

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

- Applicant:** MYD Korea Pty Ltd
(represented by Mr Mario Sequeira of Hospitality Total Services (Aust) Pty Ltd)
- Interveners:** Director of Liquor Licensing (First)
(represented by Ms Rachel Paljetak of State Solicitors Office)
- Commissioner of Police (Second)
- Executive Director of Public Health (Third)
(both represented by Mr Luke Villiers of State Solicitors Office)
- Commission:** Ms Helen Cogan (Presiding Member)
Mr Michael Egan (Member)
Dr Eric Isaachsen (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision by the Delegate Director of Liquor Licensing to refuse the conditional grant of a liquor store licence for premises to be known as “Nungcool Butcher”.
- Premises:** Nungcool Butcher, 3/800 Albany Highway, East Victoria Park
- Date of Hearing:** 25 June 2015
- Date of Determination:** 12 August 2015

Determination:

The application is refused and the decision of the Delegate of the Director of Liquor Licensing is affirmed.

Authorities Referred to in Determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Busswater Pty Ltd v Director of Liquor Licensing* LC 17/2010
- *Harold Thomas James Blakely v Director of Liquor Licensing* LC 44/2010

Background

- 1 On 6 November 2014, MYD Korea Pty Ltd (“the applicant”) lodged an application for the conditional grant of a liquor store licence for the premises known as Nungcool Butchers situated at Shop 3, 800 Albany Highway, East Victoria Park .
- 2 On 2 January 2015, a notice of intervention was lodged by the Commissioner of Police (“the Police”) and on 8 January 2015 by the Executive Director of Public Health (“EDPH”).
- 3 On 16 April 2015, the delegate of the Director of Liquor Licensing (“the Director”) determined that the application be refused.
- 4 On 5 May 2015, the applicant lodged an application for a review of the decision of the Director under section 25 of the *Liquor Control Act 1988* (“the Act”).
- 5 On 21 May 2015, the Director intervened in relation to the application pursuant to section 69(11) of the Act.
- 6 Submissions and responsive submissions were received from the parties to the proceeding over the period ending 18 June 2015.
- 7 A hearing before the Liquor Commission (“the Commission”) was held on 25 June 2015.

Submissions on behalf of the applicant

- 8 The applicant considered the following issues in developing the PIA:
 - 1) Australian Bureau of Statistics and Town of Victoria Park statistics noting the increasing proportion of local residents being of Asian descent;
 - 2) broad consultation that included the local community, local businesses and consumers who frequent their premises;
 - 3) the intent of offering a wider scope of speciality liquor products with both retail and wholesale trading;
 - 4) an awareness of the multi-cultural nature of the community and the intent to provide unique products instead of just providing more commonly available varieties;
 - 5) ease of access to the premises with ready parking;
 - 6) more extensive trading hours than would apply were the premises within a shopping centre;
 - 7) evidence of support provided by 149 consumer surveys (with 77% of respondents living locally), plus letters from local residents, organisations, and Asian-food focused operations.
- 9 It was further submitted that this evidence of support is ample given the unique nature of the offering in terms of the select product range and nature of the application. In addition, the demographics, as noted above, support the assertion that the application is in the public interest as it caters to the diversity of persons in a multicultural society.

- 10 Harm minimisation will be addressed by a strict Harm Minimisation Plan to be in effect at all times when the premises trade. The specific product range in a small, well controlled licensed premise will assist in minimising or eliminating the harm or ill-health (if any) that may be caused in the locality.
- 11 In terms of the hours of operation it was submitted that the proposed extension beyond the existing trading hours of the business would provide an increased service to current customers and allow patrons of local restaurants an alternate source of packaged liquor along with a selection not otherwise available.
- 12 In response to the concerns raised by the Police, the applicant agreed to each of the conditions sought, save for the following three:
 1. limits on trading hours;
 2. limits on advertising; and
 3. a requirement for the sale of liquor as an ancillary service.
- 13 The applicant submits that to provide a complete service there is a community expectation of later opening hours and that a 9.00pm closing time would more comprehensively cater to the public interest. The existing trading hours of the business cease at 7pm Monday to Saturday and 6pm on Sunday and public holidays.
- 14 The capacity to provide external advertising was sought: the submission was to have the same ability to advertise as a general liquor store – including elements such as product availability and special offers.
- 15 Sale of liquor as ancillary to the purchase of Asian grocery products is seen as not being necessary, nor in the public interest and is not imposed on other speciality stores. However, the condition would be accepted were it to be imposed.
- 16 In response to the concerns expressed and the research evidence presented by the EDPH, it was submitted that they were of limited relevance as the research was undertaken in jurisdictions other than Australia and that both the size of premises and style of retail operation were markedly different.

Submissions on behalf of the Director of Liquor Licensing

- 17 It has been submitted on behalf of the Director that the Director correctly concluded the applicant failed to discharge its onus to show that the grant of the licence is in the public interest. The following factors were considered relevant:
 - 1) the limited consumer requirement;
 - 2) the number of liquor outlets in the area;
 - 3) the lack of probative evidence demonstrating a broader community requirement.
- 18 The PIA places emphasis on the demand from the large (and growing) Asian population in the Victoria Park locality for speciality Asian liquor products where a limited and generic product range is available from other liquor outlets in the locality. Whilst there is evidence of population growth there is not the same level of evidence that this translates into a growth in demand for liquor. The focus on one demographic also makes it difficult to sustain an argument that the application caters for the broader

requirements of consumers for liquor and related services.

- 19 A further component is that there are 13 packaged liquor outlets in the area and six (6) of these sell a general range of Asian liquor products and one (1) has restricted its sales to a specialised range of Asian liquor products, and is located within 1.24 kilometres of the applicant's premises.
- 20 In assessing the weight to be given to the 149 responses to the customer surveys, it is necessary to consider that all were current patrons, and that in responding to the statement in the questionnaire: "I believe that it would be in the public interest for Nungcool Butcher to be permitted to sell a range of Korean, Japanese and Chinese liquor products, to meet the needs of consumers of Asian liquor products" there was no qualifying note as to the nature of 'public interest' nor is it possible to determine whether or not respondents knew of other liquor outlets in the area.
- 21 It was certainly evident that convenience was of significance to the respondents. However, the convenience of purchasing liquor with other food and grocery products in the same store is not, of itself, a persuasive factor in demonstrating the public interest.
- 22 The Director submits that assertions that the grant of the licence will enhance the community ; aid in the development of the hospitality, tourism and liquor industries ; introduce the broader population to quality Asian cuisine and cookery; and cater to the diverse interests of local residents, are not supported by sufficient, or any, probative evidence.

Submissions on behalf of the Commissioner of Police

- 23 The Police submit that the applicant's evidence establishes only a limited public interest in catering for the consumer requirements of the existing patrons.
- 24 The application is designed to service a demand for speciality Asian liquor products, and provide one-stop shopping convenience for both Asian grocery and liquor products. In the view of the Police, whilst the applicant would provide some additional benefits to its existing customer base, no evidence has been provided of a wider consumer requirement for speciality Asian liquor products, nor is there sufficient evidence of the overarching benefits for the public generally.
- 25 The intended manner of trade is contradictory where the provision of liquor is said to be secondary to the provision of Asian grocery products yet the trading hours are proposed to be extended by 20 hours per week. No evidence has been provided of a demand for speciality liquor, beyond its provision as an ancillary service, to justify an extension of trading hours.
- 26 It is submitted that the advertising conditions proposed by the Police are consistent with the applicant's PIA in relation to the liquor provision being intended as complementary to the existing product range. The need to advertise is also seen as questionable given the evidence that the prime market is existing customers.

Submissions on behalf of the Executive Director of Public Health

- 27 The EDPH submissions are that :
 - 1) the sale of alcohol at supermarkets can lead to increased consumption and harm;

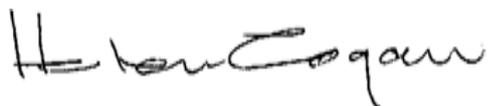
- 2) the integration of alcohol with everyday grocery items reinforces the perception of alcohol as a non-harmful product and establishes its cultural place as part of everyday life;
 - 3) the sale of alcohol from supermarkets can lead to the impulse purchasing of alcohol, which leads to increased consumption and harm;
 - 4) if the application were granted, conditions should be imposed that separate alcohol from everyday grocery items and limit the types of alcohol sold.
- 28 Despite the targeted nature of the application, intended to minimise the harm associated with the sale and supply of alcohol, the literature concerning alcohol and alcohol-related harm demonstrates that offering alcohol for sale in supermarkets can lead to an increase in the consumption of alcohol generally. Studies from New Zealand and Sweden were listed in support of this proposition.
- 29 Offering alcohol for sale as a grocery item can cause the community to perceive alcohol as a product which is not productive of harm, principally due to the de-emphasis which the grocery setting places on the drug properties of the alcohol. Such perceptions in turn affect the volume and manner in which alcohol is consumed.
- 30 Furthermore, the sale of alcohol alongside groceries also increases the likelihood of impulsive or unplanned purchases of alcohol. The impulse purchasing can likewise increase the risk of impulsive alcohol use and generally increase rates of consumption.

Determination

- 31 Section 25(2c) of the Act provides that when conducting a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 32 In conducting a review pursuant to section 25 of the Act, the Commission is not required to find an error in the Director's decision, it is required to undertake a full review of the merits of the materials before the Director and make its own determination based upon those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224).
- 33 Pursuant to section 25(4), the Commission may:
- 1) affirm, vary or quash the decision subject to the review;
 - 2) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance;
 - 3) give directions as to any questions of law reviewed, or to the Director to which effect shall be given; and
 - 4) make any incidental or ancillary order.
- 34 Section 38(2) of the Act provides that an applicant must satisfy the licensing authority that granting the application is in the public interest. There is a positive obligation on the applicant to discharge its onus.
- 35 It is not enough that an applicant express assertions or opinions about the public interest; any assertion or opinion must be supported by an appropriate level of evidence (*Busswater Pty Ltd v Director of Liquor Licensing* LC 17/2010).

- 36 The private interests of an applicant do not equate to, and should not be confused with the public interest (*Harold Thomas James Blakely v Director of Liquor Licensing* LC44/2010).
- 37 The applicant seeks to permit present and future patrons of Nungcool Butcher the option and convenience of purchasing a selection of Korean, Japanese and Chinese liquor products to complement their Asian cooking. The proposal is to set aside a small designated area of their premises with physical access to the liquor products restricted to the staff.
- 38 The process undertaken to gauge support for the proposal was outlined in detail in the PIA and the applicant submitted the responses as evidence that supported their case that the application was in the public interest. The interveners directed their submissions to a considerable degree as to whether or not it has been demonstrated that the application was in the public interest.
- 39 In assessing this aspect it is of assistance to refer to the primary objects of the Act and in particular section 5(1)(c) – ‘to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State’.
- 40 It is common ground that the surveys reported by the applicant show support from current customers for the convenience of purchasing Asian liquor products and grocery items at the same premise. It is far from clear that there is a requirement from the wider community for that availability notwithstanding the demographics of the surrounding suburbs.
- 41 If convenience was seen to be meeting the “public interest” requirement, 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. 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.
- 42 It is submitted that the unique and restricted range of liquor products to be provided will assist in harm minimisation and also enhance the consumer experience. Whilst an increased range may well be appreciated by current and future customers there is little evidence to support this assertion. Nor is it evident that there is a requirement for a broadened product range from the community other than current retail customers and letters of support from potential wholesale customers for Asian liquor products.
- 43 The application is explicit that the purchase of liquor is seen as secondary to the purchase of Asian grocery items. It is difficult to see how this relates to the request for extended trading hours where it is current practice to only provide for trade in groceries up to 7.00pm. The submission that there is a need to meet a community expectation for longer opening hours were a liquor store licence to be granted is not accepted by the Commission.
- 44 The interventions of the Police and the EDPH both sought to impose conditions on the licence in the event that it was granted, rather than oppose the application. The Commission notes the acceptance by the applicant of the proposed harm minimisation measures and the consultative manner in which this occurred.

- 45 In arriving at its determination the Commission is required to evaluate the quality and level of evidence presented by the applicant to discharge its obligations under the Act.
- 46 On examination of all the material before it, the Commission is not persuaded that there is sufficient evidence that the grant of the application is in the public interest.
- 47 The applicant has thus failed to discharge its onus under section 38(2) of the Act and the application is therefore refused.



HELEN COGAN
PRESIDING MEMBER