

Decision and reasons for decision

In the matter of an application under section 153 of the *Liquor Control Reform Act 1998* by The Cavendish Dark Horse Pty Ltd for an internal review of a decision by a delegate to refuse an application for a renewable limited licence for the premises trading as Gimlet at Cavendish House located at 33 Russell Street, Melbourne

Commission:	Ms Danielle Huntersmith, Chair Mr James O'Halloran, Deputy Chair Ms Susan Timbs, Commissioner
Appearances:	Mr Martin Towey, Counsel for the Applicant Ms Caitlin McAlister, Counsel Assisting the Commission
Date of Hearing:	5 April 2023
Date of Decision:	4 August 2023
Date of Reasons:	4 August 2023
Decision:	The Commission has determined to set aside the decision of the Delegate and, in substitution, grant a renewable limited licence subject to the conditions set out in Appendix A

Signed:



Danielle Huntersmith, Chair

Background

1. The Cavendish Dark Horse Pty Ltd (**Applicant**) holds Restaurant and Cafe Licence no. 32352893 (**R&C Licence**) issued under the *Liquor Control Reform Act 1998 (LCR Act)*¹ in respect to premises located at 33 Russell Street, Melbourne (**Premises**), trading as Gimlet at Cavendish House. The Applicant has held the R&C Licence since 10 July 2019.
2. The Premises is a Melbourne CBD restaurant. The maximum patron capacity at the Premises is 364 persons.
3. The Applicant's sole director is Mr Andrew James McConnell. He is the nominee listed on the R&C Licence. He also owns and operates several other licensed venues across Melbourne.
4. Pursuant to the R&C Licence, the Applicant is entitled to:
 - (a) supply liquor on the Premises for consumption on the Premises; and
 - (b) upon provision of notification to the Victorian Liquor Commission (**Commission**) supply packaged liquor in limited quantities on the Premises for consumption off the Premises, as part of a home delivery meal service as well as with any takeaway meal purchased by a customer attending at the Premises.²
5. The permitted trading hours under the R&C Licence are:

Monday to Friday	Between 11am and 1am the following morning
Saturday & Sunday	Between 9am and 1am the following day
ANZAC Day	Between 12pm and 1am the following morning
6. On 4 October 2022, the Applicant applied to the Commission for a renewable limited licence (**RLL**) which it asserted would be an adjunct to its R&C Licence (**Original Application**).³

¹ All references to legislation are references to the *Liquor Control Reform Act 1998* unless stated otherwise.

² As to the supply limits for takeaway or delivery under restaurant and cafe licences, see section 9A(2)(db). The Commission hasn't received any notification from the Applicant for the supply of packaged liquor under its R&C Licence.

³ Email from LGS Legal, dated 26 October 2022.

7. The basis for the Original Application was to allow, without purchasing take away food, the supply of packaged liquor on the Premises for consumption off the Premises by way of:
- (a) online orders for delivery and/or in-person pickup;
 - (b) instances where the customer has finished dining at the Premises; or
 - (c) instances where a person has just walked into the Premises to purchase a limited amount of packaged liquor.
8. The type of liquor proposed to be supplied for people ordering online and for people ordering in person (being people who dined at the Premises or anyone simply walking in) was to be the same (being liquor from the Premises' drinks menu as amended from time to time).⁴
9. The Applicant proposed the following trading times at the Premises under a RLL:
- | | |
|------------------|-----------------------------------|
| Sunday | Between 10am and 11pm |
| ANZAC Day | Between 12 noon and 11pm |
| On any other day | Between 9am and 11pm ⁵ |
10. For online orders, the Applicant sought such orders to be taken at any time but for the liquor to be delivered only during the trading hours specified in paragraph 9 above. No supply was proposed in the Original Application for Good Friday or Christmas Day.
11. In the Original Application, the Applicant proposed its supply under a RLL to be limited to:
- 4 bottled cocktails of 250ml each; or
 - 2 bottles of wine; or
 - 2 six packs of beer.
12. The redline plan area for the RLL is proposed to be the same as for the R&C Licence namely, for the entire Premises.

⁴ See supplementary attachment to the Original Application lodged by LGS Legal on behalf of the Applicant.

⁵ The Applicant originally sought a final trading hour beyond the 'ordinary trading hours' of a packaged liquor licence (after 11pm). On 26 October 2022, the Applicant amended the Original Application to accord with the ordinary trading hours of a packaged liquor licence. Section 3 defines ordinary trading hours.

13. In accordance with section 34(7), the Commission required the Applicant to display a public notice of the Original Application from 5 October 2022 to 2 November 2022. The Commission did not receive any objections from the general public.
14. The Applicant was asked in the Original Application for submissions regarding how the proposed supply of liquor under a RLL would be limited in scale and scope as required under section 9A.⁶ It was also necessary to understand why the RLL was sought given that the Applicant was already entitled, upon notification to the Commission, to supply a limited quantity of packaged liquor at the Premises in conjunction with a meal-service for take-away or delivery under the R&C Licence.
15. The Applicant explained:

“The application for a separate licence has been made because the intended amounts to be supplied, whilst remaining limited in scale and scope, are greater and different than those amounts available by right under the restaurant and cafe licence.”⁷
16. It is also noted that the Applicant did not wish to be restricted to only supplying alcohol for off premises consumption with a takeaway meal, as is required for packaged liquor supplied pursuant to the R&C Licence.
17. In accordance with section 33(3), the Commission gave a copy of the Original Application to the Chief Commissioner of Police and the licensing inspector⁸ (together **Victoria Police**), and the Melbourne City Council (**Council**). Victoria Police and the Council advised the Commission that they did not object to the grant of the Original Application.
18. On 23 November 2022, an authorised delegate of the Commission (**Delegate**) assessed the Original Application and refused it (**Original Decision**).
19. In noting the Applicant’s existing ability under its R&C Licence to supply a limited quantity of packaged liquor in conjunction with a meal-service for take-away or delivery, the Delegate stated in his Reasons for Decision:⁹

⁶ The Commission requested submissions from the Applicant on 4 October 2022.

⁷ Email from LGS Legal, dated 26 October 2022.

⁸ Section 3 defines “licensing inspector” as a person appointed as a licensing inspector under section 172.

⁹ Original Decision and Reasons for Decision, 23 November 2022, paragraph 20.

“... [this] should not necessarily be interpreted as an invitation for restaurant and café businesses to now seek a greater scope of operations in relation to the supply of packaged liquor associated with the business.”

Application for Internal Review

20. On 23 November 2022, the Applicant applied to the Commission for an internal review of the Original Decision (**Review Application**) in accordance with sections 152 and 153.
21. In the Review Application, the Applicant submitted (in summary):
 - (a) the Delegate had not properly applied the LCR Act in making the Original Decision; and
 - (b) the Delegate’s reasons for the Original Decision are not grounds for a refusal of an uncontested application per section 44(2).

Legislation and the Commission’s task

The Commission’s internal review power

22. Division 2 of part 9 of the LCR Act governs internal review applications. Under section 152, the decision made by the Delegate in the Original Decision is a reviewable decision and the Applicant is an eligible person to apply for a review of that decision. The Review Application was made pursuant to section 153.
23. 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 Original Decision; or
 - (b) sets aside the Original Decision and substitutes another decision that the Commission on review considers appropriate.¹⁰
24. In effect, the Commission on review stands in the shoes of the original decision maker and must make a fresh decision with respect to the Original Application. In this case, the Commission must decide whether to:

¹⁰ Section 157(2) to (5) further prescribes the manner in which the Commission is to undertake internal reviews.

- (a) grant the Original Application and, if so, whether to do so subject to conditions;¹¹
or
- (b) refuse to grant the Original Application.¹²

Determination of an uncontested application

25. Under the LCR Act, an application for a 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).

26. The Original Application is uncontested, as no objections were 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).

27. Pursuant to section 44(2), the Commission may refuse to grant the Original Application on certain grounds, including 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;¹³
- (b) the granting of the application would be conducive to or encourage harm;¹⁴ and
- (c) the application has not been made, displayed, or advertised in accordance with the LCR Act.¹⁵

28. 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.¹⁶ Factors that may be taken into account in determining whether granting a licence would detract from or be detrimental to the amenity of the area include:

- (d) *the possibility of nuisance or vandalism;*
- (e) *the harmony and coherence of the environment;*

¹¹ LCR Act, sections 44, 49 and 157.

¹² LCR Act, sections 44 and 157.

¹³ LCR Act, section 44(2)(b)(i).

¹⁴ LCR Act, section 44(2)(b)(ii).

¹⁵ LCR Act, section 44(2)(b)(v).

¹⁶ LCR Act, section 3A(1).

- (f) *any other prescribed matters.*¹⁷

However, the definition of “amenity” for the purposes of the LCR Act is not limited by these factors.¹⁸

29. Section 44(4) provides that, before granting or refusing an uncontested application under subsection (1), the Commission:

- (a) *may have regard to any matter the Commission considers relevant; and*
(b) *may make any enquiries the Commission considers appropriate.*

Exercising the internal review power

30. Sections 172D(3) and 172U(3)(b) require the Commission, in exercising its internal review function, to have regard to the objects of the LCR Act and any decision-making guidelines in respect of the regulation of liquor issued by the Minister. The objects of the LCR Act are set out at section 4(1) as follows:

The objects of this Act are—

- (a) *to contribute to minimising harm 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.*

¹⁷ LCR Act, section 3A(2). Until a legislative amendment in 2018, the following factors were also included as evidencing detriment to the amenity of the area: (a) the presence (or absence) of parking facilities; (b) traffic movement and density; (c) noise levels.

¹⁸ LCR Act, section 3A(3).

31. Section 4(2) further provides 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.¹⁹

32. Section 3(1) defines “harm” as follows:

harm means harm arising from the misuse and abuse of alcohol, including—

- (a) *harm to minors, vulnerable persons, or communities, including groups within communities; and*
- (b) *family violence; and*
- (c) *anti-social behaviour, including behaviour that causes personal injury or property damage.*

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

- (a) must consider all the information, material, and evidence before the original decision maker;²⁰ and
- (b) may consider further information, material, or evidence.²¹

34. The Commission considers that, while the grounds of refusal outlined in section 44(2) are relevant considerations, the determination of an uncontested application is ultimately 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.

35. Under section 49, the Commission may impose any condition it thinks fit on the grant of an application.

Conduct of an inquiry

36. As stated above, section 44(4) provides that the Commission may have regard to any matter it considers relevant and make any enquiries it considers appropriate. The Commission must give the Applicant a reasonable opportunity to be heard.

¹⁹ See further *Kordister Pty Ltd v Director of Liquor Licensing* (2012) 39 VR 92; [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).

²⁰ LCR Act, section 157(2).

²¹ LCR Act, section 157(3).

37. Section 172W(3) provides that the Commission:
- (a) is not bound by the rules of evidence but may inform itself in any way it thinks fit; and
 - (b) is bound by the rules of natural justice.

Other sections of the LCR Act relevant to this matter

Restaurant and cafe licences

38. Pursuant to section 9A(1), a R&C Licence authorises the licensee 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 to be consumed on the licensed premises (**Predominant Activity Requirement**).
39. Section 9A(3)(a) further provides that a R&C 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 the premises at any one time”.
40. Moreover, section 9A(1)(a) provides that a R&C Licence authorises a licensee to supply liquor during ordinary trading hours (as defined in section 3) and between 11 pm on any particular day until 1 am on the following day for consumption on the premises.
41. Pursuant to section 9A(2)(da), a R&C Licence authorises the licensee to supply liquor in sealed containers, bottles or cans with a takeaway adult meal or delivery adult meal prepared on the premises.
42. Section 9A(2)(db) further provides that the supply of liquor to a person for a takeaway adult meal or delivery adult meal must not be more than 750 millilitres capacity in the case of wine or six containers of not more than 375 millilitres capacity each in the case of beer, cider, or pre-mixed spirits.
43. Further, section 9A(dc) provides that a R&C licensee must notify the Commission before commencing the supply of liquor on the licensed premises in sealed containers, bottles, or cans for consumption off the premises or by off-premises request.

Limited licences

44. A limited licence may be a temporary limited licence or a RLL. Pursuant to section 14(1B), 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.
45. Section 26 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 (**Scale and Scope Requirement**).

Material before the Commission

46. The Commission on review had before it, and considered, all the materials received by the Delegate. The Commission also received and considered the following materials:
 - (a) the Original Decision and Reasons of the Delegate, dated 23 November 2022;
 - (b) the Review Application, received 21 December 2022;
 - (c) evidence and submissions at the Hearing; and
 - (d) the Applicant's further submissions, received 18 April 2023.

Hearing

47. A hearing was held in relation to the Review Application on 5 April 2023 (**Hearing**).
48. Ms Anna Augustine, Project Manager for the Applicant, gave oral evidence in support of the Review Application.
49. Mr Martin Towey, Solicitor and Director of LGS Legal, appeared on behalf of the Applicant. He submitted that the recent amendment to section 9A which allows for packaged liquor to be sold under a restaurant and cafe licence with take away meals "*...will not assist the licensee in any way, shape, or form because the licensee has not,*

*since it started operating, done any take away service. It's not that type of business. It won't be that type of business. ..*²²

50. In the Hearing, Ms Augustine gave evidence to the Commission to the effect that:
- (a) The Premises is a celebratory restaurant which has received a lot of accolades since it opened, including a listing in the top 100 restaurants in the world in 2022. The environment of the Premises is conducive with drinking wine with food.²³
 - (b) The Applicant has its own signature cocktail in a bottle which is often the drink ordered by guests. The Premises is named after the cocktail drink of "Gimlet."²⁴
 - (c) The Applicant puts a lot of effort into sourcing rare and unusual wines for its guests. Guests typically drink cocktails and high-end wine and champagne at the Premises. There is no beer on tap, only unsealed packaged beer, which is the least popular type of drink chosen by guests.²⁵
 - (d) Guests can book for lunch or dinner, or book to come in for a drink in the bar area in the afternoon. Some tables are also kept available in the Premises for guests who just walk in.²⁶
 - (e) The lunch and dinner sittings per day usually involve between 100 and 150 patrons.²⁷
 - (f) Guests are typically tourists that have deliberately sought out the Premises or local Melbournians that really like fine dining.²⁸
 - (g) The reason for making the Original Application was to have the opportunity to offer guests that have dined at the Premises, or persons staying at a hotel close to the Premises, or those that reside in the city, an ability to purchase a limited amount of packaged liquor from the Premises. This may be after their dining experience or to be able to come into the Premises to purchase a limited amount

²² Hearing transcript, page 2, line 35.

²³ Hearing transcript, page 6, line 5, page 5, line 20, and page 8, line 10.

²⁴ Hearing transcript, page 6, line 5. The Commission acknowledges that a "Gimlet" is a cocktail of gin (or sometimes vodka) and lime juice.

²⁵ Hearing transcript, page 6, line 15, and page 8, line 5.

²⁶ Hearing transcript, page 5, line 5.

²⁷ Hearing transcript, page 28, line 35.

²⁸ Hearing transcript, page 5, line 30.

of packaged liquor or to purchase a limited amount of packaged liquor online which would be posted or available for collection from the Premises.²⁹

- (h) Regarding online packaged liquor purchases, the Applicant also hopes to be able to offer persons that have purchased gift vouchers online with an option to add a sealed bottle of the Applicant's signature cocktail with the gift voucher. This would then be posted to them.³⁰
- (i) Only bespoke wines, aligned with the brand of the Premises, are proposed to be offered in respect to online sales. They will be part of a promotion with winemakers that have made a special wine for the Applicant to sell online with a specific 'Gimlet' label.³¹
- (j) Conversely, where people purchase a limited amount of packaged liquor from the Premises after their dining experience or come into the Premises to purchase a limited amount of packaged liquor, the Applicant is proposing to be able to sell to them any sealed bottle that is on the Premise's wine-list.³²
- (k) The Applicant is also proposing to offer people that purchase a limited amount of packaged liquor from the Premises after their dining experience or come into the Premises to purchase a limited amount of packaged liquor from up to five types of sealed signature cocktails with a Gimlet label or be able to offer them sealed packaged beer.³³
- (l) No beer will be sold online.³⁴
- (m) The Applicant does not consider the proposed sale of packaged liquor to be its core business, rather a small ancillary part of its operations at the Premises.³⁵
- (n) The Original Application was made because of a combination of a continuation of the marketing of the Premises and fulfilling a need or request by guests that have dined at the Premises.³⁶
- (o) All alcohol on the Premises is stored behind the bar or in the cellar. If the Commission were to grant an RLL, persons coming into the Premises to

²⁹ Hearing transcript, page 5, line 45

³⁰ The gift vouchers are for the purpose of dining at the Premises. Hearing transcript, page 6, line 35, and page 27, line 45.

³¹ Hearing transcript, page 14, line 5.

³² Hearing transcript, page 19, line 5.

³³ Hearing transcript, page 19, line 5.

³⁴ Hearing transcript, page 18, line 40.

³⁵ Hearing transcript, page 11, line 30.

³⁶ Hearing transcript, page 9, lines 20 and 35.

purchase packaged liquor would be ushered through to the bar where a bar supervisor could speak with them and source the packaged liquor that they were seeking. All of the front of house staff have RSA certificates.³⁷

- (p) At the Premises, there is a 50/50 split between front of house staff and kitchen staff.³⁸
- (q) The Applicant holds liquor licences for many other venues across Victoria. Where there has been a request in respect to other restaurants for supply of packaged liquor for off-premises consumption without a meal, the Applicant has relied on a general licence.³⁹
- (r) The Applicant doesn't hold a RLL for any restaurants it operates, only for a retail and/or grocery store in Prahran known as Morning Market.⁴⁰
- (s) The venue manager for the Premises previously worked for the Applicant in another venue which supplies packaged liquor under a general licence, Cutler & Co.⁴¹
- (t) The Applicant hasn't sought a general licence for the Premises because it feels that an RLL would give it everything it needed. The Applicant is also aware of the higher expense involved in applying for a general licence rather than a RLL.⁴²
- (u) Residential premises are located directly above the Premises. The Applicant feels that a RLL would raise less concerns than the steps that are involved in applying for a general licence.⁴³
- (v) Because the Applicant's business model for the Premises is to be a high-end, dine-in restaurant, the Applicant would never offer a takeaway meal service or deliver liquor with a meal. It could detract from the Applicant's premium style of food and change the Applicant's focus of offering a high-end dining experience at the Premises.⁴⁴

³⁷ Hearing transcript, page 7, line 5x, page 21, line 10.

³⁸ Hearing transcript, page 21, line 15.

³⁹ Hearing transcript, page 15, line 30.

⁴⁰ Hearing transcript, page 20, line 35.

⁴¹ Hearing transcript, page 22, line 40.

⁴² Hearing transcript, page 16, line 10.

⁴³ Hearing transcript, page 28, line 10.

⁴⁴ Hearing transcript, page 22, line 5.

- (w) Where a customer has made an online purchase and collects it at the Premises' reception desk, there would be no restriction from them consuming it in the Premises' dining area by way of asking a hostess to serve it at their table. There is no BYO at the Premises and customers cannot serve themselves liquor at their table.⁴⁵
- (x) The Applicant doesn't propose any difference in pricing between liquor to be sold under a RLL from liquor that is sold under the R&C Licence.⁴⁶
- (y) The Applicant doesn't currently have any operational management plan in respect to the sale of packaged liquor from the Premises. It will do this if granted a RLL.⁴⁷
- (z) The proposed liquor to be sold under a RLL would be on a one transaction per customer / per day basis. An extra component would need to be added to the Applicant's existing electronic reservation system to capture when a person might try to collect an online packaged liquor purchase at the Premises on the same day that person seeks to purchase packaged liquor from the Premises after a dining experience and/or has just walked into the Premises to purchase packaged liquor.⁴⁸

Amendments made to the Original Application to be considered on review

- 51. At the end of the Hearing, Mr Towey sought time to make further submissions to further amend the Original Application that is the subject of the Review Application.
- 52. On 18 April 2023, the Commission received Mr Towey's further submissions, in which he stated (in summary):
 - (a) The Applicant no longer seeks to supply beer under the proposed RLL.

⁴⁵ Hearing transcript, page 24, line 40.

⁴⁶ Hearing transcript, page 25, line 40.

⁴⁷ Hearing transcript, page 20, line 45.

⁴⁸ Hearing transcript, page 23, line 5, and page 27, line 30.

- (b) The Applicant no longer seeks to commence trading at 9am under the proposed RLL. Rather the proposed trading hours will be from 12 noon to 11pm on any day.⁴⁹
- (c) If the Commission were to grant the RLL, conditions could be imposed along the following lines:

Internet orders may be taken at any time.

Save for internet orders, the supply of liquor is limited to 2 bottles of wine from the restaurant wine list or 4 bottles of signature premixed cocktails (of not more than 250 mls per bottle) available on the wine list at the restaurant.

The supply of liquor via internet orders is limited to 2 bottles of wine from 5 lines of Gimlet Proprietary wines available from time to time, or 4 bottles of signature premixed cocktails (of not more than 250 mls per bottle) from a choice of 5 signature premixed cocktails available in the restaurant from time to time.

All liquor for off-premises consumption will be picked up via the reception desk only, there is to be no table service of liquor for takeaway.

Pick up orders at the Premises are limited to one takeaway transaction per customer per day.

All payment for takeaway liquor is to be via credit card.

Takeaway sales will be limited to one transaction per customer per day.

All takeaway sales from the Premises will be in sealed containers only, for the avoidance of doubt takeaway sales do not have to take place with takeaway food.

It is a condition of this licence that the Licensee comply with section 18C.

The price of liquor for internet sales is to be no different from the price of the same liquor at the restaurant.

Internet orders can be picked up at the reception desk at the Premises upon proof of age and purchaser identity being satisfied.

53. Mr Towey further submitted:

*“The Applicant will accept **any** reasonable conditions that the Commission sees fit on the grant of a licence.” [Emphasis added by Mr Towey].*

⁴⁹ This is within the permitted trading hours under the R&C Licence. The Commission notes that the scope of the definition of ordinary trading hours in respect to packaged liquor does not include Good Friday or Christmas Day. No supply was proposed in the Original Application for Good Friday or Christmas Day.

54. Overall, the Commission notes that there is a material difference between the Review Application and the Original Application that was before the Delegate.
55. Specifically, the Commission notes, as detailed in paragraph 52 above, that on internal review the Applicant has drawn a clear distinction between the proposed lines of wine available for supply to people ordering online and the proposed wine available for supply to people ordering in person (being people who dined at the Premises or anyone simply walking in). The Applicant proposes that the supply for online orders is to be limited to supply of wine of no more than five types of Gimlet labelled wines (available from time to time), whereas the in-person supply involves the supply of any line of wine which is on the Premises' extensive wine list.
56. In addition, on review, the Applicant proposed to limit the supply of cocktails to up to five types of Gimlet labelled pre-mixed cocktails for both online orders and pre-booked dining guests or anyone walking in.

Reasons for decision on review

Issues for determination on review

57. In making its decision on review, the Commission must determine the following central issues:
 - (a) first, whether the Commission is satisfied that a RLL and R&C Licence could coexist over the same Premises, given that the R&C Licence has a Predominant Activity Requirement;
 - (b) secondly, whether the Commission is satisfied that the Scale and Scope Requirement is met;
 - (c) thirdly, whether the grant of a RLL would detract from or be detrimental to the amenity of the area in which the Premises are situated;⁵⁰ and

⁵⁰ LCR Act, sections 44(2)(b)(i).

(d) fourthly, whether the grant of a RLL would be conducive to or encourage harm,⁵¹ or be contrary to the objects of the LCR Act, in particular the object of harm minimisation.⁵²

58. Each of these issues are discussed in turn.

Predominant Activity Requirement

59. It is clear from the trading hours of the R&C Licence that the Applicant will continue to operate its restaurant and café business at the Premises during the time of the proposed trading hours under a RLL.

60. The Premises' redline plan also shows that the layout of the Premises focuses on a dining experience for guests.

61. When asked by the Chair in the Hearing about the projections for revenue from sales under a RLL as a percentage of revenue, Ms Augustine said:

*"... certainly, in the single digits of lower than 5, as far as our total revenue goes."*⁵³

62. Ms Augustine further described how the proposed sale of packaged liquor business under a RLL would operate:

*"... these offerings will be discreet and not signposted, not visibly available, they are only going to be available through very much a hand selling and, again, discrete type of service. Gimlet serves a huge number of number of meals a week. I can never imagine that ever being any more than a small percentage of this type of offering to do what we do. We are a restaurant, and we don't ever want to be a restaurant. Our focus is on serving food. More than 95% of people who walked through our door consumed food of some kind."*⁵⁴

63. Ms Augustine also stated:

"... because this will be so subtly conveyed and offered, I really can't imagine it being any bigger than a very, very small percentage of what we do. The business model

⁵¹ LCR Act, sections 44(2)(b)(ii).

⁵² LCR Act, sections 4 and 172D(3). The Commission notes that, in determining this matter, it has also considered each of the grounds set out in section 44(2).

⁵³ Hearing transcript, page 17, line 5.

⁵⁴ Hearing transcript, page 19, line 35.

*stays the same. This is a small add on to increase the service to our guests and to our community.*⁵⁵

64. When asked by Deputy Chairperson O'Halloran as to whether sales of packaged liquor under a RLL could become bigger than projected, Ms Augustine said:

*"I just don't see that it's going to be that big. I really and genuinely don't see that that would be the case, and in other venues where we have that capacity under a general licence, it's not the case."*⁵⁶

65. Overall, the Commission considers in the circumstances that the Predominant Activity Requirement will be satisfied if the RLL were granted. Further, the Commission is satisfied, given the Applicant's established business model, and Ms Augustine's evidence (as set out in paragraph 68 below), that the Applicant will not ever prepare or sell take away meals at the Premises. This means that if an RLL is granted over the Premises, it will be clear that any packaged liquor sold at the Premises will be pursuant to the RLL and accordingly subject to all the terms and conditions of that licence.

Scale and Scope Requirement

66. There are no specific factors prescribed for the Commission to consider in determining whether the Scale and Scope Requirement is met. On previous occasions the Commission has considered *"the nature, location, duration or frequency of the hours of operation of a licence in question"* as relevant to the Scale and Scope Requirement.⁵⁷
67. In considering any impact of the R&C Licence on the Scale and Scope Requirement in respect to supply of liquor under a RLL, the Commission notes that the Applicant is entitled, upon provision of notification to the Commission, to supply packaged liquor in limited quantities on the Premises for consumption off the Premises as part of a home

⁵⁵ Hearing transcript, page 19, line 40.

⁵⁶ Hearing transcript, page 23, line 25.

⁵⁷ See decision of *Fynix Pty Ltd at 36A Vickers Street, Sebastapol premises (Liquor-Internal Review)* [2016] VCGLR 19, [61].

delivery meal service as well as with any takeaway meal purchased by a customer attending at the Premises.⁵⁸

68. In the Hearing, Ms Augustine said the Applicant never offered a takeaway meal service in respect to the Premises, even during COVID.⁵⁹ She further added:

“So never have we offered a takeaway at Gimlet, and I guess that's the whole premise for this licence being required to fulfil that need.”⁶⁰

“Even during the pandemic lockdowns where that was a very common thing for restaurants to do and we certainly did that at our other restaurants, that was never part of the business model for Gimlet because it is a dine in, high end, very premium experience. So, we turned the lights off and shut the doors.”⁶¹

“... having food translate and travel well is a really challenging and [a] very different skill set to what we offer.”⁶²

69. As stated above, the Commission is satisfied that the Applicant will not prepare or sell take away meals at the Premises. The Commission is also satisfied that the Applicant will not supply packaged liquor under the R&C Licence and therefore that any packaged liquor supplied at the Premises would be pursuant to the RLL. Accordingly, the Commission considers that this effectively eliminates the possibility of any scale and scope limitations and other conditions imposed pursuant to the RLL being inconsistent with the Applicant's ability to supply packaged liquor pursuant to the R&C Licence.

70. In considering the Scale and Scope Requirement, the Commission notes that, the Applicant asserts that it wishes to supply packaged liquor pursuant to the RLL in various ways and with various restrictions as part of one broad business concept. However, the Commission, having carefully considered all information before it, considers that there are two quite separate and distinct business models proposed, with one focussing on marketing, promotion and supply for patrons and the other

⁵⁸ As to the supply limits for takeaway or delivery under restaurant and cafe licences, see section 9A(2)(db).

⁵⁹ Hearing transcript, page 21, line 40.

⁶⁰ Hearing transcript, page 22, line 10.

⁶¹ Hearing transcript, page 22, line 5.

⁶² Hearing transcript, page 22, line 30.

focussing on online orders. For this reason, the Commission considers they ought to be considered separately to enable a well-considered conclusion as to whether each meets the Scale and Scope Requirement.

Online Orders

71. The Applicant has outlined that it wishes to supply liquor in response to orders received online (**Online Orders**).
72. The liquor for Online Orders will be only wine or premixed cocktails branded with the “Gimlet label” and that there will be no more than up to five types of each available.
73. Specifically, the Commission notes from Ms Augustine’s evidence in the Hearing that only bespoke wines, aligned with the brand of the Premises, are proposed to be offered in respect to online sales and that they will be part of a promotion (from time to time) with winemakers that have made a special wine for the Applicant to sell online with a Gimlet label.⁶³
74. Wine will be in sealed standard wine bottles of not more than 750 millilitres in capacity and the premixed cocktails will be in sealed bottles of not more than 250 millilitres in capacity.
75. There will be a limit of no more than two bottles of wine or up to four premixed cocktails per order and supply for Online Orders would be limited to one transaction per customer per day.
76. For Online Orders, the Applicant proposed that orders be taken at any time but for the liquor to be given to an external courier service provider such as Australia Post for home delivery, or to be available for pickup at the reception area of the Premises only during the trading hours of 12 noon to 11pm on any day.
77. Prices for Online Orders will be no different as that for the same liquor on the Premises’ wine list.

Findings in relation to Online Orders

78. The Commission considers that the limitations described above (in paragraphs 72-77 above) for Online Orders are sufficient to meet the Scale and Scope Requirement.

⁶³ Hearing transcript, page 13, line 5.

Supply for off-premises consumption to patrons at the Premises and members of the public walking into the Premises to purchase on-site.

79. The Applicant said that it also wishes to supply liquor for consumption off the Premises to patrons at the Premises and to supply liquor more broadly to anyone who may wish to attend the Premises to purchase liquor for consumption off the Premises (**Non-online Requests**).
80. The number of lines proposed for the Non-online Requests includes all wines otherwise available on its wine list for patrons. At the Hearing, Ms Augustine explained that such wines go from approximately \$48 to \$10,000.⁶⁴ Even though the Commission had no drinks menu before it from the Applicant, the Commission understands that the Premises' wine list for the Non-online Requests is extensive and contains over 100 wines from which patrons could choose.⁶⁵
81. Wine will be in sealed standard wine bottles of not more than 750 millilitres in capacity. Premixed cocktails branded with the Gimlet label will be in sealed bottles of not more than 250 millilitres in capacity.
82. There will be a limit of no more than two bottles of wine or up to four premixed cocktail bottles per order and supply would be limited to one transaction per customer per day.
83. Purchases must be made via credit card and prices for the liquor via Non-online Requests would be no different to that on the Premises' wine list.

Findings in relation to Non-online Requests

84. The Commission has concerns in relation to Non-online Requests on the basis that the requestor would be able to choose from an extensive range of wines (as opposed to from up to five different Gimlet labelled wines). Accordingly, the Commission does not consider that the proposed limitations for Non-online Requests are sufficient to meet the Scale and Scope Requirement.

Whether the grant of a RLL would detract from or be detrimental to the amenity of the area in which the Premises are situated

85. The Commission notes that the Council and Victoria Police did not object to the Original Application and that the Commission did not receive any objections from the

⁶⁴ Hearing transcript, page 7, line 40.

⁶⁵ <https://garconbleu.com.au/wp-content/uploads/2023/03/Wine-list-14.01.23.pdf>.

general public.

86. Subject to the amenity conditions detailed in Appendix A, the Commission is satisfied, on balance, that the grant of a RLL for online orders only, on the terms as set out in Appendix A, would not detract from or be detrimental to the amenity of the area.

Whether the grant of a RLL would be conducive to or encourage harm, or be contrary to the objects of the LCR Act, in particular the object of harm minimisation

87. An application may be refused if granting the application would be conducive to or encourage the misuse or abuse of alcohol.⁶⁶ Victoria Police did not raise any concerns in this regard, nor did the Council.
88. Overall, the Commission is satisfied that there are no relevant grounds for refusal under section 44(2) of the LCR Act.
89. The Commission has also had regard to the significant experience of the Applicant's director and nominee, Mr Andrew McConnell, in relation to the supply of alcohol, and the positive compliance history of these relevant businesses.
90. The Commission notes that some of his other businesses involve the supply of packaged liquor (albeit under a different licence category and/or type of business). The Commission has also noted that Mr McConnell's RSA Certificate and New Entrant Training Certificate were enclosed within the Original Application.
91. In summary, the Commission finds that the R&C Licence and the RLL allowing online orders, can coexist on the Premises, and that limitations proposed for supply for Online Orders are sufficient to meet the Scale and Scope Requirement. Further having regard to the objects of the LCR Act, particularly the harm minimisation object, the Commission is satisfied that adequate controls exist for the supply of liquor under a RLL on the basis as has been set out in Appendix A and that any risk of harm would be minimised with the imposition of the conditions as set out in Appendix A. The Commission has also had regard to the requirements in place under section 18C and section 109B if an off-premises request is made.

⁶⁶ Section 44(2)(b)(ii).

92. The Commission notes that the Applicant under the R&C Licence is entitled at any time to advise the Commission that it will supply packaged liquor for consumption off the Premises under the R&C Licence. If that occurred, the Commission considers that the Scale and Scope Requirement under the RLL would not then be satisfied and that there would be a lack of clarity about under which licence, off-premises supply is occurring. The Commission has therefore considered it to be appropriate to impose a condition to the effect that, if the Commission receives notification from the Applicant that it will supply packaged liquor for consumption off the Premises under the R&C Licence, the supply of liquor under the RLL must cease from the date of such notification until the Commission receives written notification from the Applicant that it has ceased supplying packaged liquor for consumption off the Premises under its R&C Licence (as set out in Appendix A).

Decision on review

93. The Commission has determined to set aside the decision of the Delegate and, in substitution, grant a RLL subject to the conditions set out in Appendix A.

The preceding 93 paragraphs are a true copy of the Reasons for Decision of Ms Danielle Huntersmith (Chair), Mr James O'Halloran (Deputy Chair) and Ms Sue Timbs (Commissioner).

Appendix A

Type of licence

This licence is a renewable limited licence and, subject to the conditions specified in this licence, authorises the licensee to supply packaged liquor:-

- on the licensed premises for consumption off the licensed premises, where the customer has ordered the liquor online for home delivery or to be delivered to another person as a gift; or
- on the licensed premises for consumption off the licensed premises, where the customer has ordered the liquor online for pickup at the licensed premises.

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.

Supply of liquor

The supply of liquor shall be limited to promotional liquor packaged with a 'Gimlet' label only. In addition, it shall be limited to a range of no more than five lines of wine – being wines in 750 ml bottles and packaged bearing the "Gimlet" label and no more than five lines of premixed cocktails – being premixed cocktails in 250ml bottles and branded with the 'Gimlet' label.

The quantity of liquor supplied per order must not exceed either two 750 ml bottles of wine, or alternatively be up to four 250 ml bottles of premixed cocktails, and supply is limited to one order per person per day.

Online orders for the supply of packaged liquor may be taken at any time on any day.

The price of liquor for online sales is to be no different than from the price of the same liquor if it were supplied for consumption on the licensed premises.

Any pickup at the licensed premises of alcohol ordered online must occur at the reception area.

If the Commission receives notification from the licensee under section 9A(2)(dc) that it will supply packaged liquor for consumption off the licensed premises under the Restaurant and Cafe Licence it holds in respect of the licensed premises, the supply of liquor under this Renewable Limited Licence must cease from the date of such notification until the Commission receives written notification from the licensee that it has ceased supplying packaged liquor for consumption off the licensed premises under its Restaurant and Cafe Licence.

Delivery of liquor

Liquor must not be supplied or delivered to a person under the age of 18 years.

The licensee must ensure that delivery arrangements include requiring evidence of age where appropriate.

Liquor must not be delivered and left at unoccupied premises for a first-time delivery or for a same day delivery.

Liquor may only be delivered during the trading hours specified below.

Trading hours for the supply of liquor

On any day other than Good Friday or Christmas Day – between 12noon and 11pm.

Transfer of licence

This licence is not transferable to a person who is not also the licensee of the Restaurant and Cafe Licence in respect of these premises.