

Decision and reasons for decision

In the matter of an application by DFL Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for an internal review of the decision to refuse to grant a temporary limited licence to extend trading hours, for the premises trading as Dawson St Liquor and Foodmart, located at 274 Dawson Street, Sale, Victoria 3850.

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

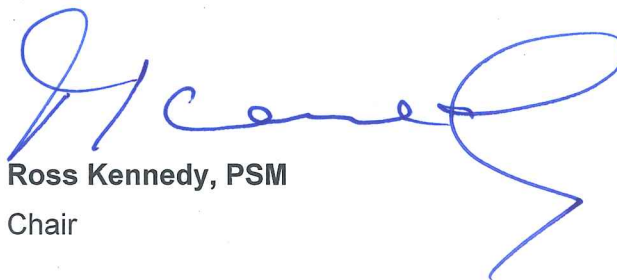
Date of Hearing: 15 December 2021

Date of Decision: 15 December 2021

Date of Reasons: 21 December 2021

Decision: The Commission has determined to affirm the decision of the delegate and refuse to grant the temporary limited licence.

Signed:



Ross Kennedy, PSM
Chair

Background

1. On 4 October 2021, DFL Pty Ltd (the **Applicant**) lodged an application with the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) for a temporary limited licence (the **Original Application**) under section 153 of the *Liquor Control Reform Act 1998 (LCR Act)*¹ for the business trading as Dawson St Liquor and Foodmart, located at 274 Dawson Street, Sale (the **Premises**).
2. The Applicant holds a packaged liquor licence, licence number 32020789 (the **Licence**) for the Premises.
3. The Licence permits the supply of packaged liquor during the following hours (the **Existing Trading Hours**):
 - On any day other than Sunday,
 - Good Friday, ANZAC Day or Christmas day Between 9am and 11pm
 - ANZAC Day Between 12noon and 11pm
 - Sunday Between 12 noon and 11pm
4. The Original Application sought a temporary limited licence to extend the Existing Trading Hours, to enable the Applicant to supply liquor on Christmas Day 2021 and Good Friday (15 April 2022), between the hours of 9am and 8pm (the **Proposed Temporary Licence Trading Hours**).
5. The Proposed Temporary Licence Trading Hours fall outside of 'ordinary trading hours' as defined in section 3 of the LCR Act. In relation to the packaged liquor licence held by the Applicant, section 3 provides that 'ordinary trading hours' are:
 - ...in relation to a packed liquor licence or late night (packaged liquor) licence –*
 - (i) *the hours between 9am and 11pm on each day, other than Sunday, good Friday, ANZAC Day or Christmas Day; and*
 - (ii) *the hours between 12noon and 11pm on ANZAC Day...*
6. The Minister for Consumer Affairs, Gaming and Liquor Regulation has published guidelines representing the policy of the Victorian Government concerning the trading hours of liquor licences that allow the sale of packaged liquor (the **Guidelines**).² The Guidelines state that the grant of a licence permitting the provision of packaged liquor from licensed premises during hours outside of ordinary trading hours should only be granted in exceptional circumstances, which are to be demonstrated by the Applicant.
7. Under section 9(4) of the *Victorian Commission for Gambling and Regulation Act 2011* (the **VCGLR Act**), the Commission must have regard to any decision-making guidelines issued by the Minister when exercising its internal review function.
8. The Original Application was submitted through the online liquor portal and had no supporting documents attached. The detail of the 'event' provided in the online application stated that the first event was on 25 December 2021 and the last event was on 15 April 2022.
9. On 6 October 2021, an authorised delegate of the Commission (the **Delegate**) wrote to the Applicant via email requesting additional supporting information to assist in determining the Original Application. In this email, the Delegate highlighted that the Commission was required to

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

² The Guidelines are dated 7 June 2012 and are titled the "Grant of Licences for the Sale of Packaged Liquor".

have regard to the Guidelines in determining the Original Application and invited the Applicant to provide a submission showing the exceptional circumstances that applied in this case.

10. In the email the Delegate set out to the Applicant the following information in relation to making a submission for exceptional circumstances:

"Please keep in mind that for a circumstance to be considered exceptional, the relevant circumstances must be:

- *unusual;*
- *special;*
- *out of the ordinary;*
- *uncommon; or*
- *not regular, routine or normally encountered."*

11. On 7 October 2021, the Applicant provided written submissions in response to the Delegate's request, via email attaching a letter in support of the Original Application (**Submission Letter**), signed by the Director of the Applicant.

12. The Submission Letter stated the following points:

- a. the Applicant runs a small family-owned grocery store that services the local community with groceries, takeaway foods and liquor;
- b. the store is not just a retail store it is an important social outlet for people in the community, the past couple of years with covid restrictions and lockdowns has highlighted the social importance;
- c. many customers are elderly and do not drive and rely on the business for daily needs;
- d. many customers are daily shoppers and rely on daily shopping to provide sense of purpose and the opportunity to socialise with others;
- e. the liquor department is a significant contributor to overall sales;
- f. employees who are low income earners rely on the holiday pay wages which contributes to their quality of life;
- g. the store has been granted approval to trade on Christmas Day and Good Friday for the past two years, it has been a huge benefit to the community as well as to employees; and
- h. the store has not had any past liquor licence issues and take liquor licence responsibilities very seriously.

13. On 5 November 2021, the Delegate determined to refuse the Application, citing that the reasons provided in the Submission Letter did not represent exceptional circumstances as envisaged by the Guidelines (the **Original Decision**).

Application for Internal Review

14. On 16 November 2021, the Applicant lodged an application for internal review (the **Review Application**).

15. The Applicant made the following submissions in support of the Review Application:

- a. due to having previously been granted a liquor licence to trade on Christmas Day and Good Friday, we kept our submissions as has been previously accepted;
- b. we therefore did not include information about our catering functions for Christmas Day and Good Friday;

- c. catering is provided for the community on Christmas Day and Good Friday, which includes hot food, liquor and ice all ready to be picked up on the day;
 - d. catering and pick up can still be provided if liquor trading hours are extended to 6 pm on Christmas Day and Good Friday;
 - e. this is a needed and valued service to the community.
16. On 2 December 2021, the Applicant via email consented to the Review Application being determined on the papers and informed the Commission that it had begun to receive “enquiries and orders for Christmas Day”.

Legislation and the Commission’s task

The Commission’s internal review power

17. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the Delegate’s decision in respect of the Original Application is a reviewable decision, and the Applicant is eligible to apply for review of that decision. The Review Application was made under section 153.
18. Under section 157(1), the specific task for the Commission with respect to a review application is to make a fresh decision that:
- a. affirms or varies the Original Decision; or
 - b. sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.³
19. Under the LCR Act, an application to grant a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, an uncontested application relevantly includes “*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)*”. It is noted that the Original Application was uncontested, and the Review Application similarly remains uncontested.
20. In effect, the Commission, on internal review, stands in the shoes of the Delegate and makes a fresh decision with respect to the Original Application. In doing so, it must consider all the information, material and evidence before the Delegate. It may also consider further information, material or evidence as part of making its decision.⁴

Exercising the internal review power

21. Section 9 of the 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 Act.⁵
22. In the Review Application, the Commission must determine whether exceptional circumstances have been demonstrated by the Applicant to be granted a temporary limited licence to provide

³ Sections 4(2) and 157(2) to (5) of the LCR Act and section 25(3) of the VCGLR Act further prescribe the manner in which the Commission is to undertake internal reviews.

⁴ See section 157(3).

⁵ VCGLR Act, section 9(3) and (4).

packaged liquor from licensed premises during hours that are outside ordinary trading hours, as defined by section 3 of the LCR Act.

23. The objects of the LCR Act are set out in section 4(1), which provides:

- “(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.”

24. Section 4(2) 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 alcohol.”

25. The Court of Appeal of the Victorian Supreme Court has made it clear in *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325 (**Kordister**) that harm minimisation is a fundamental principle of the LCR Act, and can properly be regarded as *“the primary regulatory object of the Act and therefore the primary consideration in liquor licensing decisions”*.⁶ However, as was also noted by the Court of Appeal, *“this is not to say ... that it [harm minimisation] is to be taken into account, or given such weight, to the exclusion of the other objects”*.⁷

26. The Commission considers that while the grounds of refusal outlined in section 44(2) are relevant considerations, the ultimate determination of an uncontested application is to be made pursuant to sections 44(1) and 157(1) at the discretion of the Commission with reference to the objects of the LCR Act, including the development of a diversity of licensed facilities reflecting community expectations.

⁶ See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

⁷ See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

Conduct of an inquiry

27. Section 34 of the VCGLR Act provides that subject to the VCGLR Act, gambling legislation or liquor legislation, the Commission may conduct any inquiry in any manner it considers appropriate.
28. 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 the Commission must comply with the rules of natural justice.
29. As noted in paragraph 5 above, 'ordinary trading hours' in relation to a packaged liquor licence or a late night (packaged liquor) licence are defined under section 3 of the LCR Act as:
- (i) *the hours between 9 a.m. and 11 p.m. on each day, other than Sunday, Good Friday, Anzac Day or Christmas Day;*
 - (ii) *the hours between 10 a.m. and 11 p.m. on Sunday; and*
 - (iii) *the hours between 12 noon and 11 p.m. on ANZAC Day.*

Material before the Commission

30. The Commission had before it and considered all the materials received by the Delegate which included:
- a. the Original Application, as at paragraph 8 above; and
 - b. submissions from the Applicant in support of the Original Application, listed at paragraph 12 above.
31. The Commission also had before it and considered additional information and evidence including:
- a. the Original Decision, in an email dated 5 November 2021;
 - b. the Review Application, dated 16 November 2021 which included submissions in support of the Review Application as listed at paragraph 15 above; and
 - c. an email from the Applicant dated 2 December 2021, in which the Applicant confirmed agreement for the matter to be determined on the papers and informed the Commission that it had started to receive orders for Christmas Day, as provided above at paragraph 16.

Reasons for decision on review

Issues for determination on review

32. In making its decision on review as to whether to grant the temporary limited licence the subject of the Review Application, the issues for the Commission to consider are as follows:
- a. the application of the Guidelines, which the Commission is required to have regard to under section 9(4) of the VCGLR Act, given the Proposed Temporary Licence Trading Hours contained in the Review Application; and
 - b. whether the Commission should exercise its discretion to grant the temporary limited licence the subject of the Review Application, having regard to the objects of the LCR Act and, in particular, harm minimisation, which is the primary object.

33. Each of these issues are discussed in turn.

Application of the Guidelines

34. Under section 9(4) of the VCGLR Act, the Commission must have regard to the Guidelines in exercising its internal review function in this matter. The operative section of the Guidelines is outlined at paragraph 6 above, and their relevance to this Review Application is discussed below.

35. Paragraph 3 of the Guidelines requires applicants for licences, excepting those specified in paragraph 2,⁸ that allow for the provision of packaged liquor from licensed premises during hours that are outside ordinary trading hours to demonstrate exceptional circumstances. The Proposed Temporary Licence Trading Hours sought in the Review Application are not those specified in paragraph 2 of the Guidelines, meaning that paragraph 3 of the Guidelines applies to this Review Application. Accordingly, the Guidelines set out that the Commission should only grant the Licence if exceptional circumstances can be demonstrated by the Applicant.

36. In summary, the Applicant's submissions in this regard centre on a commitment to provide catering and pick up services on Christmas Day and Good Friday to the local community. The Applicant has submitted that the community has a reliance on this service, and the Applicant has started to receive some orders for Christmas Day.

37. The Commission has considered the submissions from the Applicant and has determined the following:

- a. While the Commission acknowledges the Applicant's submissions that there have been no negative issues with the Licence, a history of compliance does not demonstrate exceptional circumstances in this case. Licensees are expected to comply with the conditions set out in a licence or will be otherwise committing an offence against the LCR Act.
- b. The Applicant's submission that trading on Christmas Day and Good Friday will allow its mostly elderly customers and other locals in the area, to shop daily as a preference and to allow for some social interactions, amounts to a desire for greater convenience. While the Commission notes the Applicant has submitted the importance of socialising through daily shopping by its elderly customers at the Premises, the decision of the Liquor Control Commission on 7 July 1998 in the matter of Rosstown Hotel⁹ (**Rosstown**), establishes the basic principles underpinning Victoria's approach to applications for extended hours for the selling of packaged liquor. In Rosstown, the Liquor Control Commission took the view that a slight inconvenience of a customer not being able to purchase packaged when it is suitable to them cannot be converted into a substantial need.
- c. In the Commission's view, the Applicant's submission that trading on Christmas Day and Good Friday will allow for the provision of catering to the local community is not an exceptional circumstance. The main benefit to customers would be the convenience of not needing to purchase liquor (and other groceries) prior to Christmas Day, something that can be arranged with a small amount of planning and without the increased risk of persons who,

⁸ Paragraph 2 of the Guidelines provides: "That, in the case of a general license or a packaged liquor licence that allows for the provision of packaged liquor from licensed premises during the hours specified in section 8(1)(a)(ii)–(iii) of the Act in the case of general licences or section 11(1)(b)–(c) of the Act in the case of packaged liquor licences, the Victorian Commission for Gambling and Liquor Regulation should consider the position of Government in these guidelines in determining the grant of the licence. In all circumstances, the extended hours for a packaged liquor licence should not extend past 12 midnight." For completeness, section 11(1)(b)–(c) of the LCR Act provides for packaged liquor licensed trading that have been granted for between 11 pm and 1 am and, for opening hours prior to 9 am but not before 5 am,

⁹ *Rosstown Holdings Pty Ltd v Liquor Licensing Commission* [1998] LLCV 611A

having run out of liquor, seek to purchase additional alcohol, from which the consequential risks of harm, misuse or abuse of alcohol would be adverse to community interests.

- d. The Commission does not agree with the Applicant's submissions regarding the positive effect of public holiday wages for staff in a lower income bracket combined with the positive impact on the Applicant's revenue, if the Review Application is granted, as an exceptional circumstance. If other venues in the area are operating under 'ordinary trading hours' there are unlikely to be unintended consequences to the Applicant's revenue.
- e. The Applicant also submits that the Commission should grant the Review Application as the Applicant was granted a temporary limited licence to trade on Christmas Day 2020, and because of the impact of COVID-19 pandemic during 2021.

The Commission notes that the Applicant was granted a temporary limited licence to trade on Christmas Day 2020 and further that the Commission aims for consistency in its decision making. However, the Commission is not bound by its earlier decisions, as each decision is made on a case-by-case basis having regard to the individual circumstances and merits of each application. The Commission notes that 2020 was a year in which the impacts of COVID-19 were far reaching with many lockdowns and other restrictions imposed on businesses, and the approach taken by the Commission to temporary limited licence applications during this year was unique to the circumstances of 2020 consistent with the objects of the LCR Act, and the governmental directions. The Commission finds that the circumstances related to COVID-19 in 2020 are not replicated in 2021 (or, in any event, not to the same extent). The Commission finds that the previous granting of a temporary limited licence for Christmas Day 2020 does not constitute an exceptional circumstance.

Further, having regard to the Guidelines, and the circumstances of 2021, the Commission finds that the impact of the COVID-19 pandemic during 2021, could not be considered as an exceptional circumstance.

- 38. The Commission has carefully considered all the Applicant's submissions and finds that collectively these do not meet the test of exceptional circumstances, in accordance with paragraph 3 of the Guidelines.

Whether to grant the Review Application having regard to the objects of the LCR Act

- 39. The Commission must exercise its discretion under section 44(1) when determining whether or not to grant the Licence the subject of the Review Application, having regard to the objects of the LCR Act, particularly harm minimisation, which is the primary object.
- 40. For the reasons set out above, the Commission is not satisfied that the Licensee has demonstrated exceptional circumstances in relation to the Review Application. Taking into account all other relevant circumstances presented by the Review Application and the objects of the Act, especially harm minimisation, the Commission finds no other reason why the Premises should be granted a temporary limited licence which contains trading hours exceeding the ordinary trading hours for a packaged liquor licence.
- 41. The Commission notes that an object of the LCR Act is to facilitate the development of a diversity of licensed facilities reflecting community expectations. The LCR Act defines ordinary trading hours (as outlined at paragraph 5 above) to specifically exclude trading on Christmas Day or on Good Friday. Accordingly, the Commission is of the view that community expectations in this regard would be for liquor outlets to be closed on Christmas Day, so the grant of the Review Application would not further this object as outlined in section 4(1)(b) of the LCR Act.

42. After considering all the material before it and having regard to the Guidelines and the objects of the LCR Act, in particular section 4(1)(a)(i) concerning minimisation of harm from the misuse or abuse of alcohol by providing adequate controls on supply and consumption, the Commission has determined that, in this instance, it is not appropriate to exercise its discretion to grant the Review Application.

Decision on review

43. For the reasons set out above, the Commission has determined to affirm the decision of the Delegate and has refused to grant the temporary limited licence the subject of the Review Application.

The preceding 43 paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy, Chair, Ms Deirdre O'Donnell, Deputy Chair, and Mr Des Powell, Commissioner.