



DECISION AND REASONS FOR DECISION

In the matter of an application by What's In That Box Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision to grant a renewable limited licence for the premises trading as What's In That Box located at 72 Jubilee Drive, Rowville.

Commission:

Ms Helen Versey, Deputy Chair

Ms Deirdre O'Donnell, Deputy Chair

Mr Des Powell AM, Commissioner

Date of Decision:

29 November 2019

Date of Reasons:

29 November 2019

Decision:

The Commission has determined to vary the decision of the Delegate and grant the renewable limited licence subject to the conditions set out in Appendix A.

Signed:

A handwritten signature in black ink that reads "Helen Versey".

Helen Versey

Deputy Chair



REASONS FOR DECISION

BACKGROUND

The Original Application

1. On 15 April 2019, What's In That Box Pty Ltd (**Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) to grant a renewable limited licence (**Licence**) under the *Liquor Control Reform Act 1998 (LCR Act)*¹ in relation to the premises located at 72 Jubilee Drive, Rowville (**Premises**) (**Original Application**).
2. Prior to the Original Application, the Applicant supplied liquor as a giftmaker under the minor business exemption in section 6B of the LCR Act. The Applicant now sought the Licence to expand its business and supply liquor in gift hampers via a website in circumstances that were beyond that relevant exemption.
3. On 17 April 2019, a delegate of the Commission (**Delegate**) wrote to the Applicant to acknowledge receipt of the Original Application and to seek further information. In particular, the Delegate sought further information regarding how the scale and scope of the supply of liquor at the Premises will be limited. Between 17 April and 7 May 2019, the Delegate and the Applicant exchanged correspondence regarding the scale and scope requirements of section 26 of the LCR Act. In summary, the Applicant submitted that the supply of liquor was limited in scale and scope as follows:
 - (a) trading hours for delivery of liquor would be limited to the ordinary trading hours of a packaged liquor licence;
 - (b) liquor available would be limited to those brands of liquor the Applicant selected and stocked as part of its range (currently limited to wines and Everleigh Bottling Co bottled cocktails, however intending to expand the range to include craft beer, cider, boutique gin and whiskey and other spirits);
 - (c) while most sales were currently limited in number, the Applicant was seeking to expand its business towards a corporate clientele, which may involve larger orders of hampers (i.e. in the hundreds) as gifts for staff or clients; and
 - (d) while the quantity of liquor per hamper would not be limited, most hampers currently contain one or two 750ml bottles of wine and/or some 200ml cocktail bottles.

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



4. On 17 April 2019, a copy of the Original Application was served on Victoria Police in accordance with section 33(1) of the LCR Act. On 2 May 2019, Victoria Police advised the Commission that it did not object to the grant of the Original Application.
5. On 9 May 2019, the Delegate determined to grant the Original Application (**Original Decision**). In the subsequent reasons for decision, the Delegate stated that “the Applicant confirmed that the supply of liquor would be limited to wines and Everleigh Bottling Co bottled cocktails”, noting the Applicant’s submission that “at some future point they would source craft beer, cider, wine cans, boutique gin or whiskey bottles”. The Delegate granted the Licence subject to the following conditions:
 - Ordinary trading hours for packaged liquor licence
 - The supply of liquor on the licensed premises for consumption off the licensed premises together with and ancillary to the sale or supply of any other merchandise which is not liquor during trading hours specified above
 - The supply of liquor is limited to wines and Everleigh Bottling Co bottled cocktails
 - The supply of liquor is limited to 48 gift hampers (containing liquor) per customer per transaction per day.

The Review Application

6. On 13 June 2019, the Applicant applied for an internal review of the Original Decision (**Review Application**). The Applicant submitted that the Delegate misunderstood its submissions in relation to the range and type of liquor it sought to supply. Consequently, the Review Application sought to amend the conditions as imposed by the Delegate to enable the Applicant to:
 - (a) supply a wider range of liquor, and
 - (b) increase the limit of the total number of hampers supplied per day from 48 hampers to 100 hampers.
7. Following discussions with Counsel Assisting the Commission, the Applicant accepted the first and second condition as determined by the Delegate, and proposed that the following conditions should replace the third and fourth conditions:
 - The supply of liquor is limited to not more than 3 litres of liquor per gift hamper.
 - The supply of liquor is limited to five gift hampers (containing liquor) per individual customer per transaction per day and 100 gift hampers (containing liquor) per business customer per transaction per day.



8. With the consent of the Applicant, the Review Application was determined by the Commission on the papers without the need for a public hearing.

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission's internal review power

9. 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 Applicant is eligible to apply for review of that decision. The Review Application was made under section 153 of the LCR Act.
10. 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.²
11. 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).*³
12. The Review Application is uncontested, as was the Original Application, as no objections were received. The Commission on review 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);⁴ or
 - (b) refuse to grant the application.⁵

Exercising the internal review power

13. 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

² Section 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.

³ 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)*".

⁴ LCR Act, sections 44, 49 and 157.

⁵ LCR Act, section 44 and 157.



objects of the LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act.⁶

14. 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*
- (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.*

15. 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.⁷

16. The Minister's Decision-Making Guidelines, Grant of Licences for the Sale of Packaged Liquor (**Guidelines**)⁸ are made under section 5 of the VCGLR Act and apply to "*the grant of liquor licences that may allow the sale of packaged liquor*". The Guidelines represent the policy of the Victorian Government concerning licensed venues that operate in excess of ordinary trading hours as defined in section 3 of the LCR Act.

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

- (a) must consider all the information, material and evidence before the original decision maker;⁹

⁶ VCGLR Act, sections 9(3) and (4).

⁷ 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).

⁸ Minister's Decision-Making Guidelines, Grant of Licences for the Sale of Packaged Liquor, 7 June 2012.

⁹ LCR Act, section 157(2).



- (b) may consider further information or evidence;¹⁰ 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.¹¹
18. The Commission considers that while the grounds of refusal outlined in section 44(2) of the LCR Act are relevant considerations, the ultimate determination of an uncontested application is to be made pursuant to section 44(1) and 157(1) of the LCR Act at the discretion of the Commission, and with reference to the objects of the LCR Act at section 4.
19. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
20. Section 44(1) of the LCR Act states that the Commission must grant or refuse to grant an uncontested application at any time after the expiry of the period for objection under Division 5 (or that period as extended under section 174 of the LCR Act).
21. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds, including that:
- i. 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
 - ii. the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.
22. In relation to limited licences, section 26(1) of the LCR Act states the Commission may grant a limited licence only if satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature.

Conduct of an inquiry

23. 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:

¹⁰ LCR Act, section 157(3).

¹¹ LCR Act, section 44(4).



“(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

24. The Commission on review had before it and considered all material before the Delegate, which included the Original Application consisting of:
- (a) a completed application form for a renewable limited licence, dated 15 April 2019, together with supporting material; and
 - (b) correspondence between the Applicant and the Delegate relating to the limitation of scale and scope under section 26 of the LCR Act.
25. The Commission also had before it and considered additional information and evidence including:
- (a) the Review Application, dated 13 June 2019 with attachments;
 - (b) the reasons for decision of the Delegate, dated 26 June 2019; and
 - (c) correspondence between the Applicant and the Counsel Assisting the Commission clarifying the Applicant's submission with respect to limiting the scale and scope of the Original Application, as referred to in paragraph 7.



ISSUES FOR DETERMINATION

Limited in scale and scope

26. The central issue for the Commission is whether it is satisfied that the scale and scope of the supply of liquor the subject of the Review Application, being the supply originally permitted under the Licence by the Original Application and as proposed to be amended as outlined in paragraph 7 above, is limited in nature in accordance with section 26 of the LCR Act. These limitations primarily include:
- (a) liquor can only be purchased as part of a gift hamper, not individually;
 - (b) limitations as to the volume of liquor that can be supplied per hamper, being 3 litres per hamper; and
 - (c) limitations to the number of Hampers to be supplied by customer type, being:
 - i. five Hampers for an individual customer per transaction per day; and
 - ii. 100 Hampers for a business customer per transaction per day.
27. The Applicant submitted that given the nature of the gift Hampers, each item would be sold at a premium price to cover the cost of non-liquor items, packaging, gift card, etc. This would limit the clientele base to only those customers seeking to provide the Hampers as gifts, as opposed to consuming the liquor on a personal basis.
28. In relation to the number of Hampers to be supplied per transaction, the Applicant submitted that personalising Hampers for business purposes (for example, by including items with business logos) would include sourcing such items from third parties that routinely impose minimum ordering numbers, which were often at or around 100 items. Consequently, the Applicant intended to impose the same or similar minimum ordering requirements where a business customer sought to include such items as part of the hamper. Such an issue did not arise with regard to individual customers, and the Applicant proposed a maximum order of five per day for those customers.
29. The Applicant also gave an estimate regarding the origin of the liquor available (or likely to be made available) at the Premises. In particular, the Director of the Applicant stated that its products were predominantly Australian from small or local businesses, with a very small range of international products. Due to the desire to maintain flexibility in sourcing product lines that would complement the available gift Hampers, the Director stated that the Applicant would prefer to avoid a condition limiting the liquor available to any particular place of origin (such as Australia) and therefore did not propose this as a condition.



The Commission's view

30. The Commission accepts that there appears to have been a misunderstanding by the Delegate as to the Applicant's intended business model and the timing of the proposed expansion of the Applicant's business towards corporate clientele. In the circumstances, the Commission accepts that the current condition limiting the range of liquor to wine and Everleigh Bottling Co cocktail bottles is not consistent with the Applicant's stated intention as to its planned expansion of its business.
31. The Commission finds that limiting the supply of the volume of liquor that can be supplied to 3 litres per hamper is a limitation on the scale and scope of the supply of liquor for the purpose of section 26 of the LCR Act. This amount provides the Applicant with the ability to supply not more than four standard (750ml) bottles of wine, eight standard (375ml) beer/cider bottles or cans, or six large (500 ml) beer/ cider bottles or cans per hamper. The Commission notes that this limitation, combined with the total number of hampers that can be supplied to an individual customer per day, results in a daily maximum of 20 bottles of wine (less than two cases) or 40 standard bottles of beer/cider (less than two slabs).
32. The Commission notes that the proposal to supply up to 100 hampers to business customers per transaction per day is based on the Applicant's intention to produce corporately branded hampers to businesses to be used as gifts to staff or clients. The Commission accepts the Applicant's submissions that sourcing such branded items routinely involves a minimum ordering requirement, and therefore would create a significant disadvantage to the Applicant if it was prohibited from accepting orders from its business customers in similar numbers. For clarity, the Commission refers to a 'business customer' as an entity that holds an active Australian Business Number (ABN).
33. The Commission also notes that the supply of liquor together with non-liquor products in a hamper, together with the online nature of the Applicant's business, are further limitations that are relevant factors in determining the Review Application under section 26 of the LCR Act.
34. The Commission did not consider the predominantly Australian origin of the liquor for supply to be a limitation for the purpose of the test in section 26 of the LCR Act because the Applicant was unable to confirm this limitation through a proposed condition.
35. For the reasons detailed above, the Commission is satisfied that the scale and scope of the supply of liquor the subject of the Licence is limited in nature should the proposed limitations be enforced as conditions upon a licence. Accordingly, the Commission finds that the Review Application meets the 'scale and scope' requirement of section 26 of the LCR Act.



Discretion to grant or refuse the licence

36. The Commission has a discretion under section 44(1) to grant or refuse the Review Application. In exercising this discretion, the Commission must have regard to matters listed in section 44(2)(a) and (b) of the LCR Act and the objects of the LCR Act.
37. In relation to the issue of amenity, the Commission does not consider that granting the Review Application on the conditions as proposed by the Applicant is likely to result in a detriment to the amenity of the area in which the Premises are located to a degree which would warrant the refusal to grant the Review Application.
38. In relation to the issue of misuse or abuse of alcohol, the Commission notes that the supply of the liquor for consumption off the Premises in the proposed quantities could be associated with misuse and abuse of alcohol. However, the Commission considers that the limitations imposed in relation to the quantity of liquor per hamper and the total number of Hampers that can be supplied to an individual per transaction per day, together with the fact that the Applicant's products are sold at a premium price, serves to reduce the risk associated with this.
39. However, the Commission notes that the Applicant's trading hours are consistent with the ordinary trading hours for a packaged liquor licence, and the Licence includes the standard conditions relating to the delivery of packaged liquor. The Commission also notes that there is no evidence to conclude that the Applicant or its Directors lack an awareness of their responsibilities regarding the responsible service of liquor.
40. Accordingly, the Commission does not consider that granting the Review Application subject to these conditions will increase the risk of misuse and abuse of alcohol at the Premises.

Whether to exercise discretion to grant the licence having regard to the objects of the LCR Act

41. The Commission is satisfied that the Review Application meets the requirements of section 26 of the LCR Act, and the Commission is satisfied that there are no grounds for refusal under section 44(2) of the LCR Act. After having regard to the objects of the LCR Act, particularly the harm minimisation object, the Commission determines to grant the Review Application.

DECISION

42. The Commission has determined to vary the decision of the Delegate and grant the renewable limited licence subject to the conditions set out in Appendix A.

The preceding paragraphs are a true copy of the Reasons for Decision of Ms Helen Versey, Deputy Chair, Ms Deirdre O'Donnell, Deputy Chair and Mr Des Powell AM, Commissioner.

Appendix A

Renewable Limited Licence

TYPE OF LICENCE

This licence is a renewable limited licence and authorises the licensee to supply packaged liquor only when such liquor is ordered by mail, telephone, facsimile transmission or internet.

RESTRICTIONS ON SALES

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

- personal shopping for liquor
- browsing, liquor stocks or stores
- the display of liquor for sale
- the collection of liquor by customers
- the storage of liquor for delivery

DELIVERY OF LIQUOR

Liquor must be delivered to 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 and left at unoccupied premises on same day the order is received.

Liquor may only be delivered during the following hours:

- between 9 a.m. and 11 p.m. on any day other than Sunday, Good Friday, Anzac Day or Christmas Day.
- between 10 a.m. and 11 p.m. on Sunday.
- between 12 noon and 11 p.m. on Anzac Day.
- No deliveries are permitted on Christmas Day or Good Friday.

INFORMATION REQUIRED TO BE DISPLAYED ON WEBSITE/S

The following notice must be prominently displayed on the licensee's website/s:

WARNING

Under the Liquor Control Reform Act 1998 it is an offence;

- To supply alcohol to a person under the age of 18 years (Penalty exceeds \$17,000)
- For a person under the age of 18 years to purchase or receive liquor (Penalty exceeds \$700)

The licensee is required to prominently display the number of this licence on the website.

ORDERS FOR LIQUOR

Orders for the supply of liquor may be taken at any time on any day.

Internet orders may only be taken through the following website(s):

www.whatsinthatbox.com.au

SUPPLY OF LIQUOR

To supply liquor on the licensed premises for consumption off the licensed premises together with and ancillary to the sale or supply of any other merchandise which is not liquor during trading hours specified above.

The supply of liquor is limited to not more than 3 litres of liquor per gift hamper.

The supply of liquor is limited to five gift hampers (containing liquor) per individual customer per transaction per day and 100 gift hampers (containing liquor) per business customer per transaction per day.