

DECISION AND REASONS FOR DECISION

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* by Merchants Manila Pty Ltd for the internal review of a decision to refuse to grant a renewable limited licence to the premises trading as Merchants Manila located at 4 Radnor Drive, Deer Park 3023.

Commission:

Mr Ross Kennedy, Chair

Dr Dina McMillan, Commissioner

Mr Des Powell AM, Commissioner

Date of decision:

14 August 2019

Date of reasons:

14 August 2019

Decision:

The Commission has determined to set aside the decision of the Delegate, and in substitution, grant a renewable limited licence subject to the conditions at Appendix A.

Signed:

A handwritten signature in blue ink, appearing to read 'Ross Kennedy', written over a horizontal line.

Ross Kennedy

Chair



REASONS FOR DECISION

BACKGROUND

The Original Application

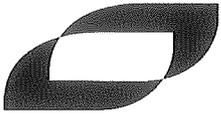
1. Merchants Manila Pty Ltd trading as Merchants Manila (**the Applicant**) is a body corporate with one director (**the Director**). On 4 December 2018, the Applicant applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) for a renewable limited licence (**the Original Application**) under the *Liquor Control Reform Act 1998 (LCR Act)*¹ in relation to the premises located at 4 Radnor Drive, Deer Park 3023 (**the Premises**).
2. The Original Application sought a renewable limited licence to sell packaged liquor directly from the Premises, being a warehouse in a commercial area, between 9am to 7pm, Monday to Sunday. The Original Application also proposed to deliver liquor during hours unspecified within the Original Application. The Original Application stated that the consumption of liquor would not occur at or on the Premises.
3. The Original Application proposed to limit the maximum quantity of liquor supplied which would be supplied under a licence to 33 cartons of liquor (per product, per day) to be sold wholesale to liquor licensees and two cartons (per product, per day) directly to consumers. It was proposed that all liquor would be sold directly from the Premises, with the Applicant delivering upon request.
4. The Applicant proposed to limit the lines of liquor which it would supply to liquor originating in the Philippines, consisting of: Red Horse Beer, Emperador Light brandy, various types of San Miguel Beer and Tanduay Strong Ice premixed drinks.
5. The Applicant submitted that it sought to sell 15 different lines of liquor by the carton. Each carton would consist of one of the following lines and quantities of liquor:
 - (a) Emperador Light brandy– 12 bottles x 750ml;
 - (b) Emperador Light brandy – 20 bottles x 350ml;
 - (c) Red Horse Beer – 24 bottles x 330ml;
 - (d) Red Horse Beer – 24 bottles x 500ml;
 - (e) Red Horse Beer – 6 bottles x 1000ml;
 - (f) Red Horse Beer – 24 cans x 330ml;
 - (g) San Miguel Beer Light – 24 bottles x 330ml;

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



- (h) San Miguel Beer Light – 24 cans x 330ml;
 - (i) San Miguel Beer Light Apple – 24 bottles x 330ml;
 - (j) San Miguel Beer Light Apple – 24 cans x 330ml;
 - (k) San Miguel Beer Light Lemon – 24 bottles x 330ml;
 - (l) San Miguel Beer Light Lemon – 24 cans x 330ml;
 - (m) San Miguel Pale Pilsen – 24 bottles x 320ml;
 - (n) San Miguel Pale Pilsen – 24 cans x 320ml; and
 - (o) Tanduay Ice – 24 bottles x 330ml.
6. The Applicant also submitted that only staff qualified in the Responsible Service of Alcohol would be involved in the supply of liquor under the proposed licence. Accordingly, the Original Application included evidence that the Director had completed the “Licensees’ First Step” and “Responsible Service of Alcohol” training programmes.
7. On 19 December 2018, a delegate of the Commission (**the Delegate**) served a copy of the Original Application upon the Chief Commissioner of Police (**Victoria Police**) in accordance with section 33(3) of the LCR Act. On 8 January 2018, Victoria Police informed the Commission that it did not object to the Original Application.
8. Similarly, on 19 December 2018, the Delegate served a copy of the Original Application upon the Brimbank City Council (**the Council**) in accordance with section 33(3) of the LCR Act. On 23 January 2019, the Council notified the Commission that it wished to object to the Original Application, stating that it had concerns regarding the Applicant’s proposed use of the Premises specifically relating to whether this fell within the permitted use of the Premises as specified by the relevant planning scheme. As the Council did not specify amenity grounds relating to its objection, the Delegate did not consider Council’s comment to be an objection made pursuant to section 40 of the LCR Act, but noted this as information provided with respect to the Original Application.
9. The Original Application proposed to supply of packaged liquor from licensed premises during hours exceeding “ordinary trading hours” for the provision of packaged liquor as the Applicant sought to trade on every day of the year.² Accordingly, on 19 December 2018, the Delegate

² ‘Ordinary trading hours’ are defined at s3 of the LCR Act, but not in relation to limited licences.



invited the Applicant to make a submission outlining any exceptional circumstances in favour of granting a licence permitting the sale of packaged liquor during extended hours of trade.³

10. In response, on 31 December 2018 the Applicant informed the Commission that it wished to amend the Original Application, limiting the proposed hours of supply to the following (**the Amended Original Application**):
 - (a) between 9 a.m. and 7 p.m. on each day, other than Sunday, Good Friday, ANZAC Day or Christmas Day; and
 - (b) between 10 a.m. and 7 p.m. on Sunday; and
 - (c) between 12 noon and 7 p.m. on ANZAC Day.
11. As the Amended Original Application sought to further limit the Original Application, the Council and Victoria Police were not invited to comment with respect to the Amended Original Application.
12. On 8 March 2019, The Delegate refused to grant the Amended Original Application (**the Original Decision**) on the basis that the Delegate was not satisfied that the scale and scope of the supply of liquor, the subject of the licence, would be limited in nature under the licence, and that the Amended Original Application had therefore not been made in accordance with the LCR Act.

The Review Application

13. On 22 March 2019, the Applicant applied for the internal review of the Original Decision (**the Review Application**).
14. The Review Application proposed to reduce the quantity of liquor which the Applicant would be able to supply under a licence, from 33 cartons to 11 cartons,⁴ each containing one of the quantities and lines of liquor referred to in paragraph 5 above. The Review Application was otherwise identical to the Amended Original Application, as described in paragraph 10.
15. The Commission notified Victoria Police of the Review Application on 28 March 2019. On 29 March 2019, Victoria Police notified the Commission that it did not wish to provide information with respect to the Review Application.

³ The Decision-Making Guidelines, Grant of Licences for the Sale of Packaged Liquor, 7 June 2012 outline the Minister's position with respect to the sale of packaged liquor for businesses which operate for periods in excess of ordinary trading hours as defined in section 3 of the LCR Act. While this applies specifically to a packaged liquor licence, the Commission may consider this guideline relevant to the grant of a renewable limited licence.

⁴ Per product, per customer, per day.



16. The Commission also notified the Council of the Review Application on 28 March 2019. On 2 April 2019, the Council wrote to the Commission reiterating that it was unable to assess the possible amenity impacts with respect to the Review Application until the Applicant had applied for a planning permit, though the Council did not specify any ground of objection in accordance with section 40 of the LCR Act.

The Amended Review Application and Inquiry on the Papers

17. On 23 April 2019, the Commission notified the Applicant that the Review Application was listed for a public inquiry on 21 May 2019 at 10:00am.
18. The Applicant was invited to provide further written submissions and material upon which it sought to rely prior to the hearing. On 16 May 2019, the Applicant wrote to the Commission to advise that it did not wish to provide additional documents or submissions in support of the Review Application.
19. The Applicant did not attend the hearing scheduled on 21 May 2019, nor notify the Commission that it would not attend. Accordingly, the Commission contacted the Applicant to ask whether it preferred for the Commission to proceed to determine the Review Application on the papers, to which the Applicant replied that it did.
20. On 11 July 2019, the Applicant requested to amend the Review Application (**the Amended Review Application**) by email to further limit the quantity of liquor which could be supplied to any customer to a maximum of two cartons.⁵

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission's internal review power

21. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the Original Decision is a reviewable decision, and the Licensee is eligible to apply for review of that decision. The Review Application was made under section 153 of the LCR Act.
22. 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.⁶

⁵ per customer, per day.



23. Under the LCR Act, an application for a renewable limited licence may be contested or uncontested. Pursuant to section 3(1), an uncontested application is:

an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174).⁷

24. The Original Application and the Review Application are both uncontested as no valid objections were received with respect to either. Upon review, the Commission stands in the shoes of the original decision maker and, in respect of an uncontested application, must either:
- (a) grant the application (and may do so subject to conditions);⁸ or
 - (b) refuse to grant the application.⁹

Exercising the internal review power

25. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act)* requires the Commission, in exercising its internal review function, to have regard to the objects of the LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act.¹⁰
26. The objects of the LCR Act are set out in section 4(1):

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*

⁶ Sections 4(2) and 157(2) to (5) of the LCR Act and section 25(3) of the VCGLR Act further prescribe how the Commission is to undertake internal reviews.

⁷ Conversely, a "contested application" is defined in section 3(1) as being "*an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which any objections are received under Division 5 of Part 2 within the period set out in that Division for those objections (or that period as extended under section 174)*".

⁸ LCR Act, sections 44, 49 and 157.

⁹ LCR Act, section 44 and 157.

¹⁰ VCGLR Act, sections 9(3) and (4).



- (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.*

27. Section 4(2) of the LCR Act provides further that:

It is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act must be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.¹¹

28. On 7 June 2012, decision-making guidelines with respect to the “Grant of Licences for the Sale of Packaged Liquor” (**the Guidelines**) were issued under section 5 of the VCGLR Act. Paragraph 3 of the Guidelines relevantly states:

“the grant of a licence that allows for the provision of packaged liquor from licensed premises during hours that are outside ordinary trading hours as defined in section 3 of the Act should only be granted by the Victorian Commission for Gambling and Liquor Regulation if exceptional circumstances can be demonstrated by an applicant.”

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

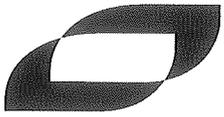
- (a) must consider all the information, material and evidence before the original decision maker;¹²
- (b) may consider further information or evidence;¹³ and
- (c) may, in respect of uncontested applications on review, have regard to any matter the Commission considers relevant, make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.¹⁴

¹¹ 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).

¹² LCR Act, section 157(2).

¹³ LCR Act, section 157(3).

¹⁴ LCR Act, section 44(4).



30. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
31. Commission considers that while the grounds of refusal outlined in 44(2) of the LCR Act are relevant considerations, the determination of an uncontested application is to be ultimately made pursuant to sections 44(1) and 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.
32. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Amended Review Application on various grounds including, amongst others, 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.
33. In relation to limited licences, section 26(1) of the LCR Act prohibits the Commission from granting a limited licence unless it is satisfied that the scale and scope of the supply of liquor under such a licence is limited in nature (**the Scale and Scope Requirement**).

Conduct of an inquiry

34. Section 34 of the VCGLR Act provides that, subject to that Act, gambling legislation or liquor legislation, the Commission may conduct any inquiry in any manner it considers appropriate. Relevant provisions governing the conduct of an inquiry by the Commission in this matter include:
 - (a) section 33 of the VCGLR Act, which provides, inter alia:

“(1) The Commission may conduct an inquiry for the purposes of performing its functions or duties, or exercising its powers under this Act, gambling legislation or liquor legislation.

...

(3) When conducting an inquiry for the purposes of performing its functions under section 9(1)(a), (b), (c) or (d) the Commission is taken to be a board appointed by the Governor in Council and Division 5 of Part I (including section 21A) of the Evidence (Miscellaneous Provisions) Act 1958, as in force immediately before the repeal of that Division, applies accordingly.”
 - (b) section 25(3) of the VCGLR Act, which provides:



"In performing a function or duty the Commission—

- (a) except when exercising a power under Division 5 of Part I of the Evidence (Miscellaneous Provisions) Act 1958, is not bound by the rules of evidence but may inform itself in any way it thinks fit;*
- (b) is bound by the rules of natural justice."*

MATERIAL BEFORE THE COMMISSION

35. The Commission on review had before it and considered all material before the Delegate, which included the Original Application consisting of:
- (a) the completed application form for a renewable limited licence;
 - (b) a declaration of right to occupy the premises;
 - (c) a declaration of the Applicant's associates;
 - (d) certificates of completion showing that the Director had completed the training referred to in paragraph 6 above;
 - (e) a statement of display with respect to the Original Application;
 - (f) correspondence from Victoria Police and Council;
 - (g) a red line plan of the proposed licensed area; and
 - (h) submissions addressing the Scale and Scope Requirement.
36. The Commission also had and considered additional information including:
- (a) the decision and reasons of the Delegate, dated 8 March 2019;
 - (b) the Review Application, which included the Applicant's proposal to further limit the quantity of liquor as described in paragraph 14; and
 - (c) the correspondence from the Applicant, as referred to in paragraphs 18 to 20.

ISSUES FOR DETERMINATION

The Scale and Scope Requirement

37. Section 14 of the LCR Act provides that a renewable limited licence "*authorises the licensee to supply liquor at the times determined by the Commission and specified in the licence.*" However, unlike other categories of licence, limited licences are subject to the additional restriction found at section 26 of the LCR Act, "*that the scale and scope of the supply of liquor the subject of the licence is limited in nature*" (**the Scale and Scope Requirement**).
38. There are no statutory signposts which prescribe specific factors for the Commission to consider in determining whether the Scale and Scope Requirement is satisfied. Previously however, the



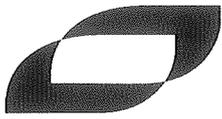
Commission has considered *the nature, location, duration or frequency of the hours of operation of a licence in question* in considering the Scale and Scope Requirement.¹⁵

39. The quantity of liquor sought to be supplied by the Amended Review Application is limited to no more than two cartons, per customer, per day. The Commission considers that this is an effective limitation on the scale and scope of the supply of liquor, which would be the subject of the licence, as sought by the Amended Review Application.
40. The Applicant's commitment to supply only the lines of liquor described at paragraph 5 constitutes a further limitation to the scale and scope of the supply of liquor proposed by the licence. The Amended Review Application only proposes to supply two types of beer, one type of brandy and one type of mixed drink. Further, all lines proposed to be supplied consist of liquor produced in the Philippines and the Applicant's clientele is likely to consist of customers associated with this region.
41. Finally, the Commission notes that the hours of supply proposed by the Amended Review Application are more limited than the ordinary trading hours defined at section 3(1) of the LCR Act. While this is not alone a significant limitation for the purpose of the Scale and Scope Requirement, this may be considered cumulatively with the limitations referred to in paragraphs 39 and 40 above.
42. The Commission is satisfied that the combination of limiting factors in paragraphs 39 to 41 indicate that the Amended Review Application satisfies the Scale and Scope Requirement.

Amenity

43. The Commission notes that no amenity-based objection was received from the Council with respect to the Original Application nor the Review Application. As the Amended Review Application only sought to further limit the quantity of liquor to be supplied to licensees, the Commission did not seek any further comment from the Council to comment with respect to the Amended Review Application.
44. The Premises is located within an area characterised by similar warehouse premises and vacant land. The Applicant's use of the Premises as licensed premises is not likely to cause noise or other amenity impacts which would disrupt the existing character of the area.
45. Relevantly, the area of Deer Park is less urbanised than metropolitan Melbourne. There are no residential properties in the area immediately adjacent to the Premises and the closest residential premises appear to be situated approximately 100 metres to the west on the other

¹⁵See decision of *Fynix Pty Ltd at 36A Vickers Street, Sebastapol premises* (Liquor-internal review) [2016] VCGLR 19 (25 July 2016) At [61].



side of Mt Derrimut Road. This suggests that residents in the wider area are unlikely to experience negative amenity impacts as a result of granting the Amended Review Application.

46. Finally, the Amended Review Application seeks a renewable limited licence which would propose to supply liquor for consumption off the Premises, in an area where established licensees already operate under packaged liquor licences in more prominent locations. This suggests that granting the Amended Review Application would not disrupt the amenity of the area in the sense that it would contribute towards the antisocial behaviours described at section 3AA of the LCR Act which are associated with intoxication.

Misuse and abuse of alcohol

47. The Commission notes that the grant of any liquor licence represents some possibility of an increased incidence of the misuse and abuse of alcohol.
48. The Amended Review Application proposes to supply a maximum 15 lines of liquor originating in the Philippines during ordinary trading hours. The Commission considers it unlikely that the supply of liquor specifically proposed by the Amended Review Application would significantly contribute towards the misuse and abuse of alcohol when a broader selection of liquor is already available from licensed premises in the area. The relative lack of visibility of the Premises indicates that it would not be a highly convenient or accessible source of liquor and it is likely that most liquor sales will be to customers who are already aware of the Applicant's business.
49. For the above reasons the Commission does not regard the potential for the misuse and abuse of alcohol as a ground to refuse to grant the Amended Review Application.

Application of the Packaged Liquor Guidelines

50. The Guidelines apply to "the grant of liquor licences that may allow the sale of packaged liquor". The licence sought by the Amended Review Application fits this description as the Applicant intends to sell packaged liquor directly from the Premises while also providing delivery to customers.
51. Paragraph 3 of the Guidelines only applies to "the grant of a licence that allows for the provision of packaged liquor from licensed premises during hours that are outside ordinary trading hours as defined in section 3" of the LCR Act.
52. The LCR Act specifies "ordinary trading hours" for a packaged liquor licence but not for a renewable limited licence. Having regard to the policy considerations underpinning the Guidelines, the Commission considers it should have regard to the Guidelines in relation to the



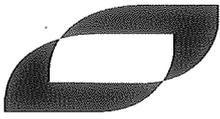
provision of liquor proposed under this licence, given that it proposes to authorise the sale of packaged liquor if granted.

53. Section 3(1) defines ordinary trading hours for various licences. While there are no ordinary trading hours for a renewable limited licence, the licence sought by the Review Application is for the supply of packaged liquor and the ordinary trading hours for a packaged liquor licence are as follows:
- (a) the hours between 9 a.m. and 11 p.m. on each day, other than Sunday, Good Friday, ANZAC Day or Christmas Day;
 - (b) the hours between 10 a.m. and 11 p.m. on Sunday; and
 - (c) the hours between 12 noon and 11 p.m. on ANZAC Day.
54. As the Applicant amended its application to supply liquor during hours which are significantly more limited than the ordinary trading hours for a packaged liquor licence, the Commission is satisfied that the Applicant's proposed operations, if permitted with appropriate conditions, are consistent with the Guidelines.

Discretion to grant or refuse the licence

55. Although the Commission is satisfied that the Amended Review Application meets the requirements of section 26 of the LCR Act and that no grounds for refusal exist under section 44(2) of the LCR Act, the Commission has a discretion whether to grant the Amended Review Application. This discretion must be exercised by the Commission with regard to other relevant considerations, including the objects of the LCR Act, particularly harm minimisation, which is the primary object.¹⁶
56. The Commission considers that enabling small businesses to supply a limited selection and quantity of liquor to niche markets is consistent with the object of facilitating "the development of a diversity of licensed facilities reflecting community expectations".
57. The Applicant provided evidence in support of the Original Application of having completed the Responsible Service of Alcohol and Licensees' First Step training, and the Commission regards this as evidence that the Applicant has sufficient knowledge of the LCR Act.
58. The Commission therefore does not consider that there are grounds to exercise its discretion to refuse the Amended Review Application.

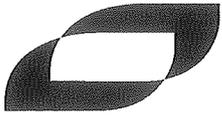
¹⁶ See further *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325, which confirms that harm minimisation is the primary regulatory object of the LCR Act and therefore the primary consideration in liquor licensing decisions (although not to the exclusion of the other objects).



DECISION

59. The Commission has determined to set aside the decision of the Delegate, and in substitution, grant a renewable limited licence subject to the conditions at Appendix A below.

The preceding 59 paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy, Chair, Dr Dina McMillan, Commissioner and Mr Des Powell AM, Commissioner.



Appendix A

TYPE OF LICENCE

This licence is a renewable limited licence and authorises the licensee to supply liquor on the licensed premises for consumption off the licensed premises during the trading hours specified below.

RESTRICTIONS ON SALES

The licensee must not use the above licensed premises to provide for:

- personal shopping for liquor;
- browsing for liquor; and
- the display of liquor for sale.

Any director of the licensee must complete an approved responsible service of alcohol program:

- prior to, or within two months after, the date on which the licensee commences supplying liquor under this licence, or within two months of being appointed as a director of the licensee (whichever is the later); and
- within 3 years from the date on which the director last completed an approved responsible service of alcohol program.

ORDERS FOR LIQUOR

Orders for the supply of liquor may be taken face-to-face, by email or by telephone. Such orders:

- may be taken at any time on any day;
- are limited in volume to a maximum of two cartons in total, per customer, per day; and
- may only include the following lines of liquor:
 1. Emperador Light brandy in cartons or part thereof, totaling no more than 9 litres each;
 2. Red Horse Beer variants in cartons or part thereof, totaling no more than 12 litres each;
 3. San Miguel Light beer variants in cartons or part thereof, totaling no more than 12 litres each;
 4. San Miguel Pale Pilsen variants in cartons or part thereof, totaling no more than 12 litres each; and
 5. Tanduary Ice variants in cartons or part thereof, totaling no more than 12 litres each.

PICK UP AND DELIVERY OF LIQUOR

- Liquor must be delivered to, or picked up by a person aged 18 or over. The licensee must ensure that delivery arrangements include requiring evidence of age where appropriate.
- Liquor must not be delivered on the same day the order is received.
- Liquor must not be stored in the office area of the premises, yet may be taken to this area while fulfilling an order.
- Liquor may only be picked up or delivered during the following hours:
 - Monday to Saturday between 9 a.m. and 7 p.m.;
 - Sunday between 10 a.m. and 7 p.m.;



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- ANZAC Day between 12 noon and 7 p.m.; and
- No trading on Good Friday and Christmas Day.
- The licensee must ensure that delivery arrangements include requiring that liquor is only delivered during the hours set out above.