific planning application before us, the absence of further action by state and local government to provide the recommended benchmarks and guidance is also a factor that might militate in favour of the grant of a future permit to Swancom.

**Mark Dwyer**  
**Deputy President**

**Elizabeth Benz**  
**Member**