

Decision and reasons for decision

In the matter of an application by Swancom Pty Ltd under section 153(1) of the *Liquor Control Reform Act 1998* for an internal review of a decision by a delegate to grant a temporary limited licence for the Car Park of the premises known as the Corner Hotel located at 57-61 Swan Street, Richmond

Commission: Ms Danielle Huntersmith, Chairperson
Mr James O'Halloran, Commissioner
Ms Susan Timbs, Commissioner

Date of Decision: 7 December 2022

Date of Reasons: 18 April 2023

Decision:

The Commission has determined to vary the decision of the delegate and grant the application for a temporary limited licence subject to the conditions set out in Appendix A

Signed:



Danielle Huntersmith
Chairperson

Background

The Original Application

1. On 14 October 2022, Swancom Pty Ltd (**Applicant**) applied to the Victorian Liquor Commission (**Commission**) for a temporary limited licence (**TLL**) under the *Liquor Control Reform Act 1998 (LCR Act)*¹ to supply liquor in the car park (**Car Park**) of the premises known as the Corner Hotel located at 57-61 Swan Street, Richmond (**Premises**), between 15 December 2022 and 30 December 2022 (inclusive), for customer Christmas party functions as well as for the Boxing Day test series (**Original Application**).
2. The Car Park is at the rear of the permanently licensed area of the Premises under late night (general) licence 31903845 (**Permanently Licensed Area**).
3. The Permanently Licensed Area consists of an enclosed hotel building on the corner of Swan Street and Stewart Street in Richmond.
4. The Carpark has one separate entrance and exit point from that of the Permanently Licensed Area that is accessible from Wangaratta Street.
5. Under the proposed TLL, the trading hours in the Car Park were between 10am and 11pm on any day with a maximum patronage of 250.
6. In the Permanently Licensed Area, the final trading hour for supply of liquor for consumption on the Permanently Licensed Area is 3am on any day except for Sunday when it is 1am.² The overall maximum patronage capacity in this Permanently Licensed Area is for 750 patrons.
7. As part of the Original Application, the management plans were submitted for the proposed Christmas party functions to be held in the Car Park and in relation to supply of liquor in the Car Park to be held during the period of the Boxing Day test series. Those management plans indicated that the Applicant would ensure a minimum of one crowd controller was present in the Car Park between 15 December 2022 and 30 December 2022 until 30 minutes after trade ceases each day under the proposed TLL.
8. Currently, in the Permanently Licensed Area, when live or recorded amplified music is provided, the Applicant is required to have a crowd controller on the street outside the Permanently Licensed Area. Additionally, the Applicant is to have security inside the Permanently Licensed Area at a ratio of two crowd controllers for the first 100 patrons and one crowd controller for each additional 100 patrons or part thereof.

¹ All references to legislation are references to the LCR Act unless stated otherwise.

² The final trading hour in the beer garden of the Premises is 1am on any day.

9. It is noted that on 4 December 2020 the City of Yarra (**Council**) had confirmed its consent for the Applicant to utilise the Car Park for the consumption of food and drink until 11pm with background music to be played until 10pm. This was approved by the Council for the planning permit exemption period (which was introduced by the Council due to the COVID-19 pandemic). The Applicant advised that the period of effect for the Council's consent as to the utilisation of the Car Park did not expire until the middle of 2023.
10. The Commission noted that the Applicant was previously granted six TLLs by the Commission in connection with the use of the Car Park.³
11. On 21 November 2022, a delegate of the Commission (**Delegate**) granted the Original Application with the following special condition in relation to crowd control (**Original Decision**):

Crowd controllers, licensed under the "Private Security Act 2004", are to be employed at a ratio of two (2) crowd controllers for the first 100 patrons and one (1) crowd controller for each additional 100 patrons or part thereof. One (1) licensed crowd controller shall remain on the street outside the premises to monitor the behaviour of patrons arriving and departing the premises.

Application for Internal Review

12. On 22 November 2022, the Applicant applied to the Commission for review of the Original Decision and requested to vary the decision by removing the 'special condition' in relation to crowd control. Specifically, the Applicant sought a variation to the crowd control special condition under the TLL, approved by the Delegate on 21 November 2022. The Applicant requested that the TLL crowd control condition simply require the Applicant to ensure a minimum of one crowd controller to be present in the Car Park until 30 minutes after trade ceases each day.
13. This proposed requirement would then be in line with the Applicant's management plans for Christmas party functions in the Car Park and in relation to supply of liquor in the Car Park during the period of the Boxing Day test series (**Review Application**).
14. The Applicant also submitted that the previous TLLs granted to the Applicant in connection with the Car Park had not contained the same special condition in relation to crowd control as was imposed by the Delegate in the Original Decision. The Applicant further submitted that the events carried out under the previous TLLs in connection with the Car Park occurred without incident.

³ TLLs #90163812, #90166960, #90160946, #90159714, #90156368 and #90153990.

Legislation and the Commission's task

The Commission's internal review power

15. Division 2 of Part 9 governs internal review applications. Under section 152, the decision made by the Delegate in the Original Decision is a reviewable decision and the Applicant is an eligible person to apply for a review of that decision. The Review Application was made pursuant to section 153.

16. 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.⁴

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 decide whether to:

- (a) grant the Original Application, and if so, whether to do so subject to conditions;⁵
or
- (b) refuse to grant the Original Application.⁶

Determination of an uncontested application

18. Under the LCR Act, an application for variation of a 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).

19. The Original Application was 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).

⁴ Section 157(2) to (5) further prescribes the manner in which the Commission is to undertake internal reviews.

⁵ Sections 44, 49 and 157.

⁶ Sections 44 and 157.

20. Section 44(2) 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.⁷*

Exercising the internal review power

21. Section 172U(3)(b) requires the Commission, in exercising its internal review function, to have regard to the objects of the LCR Act and any decision-making guidelines in respect of the regulation of liquor issued by the Minister. 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;

(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.

22. Section 4(2) 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

⁷ Section 44(2)(b).

*due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.*⁸

23. The Commission considers that while the grounds of refusal outlined in section 44(2) 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. Under section 49, the Commission may impose any condition it thinks fit on the grant of an application.

Conduct of an inquiry

25. Section 44(4) provides that the Commission may have regard to any matter the Commission considers relevant and make any enquiries the Commission considers appropriate.
26. Section 172W(3) provides that the Commission is not bound by the rules of evidence but may inform itself in any manner it thinks fit and is bound the rules of natural justice.

Limited licences

27. A limited licence may be a TLL or a renewable limited licence⁹. Pursuant to section 14(1A) of the LCR Act, a TLL authorises the licensee to supply liquor at the times determined by the Commission and specified on the licence, and it may not 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.
28. 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**).
29. 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*

⁸ See further *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 323, 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).

⁹ LCR Act, section 14(1).

the hours of operation of a licence in question” as relevant to the Scale and Scope Requirement.¹⁰

Material before the Commission

30. The Commission on review had before it and considered all the materials before the Delegate. The Commission on review also received and considered the following additional materials:

- (a) the Delegate’s TLL Decision Record, dated 21 November 2022;
- (b) the Review Application, dated 22 November 2022; and
- (c) the Applicant’s email communication, dated 22 November 2022, in support of the Review Application.

On-the-Papers determination of the Review Application

31. On 5 December 2022, a preliminary meeting took place by videoconference between the Applicant’s representatives, Ms Lara Whalley, the Premises’ Venue Manager, Mr Rod Smith, the Applicant’s General Manager, Ms Danielle Huntersmith, Chairperson of the Commission, Mr James O’Halloran, Commissioner, Ms Susan Timbs, Commissioner, and Counsel Assisting, Ms Caitlin McAlister (**Preliminary Meeting**).

32. At the Preliminary Meeting, the Commission informed Ms Whalley and Mr Smith that it was possible to determine the Review Application ‘on the papers’, without a hearing in person. Ms Whalley and Mr Smith confirmed on behalf of the Applicant that they were comfortable with the Commission determining the matter ‘on the papers’.

33. Ms Whalley and Mr Smith also told the Commissioners in the Preliminary Meeting that:

- a) The entrance and exit point to the Car Park for patrons would be separate from that of the Permanently Licensed Area.
- b) There would be no live or recorded amplified music provided in the Car Park. The music provided would only be at background music noise level until 10pm.
- c) More patrons were expected for the Boxing Day test series than for the customer Christmas party functions, which are usually private end of year work-related parties

¹⁰ See decision of Fynix Pty Ltd at 36A Vickers Street, Sebastapol premises (Liquor-internal review) [2016] VCGLR 19 (25 July 2016) At [61].

during lunch time (as opposed to evening events) and that food would be offered for those functions.

- d) The expected number of patrons for customer Christmas party functions are not likely to require more than one crowd controller for the Car Park as per the Applicant's management plan for customer Christmas party functions in the Car Park.
- e) In their view, the existing crowd control condition as imposed by the Delegate in the Original Decision is excessive.
- f) Given that more patrons are expected for the Boxing Day test series than for the customer Christmas party functions and given that the lifting of COVID-19 restrictions would also mean a likely increase in patronage, the Applicant could commit to a minimum of two crowd controllers for the Car Park during the period of the Boxing Day test series, one inside the Car Park as well as one at the street entrance.
- g) All conditions of the Applicant's late night (general) licence regarding the Permanently Licensed Area would still be complied with in any event.

Reasons for decision on review

Issues for determination on review

34. In detailing the reasons for its determination of this Review Application, the Commission addressed the issues before it by reference to two general questions:

- (a) first, whether the Commission was satisfied that the Scale and Scope Requirement was met; and
- (b) secondly, whether the Commission considered it should grant or refuse the Review Application given the grounds for refusal set out in the LCR Act, and the objects of the LCR Act, in particular harm minimisation, which is the primary object.

Limited in scale and scope

35. Having regard to the Original Application in respect to the Scale and Scope Requirement as well as regard to what Ms Whalley and Mr Smith said in the Preliminary Meeting, the Commission noted the following limitations as to the proposed supply of liquor for which the proposed licence was sought:

- a) the final trading hour for supply of liquor for consumption in the Car Park would be limited to up to 11pm on any day, in spite of the later final trading hours available for supply of liquor for consumption on the Permanently Licensed Area;¹¹
- b) the period for operation of the proposed licence was no more than 16 days (between 15 December 2022 and 30 December 2022 (inclusive)),
- c) the maximum patron capacity on any day in the Car Park would be no more than 250 patrons and the entrance and exit point to the Car Park for patrons would be separate from that of the Permanently Licensed Area;
- d) the scope of the licensed area would be no more than the Car Park;
- e) the Christmas party functions in the Car Park were focused on pre-booked private end of year work-related parties; and
- f) there would be crowd control management at any time that liquor would be supplied and consumed in the Car Park.

36. Overall, the Commission accepted that the supply of liquor in the Car Park between 15 December 2022 and 30 December 2022 (inclusive) would be sufficiently restricted given the limitations discussed above, including a cap on the maximum number of attendees as well as a comparatively early final trading hour.

37. Accordingly, the Commission was satisfied that the Scale and Scope Requirement was met.

Discretion to grant or refuse the Review Application

38. 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 object.

39. The Commission could 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.¹²

Misuse and abuse of alcohol

40. The Commission considered that Ms Whalley and Mr Smith provided detailed information in the Preliminary Meeting and overall as part of the Review Application. The Commission further considered that the Applicant was well prepared and cognisant of its obligations as

¹¹ See paragraph 6 above.

¹² LCR Act, section 44(2)(b)(ii).

a licensee in relation to the Car Park for the Christmas party functions and during the period of the Boxing Day test series.

41. The Commission also noted that Ms Whalley had provided relevant additional information as attachments to the Review Application as well as part of the Original Application. These included:

- a) the management plans in relation to Christmas party functions in the Car Park and for the proposed supply of liquor in the Car Park during the period of the Boxing Day test series. Importantly, these plans included strategies for dealing with patrons and amenity of the neighbourhood;
- b) an overview of the function packages for the Car Park; and
- c) confirmation of the Council's consent as to the Applicant's utilisation of the Car Park and relevant planning permit conditions.

42. The Commission also had regard to the Applicant's prior experience (particularly in respect to hosting events in the Car Park under TLLs) and as well there being no adverse compliance history in relation to the Premises.

43. The Commission also noted from the Original Application that the liquor served in the Car Park would be in polycarbonate glassware as well as food being offered. The Commission considered this was also indicative of the Applicant giving consideration to ways to assist in minimising the risk of harm.

44. The Commission also had regard to the information provided during the Preliminary Meeting with the Commission in support of the Review Application. Ms Whalley and Mr Smith advised that the Applicant would now be employing a minimum of two crowd controllers for the Car Park during the period of the Boxing Day test series. This was more than had been specified by the Applicant in support of the Original Application.¹³

45. Further, the Commission notes that the more onerous crowd controller condition, (requiring two crowd controllers for the first 100 patrons and one crowd controller per 100 thereafter) which is present in the licence for the Permanent Licensed Area is only applicable when live or amplified recorded music is being played. The Applicant confirmed in the Preliminary Meeting that only background music and no live or amplified recorded music would be played in the Car Park.

46. For a combination of the above reasons, the Commission did not consider the potential for the misuse and abuse of alcohol as a ground to refuse to grant the Review Application, particularly with the imposition of the conditions as set out in Appendix A.

¹³ See paragraph 33(f) above.

47. Overall, the Commission was satisfied that there were no relevant grounds for refusal under section 44(2) of the LCR Act.

Objects of the LCR Act

48. Having regard to the objects of the LCR Act, particularly the harm minimisation object, the Commission was satisfied that adequate controls existed over the supply and consumption of liquor at the Premises and that any risk of harm would be minimised with the imposition of the conditions as set out in Appendix A.

Decision on review

49. Having regard to all the matters set out above, the Commission determined to vary the decision of the delegate and grant the application for a temporary limited licence subject to the conditions set out in Appendix A

The preceding 49 paragraphs are a true copy of the Reasons for Decision of Ms Danielle Huntersmith (Chairperson), Mr James O'Halloran (Commissioner) and Ms Susan Timbs (Commissioner).

Appendix A

Type of licence

This licence is a temporary limited licence and subject to the conditions specified in this licence authorises the licensee to supply liquor for consumption on the licensed premises.

Noise and Amenity

The licensee will not cause or permit undue detriment to the amenity of the area to arise out or in connection with the use of the premises to which the licence relates during or immediately after the trading hours authorised by this licence.

Supply of liquor

The licensed area is the Car Park area marked on the plan as endorsed by Liquor Control Victoria.

The entrance and exit point of the licensed area must be separate from that of the licensed area for permanent licence number 31903845.

Any licensed area which is not an enclosed building must be clearly defined and demarcated.

Liquor may not be removed from the licensed area.

Special condition

The licensee must not permit any live or recorded amplified music to be provided in the licensed area.

Copy of Plan

The licensee must make available for inspection by a Compliance Inspector or member of Victoria Police a copy of the endorsed plan.

Crowd control

A minimum of one (1) crowd controller, licensed under the "Private Security Act 2004", is to be employed from 15 December 2022 to 25 December 2022 inclusive, who must remain on the street at the entrance to the licensed area until 30 minutes after closure for the purpose of monitoring the behaviour of patrons arriving and departing the licensed area.

A minimum of two (2) crowd controllers, licensed under the "Private Security Act 2004", are to be employed from 26 December 2022 to 30 December 2022 inclusive until 30 minutes after closure, one (1) of which must remain on the street at the entrance to the licensed area for the purpose of monitoring the behaviour of patrons arriving and departing the licensed area.

Conditions of permanent licence also apply

This licence is also subject to all conditions of permanent licence number 31903845 held by the licensee other than capacity and trading hours.

Period of licence

This licence has effect and continues in force from 15 December 2022 to 30 December 2022 inclusive.

Patron capacity for the licensed area

250

Trading hours

Monday to Sunday

Between 10am and 11pm