



**DECISION**

In the matter of an application by Esoteric Festival Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to grant a major event licence, with conditions, in respect of the event known as Esoteric Festival 2020, located at 457 Gil Gil Road, Donald, Victoria 3480.

**Commission:**

Ms Deirdre O'Donnell, Deputy Chair

Ms Danielle Huntersmith, Commissioner

Mr Andrew Scott, Commissioner

**Date of Hearing**

20 January 2020

**Date of Decision:**

14 February 2020

**Appearances:**

Mr Sam Goldsmith, director of the Applicant

Senior Sergeant Phil Eager, on behalf of the Chief Commissioner of Police

Mr Paul Davies, Counsel Assisting the Commission

**Decision:**

The Commission has determined to vary the decision of the Delegate and grant the licence subject to the conditions set out in Appendix A

**Signed:**

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

**Deirdre O'Donnell**

Deputy Chair

## REASONS FOR DECISION

### BACKGROUND

1. On 11 September 2019, Esoteric Festival Pty Ltd (**the Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) for a major event licence (**the Licence**) under the *Liquor Control Reform Act 1998* (**the LCR Act**)<sup>1</sup> in respect of the event known as Esoteric Festival 2020 (**the Event**), located at 457 Gil Gil Road, Donald, Victoria 3480, to be held from 6-9 March 2020 inclusive (**the Original Application**).
2. The Original Application included the following materials submitted by the Licensee:
  - (a) a completed application for internal review received by the Commission on 22 November 2019;
  - (b) Safety Management Plan – Esoteric Festival, dated August 2019;
  - (c) Security Management Plan – Esoteric Festival, dated 15 September 2019;
  - (d) Alcohol Management Plan – Event: Esoteric Festival (undated);
  - (e) Esoteric Post-Event Report – 8 to 11 March 2019; and
  - (f) Esoteric Noise Management Plan, version 3 – dated September 2019.
3. In accordance with section 33(3) of the LCR Act, a Delegate of the Commission (**the Delegate**) gave a copy of the Application to the Chief Commissioner of Victoria Police (**Victoria Police**) on 11 September 2019. Victoria Police did not object to the Original Application.
4. On 25 October 2019, a Delegate of the Commission determined to grant the Original Application, subject to conditions (**the Original Decision**), relevantly including;
  - Any licensed area which is not an enclosed building must be enclosed by an immovable barrier. No liquor may be removed from the licensed area.
  - BYO liquor is not permitted at this event. Patrons are not permitted to bring liquor into the event area or the camping area.

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<sup>1</sup> All references to legislation are references to the LCR Act unless stated otherwise.

5. On 22 November 2019, the Applicant applied to the Commission for an internal review (**the Review Application**) of the Original Decision, seeking that the conditions imposed on the Licence be varied or removed.
6. The Commission served a copy of the Review Application on Victoria Police on 26 November 2019.
7. On 27 November 2019, Victoria Police informed the Commission that it sought to be joined as a party to the Review Application. Victoria Police went on to state that its concerns were that the proposed crowd controller arrangements at the Event were inadequate to mitigate the risks of misuse or abuse of alcohol and secondary supply.

## LEGISLATIVE FRAMEWORK AND THE TASK BEFORE THE COMMISSION

### The Commission's internal review power

8. Division 2 of Part 9 of the LCR Act governs internal review applications. Under section 152, the Delegate's decision in respect of the Application is a reviewable decision, and the Applicant is eligible to apply for review of that decision. The Review Application was made under section 153.
9. Under section 157(1), the specific task for the Commission with respect to a review application is to make a fresh decision that:
  - (a) affirms or varies the Original Decision; or
  - (b) sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.<sup>2</sup>
10. Under the LCR Act, an application to vary a licence may be contested or uncontested. Pursuant to section 3(1) of the LCR Act, an uncontested application relevantly includes "an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174)". It is noted that the Application was uncontested and the Review Application similarly remains uncontested, although Victoria Police requested to be and were joined as a party.
11. In effect, the Commission, on internal review, stands in the shoes of the delegate and makes a fresh decision with respect to the Application. In doing so, it must consider all of the information,

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<sup>2</sup> Sections 4(2) and 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.

material and evidence before the delegate.<sup>3</sup> It may also consider further information, material or evidence as part of making its decision.<sup>4</sup>

### ***Exercising the internal review power***

12. 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 Act<sup>5</sup>.

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

- “(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.”*

14. 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.”*

15. The Court of Appeal of the Victorian Supreme Court has made it clear in *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325 (***Kordister***) that harm minimisation is a fundamental principle of the LCR Act, and can properly be regarded as “the primary regulatory object of the Act and

<sup>3</sup> Section 157(2).

<sup>4</sup> See section 157(3).

<sup>5</sup> 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.

therefore the primary consideration in liquor licensing decisions”.<sup>6</sup> 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”.<sup>7</sup>

16. Pursuant to section 44(2) of the LCR Act, the Commission may refuse to grant the Application on the grounds, *inter alia*:
  - (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 (section 44(2)(b)(i)); or
  - (b) that the grant of the application would be conducive to or encourage the misuse or abuse of alcohol (section 44(2)(b)(ii)).
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.<sup>8</sup> Factors that may be taken into account in determining whether a proposed grant would detract from or be detrimental to the amenity of the area include:
  - (a) the possibility of nuisance or vandalism;
  - (b) the harmony and coherence of the environment; and
  - (c) any other prescribed matters.<sup>9</sup>
18. Under section 49, the Commission may impose any condition it thinks fit on the grant of an application.
19. The Commission considers that while the grounds of refusal outlined in section 44(2) are relevant considerations, the ultimate determination of an uncontested application is to be made pursuant to sections 44(1) and 157(1) at the discretion of the Commission with reference to the objects of the LCR Act.

### ***Conduct of an inquiry***

20. 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*:

<sup>6</sup> See *Kordister* [2012] VSCA 325, at [19] per Warren CJ and Osborn JA; [188] per Tate JA.

<sup>7</sup> See *Kordister* [2012] VSCA 325, at [188] per Tate JA.

<sup>8</sup> Section 3A(1).

<sup>9</sup> Section 3A(2).

*“(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 1 (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 1 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.”*

21. On 20 January 2020, the Commission conducted a public hearing in relation to the Review Application (**the Hearing**). The Applicant was represented by its Director, Mr Goldsmith, and was also assisted by Mr Matthew Wood.
22. On 11 February 2020, the Commission informed the Applicant of its decision (**the Decision**) to vary the decision of the Delegate and grant the licence subject to the conditions set out in Appendix A.
23. The Commission elected to make its decision first, with reasons to be released at a later time, due to the short timeframe before the scheduled commencement of the Event.
24. Following receipt of the Decision, the Applicant informed the Commission it wished to surrender its liquor licence and conduct the Event without supplying liquor. It applied to the Commission to surrender the licence, pursuant to section 63 of the LCR Act. The Commission accepted the surrender and wrote back to the Applicant to advise that it was unable to supply liquor at the Event as there was no licence.
25. The Commission has determined to provide the reasons for its Decision, notwithstanding that subsequent events mean that this Decision no longer has application to the Event.

## REASONS FOR DECISION

26. In determining this Review Application, the Commission had regard to the risk of misuse and abuse of alcohol arising out of the supply of alcohol proposed by the Applicant. A major factor in this regard was that the proposed supply would occur within small licensed premises within the Event grounds. In this space it was proposed there would be Responsible Service of Alcohol trained staff and three crowd controllers. The proposal was however that the liquor supplied in this licensed premises would then be able to be taken out of the licensed area and consumed anywhere in the grounds of the Event (including within the camping area). Additionally, the proposal sought that the event be BYO anywhere in the grounds of the Event (including within the camping area).
27. At a hearing on 20 January 2020, the director of the Applicant informed the Commission that the previous event in 2019 was not a BYO event and yet crowd controllers had confiscated 'tandem trailer loads' of alcohol from car searches. The director of the Applicant described the effort to stop alcohol coming into the 2019 event as 'hugely unsuccessful' and added that, notwithstanding the substantial confiscated amount, consumption of prohibited BYO alcohol at the 2019 event was 'prevalent'.
28. The Commission notes that the Applicant proposed there would be other crowd controllers in place around the grounds of the Event, which at their maximum would number 23. However, the Commission considered that the area of the Event was very large and included a camping area, and that it was estimated there would be 6,000 patrons in attendance at the Event. In the Commission's view, the proposed numbers of crowd controllers were not sufficient to ensure adequate control over the supply and consumption of liquor at the Event. In the Commission's view, the risks of misuse and abuse of alcohol and secondary supply can be addressed by licence conditions, including that liquor may not be removed from the licensed area, that BYO liquor is not permitted at the event and that the licensee shall take reasonable steps to prevent BYO liquor coming into the event area and the camping area.
29. Minimising harm is the principal object of the LCR Act, and this includes 'providing adequate controls over the supply and consumption of liquor'. Sections 119 to 125 at Division 2 of Part 8 of the LCR Act contain penal provisions with respect to underage drinking, and these reflect the importance of protecting minors from the risks of harm associated with the supply of liquor. Accordingly, a key consideration for the Commission in this Review Application was minimising the risk of harm to any minors attending the Event.

30. Having considered the Licensee's proposals, particularly regarding the size of the Event grounds, the number of patrons expected to attend the Event, the proposed crowd controller arrangements and the paucity of dry zones, the Commission did not consider that the number of crowd controllers the Applicant was willing to engage at the Event was adequate to mitigate the risk of alcohol-related harm.
31. Having regard to all these factors, the Commission therefore decided to vary the decision of the Delegate and grant the licence subject to the conditions at Appendix A, again noting that since the date of this decision the Applicant has surrendered its licence, thereby making this decision of no practical effect.

**The preceding 31 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.**

## Appendix A

### CONDITIONS

#### TYPE OF LICENCE

This licence is a major event licence and authorises the licensee to supply liquor on the licensed premises for consumption on the licensed premises.

#### 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 to which the licence relates during or immediately after the trading hours authorised under this licence.

#### SUPPLY OF LIQUOR

The licensed premises is the area marked on the plans as approved by the Victorian Commission for Gambling and Liquor Regulation (VCGLR).

Any licensed area which is not an enclosed building must be enclosed by an immovable barrier. No liquor may be removed from the licensed area.

BYO liquor is not permitted at this event. The licensee shall take reasonable steps to prevent BYO liquor coming into the event area and the camping area including by:

- Conducting searches of patrons, their vehicles and their personal effects at the point(s) of entry into the event area; and
- Providing on the licensee's event website a prominent notice advising potential patrons that BYO liquor is not permitted at the event and that searches will be undertaken to detect and confiscate liquor being brought into the event in breach of that prohibition.

No pass outs are permitted at the event.

All patrons of or over the age of 18 years are to be provided with a suitable tamper-proof wristband to indicate their proof of age. All patrons receiving an 18+ wristband are to be in possession of an evidence of age document as defined in section 3 of the *Liquor Control Reform Act 1998*. Patrons without a suitable wristband cannot be served liquor.

Queues of patrons awaiting the supply of liquor are to be directed by the use of petitioning/corralling to ensure orderly and efficient queuing.

The supply of liquor is restricted to beer, cider and premixed/ready-to-drink (RTD) spirits. The licensee must not serve shots or unmixed spirits at the event.

Liquor may only be supplied in open plastic containers or open cans with a maximum serving volume of 425mL for beer and cider, and a maximum serving volume of 375mL for premixed spirits.

Until 12 midnight, the licensee shall not serve more than four (4) alcoholic drinks per customer, per time.

Between 12 midnight and 1am, the licensee shall not serve more than two (2) alcoholic drinks per customer, per time

After 1am, the licensee shall not serve more than one (1) alcoholic drink per customer, per time.

### **CROWD CONTROLLERS**

Crowd controllers, licensed under the *Private Security Act 2004*, are to be employed at a ratio of 2 crowd controllers for the first 100 patrons and 1 crowd controller for each additional 100 patrons or part thereof for the licensed premises. At least one crowd controller is to be stationed at each entry/exit to the licensed area to monitor patrons and check identification documents. Crowd controllers are to be present from 30 minutes before the commencement of trading under this licence until 30 minutes after closure.

Each alcohol service counter/point of sale will have present at least one (1) crowd controller, licensed under the *Private Security Act* and trained in Responsible Service of Alcohol, to monitor patrons and alcohol service areas to ensure that liquor is not provided in any way contrary to the *Liquor Control Reform Act 1998*. These crowd controllers are to wear reflective vests that state "RSA Officer", no less than 10cm in height. These crowd controllers are not to be utilised for the service of alcohol and must be in place at any time liquor is being served.

Free drinking water must be provided at every bar that supplies alcohol. A4 signs advertising that free drinking water is available must be displayed at every bar that supplies alcohol. Free drinking water facilities must be in a prominent position adjacent to bar areas within the licensed area with appropriate A4 signs advertising free drinking water is available.

All staff engaged in the serving of liquor will have undertaken a Responsible Service of Alcohol (RSA) course within the preceding three years approved by the VCGLR. All copies of the RSA certificates for each member of staff must be kept in one central place and must be made available upon request by a member of Victoria Police or a VCGLR Inspector.

To the extent that a matter is not already dealt with in this licence, it is a condition of this licence that the licensee must comply with all requirements of the Alcohol Management Plan as provided by the applicant and approved by the VCGLR.

A copy of this licence, as well as "Intoxicated? Drunk? Disorderly?", "Under 18? Can You Enter?", "Under 18? No Supply" and "Do Not Attempt To Buy Liquor For Under 18s" signage, must be displayed at each alcohol service counter/point of sale.

### **UNDERAGE**

Persons under the age of 18 are not permitted to be on the licensed premises unless they are in the company of a parent, legal guardian or responsible adult.

### **MAXIMUM CAPACITY (LICENSED PREMISES)**

200 patrons

### **TRADING HOURS**

6/03/2020 between 2.00pm and 2.00am the following morning.

7/03/2020 between 12.00 noon and 4.00am the following morning.

8/03/2020 between 12.00 noon and 3.00am the following morning.