



DECISION AND REASONS FOR DECISION

In the matter of an application by Rachel Amy Russo and Amanda Jane Grumley under section 153 of the *Liquor Control Reform Act 1998* for an internal review of a decision to refuse to vary a renewable limited licence for the premises trading as Udder & Hoe located at 37 Victoria Road, Loch 3945.

Commission: Mr Ross Kennedy PSM, Chair
Ms Deirdre O'Donnell, Deputy Chair
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 set aside the decision of the Delegate and, in substitution, grant the variation to the renewable limited licence subject to the conditions set out in Appendix A.

A handwritten signature in black ink, appearing to read 'R Kennedy', written in a cursive style.

Signed:

Ross Kennedy PSM

Chair



REASONS FOR DECISION

BACKGROUND

The Original Application

1. On 23 October 2019, Rachel Amy Russo and Amanda Jane Grumley (the **Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) to vary its renewable limited licence no. 36147884 (the **Licence**) under section 29 of the *Liquor Control Reform Act 1998* (the **LCR Act**)¹ in respect of a premises located at 37 Victoria Road, Loch (the **Premises**) trading as Udder & Hoe (the **Original Application**)².
2. In the Original Application, the Applicant sought to vary the Licence to extend the original licensed area of the Premises (the **Red Line Plan**) and to change the type of supply of liquor to include for on-premises consumption. The Licence restricts supply of liquor to 18 lines of liquor produced within the Gippsland regions. The Licence originally authorised supply of liquor for off-premises consumption only during the following trading hours³:
 - (a) on any day other than Sunday, Good Friday, ANZAC Day or Christmas Day – Between 9 am and 11 pm;
 - (b) on Sunday – Between 10 am and 11 pm; and
 - (c) on ANZAC Day – Between 12 noon and 11 pm.(the **Original Conditions**).
3. The Original Application consisted of:
 - (a) a completed application for variation to an existing licence or permit, received 23 October 2019;
 - (b) a statement of display, dated 26 November 2019;
 - (c) photographs of the Premises;
 - (d) a plan or depiction of the Red Line Plan, approved by the Commission on 7 March 2018;
 - (e) a plan or depiction of the proposed licensed area, dated 28 November 2019 (the **Proposed Red Line Plan**); and

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

² Section 29(2) provides that a variation to a licence may include (b) a variation to the size or perimeter of the licensed premises and (c) a variation of a condition of the licence or permit.

³ The trading hours are similar to 'ordinary trading hours' as defined under section 3(1) of the LCR Act.



- (f) a submission prepared by the Applicant addressing the 'scale and scope'⁴ requirement in support of the Original Application, dated 28 November 2019.
4. On 23 October 2019, a copy of the Original Application was served on Victoria Police in accordance with section 33(1) of the LCR Act, and to the South Gippsland Shire Council under section 33(2) of the LCR Act. On 15 November 2019, the South Gippsland Shire Council advised it did not object to the grant of the Original Application. On 18 November 2019, Victoria Police advised the Commission that it did not object to the grant of the Original Application.
5. The submission from the Applicant dated 28 November 2019, stated that *“supply of liquor will continue to be limited to 18 lines of liquor that is produced in the Gippsland wine region... this therefore meets the criteria of limited in its nature and scope.”* The submission also stated that *“the current licence allows off the premises consumption, there would be nothing in the legislation that would have prevented the applicant from setting up an area of the premises outside of the current licensed area and allow patrons to consume their limited type of alcohol in that area. This application merely seeks to allow more transparency and a more formalised area.”*
6. On 6 December 2019, 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 for the following reasons:
- (a) The Applicant maintain that the existing limitation of 18 lines of liquor produced in the Gippsland regions *“meets the criteria of limited in its nature and scope”*, despite seeking to extend the licensed area of the Red Line Plan to include an outdoor area and to allow for supply of liquor for consumption of liquor on the licensed premises.
- (b) If the Original Application were to be granted the resulting licence would enable the Applicant to supply liquor for consumption both on and off the Premises, seven (7) days a week for a full range of trading hours. Accordingly, the scope of licensed activity is not too dissimilar to that of a general licence.

(the **Original Decision**).

The Review Application

7. On 17 December 2019, the Applicant applied for an internal review of the Original Decision (the **Review Application**). The Applicant submitted the Delegate had *“failed to consider the type, style and location of the business, and the extend (sic) of alcoholic items that are for sale.”* Furthermore, the Applicant submitted the Delegate had *“failed to appropriately consider the restrictions that are*

⁴ See section 26 of the LCR Act



currently placed on the licence, that will continue to restrict the extent of what can be sold and that those restriction (sic) are consistent with the limits of scale and scope that would continue to be present should this application be granted.”

8. On 3 January 2020, a copy of the Review Application was served on Victoria Police in accordance with section 33(1) of the LCR Act, and to the South Gippsland Shire Council under section 33(2) of the LCR Act. On 6 January 2020, Victoria Police advised the Commission that it did not object to the grant of the Review Application. On 13 January 2020, the South Gippsland Shire Council advised the Commission that it did not object to the grant of the Review Application.
9. The Applicant confirmed to the Commission on 17 March 2020 that the Applicant was agreeable to the Commission determining the matter ‘on the papers’ without the need to attend a hearing.
10. On 22 April 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 both on-premises and off-premises. In particular, the Commission sought the Applicant’s submission regarding the proposed trading hours for supply of liquor for both on-premises and off-premises consumption of liquor and whether it proposed any change to these in light of the Original Decision.
11. On 24 April 2020, the Applicant requested to amend the Review Application to reflect the following proposed reduced trading hours:
 - i. On-premises consumption: on any day between 12 noon and 10 pm; and
 - ii. Off-premises consumption: ANZAC Day between 12 noon and 7 pm; and on any other day (other than Christmas Day and Good Friday) between 10 am and 7 pm (the **Amended Review Application**)⁵.
12. On 30 June 2020, the Commission requested the Applicant provide a copy of a planning permit or an occupancy certificate or a building surveyor report to assist in assessing the maximum patron capacity for the Premises. The Commission noted to the Applicant that where on-premises consumption is to occur then patron capacity of the premises is a relevant consideration for a renewable limited licence – both in terms of harm minimisation and amenity considerations, as well as in relation to the scale and scope of the proposed supply of liquor. The Applicant confirmed it did not have the above requested documentation. Accordingly, the Commission requested that the Applicant submit the Proposed Red Line Plan with measurements to enable the floor area to be calculated to assist in the determination of an appropriate patron capacity for the Premises.

⁵ Pursuant to section 48(a) of the LCR Act the Commission permitted the amendment to the Review Application.



The Applicant was also informed that the maximum patron capacity may be assessed against a standard ratio of one person per 0.75 metres squared⁶.

13. On 1 July 2020, the Applicant provided a copy of the Proposed Red Line Plan with measurements for the Commission's consideration.
14. On 13 July 2020, the Commission informed the Applicant that on its calculation, based on the standard ratio of one person per 0.75 metres squared, the patron capacity of the internal area of the Premises could be up to 62 patrons, and the patron capacity of the external courtyard could be up to 60 patrons. Given the quite large potential patron capacity, the the Commission sought submissions from the Applicant regarding the number of patrons to whom they are seeking to be permitted to supply liquor for on-premises consumption, with reference to the scale and scope requirement.
15. On the same day, the Applicant confirmed it would consent to a reduction of the maximum patron capacity to 40 patrons for each of the internal and external (Courtyard) areas. The Applicant also submitted that the *"continuing restriction to Gippsland regional products satisfies the Commission's requirements of limited in scale and scope"*.

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission's internal review power

16. 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.
17. 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 appropriate⁷.
18. 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:

⁶ https://www.vcglr.vic.gov.au/sites/default/files/fact_sheet_maximum_patron_capacity.pdf

⁷ 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.



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)⁸.

19. 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)⁹; or
 - (b) refuse to grant the application¹⁰.

Exercising the internal review power

20. 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 Act¹¹.

21. 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.*

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

⁸ 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)*”.

⁹ LCR Act, sections 44, 49 and 157.

¹⁰ LCR Act, section 44 and 157.

¹¹ VCGLR Act, sections 9(3) and (4).



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 alcohol¹².

23. The Minister's Decision-Making Guidelines titled 'Grant of Licences for the Sale of Packaged Liquor' (the **Guidelines**)¹³ 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.
24. In exercising the internal review power, the Commission:
 - (a) must consider all the information, material and evidence before the original decision maker¹⁴;
 - (b) may consider further information or evidence¹⁵; 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 application¹⁶.
25. 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.
26. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
27. 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).
28. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds, including that:

¹² 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).

¹³ Minister's Decision-Making Guidelines, Grant of Licences for the Sale of Packaged Liquor, 7 June 2012.

¹⁴ LCR Act, section 157(2).

¹⁵ LCR Act, section 157(3).

¹⁶ LCR Act, section 44(4).



- 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.

29. 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

30. Section 34 of the VCGLR Act provides that, subject to that Act, gambling legislation or liquor legislation, the Commission may conduct any inquiry in any manner it considers appropriate. Relevant provisions governing the conduct of an inquiry by the Commission in this matter include:

(a) section 33 of the VCGLR Act, which provides, inter alia:

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

...

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

(b) section 25(3) of the VCGLR Act, which provides:

“In performing a function or duty the Commission—

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

(b) is bound by the rules of natural justice.”

MATERIAL BEFORE THE COMMISSION

31. The Commission on review had before it and considered all materials received by the Delegate as referred to in paragraphs 3 above.

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



- (a) the Original Decision, dated 23 October 2019;
- (b) the Review Application received on 17 December 2019 including an 8-page submission by the Applicant; and
- (c) the Amended Review Application received on 24 April 2020 to reflect reduced trading hours at the Premises.

DETERMINATION OF THE AMENDED REVIEW APPLICATION

Issues for determination

33. In making its decision on review, the matters for the Commission to consider are as follows:
- (a) 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;
 - (b) whether the Commission should exercise its discretion under section 44(1) of the LCR Act to grant the variation to the renewable limited licence, having regard to the objects of the LCR Act, with particular regard to the object of harm minimisation¹⁷.

Limited in scale and scope

34. As referred to in paragraph 24 above, pursuant to section 26(1) of the LCR Act, the Commission may only grant a renewable limited licence if satisfied that the scale and scope of the supply of liquor is limited in nature.

The Applicant's submission

35. The Applicant submitted that its business model is dedicated to showcasing produce (food as well as alcohol) from the Gippsland regions. The produce showcased is from local Gippsland farms and businesses that are self-sufficient, sustainable, and use traditional and organic farming methods. The Applicant stated that food represents the majority of sales from the Premises.
36. The Applicant submitted that the restriction of 18 lines of liquor from the Gippsland regions on the Licence is a significant limitation in relation to the scale and scope of the supply of liquor. The Applicant noted that Gippsland is a wine region, with only a small number of boutique beer and cider breweries. Accordingly, there is no opportunity for the Applicant to supply spirits, as they are simply not produced in the regions. The Applicant stated that they currently supply 15

¹⁷ See paragraph 16. The Commission notes in determining this matter, it has also considered each of the other grounds set out in section 44(2) of the LCR Act.



products (i.e. 1 sparkling wine, 3 white wines, 1 rose wine, 3 red wines, 2 cider products and 5 beer products) produced within the Gippsland regions.

37. The Applicant also submitted that whilst the trading hours that were contained in the Original Application were similar to those of a general licence, they still were in fact restricted compared to a general licence's ordinary trading hours. Further, as referred to in paragraph 10 above, the proposed trading hours for the supply of liquor for consumption on the Premises were reduced in the Amended Review Application.

The Commission's view

38. The Commission has carefully considered the evidence before it in the Review Application and notes that the scale and scope of the proposed supply of liquor has changed to what was proposed in the Original Application.
39. The Commission considers the Applicant's business model to be boutique in nature as it is dedicated to showcasing local food and alcohol from the Gippsland regions. The Commission finds that the restriction of 18 product lines of liquor produced within the Gippsland regions is a limitation in relation to the scale and scope of the supply of liquor.
40. The Commission also considers that the size of the licensed area of the Premises further acts to restrict the potential scale of the supply of liquor, with the Proposed Red Line Plan depicting the relatively small space in which the Applicant intends to supply liquor for consumption both on and off the licensed premises. Further, it is likely that a large portion of the potential customers at the Premises are more likely to be tourists visiting the Gippsland regions.
41. As referred to in paragraphs 12-15 above, the Applicant has proposed to limit the maximum patron capacity to a total of 40 patrons for both the internal and external (Courtyard) area. The Commission finds that this proposed patron limit, along with the limited lines of liquor being offered during the operating hours set out in the Amended Review Application, together support the view that the scale and scope of the supply of liquor proposed is limited for the purpose of section 26 of the LCR Act.
42. The Commission also notes that the Amended Review Application involves a reduction to the existing trading hours for supply of liquor for off-premises consumption by some 5 hours per day¹⁸. It also involves a reduction to the trading hours proposed for supply of liquor for on-premises consumption compared to those proposed in the Original Application, commencing at 12 noon instead of 9 am and ending at 10 pm instead of 11 pm. The Commission considers that the hours

¹⁸ The Applicant is seeking to vary the trading hours for supply of liquor for off-premises consumption to 10 am to 7 pm, whereas it was previously 9 am to 11pm.



of trade proposed by the Application are reasonable for the business serving lunch and dinner and limited liquor lines of liquor from the local area.

43. For the reasons detailed above, the Commission is satisfied that the scale and scope of the supply of liquor the subject of the variation to the Licence sought in the Amended Review Application is limited in nature, should the proposed limitations be enforced as conditions upon a licence. Accordingly, the Commission finds that the Amended Review Application meets the scale and scope requirement of section 26 of the LCR Act.

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

44. The Commission notes no amenity concerns were raised by the public, Victoria Police, South Gippsland Shire Council or any other persons regarding the current supply of liquor at the Premises or that which is proposed in accordance with the Amended Review Application. The Commission also notes the proposed trading hours for supply of liquor for on-premises consumption are less than ordinary trading hours for a restaurant and cafe licence.
45. The Commission also notes there is no evidence to indicate that the supply of liquor at the Premises and the Proposed Red Line Plan will increase the risk of misuse and abuse of alcohol at the Premises. It is also noted that the Applicant has held the Licence since 7 March 2018 with a good compliance history. Accordingly, the Commission does not consider that there is a ground to refuse the Amended Review Application under section 44(2)(b)(ii) of the LCR Act.
46. The Commission is satisfied that having regard to the grounds for refusal set out in section 44(2) of the LCR Act and to the objects of the LCR Act, particularly the harm minimisation object, granting the Amended Review Application would be consistent with those objects and appropriate in all the circumstances.

DECISION ON REVIEW

47. After considering all the material before it, and taking into account the necessary considerations under the legislative framework, the Commission is satisfied that the Amended Review Application meets the requirements of section 26(1) of the LCR Act and, in the circumstances, the Commission has determined to vary the decision of the Delegate and grant the Review Application subject to the conditions set out in Appendix A.

The preceding forty-seven (47) paragraphs are a true copy of the decision and reasons for decision of Mr Ross Kennedy PSM (Chair), Ms Deirdre O'Donnell (Deputy Chair) and Mr Andrew Scott, (Commissioner).

Appendix A

Renewable Limited Licence

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 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 under 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 shall be limited to no more than 18 lines of liquor.

The supply of liquor shall be limited to liquor produced in the Gippsland regions.

MAXIMUM CAPACITY (LICENSED PREMISES)

40 patrons for both the internal and external (Courtyard) areas.

TRADING HOURS – FOR ON PREMISES CONSUMPTION

On any day	Between 12 noon and 10 p.m.
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TRADING HOURS – FOR OFF PREMISES CONSUMPTION

On ANZAC Day	Between 12 noon and 7 p.m.
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On any other day	Between 10 a.m. and 7 p.m.
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Christmas Day and Good Friday	No trade
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