



DECISION AND REASONS FOR DECISION

In the matter of an application by Ornate Banquets Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to refuse to grant a restaurant and cafe licence for the premises trading as Ornate Banquets, located at 16 Rushwood Drive, Craigieburn.

Commission:

Ms Deirdre O'Donnell, Deputy Chair

Ms Danielle Huntersmith, Commissioner

Mr Andrew Scott, Commissioner

Date of Hearing

18 August 2020

Date of Decision:

16 November 2020

Date of Reasons:

16 November 2020

Appearances:

Mr Rob Steane of Liquor Consultancy Services for the Applicant

Ms Caitlin McAlister, Counsel Assisting the Commission

Decision:

The Commission has determined to set aside the decision of the Delegate and, in substitution, grant a restaurant and cafe licence subject to the conditions outlined in Appendix A.

Signed:

A handwritten signature in black ink, appearing to read 'Deirdre O'Donnell'.

Deirdre O'Donnell

Deputy Chair



BACKGROUND

1. On 11 March 2020, Ornate Banquets Pty Ltd (**Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) for a restaurant and cafe licence for the premises trading as Ornate Banquets, located at 16 Rushwood Drive, Craigieburn (**Premises**) (**Original Application**).
2. Relevantly, the Original Application sought a restaurant and cafe licence with a maximum patron capacity of 63 patrons between Monday to Friday after 6pm, and 80 patrons on Saturday and Sunday, with the following trading hours:

Good Friday and ANZAC Day	Between 12 noon and 11pm
Sunday	Between 10am and 11pm
On any other day	Between 7am and 11pm

3. In accordance with section 33(1) of the *Liquor Control Reform Act 1998* (**LCR Act**),¹ a copy of the Original Application was served on the Chief Commissioner of Police (**Victoria Police**) on 31 March 2020. On 16 April 2020, Victoria Police indicated that they did not object to the Original Application.
4. In accordance with section 33(2) of the LCR Act, a copy of the Original Application was served on Hume City Council (**Council**) on 31 March 2020. Council did not respond.
5. On 12 May 2020, a delegate of the Commission (**Delegate**) determined to refuse to grant the Original Application (**Original Decision**). In summary, the Delegate was of the view that the primary purpose of the Applicant's business was as a pre-booked function centre, and therefore would not satisfy the predominant activity test specified in section 9A(1), and be a venue open to the general public. As such, the Delegate considered the Original Application was not made in accordance with the LCR Act.²

Application for Internal Review

6. On 13 May 2020, the Applicant applied for internal review of the Original Decision to refuse to grant the restaurant and cafe licence (**Review Application**).
7. On 26 May 2020, the Commission served a copy of the Review Application on Victoria Police and sought to confirm if Victoria Police maintained its position of 'no objection'. Victoria Police confirmed that it did not object to the grant of the Original Application.

¹ All references to sections in this decision are references to sections of the LCR Act, unless otherwise indicated.

² Section 44(2)(b)(v).



LEGISLATION AND THE COMMISSION'S TASK

The Commission's internal review power

8. 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.
9. Pursuant to section 157(1), the specific task of the Commission with respect to the Review Application is to make a fresh decision that:
 - (a) affirms or varies the reviewable decision; or
 - (b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.³
10. Under the LCR Act, an application for the grant of a licence may be contested or uncontested. Section 3(1) of the LCR Act defines an "uncontested application" 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).⁴
11. On the basis of having received no objections in relation to the Original Decision, the matter before the Commission on review is therefore uncontested.
12. The Commission on review stands in the shoes of the original decision maker (in this case, the Delegate) and, in respect of an uncontested application, must either:
 - (a) grant the application (and may do so subject to conditions);⁵ or
 - (b) refuse to grant the application.⁶

Exercising the internal review power

13. Section 9 of the *Victorian Commission for Gambling and Liquor Regulation Act (VCGLR Act)* requires the Commission, in exercising its internal review function, to have regard to the objects

³ Sections 157(2) to (5) of the LCR Act and section 25(3) of the *Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act)* further prescribe the manner in which the Commission is to undertake internal reviews.

⁴ 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)".

⁵ Sections 44, 49 and 157 of the LCR Act.

⁶ Sections 44(2), 44(3) and 157 of the LCR Act.



of the LCR Act and any decision-making guidelines issued by the Minister under section 5 of the VCGLR Act.⁷

14. The objects of the LCR Act are set out in section 4(1), which provides:

The objects of this Act are—

- (a) to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—
 - (i) providing adequate controls over the supply and consumption of liquor; and
 - (ii) ensuring as far as practicable that the supply of liquor contributes to, and does not detract from, the amenity of community life; and
 - (iii) restricting the supply of certain other alcoholic products; and
 - (iv) encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and
- (b) to facilitate the development of a diversity of licensed facilities reflecting community expectations; and
- (c) to contribute to the responsible development of the liquor, licensed hospitality and live music industries; and
- (d) to regulate licensed premises that provide sexually explicit entertainment.

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

It is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act must be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.⁸

16. The Commission may refuse to grant an uncontested application on the basis of any of the grounds contained in section 44(2), including (but not limited to):

- (a) that the grant 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; and
- (b) that the grant of the application would be conducive to or encourage the misuse or abuse of alcohol.

17. For the purposes of the LCR Act, the amenity of an area is defined as being the quality that the area has of being pleasant and agreeable.⁹ Section 3A(2) of the LCR Act lists the following factors that may be taken into account in determining whether the grant, variation or relocation

⁷ There are no decision-making guidelines issued by the Minister applicable to this matter.

⁸ 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 Act and therefore the primary consideration in liquor licensing decisions (although not to the exclusion of the other objects).

⁹ Section 3A(1) of the LCR Act.



of a licence would detract from or be detrimental to the amenity of an area:

- the possibility of nuisance or vandalism;
- the harmony and coherence of the environment;
- any other prescribed matters.

However, the definition of ‘amenity’ for the purposes of the LCR Act is not limited by these factors.¹⁰

18. The Commission considers that, while the grounds of refusal set out in section 44(2) are a relevant consideration, the ultimate determination of an uncontested application is to be made pursuant to sections 44 and 157(1) at the discretion of the Commission, with reference to the objects of the LCR Act.
19. In exercising the internal review power, in accordance with section 157(2) of the Act, the Commission must consider all the information, material and evidence before the original decision maker. It may also consider further information or evidence.¹¹
20. Section 49 of the LCR Act provides that the Commission may impose any condition it thinks fit on the grant of an application.

Other sections of the LCR Act relevant to this matter

21. Pursuant to section 9A(1), a restaurant and cafe licence authorises the Applicant to supply liquor on the licensed premises for consumption on the licensed premises, where the predominant activity carried out at all times on the premises is the preparation and serving of meals.
22. Section 9A(3)(a) further provides that a restaurant and cafe licence is subject to the condition that “tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending at any one time”.

MATERIAL BEFORE THE COMMISSION

23. The Commission had before it and considered all of the material received by the Delegate in the Original Application, which included:
 - (a) the Original Application, consisting of:
 - i. application for a restaurant and cafe licence, dated 11 March 2020;

¹⁰ Section 3A(3) of the LCR Act.

¹¹ Sections 157(2) and (3) of the Act.



- ii. ASIC company extract;
 - iii. proposed red-line plan;
 - iv. amended planning permit containing maximum patron capacity, dated 12 September 2019 (**Planning Permit**);
 - v. evidence of completion by the Applicant's director of the Responsible Service of Alcohol (**RSA**) program, dated 19 March 2020, and New Entrant Training, dated 3 March 2020;
 - vi. relevant questionnaire form on behalf of the Applicant and its director; and
- (b) a submission from the Applicant regarding its business and the contents of Planning Permit, dated 27 March 2020.
24. The Commission also had before it and considered additional information and evidence as follows:
- (a) the Review Application, dated 13 May 2020, attaching a copy of the Decision of the Delegate, dated 12 May 2020, refusing the Original Application; and
 - (b) submissions by the Applicant, dated 26 June 2020.
25. In the submissions dated 26 June 2020, the Applicant provided the Commission with an amendment to its proposed trading hours as follows:
- | | |
|---|--------------------------|
| Monday to Friday (other than ANZAC Day) | Between 6pm and 11pm |
| ANZAC Day when on Saturday or Sunday | Between 12 noon and 11pm |
| Any other Saturday or Sunday | Between 9am and 11pm |

The public hearing

26. The Commission listed the Review Application for hearing on 10 September 2020 (**Hearing**) to be conducted by videoconference due to the COVID-19 pandemic-related restrictions on indoor gatherings.
27. At the Hearing, the director of the Applicant gave evidence and the Applicant's representative made submissions in support of the Review Application. Details of this evidence are set out below.

REASONS FOR DECISION ON REVIEW

Issues for determination on review

28. For the Commission to make its decision on review, the following issues require consideration:
- (a) the Commission's general discretion to refuse to grant the Review Application, including consideration of whether the predominant activity that is to be carried out on the Premises



at all times is the preparation and serving of meals to be consumed on the Premises (section 9A(1)(a)) and whether there are sufficient tables and chairs in the Premises, in compliance with the condition in section 9A(3)(a); and

- (b) having considered the issue above, whether the Review Application should be granted or refused, having regard to the objects of the LCR Act.

Compliance with section 9A

29. The Commission may refuse to grant an uncontested application should the applicant fail to persuade the delegate that the business will operate in a way that complies with section 9A, under the general discretion contained in section 44(1).

Preparation and service of meals

30. In applying for a licence under section 9A, the Applicant must satisfy the Commission that the 'predominant activity' will at all times be the 'preparation and service of meals'.
31. In the Hearing, Mr Steane for the Applicant submitted (in summary):
- (a) the wording contained in clause 9 of the Planning Permit clearly obliges the Applicant to ensure the predominant activity carried out at all times on the licensed premises is the preparation and service of meals for consumption on the Premises;
 - (b) comparative liquor licences show that a function centre can also operate as a restaurant and café; and
 - (c) the main activity of the Applicant's business model for the general public is aligned with section 9A.
32. The director of the Applicant gave evidence that the Premises has a commercial kitchen that will be utilised to provide food for pre-booked functions and also to a lesser extent to the general public for both consumption on the Premises and for takeaway and delivery.
33. The director gave evidence that the Premises may also open up to serve the public because functions don't take place every day. The director explained that the business has two aspects to it and the Premises is able to be split in two so there is a "back of house area" that can be used when the area for functions is not being used.
34. The director of the Applicant also confirmed that at the time of the Hearing, due to the impact of COVID-19, the Premises had commenced operating with its takeaway and delivery service only.



35. When asked to provide details of how the “reception and party hall” aspect of the Premises would operate once patrons are permitted to attend the Premises post COVID-19, the director of the Applicant gave evidence as follows:
- (a) the business will cater for marriages, birthday parties, marriage anniversaries and that type of function;
 - (b) functions will tend to run from about 5:30 or 6pm to about 10:30 or 11pm and that food will always be served by the Applicant at these functions;
 - (c) the food will be provided and will be available across most if not all the time of the function and it will consist of Indian buffet style food incorporating entrees, mains and desserts.
36. Having heard the evidence and considered the submissions of the Applicant, the Commission is satisfied overall that the predominant activity that is to be carried out at all times on the Premises is the service and preparation of meals, thereby complying with section 9A(1)(a).

Tables and chairs in the Premises

37. As required by section 9A(3)(a), a condition of a restaurant and cafe licence is that tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending the premises at any one time.
38. The Commission notes that the Planning Permit has conditions that replicate the wording of sections 9A(1) and 9A(3) of the LCR Act regarding the preparation of meals and the provision of tables and chairs.
39. The Commission also notes that the Planning Permit showed a maximum capacity of 63 patrons between Monday and Friday after 6pm, and 80 patrons on Saturday and Sunday. At the Hearing, Mr Steane on behalf of the Applicant confirmed that the same patron capacity is sought for the Licence.
40. The Commission notes that section 9A(3)(a) refers to patrons ‘attending the premises at any one time’. In the Hearing, the Applicant indicated that requisite seats will be made available as required (i.e. 75% of 63 between Monday to Friday after 6pm, and 75% of 80 on Saturday and Sunday).
41. The director of the Applicant gave evidence that the Premises will be set up with circular tables with eight chairs around them. The Commission notes that the plan submitted as a part of the Application shows ten tables with eight chairs each fitting within the Premises meaning that all 80 of the maximum patron capacity would be able to be seated at one time.



42. The Commission finds that requisite seating would be made available by the Applicant as demand requires. The Commission is therefore satisfied that the Applicant complies with the condition in section 9A(3)(a).

General discretion

43. The grounds on which the Commission may refuse to grant a licence in section 44(2) are not exhaustive. Although the Commission does not find any of the grounds for refusal under section 44(2) apply, it still retains a general discretion whether or not to grant the licence, a discretion which is exercised with reference to the objects of the LCR Act.
44. The objects of the LCR Act are (in summary) to contribute to minimising harm arising from the misuse and abuse of alcohol, to facilitate the development of a diverse range of licensed premises and to contribute to the responsible development of the liquor industry.¹²
45. The Commission is satisfied from the Applicant's evidence in the Hearing, together with proof of completion of the RSA program and New Entrant Training by the Applicant's director and manager of the Premises, that the Applicant will manage the Premises responsibly and has an adequate knowledge of the LCR Act.
46. In all the circumstances, the Commission considers that granting the Review Application would be consistent with the object of facilitating the development of a diversity of licensed facilities reflecting community expectations. It further considers that granting the Review Application would not be conducive to, or encourage, the misuse and abuse of alcohol. Consequently, the Commission has decided to exercise its discretion and grant the Review Application, subject to the conditions specified in Appendix A.

DECISION ON REVIEW

47. After considering all the material before it, having regard to the objects of the LCR Act, and taking into account all considerations necessary, the Commission has determined to set aside the decision of the Delegate and, in substitution, grant a restaurant and cafe licence subject to the conditions outlined in Appendix A.

The preceding 47 paragraphs are a true copy of the Reasons for Decision of Ms Deirdre O'Donnell, Deputy Chair, Ms Danielle Huntersmith, Commissioner and Mr Andrew Scott, Commissioner.

¹² Section 4.



Appendix A

TYPE OF LICENCE

This is a restaurant and cafe licence and authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises during the trading hours specified below.

RESTAURANT & CAFE CONDITIONS

This licence is subject to the following conditions:

- (a) The predominant activity carried out at all times on the premises must be the preparation and serving of meals for consumption on the licensed premises; and
- (b) Tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending the premises at any one time; and
- (c) The licensee must not permit:
 - i. the live performance of any musical works; or
 - ii. the playing of any recorded musical works –
on the premises at higher than background music level at any time outside ordinary trading hours.

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.

MAXIMUM CAPACITY

Monday to Friday - 63 patrons

Saturday and Sunday - 80 patrons

TRADING HOURS

ANZAC Day when on Saturday or Sunday

Between 12 noon and 11pm

Any other Saturday or Sunday

Between 9am and 11pm

Monday to Friday (including Good Friday)

Between 6pm and 11pm