



DECISION AND REASONS FOR DECISION

In the matter of an application by Yimart Australia Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision to refuse to grant an application for a renewable limited licence for the premises trading as Wine More Cellars located at 163 Whitehorse Road, Deepdene.

Commission: Ms Deirdre O'Donnell PSM, Deputy Chair
Mr Des Powell AM, Commissioner
Mr Andrew Scott, Commissioner

Date of Decision: 14 September 2021

Date of Reasons: 14 September 2021

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

Signed:

A handwritten signature in black ink, appearing to read 'D O'Donnell'.

Deirdre O'Donnell

Deputy Chair



REASONS FOR DECISION

BACKGROUND

The Original Application

1. Wine More Cellars is a small liquor store in Deepdene selling primarily premium quality Australian and international wines. Yimart Australia Pty Ltd (the **Applicant**) wishes to conduct relatively small on-site wine tastings for which patrons will be charged.
2. The Applicant currently holds a packaged liquor licence (32054479) (**PLL**) for the premises at 163 Whitehorse Road, Deepdene (the **Premises**). The PLL authorises the sale of liquor in sealed containers for consumption off the licensed premises. The Applicant can also conduct free tastings for its customers under section 20 of the *Liquor Control Reform Act 1998* (**LCR Act**). However, this PLL does not permit it to conduct tastings on the Premises which are paid for.
3. Deepdene is close to Kew, Balwyn, Canterbury and Hawthorn. The primary customers of the business are locals who, according to the Applicant, frequently travel internationally and have a sophisticated taste in wine and liquor. The business predominantly sells red and white wine, beer and spirits, and also sells other types of liquor.
4. The Directors of Yimart Australia Pty Ltd are Mr Jiaming Yan and Ms Ruonan Zhang. Mr Yan has been involved in the liquor industry for over 10 years and has developed a collection of more premium, niche and specialised wines from France, Italy and other countries. After the Applicant purchased the business in mid-2019, its focus has been on selling premium, niche and specialised wines and other liquor that are not usually sold in larger chain liquor stores.
5. On 29 September 2020, the Applicant applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) for a renewable limited licence for the Premises (**Original Application**) to enable paid tastings, when such supply was in support of the primary licensed activity under the PLL.
6. The Applicant stated that it wanted to conduct 1-2 paid wine tasting classes per week in an area of the Premises marked as a private tasting room for up to 20 people. The Applicant stated that the scale and scope limitations would be met by the high quality of the liquor and the nature of its customers, locals who enjoy a sophisticated taste in wine and liquor.
7. In its application, the Applicant set out how its business trades primarily in premium wine that is niche and specialised as well as craft beers. Due to this, the Applicant is unable to offer free tastings to customers because of the costs involved. However, given the premium and



specialised liquor sold by the business, customers generally wish to engage in tasting prior to making their purchase. The Applicant has been unable to facilitate tastings due to the conditions of the PLL.

8. On 29 September 2020, a delegate of the Commission (**Delegate**) advised the Applicant that the scale and scope of the proposal was not sufficiently limited and another type of licence may be more appropriate to supply liquor for consumption on the Premises. The Applicant was invited to further detail how the Original Application would meet the required scale and scope limitations.
9. The Applicant responded on 7 October 2020 and amended the Original Application, including a set area for tasting, a private tasting area within the red line plan and reduced trading hours.
10. In accordance with section 33(1) of the LCR Act, a copy of the Original Application was served on Victoria Police on 29 September 2020. On 26 October 2020, Victoria Police informed the Commission that it did not object to the grant of the Application.
11. In accordance with section 33(2), a copy of the Original Application was served on Boroondara City Council on 29 September 2020. On 29 October 2020, Boroondara City Council informed the Commission that it did not object to the grant of the Original Application, however did raise concern over the private tastings occurring while customers were in the store and the length of the operating hours.
12. On 20 November 2020, the Delegate determined to refuse the Original Application. The Delegate did not consider that the scale and scope of the supply of liquor as proposed was limited in nature. Further, the Delegate did not consider the grant of a renewable limited licence for the scale proposed to be a responsible development of the industry and considered the Applicant's proposal was more aligned to a General Licence, given that the Applicant was seeking to supply liquor for on-premises consumption at a premises that holds an off-premises licence (the **Original Decision**).

The Review Application

13. On 9 December 2020, the Licensee applied for an internal review of the Original Decision (the **Review Application**). The Applicant also sought to vary the Review Application as follows:

“(1) a. The quantity of liquor that may be supplied for consumption in the licensed area to be restricted to the maximum of three (3) standard drinks per patron;
b. No more than 30 patrons to be in the licensed area at any one time”

The red line plan was also amended, with the Applicant clarifying that it no longer sought to provide wine tasting classes or use the office for tasting.



14. The Applicant submitted that the Review Application was limited in scale and scope on the basis that “the licensed activity is the sale of liquor for consumption on the licensed premises ancillary to the conduct of the business under [the PLL]”, such that the licensed activity is not equivalent to a general licence as it is far more restrictive.
15. The Applicant further submitted that the proposed supply is further limited by the restrictions on the number of patrons who are to be in the licensed area at any one time. Evidence was given that the accessible area in the licensed area is approximately 8 metres x 8 metres or 64 square metres. The proposed supply is also limited to a maximum of three (3) standard drinks per patron.
16. The Review Application was listed for public hearing on 11 May 2021.

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission’s internal review power

17. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the Original Decision is a reviewable decision, and the Licensee is eligible to apply for review of that decision. The Review Application was made under section 153 of the LCR Act.
18. 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 appropriate¹.
19. Under the LCR Act, an application for a renewable limited licence may be contested or uncontested. Pursuant to section 3(1), an uncontested application is:

an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are 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)².

¹ Section 157(2) to (5) of the LCR Act and section 25(3) of the VCGLR Act further prescribe how the Commission is to undertake internal reviews.

² Conversely, a “contested application” is defined in section 3(1) as being “*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174)*”.



20. The Review Application is uncontested, as was the Original Application, as no objections were received. The Commission on review stands in the shoes of the original decision maker and, in respect of an uncontested application, must either:
- (a) grant the application (and may do so subject to conditions)³; or
 - (b) refuse to grant the application⁴.

Exercising the internal review power

21. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR 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 issued by the Minister under section 5 of the VCGLR Act⁵.
22. The objects of the LCR Act are set out in section 4(1):

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.*

23. Section 4(2) of the LCR Act provides further 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 alcohol⁶.

³ LCR Act, sections 44, 49 and 157.

⁴ LCR Act, section 44 and 157.

⁵ VCGLR Act, sections 9(3) and (4).

⁶ 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).



24. In exercising the internal review power, the Commission:
- (a) must consider all the information, material and evidence before the original decision maker⁷;
 - (b) may consider further information or evidence⁸; 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 application⁹.
25. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds, including that:
- i. 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
 - ii. the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.

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

26. In relation to limited licences, section 26(1) of the LCR Act states 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.

Conduct of an inquiry

27. Section 34 of the VCGLR Act provides that subject to that Act, gambling legislation or liquor legislation, the Commission may conduct any inquiry in any manner it considers appropriate. During the conduct of an inquiry, section 25(3) of the VCGLR 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

28. The Commission on review had before it and considered all material before the Delegate, which included the Original Application consisting of:

⁷ LCR Act, section 157(2).

⁸ LCR Act, section 157(3).

⁹ LCR Act, section 44(4).



- (a) a completed application form for a renewable limited licence, dated 29 September 2020;
 - (b) submissions from the Applicant, dated 25 September 2020;
 - (c) a statement of display, dated 2 November 2020;
 - (d) a plan or depiction of the licensed premises, submitted on 7 October 2020 (**Old Red-line Plan**);
 - (e) a copy of the Responsible Service of Alcohol Certificate of Ruonan Zhang; and
 - (f) a plan or depiction of the Premises including the extension to the licensed area, submitted on 9 December 2020 with the Original Decision (**New Red-line Plan**).
29. The Commission also had before it and considered additional information and evidence including:
- (a) the Review Application, dated 9 December 2020 with attached submission;
 - (b) the reasons for decision of the Delegate, dated 20 November 2020; and
 - (c) correspondence between the Licensee and Commission clarifying the Licensee's submission which further limited the scale and scope of proposed supply of liquor compared with the Original Application, dated 1 July 2021.

ISSUES FOR DETERMINATION

Limited in scale and scope

30. The central issue for the Commission is whether it is satisfied that the scale and scope of the supply of liquor the subject of the Review Application, being the supply of liquor for tasting on the licensed premises, is limited in nature in accordance with section 26 of the LCR Act.

Hearing

31. On 11 May 2021, the Commission conducted a public hearing to consider the Review Application. The Applicant was represented by one of its directors, Mr Yan, and Mr Jeffrey Rohde. Mr Rohde is an employee at Wine More Cellars.
32. Mr Yan explained to the Commission at the hearing that the selection available to customers for tastings will ideally be limited to three or four choices only. It will be a business decision to determine the available product.
33. Mr Yan further explained that his intention was that tastings would be marketed or communicated to familiar, returning customers, who are looking for more recommendations, and not as a service offered to strangers.



34. Upon questioning by the Commission, Mr Yan confirmed that the pour will be limited, “usually we will only pour 50 to 75 ml” and that there is no intention to pour full glasses”.
35. The Applicant submitted that the intended pricing model for tastings would be based on the “normal retail price” for the selected wines, rather than the marked-up prices usually charged at some other on-premises outlets.
36. Following the Commission’s comments at the hearing, the Applicant provided further submissions on the proposed limitations in scale and scope, by email on 1 July 2021.
37. The limitations in scale and scope proposed by the Applicant have been adjusted during the Review Application. A summary of the limitations proposed by the Applicant for the Commission’s consideration with regard to section 26 is as follows:
 - (a) Limitations upon the available hours and days that the Licensee proposes to supply liquor across six days. Notwithstanding being licensed until 10pm on most days, the trading hours for the business have been:

Monday Closed;
Tuesday and Wednesday 12:00PM – 7:00PM;
Thursday to Saturday 12:00PM – 8:00PM; (and)
Sunday 12:00PM – 7:00PM.
 - (b) The quantity of liquor that may be supplied for tasting in the licensed area is restricted to a maximum of three (3) standard drinks per patron.
 - (c) No more than 30 patrons to be in the licensed area at any one time.
 - (d) The Applicant no longer seeks to provide wine tasting classes or use the office for tasting.
 - (e) Limitations as to the type of liquor which the Licensee proposes to supply for tasting, with a maximum of 5 products being offered at any given time and no spirits to be served.
 - (f) The portion size of liquor is to be limited to not more than 100ml (regardless of glass size).
 - (g) A niche market of customers, comprising locals and returning customers who wish to taste and enjoy new, specialised and premium liquor. The Applicant has no interest in offering paid tastings of ordinary liquor which may be purchased in containers and consumed off premises.

The Commission’s view

38. The Commission considers that the Licensee’s business offers a premium range of liquor for sale and that the paid tastings proposed by the Applicant are ancillary to the conduct of the business under the PLL.



39. The Commission finds that, by the Applicant limiting the supply of liquor for tasting, as referred in paragraph 37, the scale and scope of the proposed supply of liquor the subject of the Review Application is limited.
40. The Commission finds that the fact that the Premises is currently open for 45 hours per week, over six days is a relevant limitation, in that it effectively reduces patronage to a level lower than what would be anticipated if it was open for ordinary trading hours.
41. For the reasons detailed above, the Commission is satisfied that the scale and scope of the proposed supply of liquor is sufficiently limited in nature to meet the 'scale and scope' requirement of section 26 of the LCR Act.

Discretion to grant or refuse the licence

42. The Commission has a discretion under section 44(1) to grant or refuse the Review Application. In exercising this discretion, the Commission must have regard to the objects of the LCR Act.
43. The Commission may also refuse to grant the Review Application on the basis of any of the following matters listed in section 44(2)(a) and (b) of the LCR Act:
 - (a) that the applicant is not a suitable person to hold or carry on business under the licence or BYO permit¹⁰;
 - (b) that the granting of the application would detract from or be detrimental to the amenity of the area in which the premises to which application relates are situated¹¹;
 - (c) that the granting of the application would be conducive to or encourage the misuse and abuse of alcohol¹²;
 - (d) that the applicant does not have adequate knowledge of the LCR Act¹³; or
 - (h) that the application has not been made, displayed or advertised in accordance with the LCR Act.¹⁴

Amenity

44. The Commission considers that the supply of liquor for tasting at the Premises is unlikely to result in a detriment to the amenity of the area in which the Premises are located to a degree which would warrant the refusal to grant the Review Application.

¹⁰ Section 44(2)(a) which applies only 'in the case of a grant or transfer of a licence or BYO permit'.

¹¹ Section 44(2)(b)(i).

¹² Section 44(2)(b)(ii).

¹³ Section 44 (2)(b)(iii).

¹⁴ Section 44(2)(b)(v).



Misuse or abuse of alcohol

45. The Commission considers that the supply of liquor for tasting at the Premises is unlikely to increase the risk of misuse and abuse of alcohol at the Premises and, accordingly that there is no ground to refuse the Review Application under section 44(2)(b)(ii) of the LCR Act.

Whether to exercise discretion to grant the licence having regard to the objects of the LCR Act

46. The Commission is satisfied that the Review Application meets the requirements of section 26 of the LCR Act, and the Commission is satisfied that there are no grounds for refusal under section 44(2) of the LCR Act. After having regard to the objects of the LCR Act, particularly the harm minimisation object, the Commission has determined to grant the Review Application.

DECISION

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

The preceding 47 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell PSM, Deputy Chair, Mr Des Powell AM, Commissioner and Mr Andrew Scott, Commissioner.

Appendix A

Renewable Limited Licence

TYPE OF LICENCE

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

SUPPLY OF LIQUOR

The supply of liquor is restricted to tastings of wine and beer only.

The supply of wine and beer for tastings is limited to 3 glasses per person, per transaction, per day.

The portion size of liquor is to be limited to not more than 100ml (regardless of glass size)

The point of supply of liquor is the licensed premises during the time the tastings are on offer. The licence has effect only during those times when liquor is supplied for the purposes of tastings to members of the public provided this is within the trading hours specified below.

Liquor may only be supplied in an open container.

A copy of this licence shall be displayed at the point of supply of liquor at all times when tastings are on offer.

TRANSFER OF LICENCE

This licence must be surrendered if the packaged liquor licence in respect of these premises is transferred to another person, unless such transferee is granted a transfer of this licence.

TRADING HOURS

Good Friday and Christmas Day	No trade
Tuesday and Wednesday	Between 12 p.m. and 7 p.m.
Thursday to Saturday	Between 12 p.m. and 8 p.m.
Sunday	Between 12 p.m. and 7 p.m.