



DECISION AND REASONS FOR DECISION

In the matter of an application by Angeles Hunt under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant a renewable limited licence for the premises trading as Grumpy Papi's Cafe, located at Tenancy 9, 75 Mornington-Tyabb Road, Mornington.

Commission: Ms Helen Versey, Deputy Chair
Ms Deirdre O'Donnell, Deputy Chair
Mr Andrew Scott, Commissioner

Date of Decision: 12 March 2021

Date of Reasons: 12 March 2021

Decision: The Commission has determined to affirm the decision of the Delegate and refuse to grant the application for a renewable limited licence.

Signed:

A handwritten signature in black ink that reads "Helen K. Versey".

Helen Versey
Deputy Chair

REASONS FOR DECISION

BACKGROUND

The Original Application

1. On 25 August 2020, Angeles Hunt (**the Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) for the grant of a renewable limited licence (**the Original Application**) at the premises trading as Grumpy Papi's Cafe, located at Tenancy 9, 75 Mornington-Tyabb Road, Mornington (**Premises**).
2. The Premises is situated within the HomeCo Mornington shopping centre and was described by the Applicant in the Original Application as "A café that has a seating capacity for 48 patrons that focuses on Australian fare, meat, chicken style meals, coffees and cakes".
3. The Applicant occupies the Premises under a lease agreement, while a separate licence agreement provides the Applicant with the non-exclusive right to use the area within the shopping centre, yet outside the café, as a seated area for patrons.
4. The Original Application proposed to supply 10 lines of liquor including four types of wine, four types of beer and two types of spirits, between the hours of:
 - (a) Monday to Thursday 12:00 noon till 4:00pm;
 - (b) Friday and Saturday 12:00 noon till 8:00pm; and
 - (c) Sunday 12:00 noon to 4:00pm.
5. The Original Application sought to supply liquor both within the boundaries of the leased Premises, together with the licensed area referred to in paragraph 3 above.
6. The Applicant did not propose to have live or recorded music played at the Premises other than background music.
7. The Original Application was accompanied by the following material:
 - (a) an application for a renewable limited licence dated 14 August 2020;
 - (b) an undated submission from Responsible Liquor Training Pty Ltd as to why a renewable limited licence should be granted by the Commission;
 - (c) a report from Arki Building Surveyors Pty Ltd, assessing the maximum patron capacity of the Premises in accordance with the requirements of the *Liquor Control*

Reform Regulations 2009, calculated at 119;

- (d) a statement of display certifying that public notice of the application was displayed between 29 August 2020 and 26 September 2020;
 - (e) a licence agreement granting the Applicant a non-exclusive licence to use part of the shopping centre as a café seating area;
 - (f) a plan of the proposed red line area and a photograph of the shopfront;
 - (g) a signed declaration of the Applicant's right to occupy the Premises;
 - (h) a certificate of completion showing that Angeles Hunt completed the Responsible Service of Alcohol Program, dated 29 July 2020;
 - (i) a certificate of completion showing that Angeles Hunt completed the New Entrant Liquor Licence Training, dated 21 July 2020;
 - (j) a record of registration of the business name "Grumpy Papi's Café" from the Australian Securities & Investments Commission, dated 12 February 2019; and
 - (k) a copy of renewable limited licence no 36152716 as at 19 August 2020, for the unrelated business trading as Leroni's Grill.
8. In accordance with section 33 of the *Liquor Control Reform Act 1998 (LCR Act)*,¹ a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector (together, **Victoria Police**) on 7 September 2020. On 22 September 2020, Victoria Police notified the Commission that it did not object to the grant of the Original Application.
9. On 25 August 2020, a copy of the Original Application was served on the Mornington Peninsula Shire Council (the **Council**). No objection to the Original Application was received from the Council.
10. Within the submissions and correspondence submitted with the Original Application, the Applicant submitted that its motivation for applying for a renewable limited licence rather than a restaurant and café licence was partly due to the expense associated with obtaining planning approval to use the Premises for the supply of liquor, as the LCR Act requires in the case of a restaurant and café licence.
11. The submissions also stated that the Original Application promoted the objects of the LCR Act by facilitating the development of a diversity of licensed facilities reflecting community

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

expectations and by contributing to the responsible development of the liquor and licensed hospitality industries.

12. On 28 October 2020, a delegate of the Commission (**the Delegate**) refused to grant the Original Application on the ground that they were not satisfied that the scale and scope of the proposed supply of liquor would be limited, were a licence granted (**the Original Decision**). In giving reasons, the Delegate referred to the fact that the proposed supply of liquor would be achievable under a restaurant and café licence, and noted that the proposed maximum number of patrons, the proposed limitation of 10 lines of liquor and the proposed trading hours did not, even when considered cumulatively, satisfy the requirement that the supply of liquor be 'limited' pursuant to section 26(1) of the LCR Act.
13. On 28 October 2020, the Applicant lodged an application for internal review of the Original Decision (**Review Application**).

LEGISLATIVE FRAMEWORK AND THE TASK BEFORE THE COMMISSION

14. Under the LCR Act, an application for 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)*".²
15. Provision is also made under the LCR Act for notification and consideration of an objection made by the Chief Commissioner of Police, the municipal council in which the premises are situated, and/or the licensing inspector.³
16. The Review Application is made pursuant to section 153 of the LCR Act. The Original Decision made by the delegate is a reviewable decision and the Applicant is an eligible person under Division 2 of Part 9 of the LCR Act.
17. Under 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

² Conversely, a "contested application" in the context of a transfer 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)*".

³ Sections 39 to 41.

Commission on review considers appropriate.

18. In effect, the Commission, on internal review, stands in the shoes of the original decision maker 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 original decision maker.⁴ It may also consider further information, material or evidence as part of making its decision.⁵

Conduct of an inquiry

19. Section 34 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (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.
20. Sections 25 and 33 of the VCGLR Act are to the effect, relevantly for this inquiry, that the Commission is not bound by the rules of evidence but is bound by the rules of natural justice when exercising its statutory powers of inquiry.

Determination of an uncontested application

21. Where an application is an uncontested application, pursuant to section 44(1) of the LCR Act:
“the Commission must grant or refuse an uncontested application at any time after the expiry of the period for objection under Division 5 (or that period as extended under section 174).”
22. Section 44(4) of the LCR Act provides that before granting or refusing an uncontested application under subsection (1), the Commission may:
*“(a) have regard to any matter the Commission considers relevant; and
(b) make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.”*
23. Pursuant to section 9(3) of the VCGLR Act, in exercising its discretion to either grant or refuse an uncontested application under section 44(1) of the LCR Act, the Commission must have regard to the objects of the LCR Act.
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,*

⁴ Section 157(2).

⁵ Section 157(3).

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) 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 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”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.

27. 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.

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.

28. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
29. Crucially for an application such as this, section 26(1) of the LCR Act provides that the Commission may grant a limited licence only if satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature.

MATERIAL BEFORE THE COMMISSION

30. The Commission had before it and considered all of the material received by the Delegate.
31. The Commission also had before it and considered additional information and evidence including:
 - (a) the Delegate's decision and reasons with respect to the Original Application;
 - (b) the Review Application;
 - (c) an undated submission from Sam Boehm on behalf of the Applicant, submitted with the Review Application; and
 - (d) a further written submission from Sam Boehm on behalf of the Applicant dated 29 December 2020.
32. On 15 January and 28 January 2021, the Commission asked the Applicant to indicate the hours during which the Applicant would trade in normal circumstances, notwithstanding the effects of the COVID-19 pandemic. On 28 January 2021, the Applicant indicated that its ordinary trading hours were as follows:
 - (a) Sunday to Thursday 8:00am to 3:00pm; and
 - (b) Friday and Saturday 8:00am to 8:30pm.

REASONS FOR DECISION ON REVIEW

Issues for determination on review

33. The Commission may refuse to grant an uncontested application on any of the grounds in section 44(2) of the LCR Act when making its decision in relation to the Review Application.

The Scale and Scope Requirement

34. Section 14 of the LCR Act provides that a renewable limited licence “*authorises the licensee to supply liquor at the times determined by the Commission and specified in the licence.*” However, unlike other categories of licence, limited licences are subject to the additional restriction found at section 26 of the LCR Act, “*that the scale and scope of the supply of liquor the subject of the licence is limited in nature*” (**the Scale and Scope Requirement**).
35. 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.⁸
36. Section 26(1) of the LCR Act gives the Commission a wide discretion to determine, as a question of fact, whether the Scale and Scope Requirement is met. In the decision of Club 8, VCAT considered that there was no warrant for an interpretation that the limitation in question need to “contemplate a *substantial or significant* restriction”,⁹ however this does not mean that the Commission cannot consider whether a limitation is *substantial or significant* in the exercise of its discretion to determine whether the Scale and Scope Requirement is met.
37. Although, historically, the *Liquor Control Act 1987* required the Commission to refuse to grant a limited licence where the proposed supply of liquor would more appropriately be carried on under a licence of another kind, that requirement and legislation have long since been repealed. Accordingly, the Commission does not consider it relevant whether another category of licence (such as a restaurant and café licence) might be more appropriate than a renewable limited licence.
38. The first limitation proffered by the Applicant relates to the number of lines of liquor which it proposes to supply, limited to four types of wine, four types of beer and two types of spirit.
39. The Commission considers it appropriate to determine whether this is a practical limitation on the scope of the supply of liquor by reference to the trading profile (and the Applicant’s description) of the Premises in order to be satisfied that the proposed supply is limited. It does not follow from the mere fact that the proposed lines of liquor *are not unlimited* that the Scale and Scope Requirement is met.
40. In the context of the specific application before the Commission and the features of the Applicant’s business, granting a licence under which the Applicant may supply ten lines

⁸ See decision of *Fynix Pty Ltd at 36A Vickers Street, Sebastapol premises* (Liquor-internal review) [2016] VCGLR 19 (25 July 2016) At [61].

⁹ *Club 8 Pty Limited v Director of Liquor Licensing (Occupational and Business Regulation [2009] VCAT 716 at para [24]*.

of liquor does not, when considered separately or cumulatively with other factors, satisfy the Commission that the Scale and Scope Requirement is met.

41. The second limitation proffered by the Applicant related to the proposed hours for the supply of liquor, specifically:
 - (a) Sunday to Thursday 12:00 noon till 4:00pm; and
 - (b) Friday and Saturday 12:00 noon till 8:00pm.
42. The Commission notes that while the Applicant normally operates the Premises between 8:00am and 8:30pm on Friday and Saturday, it only proposes to supply liquor from 12:00 noon to 8:00pm. On the other hand, while the Applicant operates the Premises from 8:00am to 3:00pm on Sunday to Thursday, it proposes to extend its trading hours to supply liquor until 4:00pm on these days if a licence is granted.
43. The Commission finds that the proposed trading hours are not limited to an extent which satisfies the Scale and Scope Requirement. While they are less than the maximum *ordinary trading hours*¹⁰ for a restaurant and café licence, the Applicant also proposes to extend its current trading hours until 4:00pm on Sunday to Thursday. Further, the Applicant has not indicated whether a strong demand for liquor exists prior to 12 noon such that the proposed trading hours restrict the supply of liquor at this time. As the proposed hours for the supply of liquor do not meaningfully restrict the proposed operation of the Premises, the Commission is not satisfied that the proposed trading hours, when considered separately or cumulatively with other factors, satisfy the Commission that the Scale and Scope Requirement is met.
44. While the Premises has seating for up to 48 patrons, it was not submitted that this would be a limitation on the scale and scope of the proposed supply of liquor. The Commission considers that this is a factor which could be relevant to whether the Scale and Scope Requirement is met. However, the Commission considers that in the case of the Review Application the seating capacity of the Premises is not atypical considering its size, and this factor does not satisfy the Commission, when separately or cumulatively with other factors, that the Scale and Scope Requirement is met.
45. While the Applicant's submissions stated that the Original Application should be granted on the basis that what is sought is similar to what was granted in the case of Leroni's Grill,¹¹ there were key differences in the case of Leroni's Grill which were the reason why the Commission was satisfied that the Scale and Scope Requirement was met. In particular:

¹⁰ as defined at section 3(1) of the LCR Act.

¹¹ See decision: Adriana Lerovksi at 1/27 Macquarie Drive, Thomastown premises (Liquor-internal review) [2019] VCGLR 6 (9 April 2019).

- (a) that business only operated four days per week, from Thursday to Sunday;
- (b) the redline area within that premises was described as ‘very small’ and the café usually had a maximum of 30 patrons on the premises and the licence was limited to 36 patrons. By comparison, the Premises has seating for 48 patrons and a specific limitation with respect to total patron capacity has not been proffered by the Applicant;
- (c) the premises was located in an industrial area of Thomastown, “not in a residential or high public traffic area, such as in a shopping precinct”¹² and in contrast, the Premises is located inside a shopping centre; and
- (d) a renewable limited licence was sought to offer traditional Macedonian wines and beers to patrons. While this was not ultimately endorsed as a condition on that licence, it was a consideration upon which the Commission determined that the Scale and Scope Requirement was met.

46. While the case of Leroni’s Grill involved different circumstances which led the Commission to determine that the Scale and Scope Requirement was met in that case, the Commission is not bound by its prior decisions in exercising its discretion to determine whether the Scale and Scope Requirement is met, and each case is decided upon its unique circumstances.

47. Having considered the matters in paragraphs 34 to 45 above, the Commission is not satisfied that the Scale and Scope Requirement is met. Consequently, section 26(1) of the LCR Act provides that the Commission may not grant the Review Application.

The Commission’s Decision

48. Having considered the submissions and material referred to above, the Commission determines to refuse to grant the Review Application.

DECISION

49. The Commission is not satisfied that the Scale and Scope Requirement is met. Consequently, the Commission must affirm the Original Decision and refuse to grant the Review Application.

The preceding 49 paragraphs are a true copy of the Reasons for Decision of Ms Helen Versey, Deputy Chair, Ms Deirdre O’Donnell, Deputy Chair and Mr Andrew Scott, Commissioner.

¹² *Ibid*, at paragraph [37].