

Decision

In the matter of an application by Ms Gayle Reeves under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant an application for a temporary limited licence for the market events, located at the Yarra Valley Railway Market and the Punt Road Winery Market.

Commission: Ms Danielle Huntersmith, Chairperson
Mr James O'Halloran, Commissioner
Ms Susan Timbs, Commissioner

Date of Decision: 12 August 2022

Date of Reasons: 25 August 2022

Decision: The Commission has determined to set aside the decision of the Delegate and, in substitution, grant a renewable limited licence subject to the conditions set out in Appendix A.

Signed:



Danielle Huntersmith

Chairperson

Background

The Original Application

1. Ms Gayle Reeves, trading as Mary Monica (**Applicant**), produces her own gin which she sells under her own label. The Applicant does not intend to supply any liquor other than that which she manufactures.
2. On 13 and 17 May 2022, the Applicant applied to the Victorian Liquor Commission (**Commission**) for a temporary limited licence under the *Liquor Control Reform Act 1998 (LCR Act)*¹ to supply liquor at market events for consumption off the licensed premises (**Original Application**).
3. The Applicant sought to provide 15 ml tastings of her gin, as well as to supply packaged liquor (i.e. unchilled and sealed bottles) for off-premises consumption, from the stall or point of sale operated by the Applicant at market events.
4. The Applicant sought to attend three market events at each of the Yarra Valley Railway Market and the Punt Road Winery Market, between 14 August and 20 November 2022.
5. On 20 May 2022, a delegate of the Commission (**the Delegate**) determined to refuse the Original Application (**Original Decision**) pursuant to section 44(2)(b)(v) of the Act. In particular, the Delegate noted that:
 - a. The Commission's records indicated that the Applicant had lodged and been granted 9 applications so far in 2022. As each market is counted as a separate event it appeared to the Delegate that the Applicant had 27 events granted between January 2021 and March 2022;
 - b. Temporary limited liquor licences are intended for activities that are one-off events over a limited period of time. Further, section 26(1) of the *Liquor Control Reform Act 1998* states that: "the Commission may grant a limited licence only if satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature".

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

- c. Given that the Applicant had been granted 25 temporary limited licence dates in the past 12 months, the Delegate was not satisfied that the scale and scope of the supply of liquor was limited in nature.

Application for Internal Review

6. On 9 June 2022, the Applicant applied to the Commission for review of the Original Decision (**Review Application**).
7. In the Review Application, the Applicant submitted that she had been working hard to have her family farm, based in Yarra Glen, approved by Council so that the Applicant can apply for a Producer's Licence. The Applicant's barn is ready to finalise a fit out for distillation. Planning approval for the farm had taken longer than the Applicant expected, although the Applicant did not anticipate any issues with Council.
8. The Applicant's current business plan relies on the market events to pay wages and fund future distillations. The Applicant sought to continue to trade at the market events, with a limited licence, until her ultimate goal of a Producer's Licence is achieved.

Legislation and the Commission's task

The Commission's internal review power

9. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the decision made by the Delegate in the Original Application is a reviewable decision and the Applicant is an eligible person to apply for the review of that decision. The Review Application was made pursuant to section 153 of the LCR Act.
10. Pursuant to section 157(1), the specific task for the Commission with respect to the Review Application is to make a fresh decision that:
 - a. *affirms or varies the reviewable decision; or*
 - b. *sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.*
11. Under the LCR Act, an application for a limited licence may be contested or uncontested. Pursuant to section 3(1), an uncontested application is defined as:

an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174).

12. The Original Application is uncontested, as no objections were received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174).
13. In effect, the Commission on review stands in the shoes of the original decision maker and must make a fresh decision with respect to the Original Application.

Exercising the internal review power

14. Section 172U(3)(b) of the LCR Act requires the Commission, in exercising its internal review function, to have regard to the objects of the LCR Act and any decision-making guidelines in respect of the regulation of liquor issued by the Minister.
15. The objects of the LCR Act are set out at section 4(1) and provide that:

The objects of this Act are—

- (a) *to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—*
 - (i) *providing adequate controls over the supply and consumption of liquor; and*
 - (ii) *ensuring as far as practicable that the supply of liquor contributes to, and does not detract from, the amenity of community life; and*
 - (iii) *restricting the supply of certain other alcoholic products; and*
 - (iv) *encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and*
- (b) *to facilitate the development of a diversity of licensed facilities reflecting community expectations; and*
- (c) *to contribute to the responsible development of the liquor, licensed hospitality and live music industries; and*
- (d) *to regulate licensed premises that provide sexually explicit entertainment.*

16. Section 4(2) of the LCR Act further provides that:

It is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act must be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.²

17. The Minister's Decision-Making Guidelines, referred to in paragraph 14 above, titled 'Grant of Licences for the Sale of Packaged Liquor' (**Guidelines**)³ apply to "the grant of liquor licences that may allow the sale of packaged liquor. In particular, the policy covers licensed venues in the State of Victoria that operate for periods in excess of ordinary trading hours as defined in section 3 of the Act...". The Commission has considered the Guidelines and notes that the Applicant does not seek to trade in excess of ordinary trading hours. Accordingly, the Guidelines are of limited relevance.

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

- a. must consider all the information, material and evidence before the original decision maker⁴;
- b. may consider further information or evidence⁵; and
- c. may, in respect of uncontested applications on review, have regard to any matter the Commission considers relevant, make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.⁶

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

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

² See further *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325, which confirms that harm minimisation is the primary regulatory object of the LCR Act and therefore the primary consideration in liquor licensing decisions (although not to the exclusion of the other objects).

³ Minister's Decision-Making Guidelines, Grant of Licences for the Sale of Packaged Liquor, 7 June 2012.

⁴ LCR Act, section 157(2).

⁵ LCR Act, section 157(3).

⁶ LCR Act, section 44(4).

21. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds, including that:
- (a) *the granting of the application would detract from or be detrimental to the amenity of the area in which the Premises to which the application relates are situated; or*
 - (b) *the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.*
22. A limited licence may be a temporary limited licence or a renewable limited licence⁷. Pursuant to section 14(1B) of the LCR Act, a renewable limited licence authorises the licensee to supply liquor at the times determined by the Commission and specified on the licence, and it may be renewed in accordance with the LCR Act. A limited licence may further be subject to any conditions determined by the Commission and specified on the licence.
23. Section 26(1) of the LCR Act provides that the Commission may grant a limited licence only if it is satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature (**Scale and Scope Requirement**).

Conduct of an Inquiry

24. Section 44(4) of the LCR Act provides that the Commission may have regard to any matter the Commission considers relevant and make any enquiries the Commission considers appropriate. Section 172W of the LCR Act provides that the Commission is not bound by the rules of evidence, however, must comply with the rules of natural justice.

Material before the Commission

25. The Commission on review had before it and considered all the materials before the Delegate.
26. The Commission on review also received and considered the following additional materials:
- a. Decision and Reasons for Decision of the Delegate for the Original Application, dated 20 May 2022;

⁷ LCR Act, section 14(1).

- b. Review Application received by the Commission, dated 9 June 2022;
- c. Further submissions to the Commission, dated 12 July 2022; and
- d. Further submissions to the Commission, including photographs of the works completed on the Applicant's distillery barn and plantings of Botanicals on the Applicant's farm for gin recipes, dated 4 August 2022.

Preliminary Meeting

27. On 9 August 2022, a preliminary meeting took place between the Applicant, Ms Gayle Reeves, her family, the Chairperson of the Commission and counsel assisting, Mr Paul Davies (**Preliminary meeting**). At the Preliminary meeting, the Applicant explained that despite delay and amendments to the premises, she is moving forward with her goal of obtaining Council approval of the distillery and then will apply for a Producer's Licence. The Applicant explained that she was expecting council to advise imminently that the advertising period can commence. The Applicant expects that the process of obtaining a planning permit and a Producer's Licence will take up to a further six months and, until then, the Applicant seeks to continue to trade at market events in order to pay staff and to ensure viability of the business going forward.
28. The Applicant referred the Commission to its 2021 decision in Yarra Valley Whisky⁸, in which the Commission set aside the decision of the Delegate and, in substitution, granted a renewable limited licence subject to conditions. The Applicant submitted that a renewable limited licence would be more suitable for her business plan in the short-term, until the Producer's Licence is achieved, and without the restriction under a temporary limited licence of a maximum of six market events over a calendar year.
29. At the Preliminary meeting, the following limitations to the supply of liquor under a renewable limited licence were proposed by the Applicant:
- a. The Applicant will supply liquor at no more than eight (8) market events per month with a total of no more than ninety-six (96) market events per calendar year;

⁸ See decision of Yarra Valley Whisky (Liquor-internal review) [2021] VCGLR (30 July 2021)

- b. The supply of liquor will be limited to no more than three (3) lines of gin
 - c. The supply of packaged liquor will be limited to 200ml, 500ml and 700ml bottles and will not exceed more than (3) bottles of gin per person, per day, of which no more than two (2) of the three bottles of gin shall be 700 ml bottles;
 - d. The supply of packaged liquor will be limited to no more than thirty (30) bottles per market event;
 - e. Liquor supplied in open containers will be served in disposable tasting cups filled to no more than a 10ml capacity; and
 - f. Limitations on trading days and hours as set out in paragraph 30 below
30. The Applicant proposed to have the following trading hours endorsed on the Licence (**Proposed Trading Hours**):
- a. Saturday Between 8am and 2pm
 - b. Sunday Between 10am and 2pm
31. The Applicant confirmed that she was comfortable with the Commission hearing the matter ‘on the papers’ (i.e. without a hearing in person).

Hearing

32. The Commission convened to consider the Review Application administratively ‘on the papers’, with written submissions only and no attendance at the Commission by any party on 9 August 2022.

Reasons for decision on review

Issues for determination on review

33. The Commission on review must make a fresh decision -
- a. that affirms or varies the Original Decision; or

- b. that sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.⁹

34. In this matter, the issues before the Commission include:

- a. whether it is appropriate to set aside the Original Decision and substitute another decision, being the granting of a renewable limited licence having regard to the objects of the LCR Act and, in particular, harm minimisation, which is the primary object.¹⁰; and
- b. whether the Commission is satisfied that the scale and scope of the supply of liquor proposed is limited in nature;¹¹

35. Section 14 of the LCR Act provides that a renewable limited licence “*authorises the licensee to supply liquor at the times determined by the Commission and specified in the licence.*” However, unlike other categories of licence, limited licences are subject to the additional restriction found at section 26 of the LCR Act in that the Commission may only grant a limited licence if satisfied “*that the scale and scope of the supply of liquor the subject of the licence is limited in nature*”.

36. There are no statutory signposts which prescribe specific factors for the Commission to consider in determining whether the Scale and Scope Requirement is met. On previous occasions the Commission has considered “*the nature, location, duration or frequency of the hours of operation of a licence in question*” as relevant to the Scale and Scope Requirement¹².

37. Section 26(1) of the LCR Act gives the Commission a wide discretion to determine, as a question of fact, whether the Scale and Scope Requirement is met. In the decision of Club 8, VCAT considered that there was no warrant for an interpretation that the limitation in question need to “*contemplate a substantial or significant restriction*”¹³, however this does not mean that the Commission cannot consider whether a limitation is *substantial or significant* in the exercise of its discretion to determine whether the Scale and Scope Requirement is met.

⁹ Section 157(1)

¹⁰ The Commission notes that in determining this matter, it has also considered each of the grounds set out in section 44(2).

¹¹ Section 26(1)

¹² See decision of Fynix Pty Ltd at 36A Vickers Street, Sebastapol premises (Liquor-internal review) [2016] VCGLR 19 (25 July 2016) At [61].

¹³ Club 8 Pty Limited v Director of Liquor Licensing (Occupational and Business Regulation [2009] VCAT 716 at para [24].

38. The Commission notes that the Applicant intends to attend approximately eight market events per month with a total of approximately 96 market events per calendar year. Further, the Applicant proffered various additional limitations to the business model referred to in paragraphs 29 and 30 above.
39. The Commission considers that the business model of the Applicant involves the supply of a limited range (number of lines) and quantity of spirits produced by the Applicant, during days and hours which are significantly limited by the market events. Further, the Commission notes that the renewable limited licence is only to be in effect until the Applicant becomes a holder of a Producer's Licence.
40. The Commission has considered the limitations (which it notes include additional limitations proposed at the Preliminary meeting) as set out above, as well as the size and nature of the Applicant's business. On the basis that the proposed limitations are imposed as conditions on the Licence, the Commission is satisfied that the Scale and Scope Requirement has been met.

Harm minimisation

41. The Commission is satisfied that there are no relevant grounds for refusal under section 44(2) of the LCR Act. Having regard to the objects of the LCR Act, particularly the harm minimisation object, the Commission is satisfied that there is little risk of harm given that the restrictions referred to in paragraphs 28, 29 and 38 above are imposed as conditions on the Licence.

Decision on review

42. Having regard to all the matters set out above, the Commission has determined to set aside the decision of the Delegate and, in substitution, grant a renewable limited licence subject to conditions set out in Appendix A.

The preceding 42 paragraphs are a true copy of the Reasons for Decision of Ms Danielle Huntersmith (Chairperson), Mr James O'Halloran (Commissioner) and Ms Susan Timbs (Commissioner).

Appendix A

Type of licence

This licence is a renewable limited licence and authorises the licensee to supply liquor at market premises only for consumption off the licensed premises during the trading hours specified below.

Noise and Amenity

The licensee will not cause or permit undue detriment to the amenity of the area to arise out or in connection with the use of the premises to which the licence relates during or immediately after the trading hours authorised by this licence.

Supply of liquor

The licensed premises will be the stall or point of sale operated by the licensee at a market and the licensee must not take or receive an order for liquor, or cause or permit an employee or agent to take or receive an order for liquor, at any premises that are not the licensed premises.

The supply of liquor will be restricted to liquor produced by the licensee.

The licensee may supply liquor at no more than eight (8) market events per month with a total of ninety-six (96) market events per calendar year. The licensee will keep a register of the market events they have attended which will be made available for inspection if requested by a Liquor Control Victoria Inspector and/or a member of Victoria Police.

The supply of liquor must be limited to no more than three (3) lines of gin.

The supply of packaged liquor is limited to 200ml, 500ml and 700ml bottles and must not exceed more than (3) bottles of gin per person, per day of which no more than two (2) of the three bottles of gin shall be 700 ml bottles.

The supply of packaged liquor must be limited to no more than thirty (30) bottles per market event.

All packaged liquor sales must be unchilled and in sealed containers.

Liquor supplied in open containers must be served in disposable tasting cups filled to no more than a 10ml capacity.

All copies of the RSA certificate for each member of staff must be at one central place within the licensed area for inspection if requested by a member of Victoria Police or a Liquor Control Victoria Inspector.

A copy of the renewable limited licence, as well as "Intoxicated? Drunk? Disorderly?" and "Under 18? No Supply" liquor signage must be displayed.

The licensee must ensure that it sights an adequate proof of age document for any patron that appears to be 25 years or younger.

PERIOD OF THE LICENCE Section 50(2) Liquor Control Reform Act 1998

This licence will immediately cease to have force and effect in the event that the licensee becomes a holder of a Producer's Licence.

Trading hours

Saturday

Between 8am and 2pm

Sunday

Between 10am and 2pm

Trading hours on ANZAC Day

Between 12 noon and 2pm

Christmas day

No trade