



**DECISION AND REASONS FOR DECISION**

In the matter of an application by PBS 07 Investments Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant an application to vary a packaged liquor licence for the premises known as Hoppers Crossing IGA Plus Liquor, located at 2-6 Deloraine Drive, Hoppers Crossing.

**Commission:**

Ms Deirdre O'Donnell, Deputy Chair

Ms Helen Versey, Deputy Chair

Dr Dina McMillan, Commissioner

**Date of Hearing:**

6 August 2019

**Date of Decision:**

24 October 2019

**Date of Reasons:**

24 October 2019

**Appearances:**

Ms Beth Sfetcopoulos, Director of the Licensee

Mr Lee Konstantinidis, Counsel Assisting the Commission

**Decision:**

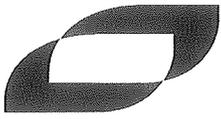
The Commission has determined to affirm the decision of the delegate, and refuse to grant the application to vary the packaged liquor licence.

**Signed:**

A handwritten signature in blue ink, appearing to read 'D. O'Donnell'.

**Deirdre O'Donnell**

Deputy Chair



## BACKGROUND

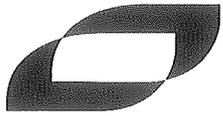
### Original Application

1. PBS 07 Investments Pty Ltd (**the Licensee**) is the holder of packaged liquor licence no. 32060242 (**the Licence**) and operates the licensed premises trading as Hoppers Crossing IGA Plus Liquor, located at 2-6 Deloraine Drive, Hoppers Crossing (**the Premises**).

2. The Licence authorises the Licensee to supply liquor on the licensed premises in sealed containers, bottles or cans for consumption off the Premises during the following hours (**the Trading Hours**):

<i>On any day other than Sunday, Good Friday, ANZAC Day or Christmas Day</i>	<i>Between 9am and 11pm</i>
<i>Sunday</i>	<i>Between 10am and 11pm</i>
<i>ANZAC Day</i>	<i>Between 12 noon and 11pm</i>

3. On 1 March 2019, the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) received an application from the Licensee to vary the Licence pursuant to section 29(1) of the *Liquor Control Reform Act 1998* (**the LCR Act**). This application sought to permit the Licensee to supply liquor between 9am and 9pm on Good Friday and Christmas Day (**the Original Application**).
4. In accordance with section 33(1) of the LCR Act, a copy of the Original Application was served on the Chief Commissioner of Victoria Police (**Victoria Police**). On 14 March 2019, Victoria Police informed the Commission that it did not object to the grant of the Original Application.
5. In accordance with section 33(2), a copy of the Original Application was also served on the Wyndham City Council (**the Council**). On 13 March 2019, the Council also advised the Commission that it did not object to the Original Application.
6. On 4 March 2019, a delegate of the Commission (**the Delegate**) sent an email to the Licensee, informing it that the minister responsible for administering the LCR Act (**the Minister**) had published guidelines (**the Guidelines**) outlining the policy of the Victorian government with respect to the grant of licences that allow for the provision of packaged liquor from licensed premises during hours outside ordinary trading hours as defined at section 3 of the LCR Act (**Ordinary Trading Hours**). These Guidelines provide that the Commission should only grant a licence permitting the supply of packaged liquor outside of Ordinary Trading Hours if exceptional circumstances can be demonstrated by an applicant.
7. On 12 March 2019, the Licensee replied to the Delegate's request that it demonstrate exceptional circumstances by stating, in summary, that the Premises were located within a

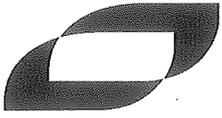


broad multicultural hub and that there was a strong customer demand for liquor to be sold on Good Friday and Christmas Day.

8. On 26 March 2019, the Licensee submitted a further email to the Delegate adding that, in summary, it would be of benefit to the community surrounding the Premises if the Delegate were to grant the Original Application.
9. The Delegate received and considered the following material as part of the Original Application:
  - (a) a variation to an existing licence or permit form accompanied by a written submission;
  - (b) a letter dated 13 March 2019 and issued by the Council advising that no planning consent was required to extend the hours in the manner sought by the Original Application;
  - (c) a statement of display dated 9 April 2019, relating to the display of the Original Application between 8 March 2019 and 5 April 2019;
  - (d) evidence that the Original Application had been displayed in the Herald Sun newspaper on 16 March 2019; and
  - (e) emails from the Licensee on 12 March and 26 March 2019 containing submissions in support of the Original Application.
10. On 17 April 2019, the Delegate had regard to the Guidelines and determined to refuse the Original Application (**the Original Decision**). In providing reasons, the Delegate referred to the harm-minimisation objects of the LCR Act and noted that the Licensee had not demonstrated exceptional circumstances in accordance with the Guidelines.

### **Review Application**

11. On 14 May 2019, the Licensee submitted an application for the internal review of the Delegate's decision (**the Review Application**).
12. The Review Application included:
  - (a) a completed application form for the internal review of the Original Decision dated 14 May 2019;
  - (b) a brief written submission requesting a review of the Original Application and submitting that granting the Review Application would assist the local community;
  - (c) a seven-page document with approximately 139 names and signatures of persons supporting the Review Application; and
  - (d) a marked-up copy of the Delegate's decision and reasons.



13. Prior to the hearing of the Review Application, Commissioner O'Donnell visited the Premises and the surrounding area.

## LEGISLATION AND THE COMMISSION'S TASK

### The Commission's internal review power

14. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152 of the LCR Act, 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.
15. Pursuant to section 157(1) of the LCR Act, the specific task of the Commission regarding the Review Application is to make a fresh decision that:
- affirms or varies the Original Decision; or
  - sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.<sup>1</sup>
16. Under the LCR Act, an application for a packaged liquor licence may be contested or uncontested.<sup>2</sup> Pursuant to section 3(1) of the LCR Act, an uncontested application is:
- “an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174)”*
17. The Review Application is uncontested as was the Original Application, as no objections were received with respect to either. Upon review of an uncontested application, the Commission stands in the shoes of the original decision maker and must either:
- grant the application (and may do so subject to conditions);<sup>3</sup> or
  - refuse to grant the application.<sup>4</sup>

### Exercising the internal review power

18. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (**the 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.<sup>5</sup>

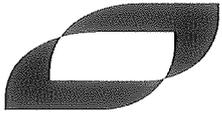
<sup>1</sup> Section 157(2) to (5) of the LCR Act and section 25(3) of the VCGLR Act further prescribe the manner in which the Commission is to undertake internal reviews.

<sup>2</sup> This application is an uncontested application.

<sup>3</sup> LCR Act, sections 44, 49 and 158.

<sup>4</sup> LCR Act, section 44.

<sup>5</sup> VCGLR Act, section 9(3) and (4).



19. The objects of the LCR Act are set out in section 4(1), which provides:

*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.*

20. 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.*<sup>6</sup>

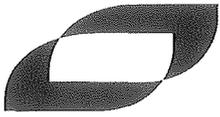
21. The Court of Appeal of the Victorian Supreme Court has made it clear in *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325 (**Kordister**) that harm minimisation is a fundamental principle of the LCR Act, and can properly be regarded as “*the primary regulatory object of the LCR Act and therefore the primary consideration in liquor licensing decisions.*”<sup>7</sup> However, as was also noted by the Court of Appeal, “*this is not to say...that it [harm minimisation] is to be taken into account, or given such weight, to the exclusion of the other objects*”.<sup>8</sup>

22. Pursuant to section 5 of the VCGLR Act the Minister for Consumer Affairs published guidelines on 7 June 2012 representing the policy of the Victorian Government concerning

<sup>6</sup> 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).

<sup>7</sup> See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

<sup>8</sup> See *Kordister* [2012] VSCA 325, at [188] per Tate JA.



the trading hours of liquor licences that allow the sale of packaged liquor (**the Guidelines**).<sup>9</sup>  
Paragraph 3 of the Guidelines relevantly states:

*“... the grant of the 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.”*

23. In exercising the internal review power, the Commission:
- a) must consider all the information, material and evidence before the original decision maker;<sup>10</sup>
  - b) may also consider further information or evidence;<sup>11</sup> and
  - c) may, in respect of uncontested applications on review, have regard to any matter the Commission considers relevant<sup>12</sup> and make any enquiries the Commission considers appropriate.<sup>13</sup>
24. Section 44(2) of the LCR Act provides that the Commission may refuse to grant an uncontested application on any of the following grounds—
- “(b) in any case—*
- (i) that 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;*
  - (ii) that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol;*
- ....”*
25. The Commission considers that while the grounds of refusal outlined in section 44(2) of the LCR Act are a relevant consideration, the ultimate determination of an uncontested application is to be made pursuant to section 44(1) and section 157(1) of the LCR Act, at the discretion of the Commission and with reference to the objects set out at section 4 of the LCR Act.

<sup>9</sup> Decision-Making Guidelines, *Grant of Licences for the Sale of Packaged Liquor*, 1176, G 23, 7 June 2012.

<sup>10</sup> LCR Act, section 157(2).

<sup>11</sup> LCR Act, section 157(3).

<sup>12</sup> LCR Act, section 44(4)(a).

<sup>13</sup> LCR Act, section 44(4)(b).

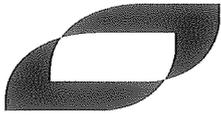


## MATERIAL BEFORE THE COMMISSION

26. The Commission has before it and has considered all the material received by the Delegate with respect to the Original Application, including the Original Application and its accompanying submissions and documents.<sup>14</sup>
27. The Commission also has before it and has considered the additional information and evidence provided with respect to the Review Application as referred to in paragraph 12.
28. On 6 August 2019, the Commission conducted a public inquiry in relation to the Review Application (**the Hearing**). The Commission heard and considered evidence and oral submissions made on behalf of the Licensee by its director, Ms Sfetcopoulos.
29. At the Hearing, the Licensee explained that the Premises had operated as a family-owned business for nearly nine years, and that while primarily family-run, the Licensee also employed managers to assist in running the business.
30. The Licensee explained that the Premises operates and sells groceries during Good Friday and Christmas Day. However, as the Premises is not licensed to supply liquor on these days, the Licensee must turn away customers who want to buy liquor on these days, explaining to customers that its liquor licence does not permit it to sell liquor on Good Friday or Christmas Day.
31. The Licensee submitted that the purpose of the Application was to support the community by providing convenient access to liquor on Good Friday and Christmas Day. The Licensee submitted that the Premises are situated in an area where many residents are of low income and where not all customers have motor vehicles which allow them to travel to licensed premises on these days. The Licensee also explained that many of its customers could not afford to visit a restaurant if they wished to consume liquor and celebrate on Good Friday and Christmas Day.
32. The Licensee explained that while it uses signage to indicate that the Premises is unable to supply liquor during Good Friday and Christmas Day, to prompt customers to purchase liquor in advance if desired, some customers fail to plan ahead accordingly.
33. The Licensee stated that the area was made up of a diverse range of cultures including people of Greek, Italian, Sudanese and Pacific Islander descent, and that for many of these cultures, Good Friday and Christmas Day held no significance beyond being public holidays.
34. The Licensee also submitted that they did not believe that the grant of the Review Application would significantly contribute towards the risk of alcohol-related harm in the community, and

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<sup>14</sup> Refer to paragraph 3.



submitted that the lack of objection to the Review Application by Victoria Police supported this view.

## REASONS FOR DECISION ON REVIEW

### Issues for determination on review

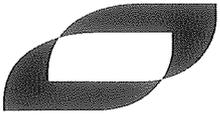
35. In order for the Commission to make its decision on review, it must consider:
- the application of the Guidelines to the supply of liquor under a packaged liquor licence; and
  - whether the Review Application should be granted or refused, having regard to the objects of the LCR Act, in particular harm minimisation, which is the primary object.<sup>15</sup>
36. Each of these issues are discussed in turn.

### The Application of the Guidelines for the sale of packaged liquor

37. The Guidelines set out the policy of the Victorian Government with respect to the grant of licences which allow for the provision of packaged liquor from licensed premises during hours that are outside Ordinary Trading Hours.
38. Ordinary Trading Hours in relation to a packaged liquor licence are specified at section 3(1) of the LCR Act as follows:
- |   |                                 |
|---|---------------------------------|
| <i>On each day other than Sunday, Good Friday, ANZAC Day or Christmas Day</i> | <i>Between 9am and 11pm</i>     |
| <i>On Sunday</i>  | <i>Between 10am and 11pm</i>    |
| <i>On ANZAC Day</i>   | <i>Between 12 noon and 11pm</i> |
39. As the Review Application seeks variation of the Licence to permit trade on Good Friday and Christmas Day, the hours sought are outside Ordinary Trading Hours. The Commission therefore considers that it should have regard to the Guidelines in relation to the Review Application.
40. The Guidelines specify that licences which allow for the provision of packaged liquor from licensed premises during hours that are outside Ordinary Trading Hours should only be granted where exceptional circumstances are demonstrated by an applicant.
41. The VCAT decision in the Saint Hotel Pty Ltd<sup>16</sup> indicates that exceptional circumstances are “*in general terms... circumstances which are unusual or out of the ordinary.*”

<sup>15</sup> See paragraphs 20 to 21 above. The Commission notes that in determining this matter, it has also considered each of the grounds set out in section 44(2) of the LCR Act.

<sup>16</sup> The Saint Hotel Pty Ltd v Director of Liquor Licensing (Occupational and Business Regulation) [2009] VCAT 2345 (23 October 2009) at [12].

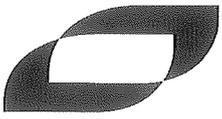


42. In *Number 17 Pty Ltd v Director of Liquor Licensing*,<sup>17</sup> Senior Member J Preuss stated that “what is to be decided as exceptional is a matter of fact and degree in every case”,<sup>18</sup> though gave general support to the treatment of “exceptional circumstances” by Coughlan DP in the *Saint Hotel Pty Ltd*, as referred to in paragraph 41.
43. Prior to determining the Original Application, the Delegate provided the Licensee with a copy of the Guidelines and invited it to demonstrate exceptional circumstances. The Licensee’s submissions in reply to this invitation were that:
- (a) there is customer demand for liquor to be available for purchase on Good Friday and Christmas Day and granting the Review Application will provide the Licensee’s customers with the convenience of allowing them to purchase liquor on those days;
  - (b) granting the Original Application would not result in the misuse and abuse of alcohol; and
  - (c) the area surrounding the Premises is inhabited by people with diverse cultures and religions, who do not necessarily attach significance to Good Friday and Christmas Day and who should be able to obtain liquor on those days.
44. The Licensee also made oral submissions at the Hearing in substantially the same terms as those referred to in paragraph 43 above.
45. The Commission notes that the Licensee is permitted to supply liquor on the days before and after Good Friday and Christmas Day. Accordingly, the main benefit to customers from granting the Review Application would be the convenience of not needing to purchase liquor prior to Good Friday or Christmas Day or travel further afield to premises which are licensed to supply liquor on those days.
46. In the Commission’s view, it is not an exceptional circumstance that the Licensee’s customers wish to purchase liquor on Good Friday or Christmas Day. No argument was advanced by the Licensee to indicate that its customers’ demand for liquor on Good Friday or Christmas Day is unique to the Premises or the area in which the Premises are situated.
47. Further, while the Licensee submitted that the Premises are located in an area which is multicultural and where much of the community does not attach religious significance to Good Friday or Christmas Day, the Commission notes that the same could be said of Melbourne generally and that information was not provided to indicate that the cultural diversity of Hoppers Crossing was exceptional compared to Melbourne generally.

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<sup>17</sup> *Number 17 Pty Ltd v Director of Liquor Licensing (Occupational and Business Regulation)* [2010] VCAT 1269 (4 August 2010)

<sup>18</sup> At [78].



48. Considering the above, the Commission does not regard the possible convenience which customers of the Licensee would enjoy were the Review Application granted as an exceptional circumstance. The grant of any application seeking to supply packaged liquor on Good Friday and Christmas Day is likely to provide customers with a level of additional convenience, and this is not unique to the Review Application.
49. Accordingly, the Commission finds that the Licensee has not demonstrated exceptional circumstances as referred to in the Guidelines. As such, the Commission notes the Government's policy guidance outlined in the Guidelines that the Commission ought to refuse the Review Application on the basis that it would contribute towards minimising harm arising from the misuse and abuse of alcohol.

**Whether to grant or refuse the licence having regard to the objects of the LCR Act**

50. The Commission has considered the objects of the LCR Act, as well as the grounds for refusal identified in section 44(2) of the LCR Act, in determining whether to set aside the Original Decision and exercise its discretion to vary the Licence.
51. While the Commission considers that no objection to the Original Application or Review Application was made by the Council or Victoria Police, this does not necessarily indicate that there is no risk of harm associated with granting the Review Application.
52. Further, the Commission is mindful of the need to ensure that appropriate regard be given to the harm minimisation object of the LCR Act,<sup>19</sup> recognising that it is the primary object.
53. For the reasons set out above, the Commission is not satisfied that the Licensee has demonstrated exceptional circumstances relevant to the Review Application. Taking into account all other relevant circumstances presented by the Review Application, the Commission finds no other reason why the Premises should be granted trading hours exceeding the Ordinary Trading Hours for a packaged liquor licence, and considers that refusing the Review Application would not result in an unjust decision warranting a departure from the Guidelines.
54. After considering all the material before it and having regard to the Guidelines and the objects of the LCR Act (in particular section 4(1)(a)(i) concerning minimisation of harm from the misuse or abuse of alcohol by providing adequate controls on supply and consumption), the Commission has determined that the Review Application should be refused.

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<sup>19</sup> LCR Act, section 4(1)(a) and 4(2).



**DECISION ON REVIEW**

55. Based on the matters discussed above, the Commission on review has decided to affirm the Original Decision and refuse to grant the Review Application.

*The preceding 55 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell, Deputy Chair, Ms Helen Versey, Deputy Chair and Dr Dina McMillan, Commissioner.*