



DECISION AND REASONS FOR DECISION

In the matter of an application by Matthew Webster on behalf of himself and Kaylene Mexon (in partnership) under section 153 of the *Liquor Control Reform Act 1998* for an internal review of the decision to refuse to grant a renewable limited licence for the premises, trading as the BBQ Garden, located at 37A Gladstone Street, Glenrowan.

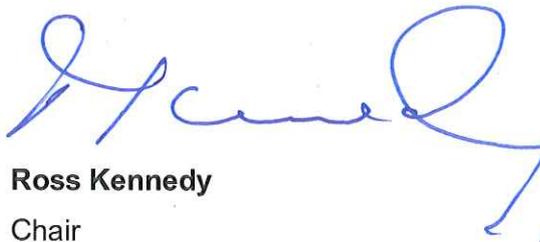
Commission: Mr Ross Kennedy PSM, Chair
Ms Deirdre O'Donnell, Deputy Chair
Mr Des Powell AM, Commissioner

Date of Decision: 7 May 2020

Date of Reasons: 7 May 2020

Decision: The Commission has determined to set aside the decision of the Delegate and, in substitution, grant the application for a renewable limited licence subject to the conditions set out in Appendix One.

Signed:



Ross Kennedy
Chair



REASONS FOR DECISION

BACKGROUND

1. On 23 October 2019, Kaylene Mexon applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) for a renewable limited licence (**Original Application**) under the *Liquor Control Reform Act 1998 (LCR Act)*¹ in relation to premises located at 37A Gladstone Street, Glenrowan, trading as the BBQ Garden (**Premises**).
2. The Original Application was subsequently amended to be made by Ms Mexon on behalf of herself and Matthew Webster in partnership in the name of “K Mexon & M.A Webster” (**Applicant**).
3. The Premises were described in the Original Application as a BBQ garden with a range of smokers and BBQs that would showcase local produce. The Applicant sought to supply local craft beer from two local microbreweries, wines and fortified wines from three local wineries and a small amount of spirits, for consumption both on and off the Premises. The supply of liquor for consumption off the Premises would be limited to “six beers and two bottles of wine per transaction”.
4. In the Original Application, the Applicant sought to trade between:
 - (a) 12 noon and 11pm on Victorian and NSW public holidays;
 - (b) 12 noon and 11pm for each day during Victorian and NSW school holiday periods; and
 - (c) 12 noon and 10pm for each Friday, Saturday and Sunday outside of these periods.
5. On 23 October 2019, a copy of the Original Application was forwarded to Victoria Police and to the Wangaratta Rural City Council (**Council**) in accordance with section 33(3) of the LCR Act. Victoria Police advised the Commission on 13 November 2019 that it did not object to the grant of the Original Application. The Commission did not receive any response or objection from the Council.
6. On 13 December 2019, an authorised delegate of the Commission determined to refuse the Original Application on the basis that (in combination):
 - (a) he was not satisfied that the Original Application was made in accordance with the LCR Act, in that a grant of the licence would not align with the objects of the LCR Act; and
 - (b) he was not satisfied that the scale and scope of the proposed supply of liquor was limited in nature in accordance with section 26(1) of the LCR Act (**Original Decision**).

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



7. On 6 February 2020, the Applicant applied for an internal review of the Original Decision (**Review Application**).²

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission's power of internal review

8. Division 2 of Part 9 of the LCR Act governs internal review applications. In accordance with section 152 of the LCR Act, the Original Decision is a reviewable decision. The Review Application is made under section 153 of the LCR Act. The Applicant is an eligible person to apply for an internal review.³
9. 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 Original Decision; or
 - (b) sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.
10. In effect, the Commission, on internal review, stands in the shoes of the original decision maker and must make a fresh decision with respect to the Original Application. In this case, the Commission must decide whether to grant a renewable limited licence to the Applicant and, if so, whether to do so subject to conditions.⁴ The Commission must consider all the information, material and evidence before the original decision maker.⁵ It may also consider further information, material or evidence as part of making its decision.⁶
11. Under the LCR Act, an application for the grant of a licence may be contested or uncontested. Pursuant to section 3(1), an uncontested application relevantly includes "*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)*".

² Pursuant to section 153(2)(a)(iii) of the LCR Act, the Commission granted the Applicant an extension to lodge the Review Application on the basis that it was satisfied that exceptional circumstances existed in light of the impact that the 2019-20 Victorian bushfires had on the Applicant during the relevant period.

³ Section 152(b), LCR Act.

⁴ Sections 44, 49 and 157, LCR Act.

⁵ Section 157(2), LCR Act.

⁶ See section 157(3), LCR Act.



12. The Original Application was uncontested and it remains uncontested on review. Therefore, the Commission must proceed to determine the matter as an uncontested application in accordance with section 44 of the LCR Act.

Exercising the internal review power

13. Section 9(3) of the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (**VCGLR Act**) provides that:

“The Commission must, when performing functions or duties or exercising its powers under the Gambling Regulation Act 2003, the Liquor Control Reform Act 1998, the Casino Control Act 1991, the Racing Act 1958 or any other Act, have regard to the objects of the Act conferring functions on the Commission.”⁷

14. Section 9(4) of the VCGLR Act further provides that:

“The Commission must, when performing functions or duties or exercising its powers under gambling legislation or liquor legislation, have regard to any decision-making guidelines issued by the Minister under section 5.”⁸

15. Accordingly, in exercising its discretion to either grant or refuse a renewable limited licence, the Commission must have regard to the objects of the LCR Act, as set out in section 4(1):

“(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*

⁷ There are no objects specified in the VCGLR Act itself.

⁸ There are no decision-making guidelines relevant to the determination of this matter.



- (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.”*

16. Section 4(2) 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.”

17. 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 Act and therefore the primary consideration in liquor licensing decisions”.⁹ 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”.¹⁰

18. Section 44(2) of the LCR Act also sets out specific grounds upon which the Commission may refuse to grant an uncontested application:

- (a) the applicant is not a suitable person to hold or carry on business under the licence or BYO permit;¹¹
- (b) that the granting of the application would detract from or be detrimental to the amenity of the area in which the premises to which application relates are situated;¹²
- (c) that the granting of the application would be conducive to or encourage the misuse and abuse of alcohol;¹³
- (d) the applicant does not have adequate knowledge of the LCR Act;¹⁴ or
- (e) that the application has not been made, displayed or advertised in accordance with the LCR Act.¹⁵

19. 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 the Review Application is to

⁹ See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

¹⁰ See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

¹¹ Section 44(2)(a)

¹² Section 44(2)(b)(i).

¹³ Section 44(2)(b)(ii).

¹⁴ Section 44(2)(b)(iii).

¹⁵ Section 44(2)(b)(v).



be made pursuant to section 44(1) and section 157(1) of the LCR Act at the discretion of the Commission, with reference to the objects of the LCR Act as set out in section 4.

Conduct of an inquiry

20. 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.”

Restriction on the grant of limited licences

21. A limited licence may be a temporary limited licence or a renewable limited licence. Pursuant to section 14(1B) of the LCR Act, a renewable limited licence authorises the licensee to supply liquor at the times determined by the Commission and specified on the licence, and it may be renewed in accordance with the LCR Act. A limited licence may further be subject to any conditions determined by the Commission and specified on the licence.

22. Section 26 of the LCR Act provides that the Commission may grant a limited licence only if it is satisfied that the scale and scope of the supply of liquor the subject of the licence is limited in nature.



MATERIAL BEFORE THE COMMISSION

23. The Commission on review had before it, and considered, all of the material before the delegate, including:
- (a) the Original Application, which contained:
 - i. a completed Application Form;
 - ii. a completed Questionnaire from Kaylene Mexon dated 18 October 2019;
 - iii. a Declaration of Associates from Kaylene Mexon dated 18 October 2019;
 - iv. an ASIC Business Name Details Extract for the BBQ Garden, held by the Applicant;
 - v. a copy of a VCGLR certificate evidencing that Kaylene Mexon completed an approved responsible service of alcohol course on 8 April 2019;
 - vi. a copy of a VCGLR certificate evidencing that Matthew Webster completed an approved responsible service of alcohol course on 8 April 2019;
 - vii. a statement of attainment evidencing that Matthew Webster completed the New Entrant Training (**NET**) course on 13 September 2019;
 - viii. plans of the Premises depicting the proposed licensed area; and
 - ix. a Declaration of Right to Occupy dated 18 October 2019;
 - (b) a Victoria Police notification, dated 13 November 2019, advising it did not object to the Original Application;
 - (c) written submissions of the Applicant dated 26 November and 3 December 2019, in response to requests for information from the delegate on 23 October and 3 December 2019 respectively; and
 - (d) a Statement of Display dated 26 November 2019.
24. The Commission on review also received the following documents:
- (a) the decision of the delegate in relation to the Original Application dated 13 December 2019;
 - (b) reasons for decision of the delegate in relation to the Original Application dated 23 December 2019;
 - (c) the Review Application, dated 6 February 2020;



- (d) email from the Applicant dated 15 April 2020, attaching further site plans for the Premises;
and
- (e) email from the Applicant dated 29 April 2020, attaching:
 - i. a completed Questionnaire from Matthew Webster dated 29 April 2020;
 - ii. a Declaration of Associates from Matthew Webster dated 29 April 2020; and
 - iii. a statement of attainment evidencing that Kaylene Mexon completed the NET course on 29 April 2020.

25. On 8 April 2020, the Applicant agreed for the Commission to determine the Review Application on the material before it without holding a public hearing.

FURTHER INFORMATION PROVIDED BY THE APPLICANT

26. On 17 April 2020, the Applicant confirmed, in a telephone conversation with the Counsel Assisting the Commission, that it proposed a maximum capacity of 100 patrons for the Premises. The Applicant accepted that if it intended to hold any event at the Premises in excess of this patron capacity, it would need to apply to the Commission for a temporary limited licence for this purpose.
27. As noted in paragraph 24(e) above, the Commission also received further evidence on 29 April 2020 in relation to the partners of the Applicant, which had not been provided at the time the Original Application had been amended to be in the name of the Applicant.

DETERMINATION OF THE REVIEW APPLICATION

Issues for determination

28. In order for the Commission to make its decision on review, two issues require consideration:
- (a) firstly, whether the Commission is satisfied that the scale and scope of the proposed supply of liquor is limited in nature; and
 - (b) secondly, whether the Commission should exercise its discretion under section 44(1) of the LCR Act to grant a renewable limited licence, having regard to the objects of the LCR Act, in particular harm minimisation, which is the primary object.

Limited in scale and scope

29. 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 licence is limited in nature, in accordance with section 26 of the LCR Act.



30. The Commission has carefully considered the evidence before it in the Review Application. The Commission notes that the scale and scope of the proposed supply of liquor has changed to what was proposed in the Original Application.
31. The Commission has had regard to the following aspects of the Review Application in considering whether the scale and scope of the supply of liquor the subject of the licence is limited in nature:
 - (a) the type and volume of liquor product that is to be supplied to patrons. The Applicant is seeking to supply a limited range of liquor produced within the local tourism region of High Country, and will impose a limitation per transaction of no more than two 750ml bottles of wine, twelve containers of beer, or a combination of one 750ml bottle of wine and six containers of beer;
 - (b) the hours and days of trading for the Premises. The Commission considers that the hours of trade proposed by the Applicant are reasonable for the business of serving lunch and dinner to patrons. The Commission also accepts that the proposed days of trading are sufficiently limited as to predominantly engage the tourism periods of school holidays and public holidays, as well as weekends across the year; and
 - (c) the proposed patron numbers for the Premises. While the Premises is on a large block of land (660 square metres), the Applicant expects that the maximum expected patrons during the above trading hours would not exceed 100 patrons. As noted above, the Applicant acknowledges that it can reapply for a different type of licence if its business grows, or apply for a temporary limited licence if it wishes to hold one-off events or functions that would exceed this maximum patron capacity.
32. The Commission is satisfied, having regard to the combination of matters above, together with the conditions in Appendix One, that in all the circumstances the proposed scale and scope of the supply of liquor the subject of the licence sought in the Review Application is limited in nature and therefore meets the requirement in section 26 of the LCR Act.

Grounds of refusal set out in section 44(2) of the LCR Act and general discretion

33. 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 the Review Application and whether to set aside the Original Decision and exercise its discretion to grant a renewable limited licence.
34. The Commission does not consider that any particular amenity concerns are likely to arise from the proposed supply of liquor at the Premises. The Commission has considered photographs of the proposed red line area, as well as the wider Premises and surrounding area. The Commission notes that the Premises are located in a primarily commercial area of the Glenrowan township.



While there are residential properties in proximity to the Premises that may be impacted by the grant of this Review Application, the Commission notes that it did not receive any objections from the local Council or members of the public. Further, the imposition of the standard amenity condition and a maximum capacity condition will assist in ensuring that excessive noise is not emitted from the Premises, which would likely reduce any potential impact on the amenity of the area.

35. The restrictions proposed by the Applicant as to hours of operation, the range of liquor that will be supplied and the number of patrons are able to be reflected in the conditions on the licence. Those conditions provide a measure of protection relevant to the amenity of the area.
36. The Commission notes that the Council and Victoria Police have not raised any objection to the licence application, and further notes that the partners of the Applicant have provided evidence of undertaking and successfully completing the relevant Responsible Service of Alcohol training and New Entrant Training.
37. Having regard to the objects of the LCR Act and the grounds for refusal identified in section 44(2) of the LCR Act, the Commission is satisfied that granting the Review Application would be consistent with those objects and appropriate in all the circumstances.

DECISION

38. After considering all the material before it, and taking into account all necessary considerations under the legislative framework, the Commission has determined to set aside the decision of the delegate and substitute a decision to grant the renewable limited licence subject to the conditions set out in Appendix One.

The preceding 38 paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy PSM, Chair, Ms Deirdre O'Donnell, Deputy Chair, and Mr Des Powell AM, Commissioner.

Appendix One

TYPE OF LICENCE

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

AMENITY

The licensee shall not cause or permit undue detriment to the amenity of the area to arise out of or in connection with the use of the premises to which the licence relates during or immediately after the trading hours authorised by this licence.

The licensee shall ensure that the level of noise emitted from the licensed premises shall not exceed the permissible noise levels for entertainment noise as specified in the State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.

SUPPLY OF LIQUOR

The supply of liquor is limited to liquor produced within the Victorian tourism region of High Country.

The quantity of liquor supplied for off-premises consumption must not exceed more than two 750ml bottles of wine, twelve containers (not more than 375ml per container) of beer, or a combination of one 750ml bottle of wine and six containers (not more than 375ml per container) of beer, per transaction.

MAXIMUM PATRON CAPACITY

100 patrons

TRADING HOURS

FOR CONSUMPTION OFF THE LICENSED PREMISES

Good Friday and Christmas Day	No trade
During Victorian & NSW Public School Holidays	Between 12 noon and 11pm
During Victorian & NSW Public Holidays	Between 12 noon and 11pm
On any other Friday, Saturday or Sunday	Between 12 noon and 10pm

FOR CONSUMPTION ON THE LICENSED PREMISES

During Victorian & NSW Public School Holidays	Between 12 noon and 11pm
During Victorian & NSW Public Holidays	Between 12 noon and 11pm
On any other Friday, Saturday or Sunday	Between 12 noon and 10pm