

Decision and reasons for decision

In the matter of an application by Yin Yam 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 located at 2/14 Apex drive, Truganina, Victoria.

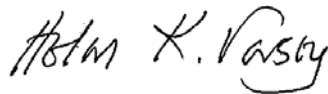
Commission: Ms Helen Versey, Deputy Chair
Ms Danielle Huntersmith, Commissioner
Mr Andrew Scott, Commissioner

Date of Decision: 3 August 2021

Date of Reasons: 3 August 2021

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

Signed:



Helen Versey
Deputy Chair

Background

1. On 16 October 2020, Yin Yam Pty Ltd (**the Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) for a renewable limited licence (**Application**) under the *Liquor Control Reform Act 1998 (LCR Act)* for the premises located at 2/14 Apex Drive, Truganina, Victoria (**the Premises**). The Applicant sought a licence to supply and deliver packaged liquor ordered via the internet from the Applicant's online grocery store, trading as Yin Yam Food and Beverage.
2. The Applicant sought to supply Asian liquors from the online store, with trading hours of between 12pm and 10pm on any day for liquor to be delivered.
3. On 16 October 2020, a delegate of the Commission (**Delegate**) notified the Applicant's representative and associate, that the following documents needed to be lodged with the Commission by 25 November 2020:
 - a. a completed application questionnaire for one of the Applicant's directors, Mr Hong La Le;
 - b. statement of display, pursuant to section 34(7) of the LCR Act;
 - c. evidence of completion of the Commission's training standard new entrant training to ensure applicants for a liquor licence have adequate knowledge of the LCR Act;
 - d. further details about how the Applicant proposes the supply of liquor will be limited in scale and scope; and
 - e. submissions regarding exceptional circumstances for seeking trading hours that are outside of standard ordinary packaged liquor trading hours.
4. On 19 October 2020, the Applicant's representative submitted Mr Le's completed application questionnaire and informed the Commission that the Applicant was yet to establish how the proposed liquor supply would be limited.
5. Pursuant to section 33(3), at the discretion of the Commission, on 16 October 2020 a copy of the Application was provided to the Wyndham City Council (**Council**) and to Victoria Police for comment.
6. On 20 October 2020, Victoria Police was provided with a copy of the application questionnaire for Mr Le. Upon receiving this information, on 20 October 2020, Victoria Police lodged an objection to the Application on the grounds that the Applicant would need to provide an amended application which provided information about the director and 50% shareholder of Feelgood Products Pty Ltd, being the company which owns 100% of the shares in the Applicant.
7. On 28 October 2020, the Applicant provided the Commission with the following information in response to the objection from Victoria Police:
 - a. an organisational chart detailing roles and responsibilities of company directors, stating that Feelgood Products Pty Ltd is a trustee company for the Feelgood Products Trust which 100% owns Yin Yam, this being a family trust structure; and
 - b. a director of the Applicant, Kim Kha, holds the role of secretary (and 50% shareholder of Feelgood Products Pty Ltd) the role also includes office administration, finance, accounting/bookkeeping and corporate compliance.
8. On 11 November 2020, the Applicant provided the following further information to the Commission:
 - a. an explanation that only the directors of the Applicant take a salary from the trustee company;
 - b. John Tran was previously a director of the Applicant but ceased this role on 27 August 2020 because of other directorship commitments; and

- c. an amended declaration of associates form for the Applicant, which declared Tran as an associate of the Applicant.
9. On 25 November 2020, Victoria Police lodged an amended objection to the Application, on the grounds that the Applicant is unsuitable to hold a licence due to the Applicant having an unsuitable associate in Tran, due to his prior criminal history.
10. The Applicant did not make any further submissions in response to the amended objection from Victoria Police, on the suitability of the Applicant's associate Tran.
11. On 28 January 2021, the Delegate refused to grant the Application on the grounds that there was insufficient information provided to complete an assessment under the LCR Act (**Original Decision**). In particular the Delegate noted that the Applicant:
 - a. did not provide all information as requested by the Commission; and
 - b. did not make submissions in response to the objection from Victoria Police regarding Tran.

Application for Internal Review

12. On 24 February 2021, the Applicant lodged an application for internal review (**Review Application**) seeking that the Commission set aside the decision of the Delegate and grant the Application.
13. The Applicant made the following submission in support of the Review Application:
 - a. Tran admits his criminal past, his only offence being knowingly using a false document, for which he was fined \$15,000;
 - b. Tran is a suitable person, he is the director of two companies that hold liquor licences, and he has only one declared conviction for an offence that occurred in 2016;
 - c. that Le, as a director of the Applicant, had now completed new entrant training, and a copy of the certificate of completion was provided;
 - d. the Applicant proposes the following scale and scope limitations for the licence:
 - i. to supply Asian liquors via online sales only;
 - ii. each sale will encompass no more than 24 x 375ml containers of beer and/or cider and/or pre-mix spirits; and/or 12 x 700ml bottles of wine per person per day; and/or 1 x 700ml of spirits; and
 - e. in the Applicant's view, the combination of the above two limitations is consistent with previous Commission approved on-line businesses operating under a renewable limited licence;
 - f. the Applicant seeks to supply liquor within the following trading hours, which no longer require submissions on exceptional circumstances because the hours are consistent with similar licences permitting the supply of packaged liquor:
 - i. orders can be made online at any time of the day;
 - ii. delivery will be limited to: on any day (except Good Friday and Christmas Day) between 12 noon and 10 pm.
14. On 26 March 2021, Victoria Police informed the Commission that it maintained an objection to the Review Application due to the Applicant being unsuitable due to having an unsuitable associate.

Legislation and the Commission's task

The Commission's internal review power

15. Division 2 Part 9 of the LCR Act governs internal review applications. The Original Decision is a reviewable decision under section 152, and the Applicant is an eligible person to apply for a review of that decision. The Review Application is made under section 153 of the LCR Act.
16. 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.
17. Under the LCR Act, an application to grant a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act a contested application 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 the Division for those objections (or that period as extended under section 174)”.
18. As Victoria Police maintains its objection, the Review Application is a contested application.
19. Accordingly, the Commission on internal review stands in the shoes of the original decision maker and must make a fresh decision with respect to the 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
20. In doing so, the Commission must consider all the information, material and evidence that was before the original decision maker.³ The Commission may also consider further information, material or evidence in making a decision.⁴

Exercising the internal review power

21. Section 9(3) of the *Victorian Commission for Gambling and Liquor Regulation Act (VCGLR Act)* provides:

“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—*

¹ Sections 44, 49 and 157 of the LCR Act.

² Sections 44 and 157 of the LCR Act.

³ Section 157(2) of the LCR Act.

⁴ See section 157(3) of the LCR Act.

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

- (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, pursuant to section 47(1) of the LCR Act:

“Subject to Division 3, the Commission must, after the period for making an objection under Division 5 has expired, including any extension of time granted for making an objection, grant or refuse a contested application.”

26. Section 47(2) of the LCR Act provides that the Commission may refuse to grant a contested application on any of grounds set out in section 44(2).

27. Section 44(2)(a) of the LCR Act provides the following grounds for refusal –

“in the case of a grant or transfer of a licence or BYO permit, that the applicant or proposed transferee is not a suitable person to hold or carry on business under the licence or BYO permit;”

28. Section 44(3)(a) of the LCR Act provides –

“Without limiting the reasons why a person is not a suitable person to hold, or carry on business under, a licence or BYO permit, a person is not a suitable person to hold, or carry on business under, a licence or BYO permit if the person or, if the person is a body corporate, any director of the person has, within the preceding 3 years —

- (a) been convicted, whether in Victoria or elsewhere, of an offence of supplying liquor without a licence or of supplying adulterated liquor or of an offence against any law relating to customs or excise;”*

29. Section 44(4) of the LCR Act provides that before granting or refusing a contested 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.”

30. 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 that harm minimisation is a fundamental principle of the LCR Act and can properly be regarded as “*the primary regulatory object of the Act and therefore the primary consideration in liquor licensing decisions*”⁶. However, as was also noted by the Court of Appeal, “*this is not to say ... that it [harm minimisation] is to be taken into account, or given such weight, to the exclusion of the other objects.*”⁷
31. 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.
32. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.

Conduct of an inquiry

33. 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.

Material before the Commission

34. The Commission on review had before it and considered, all materials received by the Delegate. In addition, the Commission received and considered the following:
 - a. Original Decision and reasons of the Delegate, dated 20 March 2020;
 - b. Application for Internal Review and supporting submissions, made on behalf of the Applicant by Mr Rob Steane;
 - c. Submissions from Victoria Police dated 22 June 2021, in response to a request made by the Commission regarding whether Victoria Police was able to provide any further information to support the objection to the Application with regard to suitability; and
 - d. Further submissions dated 12 July 2021 made on behalf of the Applicant by Mr Rob Steane, in response to a request for further information made by the Commission.
35. With the Applicant’s consent, the Commission decided that a public hearing was not required and determined the matter on the papers.

Reasons for decision on review

Issues for determination on review

36. 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 issues to be determined by the Commission in this matter are whether:
 - a. the licence is limited in scale and scope;
 - b. the Applicant is a suitable person to hold a liquor licence; and

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

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

c. any of the provisions of section 44(2) of the LCR Act justify the Application being refused.

37. In exercising its ultimate discretion to grant or refuse the Application, the Commission must have regard to the objects of the LCR Act, with particular regard to the object of harm minimisation.

Limited scale and scope

38. 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**).

39. There are no statutory signposts which prescribe specific factors for the Commission to consider in determining whether the Scale and Scope Requirement is met. On previous occasions the Commission has considered *the nature, location, duration or frequency of the hours of operation of a licence in question* as relevant to the Scale and Scope Requirement.⁸

40. Section 26(1) of the LCR Act gives the Commission a wide discretion to determine, as a question of fact, whether the Scale and Scope Requirement is met. In the decision of *Club 8*, VCAT considered that there was no warrant for an interpretation that the limitation in question need to “*contemplate a substantial or significant restriction*”,⁹ however this does not mean that the Commission cannot consider whether a limitation is *substantial* or *significant* in the exercise of its discretion to determine whether the Scale and Scope Requirement is met.

41. The first limitation proffered by the Applicant was to supply only Asian liquors for online sales.

42. On 12 July 2021, the Commission sought further information from the Applicant, specifically whether the Applicant intended to limit the lines of liquor that would be supplied, and if so what that limit would be.

43. On 12 July 2021, the Applicant via Mr Steane reiterated that the liquor proposed for supply will be “*Asian themed or orientated products, sourced from China, Philippines, Thailand, Malaysia, Indonesia, and Vietnam, which is consistent with their other businesses.*”

44. The second limitation proffered by the Applicant was the limits on the quantity of liquor supplied, that being:

“that no one sale will encompass more than –

- 24 x 375ml containers of beer, and/or ciders, and/or pre-mixed spirits AND/OR*
 - 12 x 700ml bottles of wine per person, per day.*
- AND/OR*
- 1 x 700ml bottle of spirits.”*

45. On 12 July 2021, the Commission sought further clarification on the proposed liquor for supply as it was unclear from the Applicant’s submissions what the total quantity of liquor per sale would be available to customers.

46. On 12 July 2021, the Applicant via Mr Steane submitted the proposal is to allow customers to purchase:

“24 x 375ml containers of beer, and/or ciders, and/or pre-mixed spirits AND

12 x 700ml bottles of wine per person, per day. AND

1 x 700ml bottle of spirits.

So, potentially a case of beer, a case of ciders, a case of pre-mixed spirits, 12 bottles of wine and a bottle of spirits.”

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

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

47. The Applicant submitted that a sale consisting of all liquor products would be rare and provided the Commission with copies of renewable limited licences that have been recently approved, in support of the proposed limits. The licences cited in support of the Applicant's submissions were:
- Licence number 36151671 – *Solly's Online Grocery*
 - Licence number 36147876 – *Deliveroo Australia*
 - Licence number 36163149 – *Cadell Food Service*
 - Licence number 36161228 – *All Australian*
48. The Commission notes that each application must be considered on its merits and in particular on the application of the scale and scope limitations and other relevant circumstances. Further, whilst the Commission aims for consistency in its decision-making, it is not bound by its earlier decisions.
49. In assessing the Scale and Scope Requirement for the Review Application, the Commission considered the following factors¹⁰:
- whether the liquor proposed for supply was limited in the type or lines of liquor proposed for supply;
 - whether the Application proposed sufficient transactional limits to quantity or volume, or customer limitations; and
 - whether the Application was limited by other factors, for example, membership requirements or the geographic area for supply.
50. The Commission notes that the Applicant's business model is described as an online grocery store specialising in Asian products and delivers Australia wide. The Applicant now seeks to offer customers the option to purchase Asian liquor via the online grocery store. The Applicant is proposing to supply a wide range of liquor, being wine, beer, cider, premixed spirits, and spirits.
51. Asia is a large geographic region. When limiting this to the specific countries the Applicant has listed, China, Philippines, Thailand, Malaysia, Indonesia, and Vietnam, this remains a large geographic region for sourcing lines of liquor to supply given the Applicant has offered no further limitation on the lines of liquor proposed for supply.
52. Accordingly, the Commission is of the view that the proposal to only limit lines of liquor to "*Asian themed or oriented products*" constitutes nothing more than a minimal limitation in scope.
53. The Commission went on to consider whether the Application was limited in scope with regard to proposed transactional limits proposed by the Applicant.
54. In undertaking this assessment, the Commission considered the Applicant's proposed transactional limits on the supply of liquor and noted the following:
- the Applicant's proposed transaction limits would allow for a total of 85 items of liquor to be sold per transaction;
 - the Applicant has not proposed that there is a daily limit on the number of liquor sales per customer, other than for 12 bottles of wine;
 - the transactional limits proposed by the Applicant of a total of 85 items of liquor per transaction, (and with no limitation on lines, or number of transactions per customer per day (other than in relation to wine) are significantly in excess of the quantities permitted under the licences listed above at paragraph 47 a – d; and

¹⁰ These factors were most recently considered by the Commission in the application for internal review by Australia Liquor Wholesale Pty Ltd.

- d. the licences provided by the Applicant in support of the Review Application appear to have been granted to supply liquor at the higher end of what the Commission considers to be limited in scale and scope.
55. The Commission also noted that the Applicant had not proposed any limitation on who may order, the base such as with a membership or account-based sales business model, as was the case with some of the licence examples offered by the Applicant.
56. On carefully considering all evidence before it, based on the reasons set out above the Commission is of the view that the proposed supply of liquor is not limited in scale and scope and accordingly does not satisfy the requirements under section 26 of the LCR Act.

Suitability of the Applicant

57. Given that the Commission is not satisfied that the Review Application meets the requirements under section 26 of the LCR Act, in this instance the Commission is of the view that it is not necessary to consider whether the Applicant is suitable to hold a liquor licence.

Decision on review

58. 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 grant the renewable limited licence subject of the Review Application.

The preceding fifty-eight (58) paragraphs are a true copy of the Reasons for Decision of Ms Helen Versey (Deputy Chair) Ms Danielle Huntersmith (Commissioner) and Mr Andrew Scott (Commissioner).