



DECISION AND REASONS FOR DECISION

In the matter of an application by Treasury Wine Estates Vintners Limited under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant a renewable limited licence for the premises located at Level 8, 161 Collins Street, Melbourne.

Commission: Mr Ross Kennedy PSM, Chair
Mr Des Powell AM, Commissioner
Mr Andrew Scott, Commissioner

Date of Decision: 28 July 2020

Date of Reasons: 28 July 2020

Counsel Assisting: Ms Karpaagam Shanmugam

Decision: The Commission has determined to affirm the decision of the Delegate and refuse to grant the application for a renewable limited licence.

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

Signed:

Ross Kennedy PSM

Chair



REASONS FOR DECISION

BACKGROUND

1. On 1 November 2019, Treasury Wine Estates Vintners Limited (the **Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) for a renewable limited licence in respect of the premises located at Level 8, 161 Collins Street, Melbourne (the **Premises**) (the **Original Application**).
2. In the Original Application, the Applicant sought to supply liquor to customers and small-scale retail outlets (e.g. restaurants and cafes). The Applicant proposed to supply liquor by telephone and online through 11 websites: www.cellardoor.co, www.wynns.com.au, www.saltramwines.com.au, www.penfolds.com, www.twedirect.com.au, www.coldstreamhills.com.au, www.seppelt.com.au, www.theblackgrapesociety.com, www.tgallant.com.au, www.wolfblass.com/en-au and www.devils-lair.com. The Applicant also sought to deliver liquor from 8 am to 10 pm, seven (7) days a week.
3. The Applicant proposed liquor will be limited to their product range, which comprises 45 established wine brands, however this list is not exhaustive. Further, the Applicant proposed to supply liquor without any limit of quantity and sought to provide wine as well as limited beers and spirits.
4. The Commission notes that the Applicant currently holds a renewable limited licence no. 36127397 (the **existing RLL**), which authorises the following in relation to supply of liquor on the Premises for off-premises consumption of the Applicant's product:

SUPPLY OF LIQUOR

- (a) *supply liquor on the licensed premises for consumption on and off the licensed premises*
- (b) *supply of liquor for consumption on or off the licensed premises is restricted to liquor produced by the licensee or a related body corporate of the licensee, liquor which is sold in Australia under brands owned or distributed by the licensee or a related body corporate of the licensee*

TRADING HOURS



- (c) *For consumption off the licensed premises Monday to Friday Between 12 midday and 8.30pm (excluding Good Friday, ANZAC Day & Christmas Day)*
- (d) *For consumption on the licensed premises by way of tastings – Monday to Friday Between 7am and 11pm (excluding Good Friday, ANZAC Day & Christmas Day)*
5. The Commission further notes that the existing RLL would permit online sale, however the delivery hours are more limited than the those sought by the Original Application.
6. The Original Application consisted of:
- (a) an application for Renewable limited licence, received 1 November 2019;
 - (b) a Liquor Licensing Questionnaire completed by the directors for the Applicant;
 - (c) declaration of right to occupy Level 8, 161 Collins Street, Melbourne; and
 - (d) certificates for the director of the Applicant: (1) Completion of Responsible Service of Alcohol Program and (2) Completion of New Entrant Training course dated 26 February 2020.
7. On 1 November 2019, in accordance with section 33(3) of the *Liquor Reform Control Act 1998* (the **LCR Act**), a copy of the Original Application was served upon the Chief Commissioner of Victoria Police. On 3 November 2019, Victoria Police informed the Commission it did not object to the grant of the Original Application.
8. On 1 November 2019, the Commission wrote to the Applicant seeking additional supporting documents and information regarding scale and scope of the activities of the business, with particular focus as to whether there would be any limitations on the quantity of liquor supplied, the product range and delivery hours.
9. On 28 November 2019, the Applicant wrote to the Commission with submissions addressing the limitations in scale and scope of the activities of the business, which can be summarised as follows:
- (a) The Applicant will only sell products it produces, or products marketed under the Applicant owned or licensed brands. The method of purchasing products will be through placing an order with one of the 11 online stores, referred at paragraph 2. The method of delivery will be direct delivery through the Applicant's delivery partner, Australia Post.



- (b) The Applicant requested that a condition proposed by the Commission, limiting the amount of liquor supplied to 48 bottles per transaction, per customer, per day, to be excluded. The Applicant noted the *“cap equated to only four dozen cases of wine, and that in many circumstances consumers are likely to want to order in excess of this amount through our online stores”*. Furthermore, the Applicant indicated that it was *“unsure as to the intent of the limit, or the effect it is trying to achieve, other than to require a customer to split and order across multiple transactions, which does not decrease or limit the volume purchased”*.
- (c) The Applicant submitted that it is *“continually exploring new sales opportunities and has started trialling new products that sit outside of the wine category”*. In terms of spirits, the Applicant has recently launched Squealing Pig Gin, and it is the only spirit produced by the Applicant. In terms of beer, the Applicant indicated that it does not produce any beer in Australia. However, the Applicant intends to produce its own beer *“at some point”*. The Applicant notes that it is *“very difficult to provide an estimation of... expected future sales of this product”*. Accordingly, the Applicant *“stress that the inclusion of the reference to beer and spirit to the proposed sale of products that... are non-core, experimental product lines”*.
- (d) The Applicant submitted that it accepts the standard set of delivery conditions proposed by the Commission, with one exception being to have the condition of the standard delivery start time of 9 am amended to 8 am. The Applicant noted that this amendment is to *“account for the fact that... Australia Post commences its delivery runs at 8 am and therefore may make deliveries... before 9 am”*. The Applicant also requested to remove the standard condition that liquor must not be delivered and left at unoccupied premises on same day the order is received. The Applicant noted that *“removing this condition as essential to avoid... being placed in inadvertent breach of its licence conditions due to the business practices of a third party over which [the Applicant] exercises no control”*.

10. On 28 February 2020, a delegate of the Commission (the **Delegate**) refused to grant the Original Application on the basis that the Delegate was not satisfied that the scale and scope of the supply of liquor is limited in nature (the **Original Decision**). Further, the Delegate did not consider the grant of a renewable limited licence for the scale of the proposed supply to be a responsible development of the liquor industry. Finally, the Delegate did not consider such a grant would reflect community expectations for a business operating under this licence type.

REVIEW APPLICATION



11. On 12 March 2020, the Applicant applied to the Commission for review of the Original Decision, and amended its application to include a condition to limit the quantity of liquor supplied to 48 bottles per transaction, per customer, per day (the **Review Application**).
12. On 17 June 2020, the Commission wrote to the Applicant to seek further submissions regarding how the Applicant proposes to limit the scale and scope of the supply of liquor for consumption off the Premises. In particular, the Commission noted that the existing RLL would permit online sale sought by the Review Application, however the hours were more limited than requested by the Review Application. Accordingly, the Commission proposed it would be open to the Applicant to seek a variation of the existing RLL. The Commission also noted on a preliminary view that the supply sought by the Review Application is akin to that permitted under a packaged liquor licence.
13. On 22 June 2020, the Applicant confirmed that it does not wish to make any further submissions regarding the Review Application and would like to proceed on the basis of what is currently before the Commission.

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission's internal review power

14. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the decision made by the Delegate in the Original Application is a reviewable decision and the Applicant is an eligible person to apply for the review of that decision. The Review Application was made pursuant to section 153 of the LCR Act.
15. 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 appropriate¹.

¹ 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.



16. 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 defined as:

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 no objections were 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).

18. In effect, the Commission on 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:

- (a) grant the renewable limited licence, and if so, whether to do so subject to conditions²; or
- (b) refuse to grant the application³.

Exercising the internal review power

19. 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 Act⁴.

20. The objects of the LCR Act are set out at section 4(1) and provide that:

The objects of this Act are—

- (a) *to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—*
 - (i) *providing adequate controls over the supply and consumption of liquor; and*

² LCR Act, sections 44, 49 and 157.

³ LCR Act, section 44 and 157.

⁴ VCGLR Act, section 9(3) and (4). The Commission considered and was satisfied as to the matters set out in the Decision-Making Guidelines relating to the assessment of the cumulative impact of licensed premises dated 7 June 2012, particularly as granting the Review Application with conditions would result in new licensed premises with a relatively small capacity and limited trading hours.



- (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.*

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

It is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act must be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol⁵.

22. The Minister's Decision-Making Guidelines titled 'Grant of Licences for the Sale of Packaged Liquor' (the **Guidelines**)⁶ 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 Commission does not consider that the Guidelines are relevant in this matter, as the Applicant is not seeking to supply packaged liquor outside the ordinary trading hours permitted for such supply.

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

- (a) must consider all the information, material and evidence before the original decision maker⁷;*
- (b) may consider further information or evidence⁸; and*

⁵ 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).

⁶ Minister's Decision-Making Guidelines, Grant of Licences for the Sale of Packaged Liquor, 7 June 2012.

⁷ LCR Act, section 157(2).

⁸ LCR Act, section 157(3).



(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.⁹

24. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.

25. The Commission considers that while the grounds of refusal outlined in section 44(2) of the LCR Act are relevant considerations, the determination of an uncontested application is ultimately to be made pursuant to section 44(1) and section 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.

26. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds, including 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.*

27. 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.

28. Section 26(1) 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.

Conduct of an inquiry

29. Section 34 of the VCGLR Act provides that, subject to that Act, gambling legislation or liquor legislation, the Commission may conduct an inquiry in any manner it considers appropriate.

30. Relevant provisions governing the conduct of an inquiry by the Commission in this matter are:

⁹ LCR Act, section 44(4).



(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

31. On review, the Commission had before it and considered all the materials received by the Delegate as referred to in paragraphs 2 to 7 above.

32. The Commission also had before it and considered additional information and evidence including:

(a) the Original Decision, dated 28 February 2020; and

(b) the Review Application received on 12 March 2020.

DETERMINATION OF THE REVIEW APPLICATION

Issues for determination on review

Whether the proposed supply of liquor is limited in scale and scope

33. As a preliminary matter, the Commission must consider whether the nature of the supply of liquor as proposed by the Applicant is limited in scale and scope as required by section 26(1) of the LCR



Act. As is made clear in that section, the Commission must not grant a limited licence if it is not satisfied that the scale and scope of the supply of liquor is limited in nature.

The Applicant's submission

34. The Applicant seeks to be able to supply liquor by telephone and online through 11 websites (as referred to in paragraph 2 above) for off-premises consumption. The Applicant proposes to restrict supply of liquor to liquor produced by the Applicant or a related body corporate of the Applicant, or liquor which is sold in Australia under brands owned or distributed by the Applicant or a related body corporate of the Applicant.
35. The Applicant seeks to deliver liquor from 8 am to 10 pm, seven (7) days a week. The Applicant has agreed to a condition being imposed on the licence for 48 bottles per transaction, per customer, per day.
36. Despite being invited by the Commission to propose further restrictions to the scale and scope of supply (as noted in paragraph 12 above), no further submissions were provided by the Applicant other than what was considered by the Delegate, as referred to in paragraphs 2 to 10 above.

The Commission's view

37. The Commission notes the Applicant's business model comprises 45 established wine brands, however the list is not exhaustive. The Applicant also seeks to provide wine as well as limited beers and spirits, however the Applicant is unable to provide an estimation of expected future sales of these products.
38. The Commission accepts that there are some restrictions to the proposed business model, such as a condition being imposed on the licence for 48 bottles per transaction, per customer, per day. However, the Commission considers that to supply liquor by telephone and online through 11 websites for off-premises consumption only constitutes a very minor limitation to the scale or scope of the supply of liquor. Further, the Commission does not consider the Review Application to be limited in scale and scope to an extent that it would be appropriate to grant a renewable limited licence.



39. In accordance with the matters set out above, the Commission is not satisfied the scale and scope of the proposed supply of liquor is limited in nature and has consequently determined to refuse to grant the Review Application.

40. On the basis that the Commission has determined to refuse to grant the licence that is the subject of the Review Application, it is not necessary to consider any other matters.

DECISION ON REVIEW

41. The Commission refers to the factors in paragraphs 33 to 40 in relation to scale and scope. The Commission is not satisfied that the Review Application meets the requirements of section 26(1) of the LCR Act and, in the circumstances, the Commission has determined to affirm the decision of the Delegate and refuse to grant the Review Application.

The preceding forty-one (41) paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy PSM (Chair), Mr Des Powell AM (Commissioner) and Mr Andrew Scott (Commissioner).