

Decision and reasons for decision

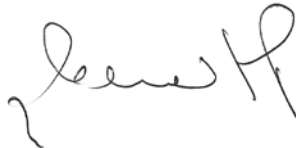
In the matter of an application by Gisborne Supermarket Pty Ltd under section 153 of the Liquor Control Reform Act 1998 for an internal review of the decision to refuse to grant a temporary limited licence to extend trading hours for the premises, trading as the Gisborne Foodworks, located at 24-28 Hamilton Street, Gisborne.

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

Date of Decision: 1 April 2021
Date of Reasons: 1 December 2021

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

Signed:



Ross Kennedy PSM
Chair

Background

1. On 11 March 2021, Gisborne Supermarket Pty Ltd (the **Applicant**) applied to 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 Gisborne Foodworks, located at 24-28 Hamilton Street, Gisborne (the **Premises**).
2. The Applicant holds packaged liquor licence number 32007561 (the **Licence**) at the Premises.
3. The Licence permits the supply of packaged liquor during the following hours (the **Existing Trading Hours**):

Sunday	Between 10am and 9pm
ANZAC Day	Between 12noon and 11pm
Good Friday and Christmas Day	No trade
On any other day	Between 9am and 9pm
4. The Original Application sought a temporary limited licence to enable them to supply liquor on Good Friday (02 April 2021) between 9am and 1pm (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.

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".

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 for this matter.

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:

“Fundraising day for the Royal Children’s Hospital Appeal. All proceeds raised are donated to the RCH Appeal. All Management and Staff donate their time on the day. Due to COVID-19 we were unable to hold this event in 2020. We are hoping that this year will be our biggest ever year that we are able to donate”.

9. On 19 March 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 have regard to the Guidelines in determining the Original Application and invited them to provide a submission showing the exceptional circumstances that applied in this case. The Delegate included a link to enable the Applicant to access a copy of the Guidelines.

10. The Delegate also provided the following information in relation to making a submission for exceptional circumstances:

“...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 22 March 2021 the Applicant provided submissions in response to the Delegate’s request via return email. Three attachments were enclosed to the reply email, which were:

- a. A submission letter in support of their Original Application (the **Submission Letter**);
- b. An advertisement for the 2 April 2021 Good Friday Event at the Premises; and
- c. A copy of a 2018 Good Friday Appeal certificate, thanking the Applicant for their contribution of \$20,000.00

12. The Submission Letter, signed by a director of the Applicant, stated that the Applicant has participated in the Good Friday Appeal since 2012 and has contributed \$225,000 over those years. The Applicant reiterated that management and staff donate their time on the day, and all proceeds from the sales go to the RCH charity.

13. On 30 March 2021 the Delegate determined to refuse the Application in line with section 44(1) of the LCR Act, citing that they did not consider the submissions put forward by the Applicant to represent exceptional circumstances as envisaged by the Guidelines (the **Original Decision**).
14. Further, the Delegate considered that, while the Applicant had demonstrated admirable community spirit, there was nothing that prevented it from implementing planning in advance to support the Good Friday Appeal on a different day where trade was not restricted. The Delegate also noted that the Good Friday Appeal is an annual event, which further supported the conclusion that the Applicant's circumstances were not unusual or out of the ordinary, as required by the Guidelines.

Application for Internal Review

15. On 31 March 2021 at 5:45pm the Applicant contacted the Delegate by email. The Applicant's email:
 - a. Apologised for the late Application, indicating it had waited to see if the event would be able to run due to COVID-19 restrictions;
 - b. Acknowledged that it hadn't provided much detail in the Original Application due to eight previously successful applications for the same event in preceding years;
 - c. Stated that as an independent retail owner this is the only time of the year it can dedicate to an event like the Good Friday Appeal. It also indicated that they donate and raise funds for the local community all year round;
 - d. Restated that it considers the Application meets exceptional circumstances as all profit is donated to charity and it ordinarily raises in excess of \$20,000.00 each year.
 - e. The Applicant requested that, due to the short timeframe available, the Delegate reconsider the Original Decision.
16. On 1 April 2021 the Delegate wrote back to the Applicant advising that it would need to apply for internal review of the Decision.
17. On the same day, the Applicant made an internal review application, which would require an expedited turn-around, given the proposed date of the event was the next day on 2 April 2021 (the **Review Application**).
18. The Applicant made the following submissions in support of the Review Application:
 - a. The proposed event is for fundraising only;
 - b. The event has run for last nine years, excluding 2020 due to COVID-19;

- c. The previous decision referred to in the Original Decision regarding extended trading hours are not comparable to the Applicant's circumstances, as each of those decisions relate to trading for profit, where the Applicant is proposing to extend trading hours for a not-for-profit event.

Legislation and the Commission's task

The Commission's internal review power

19. 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.
20. 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
21. 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.
22. 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.⁴ It may also consider further information, material or evidence as part of making its decision.⁵

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 Section 157(2).

⁵ See section 157(3).

Exercising the internal review power

23. 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.⁶

24. 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.”*

25. 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.”

26. 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”.⁷ 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”.⁸

27. The Review Application must be considered to determine whether exceptional circumstances have been demonstrated by the Applicant to be granted a temporary limited licence that seeks

⁶ VCGLR Act, section 9(3) and (4).

⁷ See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

⁸ See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

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

28. 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.

Conduct of an inquiry

29. 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.

30. 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.

31. 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

32. The Commission had before it and considered all the materials received by the Delegate, which included:

- a. the Original Application, listed in paragraph 4 above; and
- b. submissions from the Applicant in support of the Original Application, detailed in paragraph 11 above.

33. The Commission also had before it and considered additional information and evidence including:

- a. the Original Decision, dated 30 March 2021;
- b. the Review Application, dated 1 April 2021; and
- c. emails from the Applicant, dated 1 April 2021.

Reason for decision on review

Issues for determination on review

34. In making its decision on review as to whether to grant the Licence, 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 Licence, having regard to the objects of the LCR Act and, in particular, harm minimisation, which is the primary object.
35. Each of these issues are discussed in turn.

Application of the Guidelines

36. 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.
37. Paragraph 3 of the Guidelines requires applicants for licences, excepting those specified in paragraph 2, 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.
38. In summary, the Applicant's submissions in this regard centre on its commitment that all proceeds from sales that occur on Good Friday will be donated to the RCH Good Friday Appeal. This also included that all management and staff would be donating their time to operate the Premises on that day. Further, the Applicant submitted that it had been granted a limited licence to trade on Good Friday over many previous years and had donated a significant sum of money across this time. In this way, the Applicant sought to differentiate its application from other businesses that had sought to trade on Good Friday for profit.
39. Overall, the Commission determined that the Applicant's commitment to donate all proceeds from sales on Good Friday to the RCH Good Friday Appeal was one factor that demonstrated the unique and uncommon nature of the Application. The Commission accepted the Applicant's submissions that, unlike similar applications that sought to trade for profit (either wholly or in

part), this Application was sufficiently “out of the ordinary” whereby the Applicant would be supplying liquor in a not-for-profit capacity under the proposed Licence. This was further demonstrated by the Applicant’s submission that all management and staff donate their time as part of operating the Premises on Good Friday.

40. The Commission also noted the Applicant’s past experience in trading on Good Friday under temporary limited licences. Although not bound by its past decisions, the Commission considered that this was a relevant consideration in determining the “special” and “uncommon” nature of the Applicant’s circumstances and were supportive in establishing the necessary threshold of “exceptional circumstances” in this matter.
41. Nevertheless, the Commission considered it appropriate for a condition to be imposed on the Licence which obliged the Applicant to not only make the donation to the RCH as proposed, but also provide evidence to the Commission of such donation having been made within 28 days.
42. Ultimately, the Commission carefully considered all the Applicant’s submissions and found that collectively these were sufficient to meet the test of exceptional circumstances, in accordance with paragraph 3 of the Guidelines.

Whether to vary the Licence having regard to the objects of the LCR Act

43. 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.
44. For the reasons set out above, the Commission is satisfied that the Applicant 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 LCR Act, the Commission finds no reason why the Licence should not be granted with trading hours exceeding the Ordinary Trading Hours for a packaged liquor licence.
45. After considering all the material before it and having regard to the Guidelines and the objects of the LCR Act, the Commission has determined that the Review Application should be granted.

Decision on review

46. For the reasons set out above, the Commission determined to set aside the decision of the Delegate and, in substitution, grant the application for a temporary limited licence subject to the conditions set out in Appendix One.
47. For completeness, the Commission notes that on 28 April 2021, the Applicant provided evidence to the VCGLR that it had made a donation to the RCH Appeal in the amount of \$25,000,

exceeding the Applicant's calculation of gross proceeds from its sales on Good Friday of \$22,624.18.

The preceding 47 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.

Appendix One

Type of licence

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

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.

Permanent Licence Conditions

This licence is also subject to all the conditions, excluding trading hours, and approvals/consents of the permanent licence number 32007561.

Trading Hours

02/04/2021 Between 9am to 1pm

Special Condition

All proceeds from the sale of liquor during the above trading hours must be donated by the licensee to the Royal Children's Hospital Good Friday Appeal. The licensee must, within 28 days following Good Friday, provide the Commission with evidence of compliance with this special condition, including the provision of the account of sales and calculation of proceeds.