

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICATION ID: A000191987

APPLICANT: SEOUL MART SOUTHLANDS PTY LTD

PREMISES: SEOUL MART SOUTHLANDS

PREMISES ADDRESS: SHOP 76 SOUTHLANDS SHOPPING CENTRE,
45 BURRENDAH BOULEVARD, WILLETTON

NATURE OF APPLICATION: GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 11 MAY 2016

1. On 14 December 2015, an application was lodged by Seoul Mart Southlands Pty Ltd ("the Applicant") for the grant of a liquor store licence in respect of premises known as *Seoul Mart Southlands* and situated at Shop 76 Southlands Shopping Centre, 45 Burrendah Boulevard, Willetton.
2. Pursuant to the provisions of section 17(1)(b) of the Act, the Applicant is represented by No Borders Group Pty Ltd in these proceedings¹.
3. The application is made pursuant to s 47 of the *Liquor Control Act 1988* ("the Act") and was advertised in accordance with instructions issued by the Director of Liquor Licensing ("the Director"), which resulted in a notice of intervention² being lodged by the Executive Director Public Health ("EDPH").
4. To give effect to the provisions of s 16 of the Act, a document exchange was initiated between the parties in order to ensure that each party was given a reasonable opportunity to present its case.
5. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, some of which are summarised below.
6. The application was supported by a Public Interest Assessment ("PIA") and other submissions, for the purpose of addressing the requirements of s 38 of the Act and demonstrating that the grant of the application would be in accordance with the objects of the Act, as set down in s 5.

¹ Any reference in this determination to the submissions of "the Applicant" is also a reference to the submissions of its representative.

² In relation to the representations made in the notices of intervention, it should be noted that as interveners the EDPH and Commissioner carry no burden of proof (see Greaves J, *Re Gull Liquor* (1999) 20 SR (WA) 321).

7. In this regard, the PIA noted that *Seoul Mart Southlands* is currently trading as a Korean/Asian grocery store within the Willetton community in the Southland Shopping Centre commercial complex, which houses various retail and service businesses. The Applicant also submitted that:

“The current owner aims to broaden the business through product differentiation. Seoul Mart intends to implement this by offering specialty in Asian alcohol to the local community.”

8. Accordingly, the Applicant submitted that there is only a limited supply of traditional Asian alcohol in the locality, which “significantly constrains the cultural diversity in the local community” and inconveniences many Asian cultural customs, especially given that Asian cuisines are commonly complemented with an alcoholic beverage, such as Korean wines.
9. The Applicant also submitted that while its objective is to predominantly sell Asian liquor products in order to introduce them into the community and enhance diversity; the sale of liquor at the proposed liquor store would not be restricted to Asian liquor products only.
10. The Applicant further submitted that approval of the application “will not alter the existing business at all; the Applicant will continue trading Asian groceries and traditional Asian liquors will only be a small addition to its overall retail business.”
11. In relation to other licensed premises within the locality, the Applicant submitted that there are only ten licensed premises located within a two kilometre radius of the proposed licensed premises and the vast amount of those premises are either restaurants, sporting clubs, a tavern or “branches of the main Australian liquor stores brand.”
12. Although the Applicant submitted that it is unaware of any liquor store in the locality³ that sells traditional Asian alcohol, its own analysis of the other licensed premises within a two kilometre radius of the proposed premises indicated that:
- (a) *Hi Mart* imports and sells a large number of different food products and Korean wines;
 - (b) *Dan Murphy’s Canning Vale* sells some Asian alcoholic beverages;
 - (c) *Parry Place Cellars* sells an extensive range of whiskies from all over the world, including Japan, Taiwan and India; and
 - (a) *The Bottle-O at Willetton* sells Asian beers from China and Japan.

³ Pursuant to Attachment 2 to the Director’s *Public Interest Assessment* policy, the locality for a suburb in the inner Metropolitan Region is a two kilometre radius of the proposed premises.

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13. The Applicant's PIA also considered those matters prescribed in s 38(4) of the Act. In relation to the public interest associated with the minimisation of harm or ill-health that might be caused to people, or any group of people, due to the use of liquor, it was submitted that liquor will be displayed, stored and sold from a refrigerator that will be located behind the service counter, which will restrict access to persons other than the Applicant's employees, who will all have current Responsible Service of Alcohol certification and be supervised by an Approved Manager.
14. The Applicant also submitted that:
- (a) no more than five per cent of the total area of the store can be used for the display of liquor; and
 - (b) a Closed Circuit Television ("CCTV") surveillance system will be installed to monitor the sale of alcohol, as a part of its responsible sale of alcohol initiatives.
15. In response to the Act's object of catering for the requirements of consumers for liquor and related services, the Applicant submitted that:
- "Most of the Asian cuisines are complemented with an alcohol beverage. The area in which the venture proposes to be implemented has a limited amount access to Asian beverages. The Applicant aims to conquer the market with product specialization and provide diversity of alcoholic beverages in the community. They also aim to maintain and improve the quality of the alcohol to provide an authentic taste of Asian beverages."
16. In conclusion, the Applicant submitted that while it "does not wish to convert itself as another full liquor store", the grant of the application to authorise the sale of traditional Asian liquors to its customers would play an important cultural role.
17. The EDPH made representations regarding:
- (a) the harm and ill-health concerns indicated by the literature regarding the integration of alcohol sales alongside everyday grocery items;
 - (b) the store being located in close proximity to two schools, and research shows that regular exposure to alcohol advertising can have a negative impact on health outcomes which put children and young people at a greater risk of harm from alcohol, both now and into the future; and
 - (c) trading conditions that may assist to minimise alcohol-related harm, should the licence be granted.
18. For the benefit of the parties in this matter, before proceeding to my determination, I will briefly state the statutory obligations imposed on the licensing authority when determining an application under the Act.

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19. The power of the licensing authority to grant licences and applications under the Act is found in ss 30A(1) and 33 of the Act, respectively. In this regard, s 33 of the Act provides absolute discretion to grant or refuse an application on any ground or for any reason considered to be in the public interest, provided that applications are dealt with on their own merits (refer *Western Australian Supreme Court* decisions in *Woolworths v Director of Liquor Licensing* [2012] WASC 384 and *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
20. In determining whether the grant of an application is in the public interest, I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASC 175).
21. The scope and purpose of the Act can be ascertained from its objects (refer s 5), which the licensing authority is bound to take into consideration when determining an application. Accordingly, advancing the objects of the Act is also relevant to the public interest considerations. Furthermore, without confining the scope or meaning of the public interest in s 38(2), s 38(4) prescribes a number of factors that might be taken into consideration when determining whether or not the grant of an application is in the public interest.
22. The primary objects of the Act, as set out in s 5(1) are:
- (a) to regulate the sale, supply and consumption of liquor (s 5(1)(a));
 - (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor (s 5 (1)(b)); and
 - (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of, relevantly, the liquor industry in the State (s 5(1)(c)).
23. The matters set out in s 38(4) of the Act, which do not limit the licensing authority's public interest assessment under s 38(2), include:
- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor (par (a));
 - (b) the impact on the amenity of the locality in which the premises, or proposed premises are, or are to be, situated (par (b));
 - (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises (par (c)); and

- (d) any other prescribed matter (par (d))⁴.
24. Section 16 of the Act requires that the licensing authority should act without undue formality. In this regard, s 16(7) further provides that the authority is not bound by the rules of evidence or any practices or procedures applicable to courts of record and is to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.
25. While the rules of evidence do not apply to proceedings before the licensing authority (refer section 16(7) of the Act), decision of the authority must be made on the balance of probabilities and be based on the evidence before it. Furthermore, notwithstanding that s 5(2)(e) of the Act requires the licensing authority to provide as little formality or technicality as may be practicable, the evidence of the parties needs to be relevant, reliable and logically probative to assist the decision-maker to assess the probability of the existence of the facts asserted in each case (refer Liquor Commission of Western Australia decision in *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)).
26. Upon receipt of the application, it was noted by this Authority that the Applicant's claims in its PIA were not supported by any evidence. Accordingly, on 17 December 2015, in the letter acknowledging receipt of the application, the Applicant was advised that it might wish to give consideration to s 5 of the Act and precedent decisions of the Liquor Commission ("the Commission"), where it was determined that a PIA must be supported by objective evidence.
27. That letter also stated that:
- (a) the Commission had found that assumptions, opinions, speculation and generalised statements alone will not demonstrate that the application is in the public interest; and
 - (b) the Applicant may wish to consider providing sufficient supporting evidence that is objective, accurate and relevant to the application in support of the claims made in the PIA.
28. The letter further explained that objective evidence could include market research findings; a feasibility study; target market study; (questionnaires and surveys); letters of support from customers or potential customers and that ultimately, what objective evidence is provided in support of the application is a matter for the Applicant to consider. Additional documentation required for administration purposes was also requested.

⁴ No 'other...matter' has been prescribed pursuant to s 38(4)(d).

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29. On 18 January 2016, the Applicant responded, providing an amended PIA, Harm Minimisation documents in accordance with the Director's *Harm Minimisation* policy and other administrative requirements. However, the Applicant did not lodge the recommended objective evidence.
30. Therefore, on 1 April 2016, when this authority wrote to the Applicant and EDPH to advise that the application would be determined on the written submissions of the parties without a hearing, the Applicant was again provided with the opportunity to lodge any and all evidence upon which it wished to rely, along with any further written submissions in support of the application. At this time, the Applicant was also advised that its submissions must demonstrate that the grant of the application is in the public interest and consistent with the objects of the Act, as provided in section 5, as well as those matters set out in section 38(4).
31. However, no responsive submissions or evidence were lodged by the Applicant and following enquiries by this authority, the Applicant advised on 5 May 2016 that it would not be lodging any further submissions or evidence and requested that the application be determined in accordance with the Act.
32. Accordingly, the Applicant seeks the grant of a liquor store licence to enable it to sell and supply liquor in conjunction with its retailing of Asian groceries. While it submits that most Asian cuisines are complemented with traditional Asian beverages and that the locality has limited access to Asian beverages, there was little or no evidence lodged by the Applicant to establish its claims in its PIA or discharge its obligation under s 38(2) of the Act generally. Conversely, I consider that the Applicant's own evidence actually establishes that Asian wines, beers and spirits can already be purchased from four existing licensed premises operating within the locality.
33. While I am prepared to accept on face value that some members of the community will always find it desirable and convenient to be able to purchase packaged liquor together with convenience goods at a grocery store, delicatessen, butcher or other convenience store, the element of convenience must be weighed against the broader public interest considerations under the Act and the facts and circumstances of each case. In this regard, the proliferation of packaged liquor outlets would not be consistent with the Act's harm minimisation object (refer *Parliamentary Debates*, WA Parliament, vol 409, p 6342).
34. In regard to this, I have also noted that in *MYD Korea Pty Ltd v Commissioner of Police & Others*, matter LC 21/2015, the Liquor Commission observed that if convenience was seen to be meeting the "public interest" requirements of the Act, then the weight to be accorded to that factor would also need to be reviewed in the context of the proper development of the liquor industry, with the Commission concluding that:

"In that respect, the provision of liquor products in supermarkets, delicatessens, butchers, or other retail outlets where grocery items are purchased regularly, and at which it would merely be convenient to buy

liquor, is viewed by the Commission as not being a sufficient reason to grant an application for a liquor store licence.”

35. The Liquor Commission also observed in *Harold Thomas James Blakely v Director of Liquor Licensing* [LC 44/2010]) that:

“Licences should not be granted simply because an applicant ‘has a good idea’ or would like to establish a business involving the sale and supply of liquor. The private interests of an applicant should not be confused with the public interest. Such an approach would not be consistent with the Act or the objects of the Act (refer s 5 which includes minimizing alcohol-related harm and having regard to the proper development of the liquor industry).”

36. In considering the application, I note that the licensing authority, regardless of whether constituted by the Director or Commission, has a long established view that it is not sufficient for an applicant to merely express opinions and make assertions about the perceived benefits of an application. Rather, the obligation falls upon the Applicant, pursuant to s 38(2) of the Act, to demonstrate that the grant of the licence is in the public interest.
37. As already noted in this determination, s 38(2) of the Act imposes a positive obligation upon the Applicant to satisfy the licensing authority that the grant of the application is in the public interest. It is therefore incumbent upon an applicant to adduce sufficient evidence to make it possible for the licensing authority to be satisfied that the application is in the public interest (refer *Busswater* supra). The licensing authority cannot run an application, objection or intervention on behalf of a particular party (refer LC 44/2010, supra). Furthermore, the Courts have found that applications under the Act cannot proceed on the basis of any legal or factual presumption in favour of approval, or on the expectation that the commercial interests of an application with coincide with the public interest.
38. I am satisfied that the Applicant has been provided with sufficient opportunity to present evidence to support the application, given:
- (a) this authority’s letters of 17 December 2015 and 1 April 2016; and
 - (b) that the Director’s *Public Interest Assessment* policy is publicly available and provides detailed guidance in respect of the possible content of Public Interest Assessment submissions.
39. Accordingly, I am of the view that that there is insufficient supportive evidence to demonstrate that the granting of the licence is in the public interest, as the information provided by the Applicant is based on generalised statements and information only.
40. The application is therefore refused.
41. Given my findings in relation to the application, I do not believe it is necessary for me to consider all of the submissions of the EDPH in these proceedings.

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42. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
43. This matter has been determined by me under delegation pursuant to s 15 of the Act.



Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING