

Decisions and reasons for decision

In the matter of an application by Ocean 12 Entertainment Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to vary a late-night (on-premises) licence for the premises trading as Ocean 12 Club, located at Shop 51, 8 Whiteman Street, Crown Entertainment Complex, Southbank.

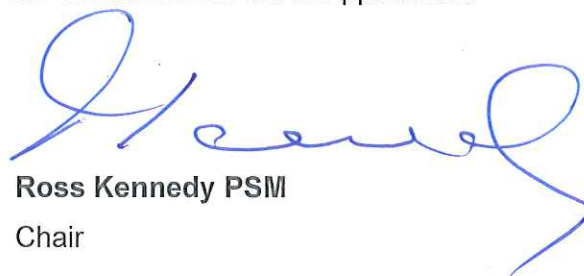
Commission: Mr Ross Kennedy, Chair
Ms Helen Versey, Deputy Chair
Ms Danielle Huntersmith, Commissioner

Date of Hearing: 14 April 2021
Date of Decision: 3 August 2021
Date of Reasons: 3 August 2021

Appearances: Mr John Larkins of Counsel (instructed by Mr Martin Towey of LGS Legal) on behalf of the Applicant
Sergeant Jay Rattigan on behalf of Victoria Police
Mr Cameron Warfe, Counsel Assisting the Commission

Decision: The Commission determined to set aside the decision of the Delegate and, in substitution, vary the late night (on-premises) licence subject to the conditions set out in Appendix A.

Signed:



Ross Kennedy PSM
Chair

Background

1. Ocean 12 Entertainment Pty Ltd (**Applicant**) operates a bar/nightclub and karaoke venue trading as Ocean 12 Club within the Crown Entertainment Complex (**Premises**). The Applicant holds a late-night (on-premises) licence (licence no. 31821530) (**Licence**).
2. On 26 September 2019, the Applicant applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) to vary its Licence for the Premises (**Original Application**).
3. The Original Application sought to vary existing licence conditions on the Licence as follows:
 - a. Vary the outdoor music condition from “*Only background music may be played in the outdoor areas when occupied*” to “*Only background music may be played on the external terraced area after 1am*” (**External Music Condition**);
 - b. Remove the condition “*The supply and consumption of liquor must cease in external areas at 1am*” (**External Consumption Condition**); and
 - c. Vary certain existing restrictions on the supply of liquor (specifically spirits and bottle service) so that they only applied within the karaoke rooms (**Karaoke Supply Conditions**).
4. In accordance with section 33(1) of the LCR Act a copy of the Original Application was served on Victoria Police on 26 September 2019. On 31 October 2019, Victoria Police informed the Commission that it objected to the Original Application, in so far as it related to the External Music Condition and the External Consumption Condition.
5. In accordance with section 33(2) of the LCR Act, a copy of the Original Application was served on the City of Melbourne (**Council**) on 26 September 2019. On 16 October 2019, the Council informed the Commission that it did not object to the Original Application.
6. On receipt of the Original Application, the Commission requested that the Applicant provide a submission addressing the Minister for Consumer Affairs, Gaming and Liquor Regulation’s Decision-making Guidelines for Applications for liquor licences in affected municipalities to trade after 1am (**2019 Freeze Guidelines**), effective on 1 July 2019.
7. On 9 October 2019, the Applicant provided submissions that the 2019 Freeze Guidelines do not apply as the Licence already authorised the supply of liquor until 5am.
8. Between 16 March and 30 April 2020, the Applicant and Victoria Police provided further submissions to the Commission in relation to the objection by Victoria Police.
9. On 19 May 2020, a delegate of the Commission (**Delegate**) determined to partially grant the Original Application (**Original Decision**). In summary, the Delegate:
 - a. refused to vary the External Music Condition based on the risk of impacts on the amenity of the area, and the Applicant’s past compliance history at the Premises;
 - b. on the basis that the 2019 Freeze Guidelines applied to the Premises, refused to remove the External Consumption Condition;
 - c. varied the Karaoke Supply Condition as requested by the Applicant.

Application for Internal Review

10. On 2 June 2020, the Applicant applied for internal review of the Original Decision to refuse to vary the Licence in relation to the External Music Condition and the External Consumption Condition (**Review Application**).
11. Following delays resulting from the COVID-19 pandemic, on 16 March 2021 the Commission served a copy of the Review Application on the Council and Victoria Police and sought to confirm if they maintained their positions of ‘no objection’ and ‘objection’ respectively. On 23 March 2021, Victoria Police confirmed that it maintained its objection to the Review Application. No response was received from the Council.

Legislation and the Commission's task

The Commission's internal review power

12. The Review Application is made under section 153 of the LCR Act. The Original Decision is a reviewable decision and the Applicant is an eligible person under Division 2 of Part 9 of the LCR Act to apply for review of that decision.
13. Pursuant to section 157(1) of the LCR Act, 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.
14. Under the LCR Act, an application to vary a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, a contested application relevantly includes "*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)*".
15. As Victoria Police objected to the Original Application and maintained that objection in relation to the Review Application, it is a contested application.
16. 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. The Commission must either:
 - a. grant the application (and may do so subject to conditions);¹ or
 - b. refuse to grant the application.²
17. In doing so, it must consider all the information, material and evidence before the original decision maker.³ It may also consider further information, material or evidence as part of making its decision.⁴
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. 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.

Exercising the internal review power

19. 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.
20. The 2019 Freeze Guidelines, applicable for applications made to the Commission after 30 June 2019 and before midnight 30 June 2021, relevantly provide that the Minister publishes:

"these guidelines representing the policy of the Victorian Government concerning applications to the Victorian Commission for Gambling and Liquor Regulation (commission) for liquor licences to trade after 1am in the municipalities of Melbourne"

¹ Section 47, 49 and 157 of the LCR Act.

² Section 47 and 157 of the LCR Act.

³ Section 157(2) of the LCR Act.

⁴ Section 157(3) of the LCR Act.

(including the area known as Docklands), Stonnington, Yarra and Port Phillip (inner Melbourne municipalities)

...

In order to restrict late-night liquor licences in the inner Melbourne municipalities, it is the intention of the Victorian Government that the commission have regard to these guidelines when considering whether the grant of an application would detract from or be detrimental to the amenity of the area in which premises to which the application relates are situated, or that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.

The guidelines apply to an application for the grant, relocation or variation of a general, on-premises, packaged liquor, late night (general, on-premises and packaged liquor), limited (temporary and renewable) and major event licence, and a BYO permit.”

21. Section 9(3) of the VCGLR Act provides that:

“The Commission must, when performing functions or duties or exercising its powers under the Gambling Regulation Act 2003, the Liquor Control Reform Act 1998, the Casino Control Act 1991, the Racing Act 1958 or any other Act, have regard to the objects of the Act conferring functions on the Commission.”⁵

22. Accordingly, in exercising its discretion to either grant or refuse a contested application under section 47(1) of the LCR Act, the Commission must have regard to the objects 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) 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.”

Determination of a contested application

25. Where an application is a contested application, section 47 of the LCR Act requires the Commission to grant or refuse the application, and that the Commission may refuse to grant a contested application on any of grounds set out in section 44(2).

⁵ There are no objects specified in the VCGLR Act itself.

26. Relevantly, section 44(2)(b) of the LCR Act provides the following grounds for refusal –
- “(i) that 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;*
 - (ii) that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol;”*
27. Section 3A provides that, for the purposes of the LCR Act, the amenity of an area is the quality that the area has of being pleasant and agreeable. The factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area include those listed at section 3A(2) –
- (d) the possibility of nuisance or vandalism;*
 - (e) the harmony and coherence of the environment; and*
 - (f) any other prescribed matters⁶.*
28. Section 3AA of the LCR Act provides a list of factors which may be taken as evidence constituting detraction from or detriment to the amenity of area (including noise disturbance to occupiers of other premises – as discussed above). Those factors include:
- a. violent behaviour;
 - b. drunkenness;
 - c. vandalism;
 - d. using profane, indecent or obscene language;
 - e. using threatening, abusive or insulting language;
 - f. behaving in a riotous, indecent, offensive or insulting manner;
 - g. disorderly behaviour;
 - h. causing nuisance;
 - i. noise disturbance to occupiers of other premises;
 - j. obstructing a footpath, street or road;
 - k. littering.
29. Section 47(4) of the LCR Act provides that before granting or refusing a contested application, the Commission may:
- “(a) may have regard to any matter the Commission considers relevant; and*
 - (b) may make any enquiries the Commission considers appropriate; and*
 - (c) must give the applicant and each objector a reasonable opportunity to be heard.”*
30. The Commission considers that, while the grounds of refusal outlined in section 44(2) are relevant considerations, the ultimate determination of a contested application is to be made pursuant to sections 44(1), 47(1) and 157(1) at the discretion of the Commission with reference to the objects of the LCR Act.
31. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.

⁶ Section 3A(2) used to include three additional factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area: (a) presence or absence of parking facilities, (b) traffic movement and density and (c) noise levels until these factors were repealed by the *Liquor and Gambling Legislation Amendment Act 2018*.

Material before the Commission

32. The Commission had before it and considered all of the material received by the Delegate.
33. The Commission also had before it and considered additional information and evidence as follows:
- a. the Review Application, dated 2 June 2020;
 - b. statement of a director and nominee of the Applicant, Sam Suratman, dated 12 April 2021;
 - c. statement of Cetin Mustafof, dated 12 April 2021;
 - d. acoustic report prepared by Renzo Tonin & Associates, dated 10 March 2021;
 - e. a venue management plan for the Premises, dated 28 April 2021;
 - f. correspondence from Victoria Police stating that it maintained its objection to the Review Application, dated 23 March 2021;
 - g. correspondence from Victoria Police stating that it would withdraw its objection to the Review Application if certain conditions were imposed on the Licence, dated 13 April 2021; and
 - h. a pre-hearing compliance report prepared by VCGLR staff, dated 17 March 2021.

Public hearing

34. On 14 April 2021, the Commission held a public hearing (**Hearing**) for the Review Application. The Applicant was represented at the Hearing and made oral submissions for the Commission's consideration. Victoria Police was also represented at the Hearing.
35. Following the Hearing, the Commission received a set of proposed licence conditions from the Applicant for its consideration in the event the Commission was minded to grant the Review Application.
36. On 23 April 2021 Deputy Chair Versey and Commissioner Huntersmith conducted a site visit of the Premises in the company of the Applicant.

Reason for decision on review

Issues for determination on review

37. In making its decision on review, the Commission must determine the following issues:
- a. the application of the Freeze Guidelines to the Review Application;
 - b. whether granting the Review Application would detract from, or be detrimental to, the amenity of the area in which the Premises are located;
 - c. whether granting the Review Application would be conducive to or encourage the misuse or abuse of alcohol; and
 - d. whether the Review Application should be granted or refused, having regard to the objects of the LCR Act, with particular regard to the object of harm minimisation.
38. Each of these issues are discussed in turn below.

Freeze Guidelines

39. As indicated above at paragraph 19, when performing its internal review function, the Commission must have regard to any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act.

40. The 2019 Freeze Guidelines state that they apply to applications made to the Commission after 30 June 2019 and before 30 June 2021. The Original Application and the Review Application were made after 30 June 2019. Further, the Premises is located in one of the relevant inner Melbourne municipalities.
41. Relevantly, the 2019 Freeze Guidelines apply not only to applications for the grant of licences, but also to applications for the variation of licences, including late night (on-premises) licences.
42. The Commission has considered the Applicant's submissions in relation to the exemptions set out in the 2019 Freeze Guidelines. However, the Commission has determined that the Applicant has not demonstrated that it meets all necessary elements of any of the available exemptions.
43. As such, the Commission finds that the 2019 Freeze Guidelines apply to this Review Application, and the Commission must have regard to the 2019 Freeze Guidelines as part of determining the Review Application.
44. The Commission has had regard to the policy intent behind the 2019 Freeze Guidelines, which is to "restrict late-night liquor licences in the inner Melbourne municipalities", and the references in the 2019 Freeze Guidelines to refusing applications that would "allow the supply of liquor after 1.00 am". The Commission notes that the Review Application is not seeking a new late night licence in inner Melbourne, as the Licence is already in existence and operation. Further, the Licence already permits the supply of liquor at the Premises until 5am, however prohibits such liquor supplied at the Premises from being consumed in the external areas post 1am. The Commission also notes that the Review Application is not seeking to increase or alter the red line area of the Premises, as the outdoor area is already contained within the red line plan of the Premises.
45. As such, the Commission considers that granting the Review Application would neither result in any further licences being issued, nor permit the supply of liquor post 1am at any existing venue within the relevant municipalities. The Premises is currently permitted to supply liquor until 5am, and the Review Application is only seeking that liquor, having been supplied, may be consumed not only within the internal areas of the Premises, but also the external areas.
46. Consequently, the Commission has had regard to the 2019 Freeze Guidelines and is of the view that granting the Review Application, if it is found appropriate to do so (discussed further below), would not be inconsistent with the 2019 Freeze Guidelines in these circumstances.

Amenity

47. The Commission has considered whether granting the Review Application would detract from, or be detrimental to, the amenity of the area in which the Premises are located.
48. At the Hearing, the Applicant confirmed that, following discussions with Victoria Police, it was not seeking to continue with the Review Application with respect to the External Music Condition. That is, the current condition on the Licence that "*Only background music may be played in the outdoor areas when occupied*" should continue to apply.
49. Following that concession, the Review Application was solely involved with the variation of the External Consumption Condition, which would permit the supply and consumption of liquor in the external areas after 1am. As a consequence, this would also permit music up to background music levels only to be played until 5am (rather than the current 1am).
50. The Applicant submitted that there are several late-night liquor licences and other businesses operating within the Crown Entertainment Complex, and with balconies facing the Yarra River. No objections were received from any residents, surrounding businesses or the Council who all have rights under the LCR Act to object to an application on the basis that it may detract from, or cause detriment to, the amenity of the area in which the Premises are located.
51. The Applicant referred to the acoustic report and the relevant controls to be implemented for the external sound system, with the default settings at background levels with only managers having the code to change that level.

52. The Applicant also proposed that, if the Review Application is granted, it would submit to a maximum capacity in the external area of 175 patrons, together with the following conditions, being imposed on the Licence:
- a. Post 1 am on any day, seating must be provided in the outdoor area so as to be available for at least 75% of patrons in that area, with only table service of liquor from 1am in that area.
 - b. Post 1am (if the patron numbers exceed 150), a member of staff must be stationed at the entrance to the outdoor area, to ensure that patrons in that area do not exceed 175.
 - c. When the outdoor area operates beyond 1 am, food is to be available for purchase.
53. At the Hearing, Victoria Police confirmed that given the Applicant's concession (referred to in paragraph 48 above) and on the basis that the proposed conditions were imposed by the Commission, it would withdraw its objection to the Review Application.
54. In light of the above matters, the Applicant submitted that it was not likely that the proposed operation in the outdoor area post 1am, particularly in the circumstances of the proposed conditions, would result in an unreasonable detriment to the amenity of the area.
55. An area of concern for the Commission related to recent incidents of non-compliance that had occurred at the Premises. These matters were set out in the pre-hearing compliance report prepared by VCGLR staff.
56. In relation to its compliance history, the Applicant submitted that:
- a. no compliance issues have arisen in relation to the operation of the outdoor area at the Premises;
 - b. it had implemented enhanced and targeted training for all staff, including responsible service of alcohol;
 - c. the updated Venue Management Plan has addressed areas of concern resulting from previous non-compliance events;
 - d. since the involvement of Mr Suratnam and Mr Must at the Premises, it has improved its commitment to responsible service of alcohol and overall compliance with its licence conditions; and
 - e. the existing director of the Applicant is responsible for the financial management of the business, while Mr Suratnam is responsible for the operational management of the business.
57. The Commission has taken into account the Applicant's submissions in this regard and, although the incidents of non-compliance are quite serious, the Commission is satisfied that the Applicant has taken relevant steps to minimise the risk of future non-compliance.
58. Overall, the Commission considers that the reduced scale of the Review Application, together with the proposed conditions to be imposed on the Licence, should appropriately mitigate the risk of detracting from, or detriment to, the amenity of the area. The Commission further accepts the Applicant's submission that the Premises operates in close proximity to a number of other late night venues within the Crown Entertainment Complex, and operates in the context that there is significant social interaction along the Yarra River, to which the Premises is only a small contributing factor.
59. In relation to the External Music Condition, the Commission notes the Applicant's submission that the existing condition should continue to apply. In light of the above discussion and for certainty, the Commission has determined to vary the External Music Condition by removing the words "*when occupied*". This will reinforce the requirement that only background music is permitted in the external area of the Premises at all times.
60. Consequently, the Commission considers that the potential amenity impact associated with the grant of the Review Application is not such that it would warrant the refusal of the Review Application.

Misuse and abuse of alcohol

61. The Commission must consider whether the grant of an application for a licence would be conducive to or encourage the misuse or abuse of alcohol. The minimisation of harm arising from the misuse and abuse of alcohol is the primary regulatory object of the LCR Act.
62. The Commission refers to the proposed conditions by the Applicant set out in paragraph 52 above and considers that those same conditions will also mitigate against the risk of misuse and abuse of alcohol at the Premises arising from the Review Application.
63. Although not directly relevant for the purposes of the Review Application, the Commission considered that the Applicant had practically demonstrated its commitment to minimising harm relating to the misuse and abuse of alcohol through its implementation of improved management process, systems and staff including, for example, its policy of storing incomplete spirit bottles (purchased by patrons) at the Premises for up to six months. This reduced the risk of patrons seeking to finish the entire bottle in any one occasion at the Premises.
64. Having regard to the primary object of the LCR Act which is the minimisation of harm arising from the misuse and abuse of alcohol, the Commission finds that the risk of misuse and abuse of alcohol that may arise as a result of the granting of the Review Application will be appropriately mitigated by the conditions imposed on the Licence.

General discretion

65. In addition to the harm minimisation objective contained in section 4(1)(a), the objects of the LCR Act also aim “to facilitate the development of a diversity of licensed facilities reflecting community expectations” and “to contribute to the responsible development of the liquor, licensed hospitality and live music industries”.
66. Overall, the Commission considers that although granting the Review Application would not significantly advance the objects of facilitating a diversity of licensed facilities reflecting community expectations, and contributing to the responsible development of the liquor, hospitality and live music industries, it would also not be inconsistent with those objects. This finding is balanced with the Commission’s findings regarding amenity and misuse and abuse of alcohol set out above.
67. Having considered all the matters set out above and having regard to the objects of the LCR Act, the Commission has determined to exercise its discretion to set aside the decision of the Delegate and vary the Licence to be subject to the conditions set out in Appendix A.

Decision on review

68. Based on the matters set out above, the Commission on review has determined to set aside the decision of the Delegate and vary the late night (on-premises) licence subject to the conditions set out in Appendix A.

The preceding 68 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.

Appendix A

Type of licence

This licence is a late night (on-premises) licence and authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises during the trading hours specified below.

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.

Security Cameras

When Karaoke entertainment or live or recorded amplified music entertainment other than background music is provided:

- The licensee must install and maintain a surveillance recording system that is able to clearly identify individuals, display time and date, and provide continuous images of all areas where patrons are permitted including entrances and exits, bars, dance floors and areas where entertainment occurs (including private booths and cubicles), excluding toilets, washrooms, change rooms and lactation rooms. The position of the cameras must be to the satisfaction of the Licensing Inspector or Compliance Inspector of the Victorian Commission for Gambling and Liquor Regulation (the Commission). The surveillance recording system must operate from 30 minutes before the start of the entertainment being provided, until 30 minutes after closure. A copy of the recorded images must be retained for at least one month and must be available upon request for immediate viewing or removal by Victoria Police, or a person authorised in writing by the Commission.
- Signs must be displayed in all areas subject to camera surveillance and must read: "For the safety and security of patrons and staff this area is under electronic surveillance".

Crowd Controllers

When Karaoke entertainment or live or recorded amplified music entertainment other than background music is provided:

- The licensee must ensure two crowd controllers, licensed under the Private Security Act 2000 (Victoria), are present and on duty when patron numbers on the licensed premises are between 0 and 100. In addition, a further one crowd controller must be present and on duty for each additional 100 patrons or part thereof. At least one crowd controller is to be present at the entrance of the premises to monitor the behaviour of patrons arriving at or departing from the premises at all times when the venue is open to the public. Crowd controllers must be

present from 30 minutes before the start of the entertainment being provided, until 30 minutes after closure.

Maximum capacity

Outdoor area - 175 patrons

Overall maximum - 1100 patrons

Special Conditions - Outdoor Area

Only background music may be played in the outdoor areas.

In the outdoor area post 1 am on any day:

- Seating must be provided so as to be available for at least 75% of patrons in that area.
- Only table service of liquor is permitted.
- If the patron numbers exceed 150, a member of staff must be stationed at the entrance to the outdoor area, to ensure that patrons in that area do not exceed 175.
- Food is to be available for purchase.

Venue Management Plan

The licensee shall ensure that it operates the licence at all times in accordance with the most recent venue management plan endorsed by the Commission and ensure that the Venue Management Plan is retained on the licensed premises at all times for inspection by an authorised member of Victoria Police or the Commission. The licensee must advise the Commission in writing of any operational change made on the venue management plan.

Restriction on Liquor Supplied in the Karaoke Rooms Only

When Karaoke entertainment or live or recorded amplified music entertainment other than background music is provided:

- Any beverage supplied which contains spirits must not be supplied in a container able to hold more than 285ml and any beverage containing spirits supplied to patrons must not contain more than 30ml of spirit in each beverage.
- No full or partially full bottles or other container of spirits are permitted to be in a private booth or cubicle, except in circumstances where a staff member with responsible service of alcohol training is present.

Trading Hours

ANZAC Day

Between 12 noon and 5am the following morning

On any other day (including Good Friday)

Between 10am and 5am the following morning (except for the period between 3am and 12noon on the morning of ANZAC Day)