

Decision and reasons for decision

In the matter of an application by Cassar Corporation Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant an application for a renewable limited licence for the premises located at Shop 8, 4-6 Gilbert Street, Torquay, trading as Mortadeli.

Commission: Ms Deirdre O'Donnell, Deputy Chair
Ms Danielle Huntersmith, Commissioner
Mr Andrew Scott, Commissioner

Date of Hearing: 15 October 2021
Date of Decision: 15 October 2021
Date of Reasons: 15 November 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:



Deirdre O'Donnell
Deputy Chair

Background

The Original Application

1. On 25 June 2021, Cassar Corporation Pty Ltd (**the Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) for the grant of a renewable limited licence (**the Original Application**) at the premises trading as Mortadeli, located at Shop 8, 4-6 Gilbert Street, Torquay (**the Premises**).
2. The Applicant leases the Premises where it operates a sandwich shop and delicatessen with a Mediterranean food theme. The Premises include:
 - a. a serving area;
 - b. a kitchen area; and
 - c. an open courtyard.
3. The internal space of the Premises comprises of one room with an overall size of 40 square metres, with half of that space designated for the kitchen. Up to 10 seats are available for customers to dine inside, and another 11 seats are available for customers to dine in the rear courtyard.
4. The Applicant sought a renewable limited licence in order to supply liquor on the Premises for consumption on and off the Premises between the hours of 10 am to 7 pm, Sunday, 12 noon to 7 pm, Good Friday and ANZAC Day, and 9 am to 7 pm, on any other day. The Applicant proposed to supply beer, wine, and pre-mixed spirits/cocktails.
5. Included with the Original Application was a plan of the proposed licensed area (**the Red Line Plan**), which incorporates the entire Premises. Also included with the Original Application were certificates of completion by the sole director of the Applicant, Mr Jake Cassar, in relation to New Entrant Training¹ and a Responsible Service of Alcohol (**RSA**)² program. Further, the Applicant provided a declaration of the right to occupy the Premises, a questionnaire completed by Mr Cassar, and a current and historical company extract.
6. In accordance with section 33 of the *Liquor Control Reform Act 1998* (**LCR Act**),³ a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector (together, **Victoria Police**), and the Surf Coast Shire (**the Council**) on 25 June 2021.
7. On 25 June 2021, a delegate of the Commission (**Delegate**) wrote to the Applicant requesting information in relation to the nature of the Applicant's business and the liquor proposed to be

¹ The New Entrant Training was completed on 3 June 2021.

² The RSA program was completed on 31 May 2021.

³ All references to legislation are references to the LCR Act unless stated otherwise.

supplied under the licence. Further, on 28 June 2021, the Delegate requested information in relation to the scale and scope of the liquor proposed to be supplied.

8. In response to the Delegate's requests for information, the Applicant submitted (in summary):
 - a. the business is a small sandwich shop which offers tea, coffee and other cold drinks. There is also a small deli with pre-packaged, sealed and refrigerated items such as ham, sausages, lasagne, and other small meals, as well as sandwiches for takeaway;
 - b. it is hoped that customers will order an alcoholic drink for consumption on the Premises with their food or a small amount for take-away with their pre-packed meals or sandwiches;
 - c. customers will likely be locals or tourists attending for lunch or snacks, as well as those seeking to purchase food and/or drinks for take-away; and
 - d. the proposed liquor available will be beer and wines, with a limited amount being kept on the Premises due to a small storage space.
9. On 10 August 2021, the Delegate refused the Original Application (**the Original Decision**). In summary, she was of the view that she could not be satisfied from the Applicant's submissions that the scale and scope of the liquor proposed to be supplied was sufficiently limited to satisfy essential requirements under section 26.

Application for Internal Review

10. On 7 September 2021, the Applicant applied for an internal review of the Original Decision and requested to supply no more than one line of each of red wine, white wine, sparkling wine, beer and premixed spirits with a limit of two glasses or cans, per customer, per sitting at the Premises, with no liquor supplied for off-premises consumption (**the Review Application**).⁴
11. The proposed trading hours for supply of liquor would be reduced to midday to 7pm on any day.⁵ All liquor would be supplied with food.
12. On 22 September 2021, a copy of the Review Application was served on Victoria Police and the Council. Both responded to the Commission on 23 September 2021, and advised that they did not object to the grant of the Review Application.

⁴ By way of the Review Application, the Applicant had amended the Original Application to be considered on review.

⁵ The Applicant confirmed the reduced trading hours for the proposed supply of liquor in email communications dated 28 September 2021 and 19 October 2021.

Legislation and the Commission's task

The Commission's internal review power

13. 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 the Applicant is an eligible person to apply for the review of that decision. The Review Application was made pursuant to section 153.

14. 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.

15. Under the LCR Act, an application for a renewable limited 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).

16. 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).

17. 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 conditions⁶; or

b. refuse to grant the application⁷.

Exercising the internal review power

18. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act)* requires the Commission, in exercising its internal review function, to have regard to the objects of

⁶ LCR Act, sections 44, 49 and 157.

⁷ LCR Act, section 44 and 157.

the LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act⁸.

19. 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*
 - (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.*

10. 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.*⁹

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

- a. must consider all the information, material and evidence before the original decision maker¹⁰;

⁸ VCGLR Act, section 9(3) and (4). Pursuant to section 9(4) of the VCGLR 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 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 given the amendments made to the Original Application by way of the Review Application to remove all requests to supply liquor for consumption off the Premises.

⁹ 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).

¹⁰ LCR Act, section 157(2).

- b. may consider further information or evidence¹¹; 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.¹²

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

22. 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.*

23. 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.

24. A limited licence may be a temporary limited licence or a renewable limited licence¹³. Pursuant to section 14(1B) of the LCR Act, a renewable limited licence authorises the licensee to supply liquor at the times determined by the Commission and specified on the licence, and it may be renewed in accordance with the LCR Act. A limited licence may further be subject to any conditions determined by the Commission and specified on the licence.

25. Section 26(1) of the LCR Act provides that the Commission may grant a limited licence only if it is satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature (**Scale and Scope Requirement**).

Conduct of an Inquiry

26. Section 34 of the 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. 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.

¹¹ LCR Act, section 157(3).

¹² LCR Act, section 44(4).

¹³ LCR Act, section 14(1).

Material before the Commission

27. The Commission on review had before it and considered all the materials before the Delegate.

28. The Commission on review also received and considered the following materials:

- a. Decision and Reasons for Decision of the Delegate for the Original Application, dated 10 August 2021;
- b. Review Application received by the Commission, dated 7 September 2021; and
- c. Email communications from the Applicant in respect to reduced trading hours for the supply of liquor as specified in paragraph 11 above, dated 28 September 2021 and 19 October 2021.

On-the-Papers determination of the Review Application

29. On 28 September 2021, the Commission informed the Applicant that it was possible to determine the Review Application 'on the papers', without a hearing or an appearance by the Applicant. On the same day, the Applicant's sole director, Mr Cassar, wrote to the Commission to state his preference for the Commission to determine the Review Application 'on the papers'.

30. On 15 October 2021, the Commission convened to determine the Review Application 'on the papers'.

Reasons for decision on review

Issues for determination on review

31. 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, 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;¹⁴ and
- 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.¹⁵

¹⁴ Section 26(1)

¹⁵ The Commission notes that in determining this matter, it has also considered each of the grounds set out in section 44(2).

32. Each of these issues is discussed in turn.

Limited in scale and scope

33. 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*”.

34. 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 Requirement¹⁶.

35. 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, the following additional restrictions were proposed by the Applicant:

- a. the range of liquor supplied would be restricted to one line of each of red wine, white wine, sparkling wine, beer and premixed spirits (the Original Application did not contain this proposed restriction);
- b. the supply of liquor would be limited to midday to 7pm on any day (in the Original Application, the Applicant had first requested the supply of liquor between the hours of 9 am and 7 pm every day of the year.¹⁷ This was later amended to 10 am to 7 pm, Sunday, 12 noon to 7 pm, Good Friday and ANZAC Day, and 9 am to 7 pm, on any other day);¹⁸
- c. the supply of liquor would be for on-premises consumption only (in the Original Application, the Applicant requested the supply of liquor for both on-premises consumption and off-premises consumption); and
- d. the supply of liquor would be limited to no more than two glasses or cans, per customer, per sitting at the Premises (in the Original Application, the Applicant’s request had included up to one whole bottle of wine per customer or two bottles/cans of beer or pre-packaged cocktails).

¹⁶ See decision of Fynix Pty Ltd at 36A Vickers Street, Sebastapol premises (Liquor-internal review) [2016] VCGLR 19 (25 July 2016) At [61].

¹⁷ Original Application, received 25 June 2021.

¹⁸ Applicant’s additional submissions on trading hours for the proposed supply of liquor, dated 28 June 2021.

36. 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.
37. 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 the liquor would only be served in conjunction with food.¹⁹ 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 35 above. What is a significantly greater limitation compared with that contained in the Original Application is the removal of the request to supply liquor for consumption off the Premises.
38. Taking into account the size and nature of the Premises, and subject to the limitations as referred to in paragraph 35 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

39. 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 object²⁰
40. 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.²¹

Misuse and abuse of alcohol

41. As previously stated, the Review Application proposes to supply no more than one line of each of red wine, white wine, sparkling wine, beer and premixed spirits with a limit of two glasses or cans, per customer, per sitting at the Premises, with the consumption of food. The food includes freshly made sandwiches and other small meals.
42. 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

¹⁹ 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).

²⁰ See further *Kordister Pty Ltd v Director of Liquor Licensing* [2012]1 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).

²¹ Section 44(2)(b)(ii).

notes that the requirement for service of food with the supply of alcohol also assists in the responsible service of alcohol and the minimising of the risk of harm.

43. The Applicant submitted as part of its Review Application that the supply liquor would be to simply fit the Mediterranean food theme of the Premises, in which food is paired with wine. In this instance, the Commission accepts from the Review Application that the proposed supply of liquor is an ancillary aspect of the Applicant's primary business of a sandwich shop and delicatessen.
44. The Commission also notes that the Applicant's sole director, Mr Cassar, has already completed the RSA program and New Entrant Training.
45. 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

46. 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.
47. Importantly, with the imposition of the conditions in Appendix One, 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.
48. Further, the Commission considers that granting the licence would facilitate the development of a diversity of licensed facilities reflecting community expectations in furtherance of the object outlined in section 4(1)(b). Relevantly, the Commission notes from the Applicant's submissions that there are no other venues with a Mediterranean food theme currently operating like the Premises within Torquay.

Decision on review

49. 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 49 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell (Deputy Chair), Ms Danielle Huntersmith (Commissioner) and Mr Andrew Scott (Commissioner).

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

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

The supply of liquor shall be limited to no more than one line of red wine, one line of white wine, one line of sparkling wine, one line of beer and one line of premixed spirits.

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

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 7 pm.