

# Decision and reasons for decision

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* by D Pty Ltd for an internal review of a decision by a delegate under section 47 to refuse an application made under section 9A for a restaurant and cafe licence for the premises trading as JBB, located in Melbourne's east

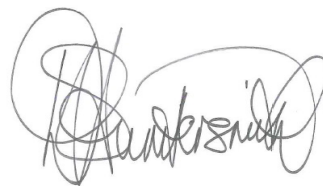
**Commission:** Ms Danielle Huntersmith, Chair  
Mr John Larkins, Deputy Chair  
Ms Thu-Trang Tran, Commissioner

**Appearances:** Mr Martin Towey, Counsel for the Applicant  
Senior Sergeant Liam Maher on behalf of Victoria Police  
Ms Caitlin McAlister, Counsel Assisting the Commission

**Date of Hearing** 30 January 2023  
**Date of Decision:** 22 February 2023  
**Date of Reasons:** 22 February 2023

**Decision:** The Commission has determined to affirm the decision of the Delegate and refuse the application

**Signed:**



**Danielle Huntersmith, Chair**

## Background

1. On 5 April 2022, D Pty Ltd (**Applicant**) applied to the Victorian Gambling and Casino Control Commission (**VGCCC**)<sup>1</sup> under section 9A of the *Liquor Control Reform Act 1998* (**LCR Act**)<sup>2</sup> for a restaurant and cafe licence for premises located in Melbourne's east (**Premises**) trading as JBB (**Original Application**).
2. The Applicant leases the Premises where it has been serving meals to eat-in, take-away or for home-delivery since April 2022.<sup>3</sup>
3. The reason for the Original Application was so that the Applicant could supply limited amounts of alcohol to customers to consume with their food on the Premises or for take-away/home delivery with a meal.<sup>4</sup>
4. The Premises is part of a shopping centre and includes a front alfresco dining area, a rear kitchen area, internal banquette seating, an internal dining area, and separate male and female toilet facilities inside.
5. The overall size of the floor space of the Premises is 85 square metres.<sup>5</sup>
6. Based on a building surveyor's report, dated 14 July 2022, up to 63 seats are available for customers to dine inside, and another 22 seats are available for customers to dine in the front outdoor area.<sup>6</sup>
7. The proposed trading hours for the supply of liquor were between the hours of 11am and 11pm on any day with the Applicant noting that its trading hours would not exceed those of other traders within the shopping centre.
8. The Applicant proposed to supply beer, wine, and basic spirits for cocktails. The Applicant currently serves non-alcoholic mocktails, soft drinks, fruit juice, and milk tea.
9. As part of the Original Application, the directors of the Applicant at the time, EH, and UA, were each required to complete and lodge a separate Liquor Licensing Questionnaire (**Questionnaire**). In completing the Questionnaire, UA, in the section headed "Criminal History", responded "No" to the question: "*Have you ever been found guilty of any offence in Australia or overseas (including findings without conviction and*

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<sup>1</sup> Before 1 July 2022, the Victorian Gambling and Casino Control Commission was the regulator of liquor in the State of Victoria.

<sup>2</sup> All references to legislation are references to the LCR Act unless stated otherwise.

<sup>4</sup> As to the supply limits for takeaway or delivery under restaurant and cafe licences, see section 9A(1)(db).

<sup>5</sup> The internal floor space is 63 square metres, and the external floor space is 22 square metres.

<sup>6</sup> Consulting Building Surveyors, 14 July 2022.

*good behaviour bonds not including traffic offences)?”.*

10. UA also answered “No” to the question, “*Have you ever been convicted of any offence in Australia or overseas (not including traffic offences)?”*”
11. On 5 April 2022, a delegate of the VGCCC provided a copy of the Original Application to the Chief Commissioner of Victoria Police under section 33(1).
12. In response, on 5 May 2022, the Licensing Inspector Mark Rogers advised that he objected to the Original Application on behalf of the Chief Commissioner of Victoria Police (together referred to as **Victoria Police**).<sup>7</sup>
13. The objection by Victoria Police was made on the basis that the Applicant was unsuitable to hold a liquor licence due to “*having unsuitable directors*”. Specifically, Victoria Police stated that:
  - (a) EH is unsuitable due to:
    - i. his history of non-compliance with regulatory schemes (including 35 traffic infringements issued by Victoria Police);
    - ii. his history of non-compliance with legislation (including prior matters for drink driving and drive whilst disqualified); and
    - iii. his criminal history for trafficking in a drug of dependence (heroin) and related offences.
  - (b) UA is unsuitable due to:
    - i. providing false and/or misleading information in the Questionnaire;
    - ii. his history of non-compliance with legislation (including prior matters for driving at a dangerous speed and driving whilst disqualified);
    - iii. his non-compliance with court orders; and
    - iv. his history of non-compliance with regulatory schemes (including 10 traffic infringements issued by Victoria Police).
14. On 17 June 2022, the Applicant informed a delegate of the VGCCC (**Delegate**), in writing, that UA was no longer a director of the Applicant and provided an updated ASIC extract which showed UA ceased to be a director on 20 May 2022 but remained a 50% shareholder of the Applicant. It was also submitted that EH is already a very experienced director of a licensee, A Pty Ltd, of a late-night general licence for a city venue trading as B, and that he continues to operate that business without reported incident. As such, it was submitted that EH would be a suitable person to operate under the Applicant’s proposed restaurant and cafe licence for the Premises. Moreover, it was submitted that,

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<sup>7</sup> As to the meaning of “licensing inspector”, see section 3.

while EH has a regrettable criminal history, there is nothing of concern in recent times. Finally, it was submitted that a liquor licence is fundamental to a restaurant business to ensure its survival.

15. On 1 July 2022, the Victorian Liquor Commission (**Commission**) was established under the LCR Act as the liquor regulator in Victoria. Accompanying legislative changes transferred the necessary functions, and powers to consider and determine applications previously made by the VGCCC to the Commission.
16. On 4 July 2022, Victoria Police amended the basis of their objection from the Applicant being unsuitable to hold a liquor licence due to *“having unsuitable directors”* to the Applicant being unsuitable to hold a liquor licence due to *“having an unsuitable director and/or unsuitable associate”*, and further submitted:
  - (a) as a registered shareholder of the Applicant, UA is an associate of the Applicant by virtue of his financial interest;
  - (b) any assertion about EH automatically being suitable by virtue of his directorship of A Pty Ltd, the licensee of B, is disputed. A previous grant of a licence does not bind the Commission in this instance; and
  - (c) EH has in fact not been operating the business at B without incident given that there are seven Licensed Premises Incident Reports (**LPIRs**), dated between 29 November 2019 and 21 May 2022.
17. On 7 August 2022, the Applicant sought to amend via email the Original Application in relation to the proposed final trading hour from 11pm to 9pm on any day.
18. On the same day, the Applicant also submitted
  - (a) the comments made by Victoria Police regarding EH are more for the context of an application by Victoria Police for a disciplinary action inquiry under the LCR Act and not whether EH (as the director of the Applicant) is capable or suitable to operate a licensed restaurant;
  - (b) the LPIRs relate to a different licensee operating under a different licence type and are therefore irrelevant; and
  - (c) the category of a restaurant and cafe licence is one of low risk and that the risk level of a licence type should be considered in assessing the issue of suitability.
19. On 20 September 2022, the Delegate refused to grant the Original Application under section 47 (**Original Decision**). The reason for the Original Decision was that the Delegate was not satisfied that the Applicant was a suitable person to hold a licence based on the reasons submitted by Victoria Police. The Delegate further noted that in completing the Questionnaire, EH, in the section headed “Criminal History”, responded

“No” to the question: “Have you ever been found guilty of any offence in Australia or overseas (including findings without conviction and good behaviour bonds not including traffic offences)?”, in spite of having a criminal history. EH also answered “No” to the question, “Have you ever been convicted of any offence in Australia or overseas (not including traffic offences)?”

20. Finally, the Delegate noted that the Applicant’s request to condition the final trading hour to be 9pm on any day was not able to be taken into account on the basis that the legislated trading hours as set out in section 9A(1)(b) are to 1am on any particular day in relation to restaurant and cafe licences (which the Delegate had no power to reduce).<sup>8</sup>

## Application for Internal Review

21. On 27 September 2022, the Applicant made an application for internal review of the Original Decision (**Review Application**).<sup>9</sup> Victoria Police confirmed that they maintained their objection on the ground that the Applicant is not a suitable person to hold a licence.

## Legislation and the Commission’s task

### The Commission’s internal review power

22. 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.
23. 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.<sup>10</sup>
24. In effect, the Commission on review stands in the shoes of the original decision maker

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<sup>8</sup> See also ‘ordinary trading hours’, section 3.

<sup>9</sup> In completing the Review Application, the Applicant, in the section headed “Reasons for review application”, stated “To persuade the Commission to set aside the decision of the delegate at first instance and obtain a grant of licence”.

<sup>10</sup> Section 157(2) to (5) further prescribes the manner in which the Commission is to undertake internal reviews.

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;<sup>11</sup>  
or
- (b) refuse to grant the Original Application.<sup>12</sup>

## Determination of a contested application

25. Where an application is a contested application, pursuant to section 47(1):

*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) provides that the Commission may refuse to grant a contested application on any of grounds set out in section 44(2) and section 44(3) applies accordingly.

27. Section 44(2)(a) provides the following ground 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) states that:

*Without limiting the reasons why a person is not a suitable person to hold, or carry on business under, a licence... a person is not a suitable person to hold, or carry on business under, a licence ... 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; or*
- (b) *engaged in activities involving the trading in or marketing of liquor in a manner contrary to the provisions of this Act.*

29. The Commission also considers it appropriate to have regard to the suitability of any persons who are associates of an applicant. Section 3AC defines “associate”:

(1) *For the purposes of this Act, an **associate** of a person (the **first person**) is—*

- (a) *a person who—*
  - (i) *holds or will hold any relevant financial interest, or is or will be entitled to exercise any relevant power (whether in right of the person or on*

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<sup>11</sup> LCR Act, sections 44, 49 and 157.

<sup>12</sup> LCR Act, sections 44 and 157.

*behalf of any other person) in any business of the first person involving the sale of liquor; and*

- (ii) by virtue of that interest or power, is able or will be able to exercise a significant influence over or with respect to the management or operation of that business; or*
- (b) a person who is or will be a director, whether in right of the person or on behalf of any other person, of any business of the first person involving the sale of liquor; or*
- (c) if the first person is a natural person, a person who is a relative of the first person, other than a relative—*
  - (i) who is not, and has never been, involved in any business of the first person involving the sale of liquor; or*
  - (ii) who will not be involved in the business the first person proposes to conduct as a licensee or permittee.*

*(2) In this section—*

**relative**, in relation to a person, means—

- (a) the spouse or domestic partner of the person; or*
- (b) a parent, son, daughter, brother or sister of the person; or*
- (c) a parent, son, daughter, brother or sister of the spouse or domestic partner of the person;*

**relevant financial interest**, in relation to a business involving the sale of liquor, means—

- (a) any share in the capital of the business; or*
- (b) any entitlement to receive any income derived from the business; or*
- (c) any entitlement to receive any payment as a result of money advanced;*

**relevant power** means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others—

- (a) to participate in any directorial, managerial, or executive decision; or*
- (b) to elect or appoint any person as a director.*

30. Further, section 3 defines “director”, being:

- (a) any person occupying or acting in the position of director of the body corporate, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and*
- (b) any person in accordance with whose directions or instructions the directors of the body corporate are accustomed to act.*

31. Section 47(3) 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.*



## Exercising the internal review power

32. 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.*

33. 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 due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.<sup>13</sup>*

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

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<sup>13</sup> 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).



- (a) must consider all the information, material, and evidence before the original decision maker<sup>14</sup>; and
  - (b) may consider further information or evidence.<sup>15</sup>
35. The Commission considers that while the grounds of refusal outlined in section 44(2) are relevant considerations, the determination of a contested application is ultimately to be made pursuant to section 47(1) and section 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.
36. Under section 49, the Commission may impose any condition it thinks fit on the grant of an application.

## Conduct of an inquiry

37. Section 47(3) provides that the Commission may have regard to any matter the Commission considers relevant and make any enquiries the Commission considers appropriate. 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.

## Other sections of the LCR Act relevant to this matter

### Restaurant and cafe licences

38. Pursuant to section 9A(1), a restaurant and cafe licence authorises the Applicant to supply liquor on the licensed premises for consumption on the licensed premises, where the predominant activity carried out at all times on the premises is the preparation and serving of meals.
39. Section 9A(3)(a) further provides that a restaurant and cafe licence is subject to the condition that “tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending at any one time”.
40. Moreover, section 9A(1)(b) provides that a restaurant and cafe licence authorises a licensee to supply liquor during ordinary trading hours as defined in section 3 and between 11 pm on any particular day until 1 am on the following day for consumption on

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<sup>14</sup> LCR Act, section 157(2).

<sup>15</sup> LCR Act, section 157(3).

the premises.

## Material before the Commission

41. The Commission on review had before it, and considered, all the materials received by the Delegate. The Commission also received and considered the following materials:
- (a) Original Decision and Reasons of the Delegate, dated 20 September 2022;
  - (b) Review Application, received 27 September 2022;
  - (c) email communications from Senior Sergeant Maher, dated 27 January 2023, enclosing details of the court outcome regarding UA at Ringwood Magistrates' Court on 20 December 2022<sup>16</sup> and attaching the Prosecutions Brief Cover Sheet, dated 20 December 2022, and Victoria Police Summary of Offence, undated;<sup>17</sup>
  - (d) email communication from Senior Sergeant Maher, dated 30 January 2023, enclosing extract of the court outcome regarding UA at Ringwood Magistrates' Court on 20 December 2022, showing that UA had been convicted of making a false statement and fined \$800 (in relation the false statements made on the Questionnaire by UA in support of the Original Application);
  - (e) evidence presented at the hearing of the Review Application on 30 January 2023;
  - (f) email communication from Mr Towey, Counsel for the Applicant, dated 3 February 2023, enclosing document entitled "*Final submissions from the Applicant*";
  - (g) email communication from Senior Sergeant Maher, dated 3 February 2023, enclosing submissions as to whether Commission could and/or should grant the Applicant a licence if the Applicant is not a suitable person, and attaching extracts of the court outcome regarding EH at Melbourne Magistrates' Court on 17 May 2000 for the drug trafficking matter;<sup>18</sup> and

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<sup>16</sup> UA was fined \$800 with conviction.

<sup>17</sup> The email communications from Senior Sergeant Maher on 27 January 2023 also included details of an outcome against EH at Melbourne Magistrates' Court on 13 October 2022 for the traffic offence of disobeying a traffic control signal on 6 May 2022, in which he was fined \$200 without conviction.

<sup>18</sup> EH was convicted and sentenced to an imprisonment term of 42 days, wholly suspended for six months. This was part of an aggregate sentence for trafficking heroin, possessing prescribed weapon without exemption, possessing regulated weapon, and possessing money being proceeds of crime.

- (h) email communication from Mr Towey, dated 7 February 2023, enclosing amended final submissions.

## Hearing

42. A hearing was held in relation to the Review Application on 30 January 2023 (**Hearing**).
43. EH, sole director of the Applicant, gave oral evidence in support of the Review Application. Mr Martin Towey appeared on behalf of the Applicant. Senior Sergeant Liam Maher appeared on behalf of Victoria Police. UA was not present at the Hearing.
44. At the commencement of the Hearing, Mr Towey confirmed that the Applicant accepts that UA is an associate of the Applicant, and that UA is unsuitable. Mr Towey submitted that the Commission has the discretion to still grant the Review Application even though the Applicant has an unsuitable associate.
45. EH gave evidence at the Hearing that he is trying to change the shareholding to remove UA but had nothing currently in place to do so. He mentioned that he would be able to do this in six months. However, also said that “...*nothing has been really confirmed*”<sup>19</sup> and that although he is working on removing UA there is “*not a - not very short-term solutions at the moment*”.<sup>20</sup>
46. At the Hearing, Senior Sergeant Maher showed EH a list of EH’s traffic infringement history and also a list of infringement notices issued under the LCR Act against A Pty Ltd between 24 April 2016 and 18 June 2022 regarding B, of which EH has been company director since 9 October 2018. These histories were accepted as accurate by EH in the Hearing.<sup>21</sup>
47. Senior Sergeant Maher also showed EH a record of EH’s criminal history which was also accepted by him in the Hearing as accurate. It is noted that the criminal history presented to EH at the Hearing was silent on whether or not a conviction was recorded. However, it did show that EH had received a term of imprisonment (wholly suspended) in relation to charges of trafficking heroin, possessing weapons and being in possession of money being the proceeds of crime. At the Hearing, EH gave evidence that there was

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<sup>19</sup> Line 35 page 50 of the Hearing transcript.

<sup>20</sup> Line 38 page 47 of the Hearing transcript.

<sup>21</sup> The LCR Act infringement history for the A Pty Ltd regarding B as of 27 January 2023 shows that the latest incident was a non-compliance incident recorded on 18 June 2022 (after EH had completed the Questionnaire on 17 March 2022) involving the offence of permitting a drunk/disorderly person on licensed premises. Liquor inspectors of the Commission issued an infringement notice on 11 August 2022 which was paid on 7 October 2022. (As to the meaning of “non-compliance incident”, see section 3).

no conviction recorded against him.<sup>22</sup> (It is noted that after the Hearing Victoria Police submitted certified extracts from the Melbourne Magistrates' Court, dated 17 May 2000, showing that EH had been convicted in respect of each of these matters).

48. At the Hearing, EH was questioned about his incorrect answers on the Questionnaire that he submitted, as a director of the Applicant, in support of the Original Application. In particular, irrespective of whether or not a conviction was recorded, he was asked why he answered "No" to the question of "*Have you been found guilty of any offence in Australia or overseas (including findings without conviction and good behaviour bonds, not including traffic offences)?*", EH stated that the reason he had answered "No" was because he thought that the reference to the exclusion of "traffic offences" in the question was referring to trafficking drugs so he didn't think he needed to include it.<sup>23</sup>
49. He then gave a contradictory explanation that the reason he had answered "No" was because he didn't want to remember the past relating to him trafficking heroin.<sup>24</sup>
50. The Commission notes that EH also answered "No" to the question, "*Have you ever been convicted of any offence in Australia or overseas (not including traffic offences)?*". As stated above, EH asserted at the Hearing that he wasn't convicted in relation to the criminal matters,<sup>25</sup> however, the extracts of the court outcomes regarding his appearance at Melbourne Magistrates' Court on 17 May 2000 show that was convicted, which means he incorrectly answered "No" to this question as well.
51. The Commission notes that EH also answered "No" to the question in the Questionnaire "*Have you ever been charged with drink driving or drive whilst disqualified*". EH admitted at the Hearing that he had been charged with both, and his explanation for answering "No" was that he answered "No" to all of the questions that appear on the Questionnaire under the heading "*Criminal History*" as he did not regard himself as a criminal.<sup>26</sup>
52. At the Hearing, Senior Sergeant Maher informed the Commission that despite these inaccuracies, Victoria Police had no intention of prosecuting EH for an offence under section 118 (which they had successfully done in relation to UA – see above).

### *Amendments made to the Original Application to be considered on review*

53. During the Hearing, Mr Towey invited the Commission to consider an alternate category of licence, namely a renewable limited licence with a total range of 10 lines of

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<sup>22</sup> Line 40-45, page 30-31, and line 25-35, page 42 of the Hearing transcript.

<sup>23</sup> Line 40-45, page 30-31, and line 25-35, page 42 of the Hearing transcript.

<sup>24</sup> Line 5-35, page 44 of the Hearing transcript.

<sup>25</sup> Line 10, line 25, page 43, and line 5, page 44 of the Hearing transcript.

<sup>26</sup> Line 35 onwards page 46-47 of the Hearing Transcript.

liquor and a maximum of 40 seats available inside and 20 seats available outside.

54. Further, Mr Towey submitted during the Hearing that the Applicant would accept a condition being imposed on the licence to the effect that the licence is granted on the basis that it does not become effective until UA is no longer an associate of the Applicant and indicated that this could occur within a period of 30 days.
55. That said, the Commission notes that Mr Towey initially indicated in the Hearing that a period of six months would be needed for the removal of UA as a shareholder in the Applicant.<sup>27</sup>
56. After the Hearing, Mr Towey's written submissions asserted that:
- (a) EH is taking steps to ensure that UA is no longer a shareholder in the Applicant;
  - (b) if the Commission were to grant a restaurant and cafe licence, conditions could be imposed along the following lines:

*UA is not permitted to be a signatory to or have any direction or control over any account with any bank or other financial institution held for or on behalf of the licensee.*

*UA is not permitted to own or hold company shares in the licensee legally or beneficially or by any legal or corporate entity of which that person may be a director, trustee, or hold any relevant power, or of which he may be a shareholder, beneficiary or hold any other relevant financial interest.*

*UA is prohibited from entering into, or remaining on, the licensed premises.*
  - (c) critically, the Applicant will need a period of no less than 28 days for removal of UA as a shareholder and, if achieved earlier, the Commission will be advised;
  - (d) making a finding as to suitability should differ depending on the category of the licence; and that a late-night licence carries more risk than a restaurant and cafe licence;
  - (e) the Commission is able to grant a licence to an entity that has an unsuitable associate;
  - (f) while EH's driving record is a relevant factor in making a decision on suitability, it should not of itself be a determinative factor in a decision as to the suitability of an applicant;
  - (g) EH's criminal priors are stale. His mistaken answers in the Questionnaire regarding his criminal record were made without intent to deceive. His criminal record and errors in the Questionnaire should not exclude him from operating a low-risk venue;

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<sup>27</sup> Line 40, page 50, line 5, page 51, and line 20, page 52 of the Hearing transcript.

- (h) EH is seeking to remove himself from the operations of B and concentrate on the Premises, which is his main income source; and
- (i) as opposed to a restaurant and cafe licence, the Applicant would accept a renewable limited licence with the following conditions:

*This renewable limited licence authorises the licensee to supply liquor on the licensed premises between 12 pm (Noon/Midday) on any particular day until 9pm for consumption on the licensed premises where the predominant activity carried out at all times on the premises is the preparation and serving of meals to be consumed on the licensed premises.*

*Tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending the premises at any one time; and the licensee must not permit—*

- (i) the live performance of any musical works; or*
- (ii) the playing of any recorded musical works—*

*on the premises at any time higher than background music level.*

*"Background music level", in relation to premises, means a level that enables patrons to conduct a conversation at a distance of 600 millimetres without having to raise their voices to a substantial degree.*

*Patron Numbers Internal 40*

*Patron Numbers External 20*

*Overall maximum 50*

*Trading Hours*

*On any day – Midday to 9pm*

**SPECIAL CONDITIONS**

*UA is not permitted to be a signatory to, or have any direction or control over any account with any bank or other financial institution held for or on behalf of the licensee; and*

*UA is not permitted to own or hold company shares in the licensee legally or beneficially or by any legal or corporate entity of which that person may be a director, trustee, or hold any relevant power, or of which he may be a shareholder, beneficiary or hold any other relevant financial interest.*

*UA is prohibited from entering into, or remaining on, the licensed premises."*

*The grant of this licence is not effective until the Commission is satisfied that the Applicant entity has divested itself of UA. The Applicant has a period of 28 days (or later as approved in writing by the Commission) to ensure that UA no longer holds any shares in the Applicant entity.*

*The supply of liquor is restricted to 10 lines only, and no more than two wines, four beers, one cider, or three mixed spirits.*

*All staff involved in the supply of liquor are to have current RSA Accreditation.*

57. After the Hearing, Victoria Police submitted:

- (a) there is nothing in the LCR Act to indicate that the Commission cannot grant an application where an associate is an unsuitable person;

- (b) the Commission must particularly consider the public interest in determining whether or not to grant an application; and
- (c) EH's oral evidence in the Hearing lacked transparency and honesty.

## Reasons for decision on review

### Issues for determination on review

#### Suitability of the Applicant

- 58. In deciding whether to exercise its discretion to affirm, vary or set aside the Original Decision and in turn grant or refuse the Original Application that is the subject of the Review Application, the key issue to be determined by the Commission is the suitability of the Applicant to hold a licence for the purposes of section 44(2)(a).
- 59. The Commission notes that the Original Application was refused by the Delegate on the basis that the Applicant was not a suitable person to hold a licence and that the sole ground for Victoria Police making their objection to the Original Application was based on suitability pursuant to section 44(2)(a).

#### *Is UA an associate of the Applicant?*

- 60. As noted above, UA was previously a director of the Applicant and ceased this directorship on 20 May 2022 (after Victoria Police lodged their objection to the Original Application) but he remains a 50% shareholder in the Applicant.
- 61. Both the Applicant and Victoria Police are of the view that UA is an associate of the Applicant by virtue of his financial interest as a shareholder in the Applicant.
- 62. As stated above, section 3AC defines who is an associate of a person.
- 63. In considering section 3AC and the submissions from Victoria Police and from Mr Towey on behalf of the Applicant, the Commission is satisfied that UA is an associate of the Applicant under section 3AC(1)(a).
- 64. It is noted that Mr Towey, in post-Hearing submissions, asserted to the Commission that the Applicant proposes that UA will be removed as a shareholder within 28 days. The Commission has observed inconsistent and insufficient evidence given on behalf of the Applicant in this regard and, in any event, considers that this proposal is not something that the Commission can condition in the circumstances of this case, particularly without supporting documentation.



65. The Commission has a number of reasons for being concerned with the various submissions made on behalf of the Applicant on review.
66. **First**, while Mr Towey has submitted that EH wants to remove UA as the Applicant's shareholder, the Commission had also previously received information from Mr Towey on behalf of the Applicant to the effect that:
- (a) UA is unable to divest himself of his shares in the Applicant due to the fact that they are essentially worthless as the proposed business is a restaurant and a low-risk venture and practically worthless due to the fact that it has no liquor licence;
  - (b) UA is very much a "front of the house person" and his presence at the Premises is needed to ensure that the business has a chance of establishing itself; and
  - (c) any condition on a licence to exclude UA from the Premises and the business of the Applicant would set the Applicant up to fail.<sup>28</sup>
67. **Secondly**, there is no evidence of any concluded or pending agreed arrangement at all for the transfer of UA's shares or any indication at all from UA that he may be agreeable to cease being a shareholder. UA informed the Commission that UA financially assisted in setting up the Applicant's business.<sup>29</sup> The Commission was not presented with any documents to support Mr Towey's submission on behalf of the Applicant that UA would be removed as a shareholder.
68. **Thirdly**, following on from the second point above, the Commission is not satisfied that there is sufficient evidence that 100% of the Applicant's shares could be owned by EH or that there is another interested party ready to be the transferee of UA's shares in the Applicant. EH said that, while nothing is confirmed, his co-manager of the Premises, G, is interested though EH couldn't recall his full name and said that this person would still need to get across the running of the business first.<sup>30</sup>
69. **Fourth**, in the Hearing it was submitted by Mr Towey that he was instructed that the Applicant would require a six-month timeframe for UA to divest himself of his shares. This was confirmed in evidence by EH. Then, this was later changed in the Hearing to

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<sup>28</sup> Applicant's submissions, 17 June 2022.

<sup>29</sup> Line 25, page 36 of the Hearing transcript. The Commission has also had regard to EH's evidence at line 20-25, page 19 of the Hearing transcript which contradicts the Applicants submissions as of 17 June 2022.

<sup>30</sup> Line 15-25, page 33, and line 30-35, page 50 of the Hearing transcript. The Commission notes that EH is already the sole shareholder of A Pty Ltd, which owns the business trading as B.

30 days, and then changed again after the Hearing to no less than 28 days. There is no evidence as to the bases for these differing timeframes, nor any evidence from UA about timing. In fact, at the Hearing, EH said in evidence that although he is trying to change the shareholding to remove UA, he had nothing currently in place to do so. EH mentioned that he would be able to do this in six months however, also said that “...*nothing has been really confirmed*”<sup>31</sup> and that although he is working on removing UA there is “*not a - not very short-term solutions at the moment*”<sup>32</sup>. There is no evidence to support any change to this timeframe.

70. **Fifth**, there is no evidence as to how the lease of the Premises where the Applicant’s business is conducted would be able to be varied with the consent of the landlord to have UA discharged as a financial guarantor.
71. In conclusion, the Commission finds that UA is currently an associate of the Applicant.

### *Is UA a suitable associate?*

72. The Commission notes that Mr Towey conceded on behalf of the Applicant that UA is not a suitable associate.<sup>33</sup>
73. The Commission confirms that it is not satisfied that UA is a suitable associate of the Applicant for the following reasons:
74. **First**, UA’s criminal history is as recent as 20 December 2022 when he appeared before Ringwood Magistrates’ Court for making a false or misleading statement contrary to section 118 by virtue of his failure to disclose his criminal history in the Questionnaire on 23 March 2022 in relation to the Original Application. UA was fined \$800 with conviction. He had answered “No” to the question in the Questionnaire: “*Have you ever been charged with drink driving or drive whilst disqualified?*”<sup>34</sup>, in spite of his criminal history showing that he was sentenced for driving at a dangerous speed and driving whilst disqualified between 2016 and 2017 (less than 10 years ago).<sup>35</sup>
75. **Secondly**, following on from the first point above in paragraph 74, UA’s conduct in relation to the section 118 offence indicates that he was less than diligent in his approach as an associate of the Applicant in completing and lodging the Questionnaire. The

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<sup>31</sup> Line 35 page 50 of the Hearing Transcript.

<sup>32</sup> Line 38 page 47 of the Hearing Transcript.

<sup>33</sup> Line 25, page 12, line 35, page 13, line 40, page 13, and line 10, page 43 of the Hearing transcript.

<sup>34</sup> UA also answered “No” to the question, “*Have you ever been convicted of any offence in Australia or overseas (not including traffic offences)?*”.

<sup>35</sup> Victoria Police submitted to the Commission a LEAP (Law Enforcement Assistance Program) report dated 24 June 2022.

Questionnaire requires the applicant to acknowledge that “...*failure to provide requested information (no matter how minor) may be detrimental to the outcomes of your application*” and “...*I understand that it is a criminal offence under section 118 of the Act to provide false or misleading statements...*”. The Commission notes that these questions were acknowledged by UA at the time of completing and lodging the Questionnaire.

76. **Thirdly**, UA has a substantial traffic history since 2010. The latest traffic offence against UA appears to be exceeding the speed limit by less than 10km/h on 10 November 2022. The Commission considers the volume of his traffic offences to be relevant to his ability to comply with regulatory schemes. Since 2010, UA has been issued with 11 infringements for contraventions of the Road Safety Rules 2017 (Vic).<sup>36</sup>
77. **Fourth**, the Commission notes that no evidence has been called from or on behalf of UA nor have any submissions been made disputing any of the matters raised by Victoria Police in relation to UA.
78. In all the circumstances, the Commission finds that UA is currently an unsuitable associate of the Applicant.

### *Is the Applicant a suitable person to hold a licence?*

79. The Commission has considered whether despite having a currently unsuitable associate, it considers the Applicant to be a suitable person to hold a licence under the LCR Act.
80. The Commission notes that Mr Towey made submissions during and after the Hearing as to the Commission having the discretion to still grant the Review Application even though the Applicant has an unsuitable associate.
81. The Commission notes that Victoria Police also submitted after the Hearing that it is not apparent from the terms of the LCR Act that the Commission is required to refuse an application in circumstances where the associate of an applicant is unsuitable.
82. The Commission agrees with these submissions.
83. In this context, it is relevant for the Commission to note that both sections 44(2) and 47(2) use the word “may”. In accordance with section 45 of the *Interpretation of Legislation Act 1984 (the Interpretation Act)*, subject to a contrary intention,<sup>37</sup> where the word “may” is used in an Act conferring a power, “that word shall be construed as

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<sup>36</sup> Victoria Police submissions, 4 July 2022.

<sup>37</sup> See section 4(1) of the Interpretation Act.

meaning that the power so conferred may be exercised, or not, at discretion”.<sup>38</sup> And the Commission notes that the provisions of section 45 “shall have effect notwithstanding any rule of construction to the contrary and any such rule is hereby abrogated with respect to ... any Act passed ... on or after the commencement of this Act [the Interpretation Act]”.<sup>39</sup> Accordingly, the Commission considers that its power to refuse to grant a licence on the ground that an applicant is not a suitable person to hold or carry on business under the licence may be exercised, or not, at its discretion.

84. In answering the question as to whether the Applicant is a suitable person to hold a licence, in addition to having regard to the findings above as to UA not being a suitable associate, the Commission has also had regard to the other materials, submissions and evidence before it.
85. Overall, while the Commission notes that the last offence recorded in EH’s criminal history is over 20 years ago, the Commission finds EH’s explanations for his incorrect answers on the Questionnaire to be inconsistent, contradictory, and unsatisfactory (see paragraphs 88 to 94 below). In combination, the evidence of EH is sufficient to raise concerns for the Commission about EH’s honesty and integrity.
86. Moreover, the Commission considers that the quantity of EH’s traffic offences (as admitted by him) to be relevant as to his ability to comply with regulatory schemes.
87. Further, the Commission notes that the infringement notices relating to B (four over the course of six years, including a non-compliance incident in 2022 as admitted by EH) raises some concern as to the adequacy, or otherwise, of EH’s knowledge of the LCR Act.

## **EH’s evidence**

88. The Commission finds that EH gave contradictory and unsatisfactory evidence in the Hearing.
89. When seeking to explain the answer to the question in the Questionnaire of “*Have you been found guilty of any offence in Australia or overseas (including findings without conviction and good behaviour bonds, not including traffic offences)?*”, where he answered “No”, EH stated that the reason he had answered “No” was because he

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<sup>38</sup> See subsection (1) of section 45 of the Interpretation Act.

<sup>39</sup> See subsection (3) of section 45 of the Interpretation Act. The Commission notes that the Interpretation Act came into effect on 1 July 1984.

thought that the reference to “traffic offences” in the question was referring to trafficking drugs.<sup>40</sup>

90. He then gave a contradictory explanation when he said that the reason he had answered “No” was because he didn’t want to remember the past relating to him trafficking heroin.<sup>41</sup>
91. The Commission notes that EH also answered “No” to the question, “*Have you ever been convicted of any offence in Australia or overseas (not including traffic offences)?*”.
92. In the Hearing, EH also stated that he wasn’t convicted in relation to the trafficking matter,<sup>42</sup> however, the extracts of the court outcome regarding his appearance at Melbourne Magistrates’ Court on 17 May 2000 show that was convicted.
93. In addition, EH answered “No” to the question “*Have you ever been charged with drink driving or drive whilst disqualified*”. The reason he gave for this response was that he answered “No” to all of the questions that appear on the Questionnaire under the heading “*Criminal History*” as he did not regard himself as a criminal.<sup>43</sup>
94. Overall, while the Commission notes that the last offence recorded in EH’s criminal history is over 20 years ago, the Commission finds EH’s explanations for his incorrect answers on the Questionnaire to be unsatisfactory and concerning.

## **Finding as to suitability of the Applicant**

95. The Commission accepts that a restaurant and cafe licence is generally regarded as a low-risk category of licence, however, the Commission notes that it is important that the public have confidence in the liquor industry and have confidence in the administration of the liquor industry and that the community can rely on those approved as a licensee as having been honest and diligent in making their application.<sup>44</sup>
96. Having regard to the matters outlined above in relation to the unsuitability of the Applicant’s associate, UA, in combination with the concerns held by the Commission in

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<sup>40</sup> Line 40-45, page 30-31, and line 25-35, page 42 of the Hearing transcript.

<sup>41</sup> Line 5-35, page 44 of the Hearing transcript.

<sup>42</sup> Line 10, line 25, page 43, and line 5, page 44 of the Hearing transcript.

<sup>43</sup> Line 35 onwards page 46-47 of the Hearing transcript.

<sup>44</sup> See *Galafaro v Director of Liquor Licensing* [2009] VCAT 919 and *Buzzo Holdings Pty Ltd & Anor v Loison* [2007] VSC 31 (26 February 2007).

relation to the Applicant's sole director, EH, the Commission finds that the Applicant is currently not a suitable person to hold a liquor licence.

## *Whether the licence should be granted having regard to the objects of the LCR Act*

97. In all the circumstances, having regard to all the materials before it and the objects of the LCR Act, the Commission is satisfied that it is appropriate to exercise its discretion to refuse to grant the Applicant a licence on the basis that the Applicant is not currently a suitable person to hold a licence.
98. The Commission also notes that this decision does not preclude the Applicant from its involvement in the hospitality industry generally. Rather, it means that, at this point in time, as discussed above, it is not currently considered to be a suitable person to be the holder of a licence under the LCR Act.

## Decision on review

99. Based on the reasons set out above, the Commission is not satisfied that granting the Original Application the subject of the Review Application is appropriate in the circumstances.
100. The Commission has therefore determined to refuse to grant the Review Application and affirm the Original Decision.

**The preceding 100 paragraphs are a true copy of the Reasons for Decision of Ms Danielle Huntersmith (Chair), Mr John Larkins (Deputy Chair) and Ms Thu-Trang Tran (Commissioner).**