

Decision and reasons for decision

In the matter of an application by Pineapple Jam Hospitality Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision by a delegate to refuse to grant a renewable limited licence for the premises trading as Pineapple Jam Hospitality, Unit 25, 1 Kingston Road, Heatherton.

Commission: Ms Danielle Huntersmith, Chairperson
Mr James O'Halloran, Commissioner
Ms Thu-Trang Tran, Commissioner

Date of Decision: 17 February 2023

Date of Reasons: 17 February 2023

Appearances: Mr Clinton Weir for the Applicant
Mr Paul Davies, Counsel Assisting the Commission

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

Signed:



Danielle Huntersmith

Chairperson

Background

1. On 24 June 2022, Pineapple Jam Hospitality Pty Ltd (**Applicant**) applied to the Victorian Gambling and Casino Control Commission (**VGCCC**) under the *Liquor Control Reform Act 1998 (LCR Act)*¹ for a renewable limited licence to supply liquor in respect of the premises located at Unit 25, 1 Kingston Road, Heatherton (**Premises**), trading as Pineapple Jam Hospitality (**Original Application**).
2. The Applicant sought to supply liquor in bottled and kegged cocktail making kits and cocktail spray mists to be ordered via its website and then delivered to individual and corporate customers. The following hours were proposed:
 - a. Monday to Saturday – between 9am and 7pm for online orders; and
 - b. Monday to Saturday – between 11am and 11pm for delivery of orders.
3. On 1 July 2022, the Victorian Liquor Commission (**Commission**) was established under the LCR Act as the liquor regulator in Victoria. Accompanying legislative changes then transferred to the Commission the necessary functions and powers to consider and determine applications previously made to the VGCCC.
4. On 15 July 2022, a delegate of the Commission (**Delegate**) wrote to the Applicant explaining that a renewable limited licence may only be granted if the Commission is ‘...satisfied that the scale and scope of the supply of liquor is limited in nature, and that such limitations are measurable and enforceable as a licence condition.’ The Applicant was asked to provide additional information about how the proposed licensed activities will be limited.
5. On 21 August 2022, the Applicant wrote to the Delegate amending the Original Application to modify the product range to:
 - a. Bottled cocktails in 100ml and 200ml sizes and 1000ml for venues and home customers;
 - b. DIY Cocktail boxes, including bar tools, cocktail garnishes, non-alcoholic ingredients and either 100ml, 200ml, 500ml 750ml bottles of spirits;
 - c. Cocktail mists in 10ml, 30ml or 100ml spray bottles, as online gift or retail mists; and

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

- d. Cocktail kegs in 20 litre premixed cocktails, supplying 4 recipes per event.
6. The Applicant proposed the following further supply limitations:
- a. Individual customers to be limited to one transaction per day and up to 5 litres of spirits in DIY boxes or bottled cocktail range;
 - b. Corporate gift boxes to be limited to 500 boxes per order.

Trading hours:

- c. Monday to Saturday – between 11am and 10pm for delivery of orders.
 - d. Good Friday and ANZAC day – between 12 noon and 10pm for delivery of orders.
7. In accordance with section 33(2), a copy of the Original Application was served on Kingston City Council (**Council**). On 11 August 2022, the Council informed the Commission that it did not object to the grant of the Original Application.
8. In accordance with section 33(2), a copy of the Original Application was served on Victoria Police. On 8 September 2022, Victoria Police informed the Commission that it did not object to the grant of the Original Application.
9. On 30 September 2022, the Delegate refused the Original Application on the basis that he was not convinced that the scale and scope of the supply of liquor was limited as is required by section 26 (**Original Decision**).

Application for Internal Review

10. On 10 October 2022, the Applicant applied for an internal review requesting that the Commission set aside the Original Decision and grant the renewable limited licence (**Review Application**).

Legislation and the Commission's task

The Commission's internal review power

11. The Review Application is made under section 153. 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. Division 2 Part 9 of the LCR Act governs internal review applications.
12. Pursuant to 157(1), 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.²

13. 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

- c. grant the renewable limited licence, and if so, whether to do so subject to conditions;³ or
- d. refuse to grant the Original Application.⁴

Determination of an uncontested application

14. The Review Application is uncontested as no objections were received under Division 5 of Part 2 within the period set out in that Division (or as extended under section 174).

Exercising the internal review power

15. 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.

16. 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

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

³ LCR Act, sections 44, 49 and 157.

⁴ LCR Act, section 44 and 157.

17. Section 4(2) further provides –

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.⁵

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

a. must consider all the information, material and evidence before the original decision maker;⁶

b. may consider further information or evidence;⁷ 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.⁸

19. The Commission may, pursuant to section 49 of the LCR Act, impose any condition it thinks fit on the grant of an application.

20. The Commission considers that while the grounds of refusal outlined at 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.

21. Relevantly, section 44(2)(b) 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.

Considerations for granting a temporary limited licence

22. A limited licence may be a temporary limited licence or a renewable limited licence.

Pursuant to section 14(1B), 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

⁵ 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).

⁶ LCR Act, section 157(2).

⁷ LCR Act, section 157(3).

⁸ LCR Act, section 44(4).

be subject to any conditions determined by the Commission and specified on the licence.

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

Conduct of an inquiry

24. 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.
25. Section 172W provides that the Commission is not bound by the rules of evidence, however, must comply with the rules of natural justice.

Pre-hearing

26. On 29 November 2022, Counsel Assisting the Commission (**Counsel Assisting**) wrote to the Applicant to enquire whether the Applicant intended to make further written submissions for the Commission’s consideration prior to the Hearing. The letter to the Applicant specifically highlighted that one of the issues before the Commission on review will be the issue of “scale and scope”.
27. The Commission may grant a limited licence only if it is satisfied that the scale and scope of the supply of liquor is limited in nature. A Renewable Limited Licence that does not have reasonable limitations in relation to the scale and scope of the supply of liquor is unlikely to be granted. Section 26(1) of the Act gives the Commission a wide discretion to determine, as a question of fact, whether the Scale and Scope Requirement is met.
28. On 5 December 2022, the Applicant wrote to Counsel Assisting and provided the following intended limitations on scale and scope;
- a. Cocktail mixes – Individual orders limited to 3 x 100ml bottles or 6 x 30ml bottles. Maximum quantity of 300ml. One order per address for individuals per day. Corporate orders limited to the purchase of 750ml per staff member or gift recipient, per order. Corporate customers will be instructed to contact the Applicant via a private email address to place an order;
 - b. Bottled Cocktails – Orders limited to 4 x 500ml bottles or 12 x 100ml bottles per order. Maximum quantity of 1200ml. One order per address and individual per day.

Corporate customers will be instructed to contact the Applicant via a private email address to place an order; and

- c. DIY Cocktail Boxes – Individual customers limited to 4 boxes per order. Corporate customers limited to 2 boxes per staff member or gift recipient per order.

Material before the Commission

29. On review, the Commission considered all material received by the Delegate and the following additional information and evidence:

- a) the Original Decision, dated 30 September 2022;
- b) the Review Application, dated 10 October 2022;
- c) evidence given at the hearing held in relation to the Review Application;
- d) the further written submissions and limitations on scale and scope, dated 5 December 2022; and
- e) post- hearing submissions as detailed below.

Public hearing

30. A public hearing was held in relation to the Review Application on 13 December 2022 (**Hearing**).

31. Mr Clinton Weir, director of the Applicant, gave oral evidence in support of the Review Application.

32. At the Hearing, Mr Weir said that he had 25 years of experience as a bartender in South Africa, England and Australia and had competed in 'flair bartending' overseas. He had travelled the world, teaching, working and performing in bartending events in 18 countries.

33. Mr Weir stated that he seeks to grow his business and be recognised by using fresh and natural ingredients, to people who want to make cocktails at home. He gave evidence that the products will be supported by training videos and tutorials provided by the Applicant, teaching people how to make creative and natural drinks in their own homes.

34. Mr Weir noted that he had refined the scale and scope of the proposed licence between the Original Application and the Review Application. He advised that the number of

orders now proposed is to be limited to one order, with a maximum quantity of 1200ml for individuals per day.

35. However, the Applicant confirmed that he also sought to supply corporate orders by reference to their stated number of staff. Mr Weir made it clear that no overall maximum quantity was proposed per corporate customer, and he gave an example that , *'If a corporate company comes to us and says...we want a hundred gift packs for our hundred staff, that also gives us the restriction of one or two cocktails per staff member and that's when I ask them to contact us directly so that we can ask them the necessary questions, make sure they ... are buying a box per staff instead of a hundred boxes per staff...'*⁹
36. Mr Weir stated that the proposed hours for delivery would be Monday to Saturday, between 8am and 10pm, and the website would inform customers not to expect same day deliveries.
37. He explained that the Applicant would use third parties to deliver the boxes. He acknowledged that this raised issues regarding his obligations if the courier does not check for proof of the recipient's age and/or intoxication. He undertook to do some research into these issues, although he was unable to provide an answer to them at the hearing.
38. Mr Weir confirmed that there could be circumstances where boxes are left at addresses unattended and said that he would implement instructions on the website to identify where a box can be left securely if unattended delivery is required.
39. Mr Weir explained that the Applicant would have an age gate on the website to ensure a customer proves their age when ordering. He confirmed that there would be no on-site shopping, browsing, display, or pick-up at its Heatherton warehouse.
40. Mr Weir stated that he had not has any previous compliance issues with the Commission.

⁹ Page 10, lines 30-40, transcript of the Hearing. Pineapple Jam Hospitality, 13.12.2022.

Reasons for decision on review

Issues for determination on review

Scale and Scope

41. In making its decision on review, an issue for determination is whether the nature of the supply of liquor as proposed by the Applicant satisfies the Scale and Scope Requirement.
42. Section 14 provides that a renewable limited licence “authorises the licensee to supply liquor at the times determined by the Commission and specified in the licence.” However, unlike other categories of licence, limited licences are subject to the additional Scale and Scope Requirement.
43. 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.¹⁰

Harm minimisation

44. 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. The Commission has considered whether granting the licence would be conducive to, or encourage, the misuse or abuse of alcohol.

Amenity

45. An additional issue to be determined by the Commission is whether granting the renewable limited licence would cause or detract from or cause detriment to the amenity of the area in which the Premises are situated, which may give grounds of refusal under section 44(2).

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

Submissions made after the Hearing

46. Following the Hearing, the Applicant submitted a further written submission setting out, inter alia, that:
- a. The online shop will have an age gate that will state that by clicking ‘yes’ the person agrees to the terms and conditions of the site;
 - b. Delivery of alcohol will be carried out by couriers who deliver during business hours and check proof of age of on delivery. The submission states that the Applicant will only be using courier companies that will check ID on delivery and ensure that alcohol is not delivered to people who are already intoxicated. The submission also states that the Applicant will not be providing rapid alcohol deliveries, with deliveries typically made to individuals via Australia Post within 3-5 days of after an order is placed, which substantially reduces the risk of alcohol abuse; and
 - c. For corporate customers the order will be limited to 2 boxes per staff and individual customers will be limited to a maximum of 1.5 litres of spirits per order.
47. The Commission notes that whilst there are some additional restrictions detailed above, including in paragraph 43, once again there are no transparent maximum quantities proposed for corporate customers. The Commission does not consider the proposed limitation on a corporate customer of 2 gift boxes or 1.5 litres of alcohol per individual staff member, per order, is sufficient to satisfy the Scale and Scope Requirement. The Applicant does not propose any fixed limitation on the quantity to be supplied to a customer who is a “corporate customer”, rather the Applicant has made it clear that it wishes to treat corporate customers differently and has proposed various limitations by reference to use for which that corporate customer is buying alcohol from them. Importantly the only limitation on the supply to a corporate customer would be a limitation arising from the asserted total number of employees.
48. As Mr Weir explained in evidence this could result in a hundred or more boxes per order being supplied to customer who is a corporate customer. The Commission is not satisfied that this is a meaningful or enforceable limitation. The Commission finds that the potential to supply 100 or more boxes, that include bottled cocktails, to a customer does not satisfy the Scale and Scope Requirement.
49. In accordance with the matters set out above, the Commission is not satisfied the scale and scope of the proposed supply of liquor is limited in nature. As section 26(1) of the LCR Act states that the Commission may grant the licence only if satisfied that the

scale and scope of the supply of liquor is limited in nature, the Commission has determined to refuse to grant the Review Application.

50. Accordingly, having determined to refuse to grant the licence that is the subject of the Review Application, on the basis that the Scale and Scope Requirement has not been met, it is unnecessary to consider amenity impacts or any other matters.
51. The Commission considered the possibility of substituting another decision for the Original Decision. This consideration arises from recent amendments to the LCR Act which contains a new category of licence for online supply that is not limited in nature; the Remote Seller's Packaged Liquor Licence.
52. The Commission notes that this new category of licence does not require supply to be limited in scale and scope. However, the Commission notes that the consideration of whether or not to grant such a licence involves consideration of additional matters which do not generally form (and have not in this case formed) part of the application and assessment process for a limited licence. This includes an assessment of planning requirements, input from the local council, public notice display and input from Victoria Police. The Commission notes that a renewable limited licence, because of its inherent limitations, is generally exempt from these requirements.
53. Accordingly, the Commission did not consider it appropriate to grant a remote seller's packaged liquor licence in circumstances where the supply is not limited in scale and scope and neither the public nor relevant stakeholders had been given an opportunity comment

Decision on review

54. Based on the reasons detailed above and having regard to the objects of the LCR Act, the Commission is not satisfied that the Review Application meets the requirements of section 26(1) of the LCR Act and, in the circumstances, the Commission has determined to affirm the decision of the Delegate and refuse to grant the Review Application.

The preceding fifty-four (54) paragraphs are a true copy of the Reasons for Decision of Ms Danielle Huntersmith (Chairperson), Mr James O'Halloran (Commissioner) and Ms Thu-Trang Tran (Commissioner).