

## Decision and reasons for decision

In the matter of an application by Mr Bradley Richards under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant an application for a restaurant and cafe licence in respect of the premises located at 2-34 Erskine Road, Macleod, trading as Bread & Butta Strathalan

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**Commission:** Ms Fran Thorn, Chair  
Ms Danielle Huntersmith, Commissioner  
Mr Andrew Scott, Commissioner

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**Date of Hearing:** 16 June 2022

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**Date of Decision:** 22 June 2022

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**Date of Reasons:** 30 June 2022

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**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.

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**Signed:**



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Fran Thorn

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Chair

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# Background

## The Original Application

1. Mr Bradley Richards is the sole director of Bimbadeen Catering Pty Ltd (**Bimbadeen Catering**). The company operates a catering business trading as Bread & Butta located at 2-34 Erskine Road, Macleod (**the Premises**).
2. Since September 2021, Bimbadeen Catering leased part of a building located at the Premises from its landlord, Baptcare Ltd.<sup>1</sup>
3. The leased part is described on an approved plan as a café and an outside café area (**the Leased Part**).<sup>2</sup> An industrial kitchen is included within the Leased Part. Based on the approved plan, up to 50 seats are available for customers to dine inside the café, and another 20 seats are available for customers to dine in the outside café area.<sup>3</sup>
4. The entire Premises consists of three buildings; residential aged care facility; homestead used by residents, and independent living apartments. The Premises provide a retirement village for persons over the age of 55 years.
5. The Leased Part has its own separate entry. While it is open to members of the public, it is predominately used by the Premises' residents and their guests. There is no signage advertising regarding the café from outside the Premises.
6. On 7 January 2022, Mr Richards applied to the Commission for a restaurant and cafe licence (**the Original Application**) under the *Liquor Control Reform Act 1998* (**the LCR Act**).<sup>4</sup>
7. The proposed licensee within the Original Application was Mr Richards as a natural person (rather than his company, Bimbadeen Catering).
8. The proposed licensed area within the Original Application included the Leased Part as well as the Premises' outside balcony, residents' lounge, lounge balcony and private dining room (**the Red-Line Plan**).

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<sup>1</sup> The street address within the lease is 1 Paice Road, Macleod.

<sup>2</sup> Approved plan – Permit No. P1038/2021. Common areas as defined in the lease are also made available to Bimbadeen Catering but are not part of the land leased.

<sup>3</sup> Ibid.

<sup>4</sup> All references to legislation are references to the LCR Act unless stated otherwise.

9. The proposed trading hours for supply of liquor within the Red-Line Plan was between the hours of 10 am and 11 pm, Sunday, 12 noon and 11 pm, Good Friday and ANZAC Day, and 7 am and 11 pm, on any other day.
10. On 25 January 2022, a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector (together, **Victoria Police**), and the Banyule City Council (**the Council**), in accordance with sections 33(1) and 33(2).
11. On 10 February 2022, Victoria Police informed the Commission that they did not object to the grant of the Original Application. On 28 January 2022, the Council informed the Commission that it did not object to the grant of the Original Application.
12. On 17 March 2022, a delegate of the Commission (**the Delegate**) determined to refuse to grant the Original Application (**the Original Decision**) for the following reasons (in summary):
  - a. Mr Richards will not be able to satisfy the predominant activity requirement of a restaurant and cafe licence under section 9A(1);<sup>5</sup> and
  - b. Mr Richards does not have an exclusive right to occupy all the proposed licensed area as indicated on the Red-Line Plan.
13. In her reasons for the Original Decision, the Delegate noted that she had suggested to Mr Richards to consider making an application for a renewable limited licence and revise the Red-Line Plan to not include the Premises' common areas (as defined in the lease) where he would not have an exclusive right to occupy.

### Application for Internal Review

14. On 6 April 2022, Mr Richards applied to the Commission for review of the Original Decision (**the Review Application**).
15. In the Review Application, Mr Richards noted that himself and Bimbadeen Catering each hold a liquor licence for venues located within La Trobe University and have a good reputation as caterers within the local community.<sup>6</sup>

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<sup>5</sup> Pursuant to section 9A(1) of the LCR Act, a restaurant and cafe licence authorises a licensee to supply liquor on the licensed premises for consumption on the licensed premises, where the predominant activity carried out at all times on the premises is the preparation and serving of meals.

<sup>6</sup> Mr Richards holds a restaurant and cafe licence #32309696 and Bimbadeen Catering holds an on-premises licence #32352631.

16. On 12 April 2022, a copy of the Review Application was served on the Council and Victoria Police, and they did not object to the grant of the Review Application.

### Revisions made to the Original Application as a part of the Review Application

17. On 3 June 2022, Mr Richards sought to revise the category of the licence requested in the Original Application from a restaurant and cafe licence to a renewable limited licence. He also proposed to reduce the proposed trading hours for the supply of liquor to 12pm to 10pm on any day and advised that food would be available at all times when liquor would be available for supply.<sup>7</sup>
18. He requested to supply one line of sparkling wine, three lines of white wine, three lines of red wine, one line of light beer and four lines of heavy beer with a limit of three standard drinks, per customer, per sitting.
19. On 14 June 2022, Mr Richards sought to change the proposed licensee to Bimbadeen Catering (as opposed to himself as a natural person).
20. On 16 June 2022, Mr Richards sought to reduce the proposed licensed area (**the Amended Red-Line Plan**). Relevantly, he informed the Commission that the effect of the Amended Red-Line Plan is that it will only contain the area within the Leased Part that Bimbadeen Catering has an exclusive right to occupy.

## Legislation and the Commission's task

### The Commission's internal review power

21. 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 Mr Richards is an eligible person to apply for the review of that decision. The Review Application was made pursuant to section 153.
22. 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.*

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<sup>7</sup> Pursuant to section 48 of the LCR Act, the Commission may permit amendments to applications. Also, section 158 of the LCR Act authorises the Commission on review to grant a different licence than that originally applied for where the original decision was to refuse to grant a licence. This is discussed further below in paragraph 33.

23. Under the LCR Act, an application for a 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).*

24. 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).

25. In effect, the Commission on review stands in the shoes of the original decision maker and must make a fresh decision with respect to the Original Application. In this case, the Commission must either:

- a. grant the application, and if so, determine whether to do so subject to conditions<sup>8</sup>; or
- b. refuse to grant the application<sup>9</sup>.

### Exercising the internal review power

26. Section 9 of the *Victorian Gambling and Casino Control Commission Act 2011 (the VGCCC 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 VGCCC Act<sup>10</sup>.

27. 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*

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<sup>8</sup> LCR Act, sections 44, 49 and 157.

<sup>9</sup> LCR Act, section 44 and 157.

<sup>10</sup> VGCCC Act, section 9(3) and (4). Pursuant to section 9(4) of the VGCCC Act, the Commission has had regard to the Decision-Making Guidelines relating to the assessment of the cumulative impact of licensed premises, dated 7 June 2012, and the Decision-Making Guidelines relating to the grant of licences for the sale of packaged liquor, dated 7 June 2012. The Commission is satisfied as to the matters set out in the Decision-Making Guidelines relating to the assessment of the cumulative impact of licensed premises, particularly as granting the revised Original Application with conditions would result in new licensed premises with a relatively small capacity and relatively restricted trading hours. The Commission did not consider the Decision-Making Guidelines relating to the grant of licences for the sale of packaged liquor as relevant to the Original Application..

- (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.*

28. 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.<sup>11</sup>*

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

- a. must consider all the information, material and evidence before the original decision maker<sup>12</sup>;
- b. may consider further information or evidence<sup>13</sup>; 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.<sup>14</sup>

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

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<sup>11</sup> 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).

<sup>12</sup> LCR Act, section 157(2).

<sup>13</sup> LCR Act, section 157(3).

<sup>14</sup> LCR Act, section 44(4).

31. 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.*

32. 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.

33. Finally, noting that the Original Application was for the grant of a restaurant and cafe licence and the grant of that licence was refused, section 158 of the LCR Act authorises the Commission on review to grant a different licence than that originally applied for if it refuses to grant such a licence originally applied for. It is noted that Mr Richards on 3 June 2022 sought to revise the category of the licence requested in the Original Application from a restaurant and cafe licence to a renewable limited licence. The grant of a renewable limited licence does not require the satisfaction of a predominant activity test as applies to a restaurant and cafe licence.<sup>15</sup> Having regard to Mr Richards' revision of the Original Application as discussed in paragraphs 17 to 20 above, the Commission will consider below whether to grant a renewable limited licence to Bimbadeen Catering.

### Conduct of an inquiry

34. Section 34 of the VGCCC 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 VGCCC 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

35. The Commission on review had before it, and considered, all materials received by the Delegate. In addition, the Commission received and considered the following:

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<sup>15</sup> See footnote 5 above.

- a. the Original Decision and reasons of the Delegate, dated 17 March 2022;
- b. the Review Application;
- c. the email communication from Mr Richards, dated 3 June 2022, attaching the written agreement between Baptcare Ltd and Bimbadeen Catering in respect to the Leased Part;
- d. the ASIC record of registration for business name, Bread & Butta;
- e. the ASIC extract for Bimbadeen Catering Pty Ltd;
- f. the email communication from Mr Richards, dated 14 June 2022, attaching an example of weekly meals served in the Leased Part; and
- g. the email communication from Mr Richards, dated 16 June 2022, attaching the Amended Red-Line Plan.

### **On-the-Papers determination of the Review Application**

36. On 10 June 2022, the Commission informed Mr Richards that it was possible to determine the Review Application 'on the papers', without an oral hearing. On 14 June 2022, he wrote to the Commission to state his preference for the Commission to determine the Review Application 'on the papers'.

37. On 22 June 2022, the Commission convened to determine the Review Application 'on the papers'.

## **Reasons for decision on review**

### **Issues for determination on review**

38. In deciding whether to affirm, vary or set aside the Original Decision and in turn grant or refuse the renewable limited licence that is the subject of the Review Application as per the amendments made by Mr Richards,<sup>16</sup> the Commission must consider:

- a. whether the Commission is satisfied that the scale and scope of the supply of liquor the subject of the proposed licence is limited in nature;<sup>17</sup> and

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<sup>16</sup> See paragraphs 17 to 20 above.

<sup>17</sup> LCR Act, section 26(1)



- b. whether the Review Application should be granted or refused, having regard to the objects of the LCR Act and, in particular, harm minimisation, which is the primary object.<sup>18</sup>

39. Each of these issues is discussed in turn.

#### *Limited in scale and scope*

40. Section 14 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 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*” (**the Scale and Scope Requirement**).

41. 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 Requirement<sup>19</sup>.

42. In this Review Application, the proposed supply of liquor for which the proposed licence is sought is clearly different from that which was before the Delegate. In particular, apart from seeking a different category of licence, the following additional restrictions were proposed by Mr Richards:

- a. the range of liquor supplied would be restricted to one line of sparkling wine, three lines of white wine, three lines of red wine, one line of light beer and four lines of heavy beer (the Original Application did not contain this proposed restriction);
- b. the supply of liquor would be limited to 12pm to 10pm on any day (in the Original Application, Mr Richards had requested the supply of liquor between the hours of 10 am and 11 pm, Sunday, 12 noon and 11 pm, Good Friday and ANZAC Day, and 7 am and 11 pm, on any other day);
- c. the supply of liquor would be limited to no more than three standard drinks, per customer, per sitting (the Original Application did not contain this proposed restriction); and

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<sup>18</sup> The Commission notes that in determining this matter, it has also considered each of the grounds set out in section 44(2) of the LCR Act.

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

- d. the supply of liquor would be for consumption only in the Leased Part (in the Original Application, Mr Richards had requested the supply of liquor for consumption in the Leased Part as well as the Premises' outside balcony, residents' lounge, lounge balcony and private dining room).

43. In this instance, the Commission accepts that the supply of liquor would be sufficiently restricted given the limitations proposed in the Review Application, including a limited range and quantity of liquor to be supplied.

44. The Commission also notes that the hours of supply proposed by the Review Application are more limited than the ordinary trading hours defined at section 3(1) and food will be available at all times when liquor is available for supply.<sup>20</sup> While this alone is not a significant limitation for the purpose of the Scale and Scope Requirement, this may be considered cumulatively with the limitations referred to in paragraph 42 above.

45. Taking into account the size and nature of the Leased Part, and subject to the limitations as referred to in paragraph 42 being imposed as conditions on the proposed licence, the Commission is satisfied that the Scale and Scope Requirement is met.

#### *Discretion to grant or refuse the Review Application*

46. 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, particularly harm minimisation, which is the primary object<sup>21</sup>

47. The Commission may also refuse to grant the Review Application on the basis of any of the matters listed in section 44(2)(a) and (b), which relevantly include that the granting of the application would be conducive to or encourage the misuse and abuse of alcohol.<sup>22</sup>

#### **Misuse and abuse of alcohol**

48. As previously stated, the Review Application proposes to restrict the range of liquor supplied to one line of sparkling wine, three lines of white wine, three lines of red wine, one line of light beer and four lines of heavy beer with a limit of three standard drinks, per customer, per sitting. Food will also be

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<sup>20</sup> The Commission even notes that the proposed hours of supply of liquor on Good Friday and ANZAC Day are more limited than the ordinary trading hours for those days as defined at section 3(1).

<sup>21</sup> See further *Kordister Pty Ltd v Director of Liquor Licensing* [20121 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).

<sup>22</sup> LCR Act, section 44(2)(b)(ii).

available at all times when liquor is available for supply, which usually includes substantial sized hot and cold meals such as salads, soup, pasta or pot roast.<sup>23</sup>

49. The Commission considers that in all circumstances, given the restrictions on the supply of liquor specifically proposed by the Review Application and the limited trading hours, capacity, and other restrictions, that the risk of misuse and abuse of alcohol would be minimal. The Commission further notes that the requirement for food to be available at all times when liquor is available also assists in the responsible service of alcohol and the minimising of the risk of harm.

50. Moreover, the Commission notes that Mr Richards completed the refresher responsible service of alcohol program on 7 January 2022 and is already the holder of an existing liquor licence.<sup>24</sup>

51. For a combination of the above reasons, the Commission does not consider the potential for the misuse and abuse of alcohol as a ground to refuse to grant the Review Application.

#### *Whether to exercise discretion to grant or refuse the Review Application having regard to the objects of the LCR Act*

52. The Commission is satisfied that the Review Application meets the Scale and Scope Requirement, and the Commission is satisfied that there are no grounds for refusal under section 44(2), having regard to the objects of the LCR Act.

53. Importantly, with the imposition of the conditions in Appendix A, the Commission is satisfied that adequate controls will exist over the supply and consumption of liquor at the Premises and that any risk of harm will be minimised.

## **Decision on review**

54. 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 54 paragraphs are a true copy of the Reasons for Decision of Ms Fran Thorn (Chair), Ms Danielle Huntersmith (Commissioner) and Mr Andrew Scott (Commissioner).**

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<sup>23</sup> Email communication from Mr Richards, dated 14 June 2022, attaching an example of weekly meals served.

<sup>24</sup> See paragraph 15 above.

# Appendix A

## Type of licence

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

## Supply of liquor

The licensee must make food available at all times when liquor is available for supply.

The supply of liquor shall be limited to no more than one line of sparkling wine, three lines of white wine, three lines of red wine, one line of light beer and four lines of heavy beer.

The quantity of liquor to be served must not exceed three glass containers or open cans, not exceeding 425 ml in volume each, per customer, per sitting.

The licensed area is the area marked on the plan as approved by the Commission.

Liquor must not be removed from the licensed area.

## Responsible service of alcohol

At all times, staff selling, offering or serving liquor are to have completed an approved Responsible Service of Alcohol training course within the preceding three years.

## Amenity

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

## Trading hours for the supply of liquor

On any day – between 12 noon and 10pm.