

Victorian Commission for Gambling and Liquor Regulation

DECISION AND REASONS FOR DECISION

In the matter of an application by Boss Bar Pty Ltd under section 153 of the *Liquor Control Reform Act 1998* for internal review of a decision to grant a variation (in part) of a renewable limited licence for the premises trading as Boss Bar Pty Ltd, located at 8/2 Brand Drive, Thomastown VIC 3084.

Commission: Mr Ross Kennedy, Chair

Ms Deirdre O'Donnell, Deputy Chair

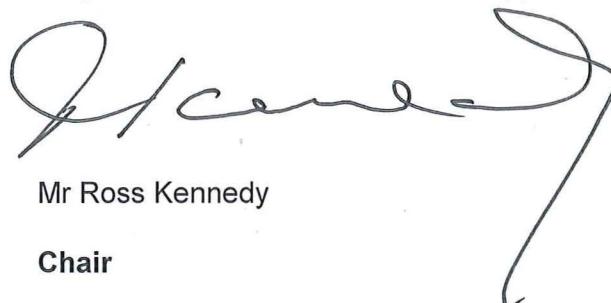
Dr Dina McMillan, Commissioner

Date of decision: 20 November 2018

Date of reasons: 20 November 2018

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

Signed:



A handwritten signature in black ink, appearing to read "Ross Kennedy". The signature is fluid and cursive, with a long horizontal stroke on the left and a more vertical, sweeping stroke on the right.

Mr Ross Kennedy

Chair



REASONS FOR DECISION

BACKGROUND

1. On 16 April 2018, Boss Bar Pty Ltd (**the Licensee**) applied to the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) to vary its renewable limited licence (**the Original Application**), seeking to expand the types of liquor it could supply to include:
 - i. wine kegs;
 - ii. cocktail kegs; and
 - iii. other packaged liquor in cans and bottles.
2. Previously, on 24 October 2014, the Commission had granted the Licensee a renewable limited licence (no. 36134645) (**the Licence**) for the premises (then) located at 7 Nioka Court, Eltham 3095.
3. The Licence authorised the Licensee to supply liquor in the course of catering for social receptions or social functions on premises other than the licensed premises for consumption on those premises and also authorised the licensee to supply packaged liquor only when ordered by mail, telephone, facsimile transmission or internet. The Licence contained the following Special Conditions:
 - i. This licence does not allow for the supply of liquor on the licensed premises.
 - ii. The supply of liquor is restricted to beer kegs, wine kegs, cocktail kegs and cider kegs only.
4. The Licensee now seeks to vary the types of liquor that can be supplied under the Licence in accordance with the Original Application and as described at paragraph 1 above.
5. In accordance with section 33(3) of the Liquor Control Reform Act 1998 (LCR Act), on 17 April 2018 a copy of the Original Application was served on the Chief Commissioner of Police and the Licensing Inspector (together referred to as **Victoria Police**). On 2 May 2018, Victoria Police indicated that it did not object to the Original Application.
6. In accordance with section 33(3) of the LCR Act, on 17 April 2018 a copy of the Original Application was served on the Nillumbik Shire Council (**the Council**) to determine whether the



Council wished to provide information with respect to the Original Application. The Council did not wish to provide further information.

7. On 23 May 2018, a Delegate of the Commission granted the Original Application in part, and varied the original special conditions on the Licence to authorise the supply of wine kegs and cocktail kegs. The Delegate refused to vary the original special conditions of the Licence to authorise the sale of packaged liquor (**the Original Decision**). The Commission gave the Licensee notice of the Decision on 24 May 2018.
8. The Delegate's reasons for the Original Decision were that the Licensee should apply for a packaged liquor licence if they wished to sell packaged liquor, and that if the Original Application were granted to permit the sale of all types of packaged liquor, the licence would no longer be limited as required by section 26 of the LCR Act.
9. Thereafter, the Licensee applied to vary the Licence seeking to relocate the licensed premises to 8/2 Brand Drive, Thomastown VIC 3074 (**the Premises**). The Commission granted this application on 18 July 2018.
10. On 6 June 2018, the Licensee applied for internal review of the Original Decision (**the Review Application**) pursuant to section 153(2) of the LCR Act. Along with the Review Application, the Applicant made submissions proposing that the supply of packaged liquor would be limited to beer, cider, wine and champagne.

REVIEW APPLICATION

11. On 28 June 2018, the Commission gave notice of the Review Application to Victoria Police, seeking an indication of whether Victoria Police wished to maintain its position of no objection. On 28 June 2018, Victoria Police replied that they did not wish to be a party with respect to the Review Application. Victoria Police was later informed of the grant of the Licensee's application to relocate the Premises and amendment to the Review Application to seek to permit patrons to pick up kegs from the Premises for pre-booked functions. No further response was received from Victoria Police.
12. The Commission gave notice of the Review Application to the Council seeking confirmation of whether they wished to maintain their position of no objection. The Council gave notice to the Commission that they did not object to the Review Application on 29 June 2018.
13. The Commission also gave notice of the Review Application to the City of Whittlesea council, being the council relevant to the Premises located at Thomastown. The City of Whittlesea was



invited to provide information to the Commission in relation to the Review Application, however did not provide information or object to the Review Application on any of the grounds set out by section 44 of the LCR Act.

LEGISLATION AND THE TASK BEFORE THE COMMISSION

The Commission's internal review power

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

15. Pursuant to section 157(1), the specific task for the Commission with respect to the Review Application is to make a fresh decision that:

- (a) affirms or varies the reviewable decision; or
- (b) sets aside the reviewable decision and substitutes another decision that the Commission on review considers appropriate.¹

16. Under the LCR Act, an application for the variation of a renewable limited licence may be contested or uncontested. Pursuant to section 3(1), an uncontested application is defined as:

an application for the grant, variation, transfer or relocation of a licence or BYO permit in respect of which no objection is received under Division 5 of Part 2 within the period set out in that Division for that objection (or that period as extended under section 174).

17. The Commission on review stands in the shoes of the original decision maker and, in respect of an uncontested application,² must either:

- (a) grant the application (and may do so subject to conditions);³ or
- (b) refuse to grant the application.⁴

Exercising the internal review power

18. 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

¹ Section 157(2) to (5) of the LCR Act and section 25(3) of the VCGLR Act further prescribe the manner in which the Commission is to undertake internal reviews.

² This Review Application is uncontested as it has no objections

³ LCR Act, sections 44, 49 and 157.

⁴ LCR Act, section 44 and 157.



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

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

The objects of this Act are—

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

20. 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.⁶

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

- (a) must consider all the information, material and evidence before the original decision maker;⁷
- (b) may consider further information or evidence;⁸ and

⁵ VCGLR Act, section 9(3) and (4). The Commission also considered and was satisfied as to the matters set out in the Decision-Making Guidelines relating to the assessment of the cumulative impact of licensed premises dated 7 June 2012, particularly as granting the Application with conditions would result in a new premises with a relatively small capacity and reduced trading hours. The Commission did not consider the Decision-Making Guidelines relating to the grant of licences for the sale of packaged liquor dated 7 June 2012 as relevant to this Application.

⁶ 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).

⁷ LCR Act, section 157(2).



- (c) may, in respect of uncontested applications on review, have regard to any matter the Commission considers relevant, make any enquiries the Commission considers appropriate but is not required to give any person an opportunity to be heard concerning the application.⁹
22. Under section 49 of the LCR Act, the Commission may impose any condition it thinks fit on the grant of an application.
23. The Commission considers that while the grounds of refusal outlined in section 47(2) and 44(2) of the LCR Act are relevant considerations, the ultimate determination of a contested application is to be made pursuant to section 47(1) and section 157(1) at the discretion of the Commission with reference to the objects of the LCR Act.
24. The Commission notes there was no objection from Victoria Police and no information provided by the relevant council regarding the Review Application in relation to any potential amenity or risk of harm associated with the Review Application, which supports the Commission's view that there is no basis to refuse this application under section 44 of the LCR Act. Section 44(2)(b) of the LCR Act empowers the Commission to refuse to grant the Review Application on various grounds including, amongst others, that:
- (a) *the granting of the application would detract from or be detrimental to the amenity of the area in which the Premises to which the application relates are situated; or*
 - (b) *the granting of the application would be conducive to or encourage the misuse or abuse of alcohol.*
25. In relation to limited licences, section 26(1) of the LCR Act prohibits the Commission from granting a limited licence unless it is satisfied that the scale and scope of the supply of liquor under such a licence is limited in nature.

MATERIAL BEFORE THE COMMISSION

26. On review, the Commission had before it and considered all the materials received by the Delegate summarised at paragraphs [2] to [7] above.
27. The Commission also had before it and considered additional information and evidence including:
- (a) the Original Decision and the Delegate's Reasons; and

⁸ LCR Act, section 157(3).

⁹ LCR Act, section 44(4). Here, on 22 May 2018, the Council reiterated its position as set out in its 5 December 2017 letter. The Council also had no objection to the Applicant's request for the matter to be dealt with 'on the papers'.



- (b) the Review Application, which included written submissions from the Licensee on 6 June 2018, explaining the current operation of the business and the reasons why a variation to the Licence was sought by the Licensee.
28. Further submissions from the Applicant were received on 29 August 2019 including a copy of the following:
- (a) Copies of the following liquor licenses for competing businesses:
 - i. Licence No. 36094293,
 - ii. Licence No. 36111980,
 - iii. Licence No. 36133144,
 - iv. Licence No. 36134792,
 - v. Licence No. 36146935,
 - vi. Licence No. 36134645;
 - (b) Evidence of a completion of a Responsible Service of Alcohol (**RSA**) program by a director of the Licensee, evidencing completion of the online refresher course on 31 March 2017;
 - (c) Proposals that the supply of liquor be limited as follows:
 - i. *Purchases cannot be made through the Applicant's website;*
 - ii. *All sales will be pre-booked and alcohol will be supplied directly to the event address;*
 - iii. *Supply will not occur to public events;*
 - iv. *All sales will be booked by email or phone;*
 - v. *The delivery of liquor will only occur between 9am and 6pm during the week;*
 - vi. *A customer aged 18 years and above must be present when the liquor is supplied. The customer will be required to sign for the delivery and show identification;*
 - (d) Other written submissions which explained that the Licensee was seeking to expand upon the types of liquor available to better compete with similar businesses.

DETERMINATION OF THE REVIEW APPLICATION

Issues for determination on review

29. In making its decision on review, the Commission must determine the following issues:



- (a) whether the nature of the supply of liquor as proposed by the Applicant is sufficiently limited in scale and scope as required by section 26;
- (b) whether the grant of a renewable limited licence would detract from or be detrimental to the amenity of the area in which the Premises are located;¹⁰
- (c) whether the grant of a renewable limited licence would be conducive to or encourage the misuse or abuse of alcohol;¹¹ and
- (d) finally, whether a renewable limited licence should be granted or refused, having regard to the objects of the LCR Act, with particular regard to the object of harm minimisation.¹²

Each of these issues are discussed in turn.

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

30. As referred to in paragraph 28 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 scale and scope requirement'**).

The Applicant's submissions

31. The Applicant's submissions are set out in the materials lodged by the Applicant including the submissions accompanying the Review Application, submissions received on 29 August 2018 and further submissions received on 18 September 2018.

32. In summary, the Applicant submitted that it could satisfy the Commission as to the scale and scope requirement due to the matters set out in paragraph [10] above. The Applicant described how it proposed to supply packaged liquor other than beer kegs, wine kegs, cocktail kegs and cider kegs only as part of its catering packages where it was engaged to serve that packaged liquor directly to patrons of private functions.

The Commission's view

33. The Commission is satisfied that the proposed variation to the Licence to permit the supply of wine and cocktail kegs, along with other limited packaged liquor being bottled beer, cider, wine and champagne, can satisfy the scale and scope requirement. In particular, the Commission has had regard to the fact that the supply of this additional packaged liquor would only be permitted in

¹⁰ See LCR Act, ss 44(2)(b)(i) and 47(2).

¹¹ Ibid.

¹² See paragraphs [18] to [19] above. 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.



connection with private, pre-booked functions. Further, the existing conditions of the Licence require that the liquor is consumed at the premises where the private, pre-booked function is taking place such that the supply of liquor is sufficiently limited given the specific event types that are involved.

34. Consequently, the Commission considers that the Review Application satisfies the requirements in section 26 of the LCR Act. Given this statutory requirement and the need for licence conditions to be both meaningful and enforceable, the Commission considers that if it is to grant the Review Application, it is appropriate to impose conditions on the licence to reflect the limitations discussed.

Consideration of grounds of potential refusal under section 44(2) of the LCR Act

35. The Commission may refuse to grant an uncontested application on certain grounds, including that the granting of the application:

- (i) would detract from or be detrimental to the amenity of the area in which the Premises are located; and
- (ii) would be conducive to or encourage the misuse or abuse of alcohol.

36. In relation to amenity, the Applicant relocated the Premises to an address which is zoned within an industrial area.

37. Addressing whether granting the application would be conducive to or encourage the misuse or abuse of alcohol, as well as addressing harm minimisation, the Applicant provided evidence of current RSA certification and submitted that the additional packaged liquor consisting of bottled beer, cider, wine and champagne will only be supplied as part of catering packages, to be served by RSA qualified staff of the Licensee. The Commission considers that the variation of the Licence would not increase the risk of misuse and abuse of alcohol given that RSA trained staff would be required to serve that further packaged liquor and that this would occur at private pre-booked functions only, as already required by the Licence.

Whether to exercise discretion to grant the licence having regard to the objects of the LCR Act

38. Although the Commission is satisfied that the Review Application meets the requirements of section 26 of the LCR Act, the Commission must still exercise its discretion whether or not to vary the Licence. Such a discretion must be exercised by the Commission with regard to any other relevant considerations, including the objects of the LCR Act, particularly harm minimisation, which is the primary object.



39. The Commission considers that the Licensee was already a current licence holder and would have had to demonstrate that it had adequate knowledge of the LCR Act and that it was a suitable person to hold a licence at the time of the grant of the Licence. There is nothing within the Commission's knowledge that would change this view.

DECISION ON REVIEW

40. Based on all of the matters set out above, the Commission on review has decided to vary the Delegate's decision and grant a renewable limited licence for the Premises subject to the conditions set out in Appendix A.

The preceding forty (40) paragraphs are a true copy of the Reasons for Decision of Ross Kennedy (Chair), Ms Deirdre O'Donnell (Deputy Chair) and Dr Dina McMillan (Commissioner).



Appendix A

SUPPLY OF LIQUOR

This is a renewable limited licence and authorises the licensee to supply liquor for consumption at pre-booked functions only. The function must be held in an area of a premises that is set aside for the exclusive use of persons who have booked the function which is attended only by those persons and their guests. This licence does not allow the supply or consumption of liquor at public events which are attended by the general public. This licence authorises the licensee to supply liquor only when such liquor is ordered by telephone or email.

Any premises where the supply and/or consumption of liquor occurs under this licence is considered to be a licensed premises for the purposes of the Liquor Control Reform Act 1998. The area set aside for the exclusive use of persons who have booked the function for the supply and/or consumption of liquor must be clearly delineated from any other area. This condition does not apply to private residential premises and is not in effect where the supply of packaged liquor is delivered to a private function and no catering services are provided by the licensee at that function.

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 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.

RESPONSIBLE SERVICE OF ALCOHOL

At all times, the licensee must abide by any guidelines relating to the responsible service of alcohol (RSA) and intoxication guidelines issued by the Victorian Commission for Gambling and Liquor Regulation, pursuant to s3AB(2) of the *Liquor Control Reform Act 1998*.

All staff engaged in the service of alcohol must complete an approved RSA training program as well as the online refresher training every three years. An RSA training register must be maintained by the licensee and should include copies of current RSA approved training and online refresher certificates.

SPECIAL CONDITIONS

The supply of liquor is restricted to:

- Kegs of beer, wine, cider and cocktail
- Bottles of beer, wine, cider and champagne
- Cans of beer and cider

The supply of bottles and cans of liquor is only permitted when served by staff employed by the Licensee during the course of catering for a function.

RESTRICTIONS ON SALES

The licensee must not use licensed premises to provide for:

- personal shopping for liquor
- browsing, liquor stocks or stores
- the display of liquor for sale



- the collection of any liquor other than beer kegs, wine kegs, cider kegs and cocktail kegs by customers for prebooked events during the hours listed for pick up below.

DELIVERY AND PICK UP OF LIQUOR

WHERE CATERING SERVICES ARE NOT PROVIDED

Liquor must be delivered to a person aged 18 or over. The licensee must ensure that delivery arrangements include requiring evidence of age where appropriate.

Liquor must not be delivered and left at unoccupied premises on same day the order is received.

Liquor may only be delivered during the following hours:

Monday to Saturday

between 9am and 6pm.

Sunday

between 10am and 6pm.

ANZAC Day

12 noon and 6pm.

No deliveries are permitted on Christmas Day or Good Friday

INFORMATION REQUIRED TO BE DISPLAYED ON WEBSITE/S

The following notice must be prominently displayed on the licensee's website/s:

WARNING

Under the Liquor Control Reform Act 1998 it is an offence

- To supply alcohol to a person under the age of 18 years (Penalty exceeds \$17,000)
- For a person under the age of 18 years to purchase or receive liquor. (Penalty exceeds \$700)

The licensee is required to prominently display the number of this licence on its website.

TRADING HOURS

WHERE CATERING SERVICES ARE PROVIDED

Sunday to Thursday

Between 9am and 11pm

Friday & Saturday

Between 9am and 1am the following morning

ANZAC Day

Between 12 noon and 1am the following morning