

## Decision and reasons for decision

In the matter of an application by Javam Pty Ltd 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 The Persian Room, located at 248A Toorak Road, South Yarra.

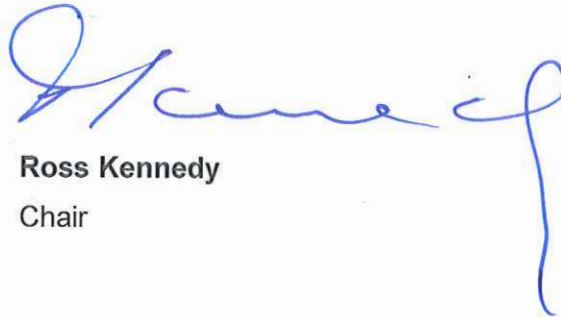
**Commission:** Mr Ross Kennedy PSM, Chair  
Ms Helen Versey, Deputy Chair  
Ms Danielle Huntersmith, Commissioner

**Date of Decision:** 5 August 2021

**Date of Reasons:** 5 August 2021

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

**Signed:**



**Ross Kennedy**  
Chair

## Background

1. On 27 November 2020, Javam Pty Ltd (the **Applicant**) lodged an application with the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) for a renewable limited licence (the **Application**) under the *Liquor Control Reform Act 1998* (**LCR Act**) for the premises trading as The Persian Room, located at 248A Toorak Road, South Yarra (**Premises**).
2. The Premises operates as a restaurant and catering business, offering Persian food. The Applicant sought to supply up to ten lines of liquor at any one time, for on-premises consumption with food. The maximum capacity at the Premises is 40 patrons.
3. The Applicant sought the following trading hours for the supply of liquor:
  - a. Wednesday to Friday – between 5pm and 10pm
  - b. Saturday and Sunday – between 12pm and 10pm.
4. In accordance with section 33(3) of the LCR Act, a copy of the Application was provided to Victoria Police and Stonnington Council (**Council**) on 27 November 2020.
5. On 15 December 2020, Victoria Police informed the Commission it did not object to the Application.
6. On 7 January 2020, the Council informed the Commission that it did object to the Application on the basis that a planning permit was required to serve liquor at the Premises, pursuant to clause 52.27 of the Stonnington Planning Scheme.
7. On 8 January 2021, the Commission advised the Council that the reason for the objection was not a valid ground under the LCR Act. However, a copy of the correspondence from the Council was provided to the Applicant for comment, and the Application proceeded uncontested.
8. On 22 January 2021, the Applicant provided a written response to matters raised by Council. In summary, the Applicant submitted the Council was incorrect in stating a planning permit application is required for a renewable limited licence. The Applicant referred the Commission to relevant extracts from the Council's planning scheme as well as the LCR Act.
9. The Applicant made the following submissions regarding the limited scale and scope of the Application:
  - a. the proposed trading hours are considerably less than ordinary hours, the Applicant is seeking to supply liquor for up to 35 hours per week compared to ordinary liquor trading hour where businesses can supply liquor for up to 97 hours per week;
  - b. limiting supply of liquor to lunchtime trade on weekends only is a significant limitation;
  - c. liquor will be supplied only with food;
  - d. supply is limited to 10 lines of liquor only at one time; and
  - e. the Premises is a small venue, catering to a maximum of 40 patrons only.
10. On 3 February 2021, the Applicant provided additional written submissions regarding the limited scale and scope of the Application. The Applicant referred to two previous decisions of the Commission, which it considered similar to its business. The decisions referred to by the Applicant are, the matter regarding the premises trading as Garden Centre<sup>1</sup> and the matter regarding the premises trading as York Street Café.<sup>2</sup> In summary the Applicant submitted:

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<sup>1</sup> *Eucalyptus Pty Ltd at Native Home, House of Plants premises* (Liquor - Internal Review) [2018] VCGLR 33 (8 August 2018).

<sup>2</sup> *Antem Mei Pty Ltd at York Street Cafe premises* (Liquor-internal review) [2020] VCGLR 60 (24 December 2020).

- a. renewable limited licences should not be so rigidly assessed, as not all businesses are able to meet legislative requirements for a restaurant and café licence, especially when there has been an increase in business for takeaway meals; and
  - b. the decision regarding the premises trading as York Street Café is relevant to the Application as that decision indicates trading hours and patron numbers are considered relevant limitation for a limited licence. In this matter, the Applicant has proposed a further limitation in seeking on-premises consumption only.
11. On 26 February 2021 a delegate of the Commission (**Delegate**) made a decision to refuse to grant the Application (**Original Decision**). The Delegate was of the view that the Application was not limited in scale and scope.

## Application for Internal Review

12. On 10 March 2021 the Applicant lodged an application for internal review of the Original Decision (**Review Application**).
13. The Applicant requested the Commission set aside the Original Decision and substitute a fresh decision on review, on the grounds that the Application is limited in scale and scope.

## Legislation and the Commission's task

### The Commission's internal review power

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)*".<sup>3</sup>
15. 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.
16. Pursuant to section 157(1) of the LCR Act, the task before 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.
17. In doing so, the Commission must consider all the information, material and evidence that was before the original decision maker.<sup>4</sup> The Commission may also consider further information, material or evidence in making a decision.<sup>5</sup>

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<sup>3</sup> 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)*".

<sup>4</sup> Section 157(2) of the LCR Act.

<sup>5</sup> See section 157(3) of the LCR Act.

## Conduct of an inquiry

18. 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. Relevant provisions governing the conduct of an inquiry by the Commission in this matter include a provision that the Commission is bound by the rules of natural justice but is not bound by the rules of evidence and can inform itself in any way it thinks fit.

## Determination of an uncontested application

19. 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).”*
20. 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.”*
21. 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.
22. 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.”*
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 alcohol."*

24. 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"*<sup>6</sup>. 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"*<sup>7</sup>.
25. 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.
26. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
27. 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

28. The Commission on review had before it and considered all materials received by the Delegate. The Commission also received and considered the following materials:
  - a. the Original Decision and reasons of the Delegate, dated 26 February 2021;
  - b. the Application for Internal Review dated 7 March 2021 submitted by Martin Towey, LGS Legal, on behalf of the Applicant;
  - c. written submissions from the Applicant dated 23 July 2021; and
  - d. email dated 2 August 2021 from the Applicant's representative, proposing a breakdown of the "10 lines" of liquor proposed for supply.
29. With the consent of the Applicant, the Commission decided that a public hearing was not needed and proceeded to determine the matter on the papers.

## Reason for decision on review

### Issues for determination on review

30. In deciding whether to affirm, vary or set aside the Original Decision and in turn grant or refuse the Application that is the subject of the Review Application, the key issue to be determined by the Commission in this matter is whether the supply of liquor pursuant to the licence is limited in scale and scope.

### Limited Scale and Scope

31. 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

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

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

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**).

32. 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>8</sup>
33. 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”,<sup>9</sup> 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.
34. 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 cider.
35. The second limitation proffered by the Applicant relates to trading hours proposed for the supply of liquor. The Applicant seeks the same trading hours under the original Application, that being:
  - a. Wednesday to Friday – between 5pm and 10pm
  - b. Saturday and Sunday – between 12pm and 10pm.
36. The Applicant informed the Commission that the Premises will continue to open at additional “zero alcohol” times to accommodate the local cultural community dining at the Premises without being exposed to alcohol.
37. A third proposed limitation from the Application was that liquor would be served with food only and only for on premises consumption.
38. In assessing the Scale and Scope Requirement for the Review Application, the Commission considered the following factors:
  - a. whether the liquor proposed for supply was limited in the type or lines of liquor proposed for supply;
  - b. whether the Application proposed sufficient limits to trading days at the Premises; and
  - c. whether the Application was limited by other factors, such as the maximum patron capacity available at the Premises.
39. The Commission notes the Premises caters to a maximum capacity of 40 patrons, and the Applicant has proposed that liquor will be supplied for consumption on-premises with food purchases only. The Commission is of the view that both are valid considerations for establishing whether the Review Application meets the Scale and Scope Requirement.
40. The Commission has also taken into consideration the decisions pertaining to York Street Café and the Garden Centre. In this particular instance the Commission is of the view that the Review Application can be considered similar with regard to the small size of the Premises (given the maximum patron capacity), the limited trading hours at the Premises, as well as the limited lines of liquor for on-premises supply which the Commission is of the view, will be ancillary to food preparation and service.
41. Accordingly, the Commission is satisfied that the Review Application is sufficiently limited in this instance. The combined factors of the limited lines of liquor which will be supplied with food only,

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

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

the small patronage allowance at the Premises, and limited hours for supply of liquor sought by the Applicant meet the Scale and Scope Requirement.

42. The Commission does not consider it relevant whether another category of licence (such as a restaurant and cafe licence) might be more appropriate than a renewable limited licence. 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 since been repealed.

### Objects of the LCR Act

43. Given the limitations for the licence sought in the Review Application, the Commission is satisfied that adequate controls will exist over the supply and consumption of liquor at the Premises and that any harm should be minimised. Accordingly, the Commission considers that the grant of a licence in this instance would not be contrary to the object of the LCR Act concerning harm minimisation.
44. The Applicant has also provided proof that the Director of the Applicant and manager of the Premises has completed responsible service of alcohol program as well as the Commission's approved new entrant training. The Commission is satisfied that the Applicant will manage the Premises responsibly and has an adequate knowledge of the LCR Act.
45. The Commission considers that granting the Review Application would be consistent with the object of facilitating the development of a diversity of licensed facilities reflecting community expectations. It further considers that granting the Review Application would not be conducive to, or encourage, the misuse or abuse of alcohol.
46. Based on the information provided to the Commission regarding the size and nature of the Applicant's business, the Commission is of the view that the Review Application meets the objects of the LCR Act and, in particular, will not contribute to any increase in harm.

### Decision on review

47. Based on the reasons detailed above and having regard to the objects of the LCR Act, the Commission has determined to set aside the Original Decision and, in substitution, grant the application for a renewable limited licence for the Premises, subject to the conditions as detailed in Appendix A.

***The preceding forty-seven (47) paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy (Chair), Ms Helen Versey (Deputy Chair), and Ms Danielle Huntersmith (Commissioner).***

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## 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 supply of liquor shall be limited to no more than four lines of wine, four lines of beer and two lines of cider.

Liquor must only be supplied for consumption on the premises with meals.

### 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.

### Noise and 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.

The licensee shall ensure that the level of noise emitted from the licensed premises shall not exceed the permissible noise levels for entertainment noise as specified in the State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.

### Maximum capacity

40 patrons

### Trading hours for the supply of liquor

Wednesday to Friday – between 5pm and 10pm.

Saturday and Sunday – between 12pm and 10pm.