Victorian Commission for Gambling and Liquor Regulation

# DECISION AND REASONS FOR DECISION

In the matter of an application by The Space Dance and Arts Centre Pty Ltd 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 located at 1 Carlton Street, Prahran

**Commission:** Mr Ross Kennedy, Chair
Ms Helen Versey, Deputy Chair
Ms Deirdre O'Donnell, Deputy Chair

**Date of Hearing** 1 March 2018

**Date of Decision:** 12 April 2018

**Date of Reasons:** 12 April 2018

**Appearances:** Mr Ariel Bud and Ms Deborah Cantoni, directors of the Applicant

Ms Caitlin McAlister as Counsel Assisting the Commission

**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

Victorian Commission for Gambling and Liquor Regulation

# REASONS FOR DECISION

## BACKGROUND

1. On 28 August 2017, The Space Dance and Arts Centre Pty Ltd (the **Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) for a renewable limited licence (the **Original Application**) under the *Liquor Control Reform Act 1998* (**LCR Act**)[1] in relation to premises located at 1 Carlton Street, Prahran (the **Premises**).[2]

2. The Applicant has previously applied for and been granted a number of temporary limited licences to operate events at the Premises. The Applicant now seeks a renewable limited licence to supply liquor at pre-organised functions held each year at the Premises.

3. At the time of making the Original Application, the Applicant sought trading hours from Monday to Sunday between 6 pm and 1 am the following morning.

4. The Applicant also sought to be permitted to supply a maximum number of alcohol products in the sum of no less than:

   (a) six wine products;

   (b) six beer and cider products; and

   (c) three spirit products at a "basic event", or ten spirits at a "cocktail function".

Objections to the Original Application

5. On 28 August 2017, a copy of the Original Application was forwarded to Victoria Police in accordance with section 33(1). Victoria Police advised the Commission on 7 September 2017 that it did not object to the grant of the Original Application.

6. On 28 August 2017, a copy of the Original Application was forwarded to the Stonnington City Council (the **Council**) in accordance with section 33(2). The Council advised the Commission on 8 September 2017 that it did object to the grant of the Original Application on the basis of amenity grounds (the **Objection**). In particular, the Council raised concern that there was a potential for a negative impact on amenity considering there was no proposed maximum patron number and no proposed maximum number of functions to be held each year at the Premises.

7. The Commission received submissions from the Applicant in response to the Objection. In summary, the Applicant submitted that:

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

[2] When lodging the Original Application, the Applicant also sought permanent approval from the Commission to permit section 120 persons under the age of 18 years to be on the Premises the subject of the Original Application other than in the company of a responsible adult.

(a) patrons will be directed to leave in a quiet and orderly manner;

(b) the existing planning permit that applies to the Premises already specifies a maximum patron number;

(c) while functions at the Premises will be regular, they will not be daily;

(d) alcohol will not be supplied in the absence of a specific event/function; and

(e) the number of alcohol products to be offered will be limited as set out in paragraph 4 above.

8. On 14 December 2017, 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 proposed limitation of trading hours and days, and the types of proposed functions, sufficiently limit the scale and scope of the supply of liquor; and

(b) he was not satisfied that the Applicant's proposed restrictions as to the supply of liquor constitute a meaningful limitation (the **Original Decision**).

9. On 2 January 2018, the Applicant applied for an internal review of the Original Decision (the **Review Application**).

## LEGISLATION AND THE TASK BEFORE THE COMMISSION

10. Under the LCR Act, an application for the grant of a licence may be contested or uncontested. Pursuant to section 3(1), a contested application relevantly includes "*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)*".[3]

11. In this matter, the Original Application was contested and it remains contested on review.

12. The Original Decision is a reviewable decision and the Applicant is an eligible person under Division 2 of Part 9. The Review Application is made pursuant to section 153.

13. 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

[3] Conversely, an "uncontested 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 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)*".

(b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.

14. In effect, the Commission, on internal review, stands in the shoes of the original decision maker and makes a fresh decision with respect to the Original Application. In doing so, it must consider all the information, material and evidence before the original decision maker.[4] It may also consider further information, material or evidence as part of making its decision.[5]

Conduct of an inquiry

15. Section 34 of the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (**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."*

Determination of a contested application

16. Where an application is a contested application, pursuant to section 47(1):

> *"Subject to Division 3, the Commission must, after the period for making an objection under Division 5 has expired, including any extension of time granted for making an objection, grant or refuse a contested application."*

17. Section 47(3), provides that before granting or refusing a contested application under subsection (1), the Commission:

> *"(a) may have regard to any matter the Commission considers relevant; and*

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4 Section 157(2).
5 See section 157(3).

*(b) may make any enquiries the Commission considers appropriate; and*

*(c) must give the applicant and each objector a reasonable opportunity to be heard."*

18. Section 9(3) of the 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."*[6]

19. 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."*[7]

20. Accordingly, in exercising its discretion to either grant or refuse a contested application under section 47(1), 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—*
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> *(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*
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> *(iii) restricting the supply of certain other alcoholic products; and*
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> *(iv) encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and*
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> *(b) to facilitate the development of a diversity of licensed facilities reflecting community expectations; and*
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> *(c) to contribute to the responsible development of the liquor, licensed hospitality and live music industries; and*
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> *(d) to regulate licensed premises that provide sexually explicit entertainment."*

21. 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."*

22. 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

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

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

object of the Act and therefore the primary consideration in liquor licensing decisions".[8] 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".[9]

23. Pursuant to sections 47(2) and 44(2)(b), the Commission may refuse to grant an application on the following relevant grounds:

    (a) 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;[10]

    (b) that the granting of the application would be conducive to or encourage the misuse and abuse of alcohol;[11] or

    (c) that the application has not been made, displayed or advertised in accordance with the LCR Act.[12]

24. The Commission considers that while the grounds outlined in section 44(2) provide relevant criteria for consideration, specifying as they do bases upon which a refusal to grant an application may be made, the ultimate determination of the application is made pursuant to section 47(1) with reference to the objects of the LCR Act.

Amenity

25. According to section 3A, the amenity of an area for the purposes of the LCR Act is the quality that the area has of being pleasant and agreeable. Factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area include:

    (a) the presence or absence of parking facilities;

    (b) traffic movement and density;

    (c) noise levels;

    (d) the possibility of nuisance or vandalism;

    (e) the harmony and coherence of the environment; and

    (f) any other prescribed matters.[13]

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8 See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.
9 See *Kordister* [2012] VSCA 325, at [188] per Tate JA.
10 Section 44(2)(b)(i).
11 Section 44(2)(b)(ii).
12 Section 44(2)(b)(v).
13 Section 3A(2).

Limited licences

26. A limited licence may be a temporary limited licence or a renewable limited licence (a **RLL**). Pursuant to section 14(1B) of the LCR Act, a RLL 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.

27. 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**

28. The Commission on review had before it, and considered, all of the materials before the delegate, including:

    (a) the Original Application, which contained:

        i. completed questionnaires from each director of the Applicant, namely Mr Ariel Bud and Ms Deborah Cantoni;

        ii. copies of certificates evidencing that Mr Ariel Bud completed the New Entrant Training (**NET**) course on 4 August 2017 and an approved responsible service of alcohol (**RSA**) course on 13 May 2014 and 9 May 2017;

        iii. a copy of a certificate evidencing that Ms Deborah Cantoni completed the RSA course on 13 March 2014 and 30 March 2017;

        iv. certificate of registration of the Applicant's business; and

        v. plans of the Premises depicting the proposed licensed area;

    (b) application form for permanent approval to permit section 120 persons under the age of 18 years to be on the Premises other than in the company of a responsible adult;

    (c) a Declaration of Right to Occupy dated 21 August 2017;

    (d) the commercial lease agreement for the Premises;

    (e) a written submission by the Applicant in support of the Original Application, dated 31 August 2017;

    (f) a Victoria Police notification of 7 September 2017, advising that it does not object to the Original Application;

(g) a letter from the Council, dated 8 September 2017, outlining the Objection;

(h) a written submission from the Applicant, dated 18 September 2017, in response to the Objection;

(i) the planning permit for the Premises issued by the Council on 25 November 2004; and

(j) a Statement of Display, dated 14 November 2017.

29. The Commission on review also received the following documents:

(a) the decision and reasons for decision of the delegate in relation to the Original Application, dated 14 December 2017;

(b) the Review Application, dated 2 January 2018, including a covering letter; and

(c) a letter from the Council, dated 24 January 2018, confirming that it maintains the Objection.

**THE HEARING**

30. The Commission conducted a public inquiry on 1 March 2018 to consider the Review Application (the **Hearing**). The Applicant was represented by its directors, Mr Ariel Bud and Ms Deborah Cantoni. The Council was not present, having previously informed the Commission that it would not be appearing at the Hearing.

31. At the Hearing, the Applicant confirmed that while it still sought a RLL, the proposed conditions in the Review Application had substantially changed from the Original Application. In particular, the proposed conditions in the Review Application included:

(a) no more than seven alcohol products to be offered comprising of two types of beer, one type of cider, two types of wine, one type of champagne and one type of spirit;

(b) a maximum of 42 functions per year;

(c) trading hours to be from Wednesday to Sunday between 6 pm and 1 am the following morning; and

(d) all functions would be pre-organised and exclusively for persons who have pre-purchased tickets.

32. Mr Bud and Ms Cantoni gave evidence that:

(a) they have an increase in demand for dance performance parties, and they have demonstrated experience and capability in holding specific events/functions at the Premises;

(b) they do not intend to supply alcohol for just any person walking in off the street. Instead, all functions will be private and pre-ticketed. They have a door-list and two security staff members monitoring the entrance and exit of the Premises to ensure liquor is not removed from the Premises;

(c) the red-line plan includes the whole of the Premises because they have contemporary dance performances, in which the performance starts in one room and travels through to the rest of the rooms on the Premises before ending up in the ballroom;

(d) the proposed final trading hour is 1 am because they require more time to cater for increasingly popular events such as tango parties, which do not just involve dance performances, but socialising too. A final trading hour of 1 am provides more flexibility;

(e) while they do offer dance classes and ancillary activities at the Premises for persons under the age of 18 years, no alcohol will be supplied or consumed on the Premises when such classes/activities are in session;

(f) liquor would not be stored on-site. Rather, they purchase liquor as needed for functions from the local liquor store; and

(g) functions at the Premises will involve 'partner dancing' which is not conducive to drunk people.

33. The Applicant referred to the RLL issued to Jason Coleman's Ministry of Dance Pty Ltd, which operates in North Melbourne, and submitted that this was similar to the arrangement sought by this Review Application. Of particular relevance, a special condition of the RLL issued to Jason Coleman's Ministry of Dance Pty Ltd is that "supply of liquor is restricted to patrons holding a ticket or who have paid an entry fee to a performance/specific event at the Jason Coleman Ministry of Dance". This is consistent with the Applicant's proposed condition specified in paragraph 31(d) above.

34. While the Applicant had proposed a condition of a maximum of 42 functions per year as set out in paragraph 31(b) above, Mr Bud indicated in the Hearing that he could not specify a reason as to why that figure would be essential, and gave evidence that an alternative maximum of 30 per year would be acceptable. The Applicant acknowledged in the Review Application that the Commission must be satisfied that the scale and scope of the supply of liquor the subject of the proposed licence will be limited in nature.

**ISSUES FOR DETERMINATION**

35. In order for the Commission to make its decision, several issues require consideration:

(a) Whether granting the application for the RLL would detract from or be detrimental to the amenity of the area in which the Premises are situated;

(b) Whether granting the application for the RLL would be conducive to or encourage the misuse or abuse of alcohol;

(c) Whether the scale and scope of the supply of liquor the subject of the proposed RLL is limited in nature; and

(d) Having considered the previous issues, whether the application for the RLL should be granted or refused, having regard to the objects of the LCR Act.

36. Each of these issues is discussed in turn.

**Amenity and risk of misuse or abuse of alcohol**

37. The Commission acknowledges there is always potential for a negative impact on amenity or the risk of harm arising out of the operation of a liquor licence. However, after considering all the evidence before it, the Commission is not satisfied that there is specific evidence to suggest that granting a RLL for the Premises will impact negatively on the amenity of the area or pose an unacceptable risk of harm.

38. The Commission notes that the Applicant has proposed restrictions as to hours of operation and number of permitted functions. These conditions have been set out in Appendix One. The Commission also acknowledges that restrictions are in place under the planning scheme for the Premises as to maximum patron capacity and permissible music levels. The Commission is satisfied that the conditions as specified in Appendix One (together with all requirements of the planning scheme) provide measures of protection relevant to the amenity of the area.

39. The conditions in Appendix One would also constrain the Applicant to private functions when supplying liquor. This will reduce the risk profile of the supply of liquor that can occur under the limited licence, thereby assisting in the minimisation of amenity concerns and risk of misuse or abuse with supply of liquor. In addition, the planning scheme includes a condition for the Applicant to display a sign at the exit of the Premises advising patrons to respect the amenity of residential areas and leave in a quiet and orderly manner.

40. The Commission acknowledges the proximity of the Premises to Chapel Street where there is existing levels of late night pedestrian traffic, and the appropriate management measures as proposed by the Applicant relevant to security, including door-lists and security staff. In addition, the Commission notes that while the Applicant provides dance classes and ancillary activities at the Premises for persons under 18 years of age, no alcohol will be supplied on the Premises

when persons under the age of 18 years are present.[14] Nor will the Premises be used to provide for the storage of liquor outside occasions of pre-booked functions.

41. The Commission is satisfied that the conditions as set out in Appendix One provide (in their totality) a suitable framework for the appropriate management and control of the supply of liquor under the limited licence. The Commission also relies on the relevant experience of the Applicant in coordinating and conducting similar events in the past at the Premises. The Commission notes it has no evidence before it of any breaches of licence conditions by the Applicant or offences under the LCR Act.

**Limited scale and scope of liquor supply**

42. As discussed in paragraph 27 above, the Commission must be satisfied that the scale and scope of the supply of liquor the subject of the proposed licence is limited in nature.

43. Having regard to the proposed conditions in the Review Application (which had substantially changed from the Original Application) together with the conditions in Appendix One, the Commission is satisfied, in all the circumstances, that the scale and scope of the supply of liquor under the licence is sufficiently limited in nature.

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

44. After considering all the material before it, and taking into account all considerations necessary (in particular, the object under section 4(1)(a) concerning minimisation of harm from the misuse or abuse of alcohol and balanced against the objects under sections 4(1)(b) and (c) regarding the development of a diversity of licensed facilities and the responsible development of the licensed hospitality industry), the Commission has determined to grant the Review Application for a RLL subject to the conditions set out in Appendix One.

**DECISION**

45. The Commission has determined to grant the Review Application for a RLL subject to the conditions set out in Appendix One.

***The preceding 45 paragraphs are a true copy of the Reasons for Decision of Mr Ross Kennedy, Chair, Ms Helen Versey, Deputy Chair and Ms Deirdre O'Donnell, Deputy Chair.***

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[14] Appendix One includes an approval to permit persons under the age of 18 years on the Premises other than in the company of a responsible adult for the purposes connected to dance classes and ancillary activities except for occasions of pre-booked functions when liquor is permitted to be supplied, consumed or made available (see footnote 2 above). For the avoidance of doubt, under the licence, no liquor is permitted to be supplied, consumed or made available on the Premises when persons under 18 years of age are present.

## 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 the licenced premises during the trading hours and in the manner specified below.

AMENITY

The licensee will 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 where the supply and consumption of liquor occurs under this licence during or immediately after the trading hours authorised by this licence.

SUPPLY OF LIQUOR

This licence authorises the licensee to supply liquor for consumption at pre-booked functions only at The Space Dance and Arts Centre.

Liquor must not be removed from the licensed area.

Liquor is not permitted to be supplied, consumed or made available in the licensed area when persons under 18 years of age are present.

The licensee must not use the licenced premises to provide for the storage of liquor outside occasions of pre-booked functions.

RESPONSIBLE SERVICE OF ALCOHOL

All staff involved in the service of liquor on the licensed premises must have completed an approved Responsible Service of Alcohol course within the preceding three years.

All copies of the RSA certificate for each member of staff must be at one central place within the licensed area for inspection if requested by a member of Victoria Police or a VCGLR inspector.

TRADING HOURS FOR CONSUMPTION ON THE LICENSED PREMISES

| | |
|---|---|
| On any day between Wednesday to Sunday: | Between 6 pm and 1 am the following morning. |

SPECIAL CONDITIONS

The quantity of liquor to be served must not exceed two (2) containers or opened cans, per customer, per time.

The range of liquor supplied on the premises is restricted to two (2) types of beer, one (1) type of cider, two (2) types of wine, one (1) type of champagne and one (1) type of spirit.

This licence permits the supply of liquor on no more than thirty (30) occasions per year. A register of pre-booked functions must be kept by the licensee within the licensed area for inspection if requested by a member of Victoria Police or a VCGLR inspector.

The supply of liquor is restricted to patrons holding a ticket to a performance/specific function at The Space Dance and Arts Centre.

APPROVAL/CONSENT

Except for occasions of pre-booked functions at The Space Dance and Arts Centre when liquor is permitted to be supplied, consumed or made available in the licensed area, Section 120 Persons under the age of 18 years are permitted on the licensed premises other than in the company of a responsible adult for the purposes connected to dance classes, auditions and ancillary activities on any day between the hours of 7 am and 11 pm. [Nothing in this approval affects the condition above that liquor is not permitted to be supplied, consumed or made available in the licenced area when persons under 18 years of age are present].

OTHER

To the extent that a matter is not already dealt with in this licence, it is a condition of this licence that the licensee comply with all requirements of the planning scheme that applies to the licensed premises under the *Planning and Environment Act 1987.*