

## Decision and reasons for decision

In the matter of an application by Theka Sharab Desi Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision to refuse to grant a variation to a renewable limited licence to increase the supply of online liquor sales, for the Licensee trading as Desi Theka Sharab.

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**Commission:** Fran Thorn, Chair  
Deirdre O'Donnell, Deputy Chair  
Andrew Scott, Commissioner

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**Date of Decision:** 29 March 2022

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**Date of Reasons:** 29 March 2022

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**Decision:** The Commission has determined to affirm the decision of the delegate and refuse to grant the variation to the renewable limited licence

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**Signed:**



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Fran Thorn

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Chair

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## Background

1. Theka Sharab Desi Pty Ltd (the **Licensee**) holds a renewable limited licence (licence number, 36163995) (the **Licence**) to supply liquor from various online retail stores,<sup>1</sup> under the trading name 'Desi Theka Sharab'.
2. On 23 July 2021, the Licensee applied to the Victorian Gambling and Casino Control Commission<sup>2</sup> (the **Commission**) to vary a Licence condition to increase its liquor supply limits (**Application**) under section 29 of the *Liquor Control Reform Act 1998 (LCR Act)*. The Licence currently authorises the Licensee to supply "no more than 1 case of beer or 6 bottles of wine or 6 bottles of mixed spirits or 6 bottles of premixed beverages per order per customer per day". Under the Application, the Licensee sought to increase that to supply up to 60 bottles per transaction, to cater for "party orders" from customers.
3. On 28 July 2021, a delegate of the Commission (**Delegate**) returned the Application, as the Licensee had not provided payment details or any submissions on scale and scope<sup>3</sup>. In the Delegate's return email, the Delegate explained to the Licensee that –

*"...the Commission must be satisfied that the scale and scope of any variation to a limited licence is limited in nature. There was insufficient information in your application for the Commission to be satisfied that the supply of liquor is limited in scale and scope. You need to provide a written submission detailing how the supply of liquor under this licence will remain limited."*

4. On 6 August 2021, the Licensee re-submitted the application form, which included payment details and a letter (**Proposed Variation**) which provided the following –

*"We have a limited liquor licence 36163995 but have the following limitation,*

*"The supply of liquor is limited to no more than 1 case of beer or 6 bottles of wine or 6 bottles of mixed spirits or 6 bottles of premixed beverages per order per customer per day."*

*We would like to request to make following changes*

*Website limit to be increased to 10 cases (60 bottles) or \$9999.00 in one transaction reason being we get lot of request from our customers for bulk orders for their weddings, birthday party, christening. etc.*

*We would like to cater for their request and have good business model for our site too. This condition still put a decent limit on our Liquor Licence."*

5. On 9 August 2021, the Delegate responded to the Licensee and explained once again that because the Licence is a limited licence, the Commission must be satisfied that the supply of liquor is limited in its scale and scope. The Delegate further provided –

*"Your proposed limitation of 10 cases (60 bottles) or \$9999.00 in one transaction for customer bulk orders is a considerable amount of liquor to be supplied under a limited licence. A limited licence is not the correct licence type for wholesale or bulk sales of liquor.*

*Please advise if you would like to continue with the limitation outlined in your application or, if not, please provide a further submission setting out a reduction of the amount of liquor to be supplied."*

6. The Delegate further noted in the email of 9 August 2021 that the Commission may consider a limitation of up to a maximum of 48 bottles of either wine or beer, or premixed spirits or premixed beverages per order, per customer, per day. The Licensee responded, on the same day, requesting that the Delegate change the request to vary the Licence condition to "up to a maximum of 48 bottles of either whiskey, Liqueurs, spirits, wine or beer cases or premixed spirits/ premixed beverages and other alcoholic bottles per order per customer, per day" (**Amended Proposed Variation**).
7. On 14 October 2021, the Delegate refused the Application because the proposed variations to the Licence submitted by the Licensee were not considered limited in scale and scope (the **Original Decision**).

<sup>1</sup> Theliquorking.com.au; Theka.com.au; Thedram.com.au; Mytheka.com.au; Kogan.com.au; eBay.com.au; and Catch.com.au.

<sup>2</sup> At the time the Application was lodged, the Commission was known as the 'Victorian Commission for Gambling and Liquor Regulation' (**VCGLR**). From 1 January 2022, the VCGLR became the VGCC and assumed all functions of the VCGLR, including those in relation to liquor licence applications and internal review applications pursuant to section 153 of the LCR Act.

<sup>3</sup> Pursuant to section 26 of the LCR Act, when considering a limited licence the Commission must be satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature.

## Application for Internal Review

8. On 3 November 2021, the Licensee applied for internal review (**Review Application**) requesting the Commission set aside the Original Decision and grant the variation the subject of the Application.
9. The Licensee made the following submission in support of the Review Application:

*“At this stage our licence limited to no more than 1 case of beer or 6 bottles of wine or 6 bottles of mixed spirits or 6 bottles of premixed beverages per order per customer per day.*

*We would like to request to make following changes*

*Website limit to be increased to max 5 cases (spirits, Beers, Whisky, wine, RTD etc) in one transaction reason being we get lot of request from our customers for bulk orders for their weddings, birthday party, christening etc.*

*We would like to cater for their request and have good business model for our site too.*

*We requested for 10 Cases but happy to slash that to half to 5 cases please.”*
10. On 22 November 2021, a director of the Licensee sent an email to the Commission seeking an update on the Review Application and made the following submission –

*“now we are happy to settle with 3 (18 bottles) cases of spirits, whisky, wine, liqueur etc and 5 cases of beers per order/customer per day limit.”*
11. On 23 December 2021, the Commission sought clarification from the Licensee regarding the scale and scope submissions it had made, specifically the Commission sought clarification from the Licensee which submissions it wanted the Commission to consider under the Review Application. The Licensee replied on 24 December 2021, and confirmed it sought the following variation to a condition under the Review Application:

*“Website limit to be increased to 5 cases (spirits, whisky, beers, wines, RTD etc) in one transaction because we get a lot of requests from our customers for bulk orders for their weddings, birthday party, christening etc.”*
12. On 14 February 2022, the Commission sought further clarification regarding the quantity of liquor in each “case” of liquor the Licensee was seeking to supply. The Licensee responded later that same day, providing –

*“Majority of Whisky & Spirits comes in cases of 6 but RTD and Beers comes in Cases of 24.*

*So when I say, 5 Cases spirits, whisky, wine I would say 30 bottles in a transaction and for beers & RTD would request 5 cases of standard 24 bottles each.”*
13. In summary, the Licensee confirmed it seeks to vary a condition on the Licence to supply the following amount of liquor, per transaction:
  - a. five cases of a range of whisky, spirits, wine, beer and RTD;
  - b. whisky, other spirits or wine, are sold at six bottles per case, whisky, spirits and wine would be limited to 30 bottles in one transaction; and
  - c. orders for beer and RTD will be sold at 24 bottles per case.

## Legislation and the Commission’s task

### The Commission’s internal review power

14. Division 2 Part 9 of the LCR Act governs internal review applications. The Original Decision is a reviewable decision under section 152, and the Licensee is an eligible person to apply for a review of that decision. The Review Application is made under section 153 of the LCR Act.
15. Pursuant to 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.<sup>4</sup>
16. 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 Application. In this case, the Commission must decide whether to
- c. grant the renewable limited licence, and if so, whether to do so subject to conditions;<sup>5</sup> or
  - d. refuse to grant the Application.<sup>6</sup>

### Determination of an uncontested application

17. 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).*

18. The Review 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 of the LCR Act).

### Exercising the internal review power

19. Section 9 of the *Victorian Gambling and Casino Control Commission Act 2011 (VGCCC Act)* requires the Commission, in exercising its internal review function, to have regards to the objects of the LCR Act and any decision-making guidelines<sup>7</sup> issued by the Minister under section 5 of the VGCCC Act.

20. The objects of the LCR Act are set out at section 4(1) and provide –

*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.*

21. Section 4(2) of the LCR Act further provides –

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<sup>4</sup> Section 157(2) to (5) of the LCR Act and section 25(3) of the VGCCC Act further prescribe the manner in which the Commission is to undertake internal reviews.

<sup>5</sup> LCR Act, sections 44, 49 and 157.

<sup>6</sup> LCR Act, section 44 and 157.

<sup>7</sup> The Commission considered it did not need to apply the packaged liquor guidelines in this instance, as the Review Application did not seek to deliver liquor outside of ordinary trading hours.

*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.<sup>8</sup>*

22. In exercising the internal review power, the Commission:
- a. must consider all the information, material and evidence before the original decision maker;<sup>9</sup>
  - b. may consider further information or evidence;<sup>10</sup> 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.<sup>11</sup>
23. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
24. The Commission considers that while the grounds of refusal outlined at 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.
25. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds and includes:
- (ii) that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.*
26. A limited licence may be a temporary limited licence or a renewable limited licence. 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.
27. 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.

## Conduct of an inquiry

28. Section 34 of the VGCCC Act provides that, subject to that Act, gambling legislation or liquor legislation, the Commission may conduct an inquiry in any manner it considers appropriate.
29. During the conduct of an inquiry, section 25(3) of the VGCCC Act provides the Commission is not bound by the rules of evidence but must comply with the rules of natural justice.

## Material before the Commission

30. On review, the Commission had before it and considered all material received by the Delegate, as referred to at paragraphs 2 – 6 above.
31. The Commission also had before it and considered the following additional information and evidence:
- a. the refusal email, dated 14 October 2021, setting out the Original Decision;
  - b. 'VCGLR Decision Record' of the Delegate, dated 14 October 2021;
  - c. the Review Application, received on 3 November 2021;

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<sup>8</sup> 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).

<sup>9</sup> LCR Act, section 157(2).

<sup>10</sup> LCR Act, section 157(3).

<sup>11</sup> LCR Act, section 44(4).

- d. emails from a director of the Licensee with further written submissions regarding the Licensee's views on the limited scale and scope for the supply of liquor, dated 22 November 2021, 24 December 2021, and 14 February 2022.

## Hearing

32. On 11 January 2022, the Licensee confirmed its agreement for the Commission to determine the matter on the papers; accordingly there was no public hearing held for this matter.

## Reason for decision on review

### Issues for determination on review

33. In making its decision on review, the key issue for determination is whether the nature of the supply of liquor as proposed by the Licensee is limited in scale and scope as required by section 26(1) of the LCR Act.
34. The Commission is also required to consider whether to exercise its discretion to grant the renewable limited licence having regard to the objects of the LCR Act, with particular regard to the object of harm minimisation.

### Limited scale and scope

35. 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**).
36. 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>12</sup>
37. 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*, the Victorian Civil and Administrative Tribunal (**VCAT**) considered there was no warrant for an interpretation that the limitation in question need to "*contemplate a substantial or significant restriction*",<sup>13</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.
38. The limitation proffered by the Licensee, in summary, is to limit liquor sales to "5 cases" of a full range of liquor, in one transaction (**Proposed Limitation**) and the reason provided for this is for the Licensee to have the ability to cater to bulk orders from its customers.
39. In assessing the Scale and Scope Requirement for the Review Application, the Commission considered the following factors:<sup>14</sup>
  - a. whether the liquor proposed for supply was limited in the type or lines of liquor proposed for supply;
  - b. whether the Review Application proposed sufficient transactional limits to quantity or volume, or customer limitations; and
  - c. whether the Review Application was limited by other factors, for example, membership requirements or the geographic area for supply.

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<sup>12</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>13</sup> *Club 8 Pty Limited v Director of Liquor Licensing (Occupational and Business Regulation [2009] VCAT 716 at para [24]*.

<sup>14</sup> These factors were most recently considered by the Commission in the application for internal review by Australia Liquor Wholesale Pty Ltd, however there is not an exhaustive list of factors the Commission may consider when determining if the Scale and Scope Requirement is met

40. As outlined above, when considering an application for a renewable limited licence, the Commission must be satisfied that scale and scope of the supply of liquor the subject of the licence is limited in nature. Referring to the Licensee's submissions and the proposed business model, the Commission finds that this is not the case with the Review Application as the Licensee has not proffered sufficient limitations on the liquor it proposes to supply, in order to satisfy the Scale and Scope Requirement.
41. The Commission acknowledges that in the Review Application, the Licensee has considered and made submissions to reduce the amount of liquor it proposes to supply from that which was originally submitted under the variation Application. However, the Proposed Limitation is not sufficient for the following reasons:
- a. essentially under the Proposed Limitation, the Licensee has specifically sought the potential to supply a full wide range of brands and types of liquor in one transaction;
  - b. as observed by the Delegate when considering the Original Decision, under the Proposed Limitation the Licensee would be able to supply five cases (or 30 bottles) of spirits in one transaction, which is not sufficiently limited for liquor with such a high percentage of alcohol by volume;
  - c. the Licensee has not proposed any further transactional limits (other than "five cases"). Therefore, hypothetically, if the Commission was to grant the variation the subject of the Review Application, there could be numerous transactions made by one customer in a day, which would enable the supply of unlimited amounts of liquor;
  - d. the Licensee has submitted that it wishes, via this particular licence, to meet "a lot of requests" from customers for "bulk orders", which in itself indicates the Licensee's desire for a business model which is inconsistent with the concept of a limited supply; and
  - e. the Licensee did not provide any information about whether its business and online websites have membership requirements that limit the supply of liquor.
42. When considering the lack of limitations as to the type of liquor to be supplied, the lack of transactional limits and the lack of any other restrictions that may limit the supply of liquor sought under the variation the subject of the Review Application, the Commission finds that the Review Application does not satisfy the Scale and Scope Requirement. The Commission notes that if the Licensee is looking to update its business model, there are other types of liquor licences under the LCR Act which may be more suitable.
43. The Commission finds, based on the submissions made by the Licensee, varying the Licence to allow the Licensee to increase liquor supply in this instance, would not be aligned with the harm minimisation object of the LCR Act given the potential for such wide and unlimited supply of liquor.

## Decision on review

44. Based on the reasons detailed above and having regard to the objects of the LCR Act, the Commission has determined to affirm the Original Decision and refuse to vary the renewable limited licence the subject of the Review Application.

***The preceding 44 paragraphs are a true copy of the Reasons for Decision of Ms Fran Thorn (Chair) Ms Deirdre O'Donnell (Deputy Chair) and Mr Andrew Scott (Commissioner).***