

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: MYD KOREA PTY LTD

PREMISES: NUNGCOOL BUTCHER

PREMISES ADDRESS: UNIT 3, 800 ALBANY HIGHWAY, EAST VICTORIA PARK

APPLICATION ID: A000057259

NATURE OF APPLICATION: **APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR STORE LICENCE**

DATE OF DETERMINATION: 16 APRIL 2015

1. This is an application by MYD Korea Pty Ltd (“the Applicant”) for the conditional grant of a liquor store licence for premises to be known as *Nungcool Butcher* and situated at Unit 3, 800 Albany Highway, East Victoria Park.
2. The application is made pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (“the Act”) and was advertised in accordance with instructions issued by the Director of Liquor Licensing, which resulted in notices of intervention being lodged by the Commissioner of Police (“the Commissioner”) and Executive Director Public Health (“the EDPH”), pursuant to the provisions of s 69 of the Act.
3. Pursuant to ss 13 and 16 of the Act, the application will be determined on the papers.
4. To support its application, the Applicant lodged a Public Interest Assessment (“PIA”) and submitted that the grant of a liquor store licence would be in the public interest because it will:
 - (a) “permit present and future patrons of Nungcool Butcher the option and convenience to purchase a selection of Korean, Japanese and Chinese liquor products to complement their Asian cooking and dining experience”;
 - (b) “allow Nungcool Butcher to meet the needs of the local community and those who resort to the Nungcool Butcher and enhance the amenity available in the locality, by providing a select range of liquor products not easily available in the locality”;
 - (c) “provide authentic liquor products to the large growing Asian population in and outside the defined locality as well as introducing quality Asian cuisine, culture and liquor to the broader population”; and
 - (d) offer a restricted range of liquor products imported from:
 - (i) Korea (approximately 15 to 20 varieties);

(ii) Japan (approximately five to 10 varieties); and

(iii) China (approximately three to five varieties),

which will be displayed in shelving behind the service counter. The Applicant also submitted that it will not stock any Korean, Japanese or Chinese liquor products, such as Asahi beer or Sapporo beer, as these products are already available in other licensed premises within the locality.

5. The Applicant's PIA cited recent Australian Bureau of Statistics data to establish that 33% of the Australian population is of Asian descent and submitted that a larger percentage of people in Victoria Park were of Chinese ancestry (7.5%) than those in the greater Perth (4.2%) area.
6. The Applicant further submitted that the "primary focus of Nungcool Butcher is and will continue to be the provision of high quality Asian grocery products with a specific focus on Korean products and the provision of fresh raw meat processed on the premises" and that there will be "strictly no 'on premises' consumption of alcohol including no tasting of alcohol products on the premises."
7. The application was supported by a survey completed by 149 respondents (77.09% of who either live in or close to Victoria Park), including members of the general public, business owners and operators, as well as letters of support from local Asian community groups and Asian restaurants. The Applicant subsequently submitted that it "expects its customers to be derived predominantly from those who presently shop at Nungcool Butcher."
8. The Applicant particularly noted that the survey responses indicate that some of its existing customers come from as far away as Scarborough, Fremantle, Subiaco, Embleton and Parkwood.
9. It was also submitted by the Applicant that the only other premises with a dedicated offering of Asian grocery and speciality liquor in the locality is Seoul Mart Victoria Park, which is located within the Centro Victoria Park Shopping Centre and which the Applicant submitted, offers a "limited and generic" range of Korean products.
10. The Applicant also submitted that:
 - (a) approval of the application will "aid in the development of the hospitality, tourism and liquor industries and provide customers with a diverse range of unique traditional Asian liquor products"; and
 - (b) the "increased convenience of being able to perform both grocery shopping and purchase complementing Asian liquor products will have a positive social and economic impact as well as supplying the need for unique Asian liquor products that are not otherwise readily available."

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11. In its analysis of existing licensed premises within the locality that are authorised to sell packaged liquor, the Applicant identified 13 licensed premises, comprised of hotels, taverns and liquor stores, six of which stock at least one type of Asian liquor, with only Seoul Mart Victoria Park having a specific focus on Asian liquor products.
 12. The Applicant's PIA also addressed those matters prescribed in s 38(4) of the Act.
 13. The EDPH made representations, notwithstanding the Applicant's intention to stock only a limited product range and volume of liquor, regarding:
 - (a) the harm and ill-health concerns indicated by the literature regarding the integration of alcohol sales alongside everyday grocery items (such as reinforcing alcohol as a non-harmful, everyday product and leading to impulse purchasing and increased consumption); and
 - (b) appropriate trading conditions, should the licence be granted, to assist in minimising alcohol-related harm or ill-health.
 14. The representations of the Commissioner are made in respect of the following public interest matters:
 - (a) that the limited public interest identified by the survey respondents relate to the purchase of Asian liquor products ancillary to the purchase of Asian groceries;
 - (b) that consistent with the Applicant's submissions, if granted, the licence should only authorise the sale of Korean, Japanese and Chinese liquor products; and
 - (c) the Applicant has misunderstood concept of one-stop shopping, which relates to regional or district shopping centres and not a small shop.
 15. The Commissioner also questioned the trading hours sought in the application and suggested that it is questionable that consumers would actually be grocery shopping late at night and submitted, instead, that the permitted trading hours under the licence should reflect Nungcool Butcher's existing trading hours, which currently cease at 7 p.m. Monday to Saturday and at 6 p.m. on Sunday and public holidays.
 16. The Commissioner concluded by recommending the imposition of a number of trading conditions on the licence, should it be granted.
 17. 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] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).

18. In this regard, s 38(2) clearly places a positive burden on an applicant to demonstrate to the licensing authority that the granting of the application is in the public. This means that an applicant cannot simply show that the grant of a licence will not be contrary to the public interest, but must demonstrate a clear public benefit through the grant of the application. As such, the level and degree of evidence to be submitted by an applicant will vary depending upon the facts and circumstances of each case. 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 will coincide with the public interest.
19. 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 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 may be taken into consideration when determining whether or not the grant of an application is in the public interest.
20. While the rules of evidence do not apply to proceedings before the licensing authority (refer section 16(7) of the Act), decisions 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 *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17of 2010)).
21. Each application must be dealt with on its merits (refer s 33) but the licensing authority has an absolute discretion to grant or refuse an application for any reason that the licensing authority considers in the public interest (refer *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
22. Nungcool Butcher is located at Unit 3, 800 Albany Highway East, Victoria Park and the Applicant proposes a very small liquor store, restricted to only a display area located behind the service counter and the service counter itself. According to the Applicant, the proposed liquor store is designed to add convenience to shoppers of the Nungcool Butcher.
23. To support its application, the applicant submitted a number of customer support questionnaires, presumably to demonstrate that the grant of the application would be consistent with object 5(1)(c) of the Act (i.e. catering to the requirements of consumers). In this regard, I note that the licensing authority has previously found the probative value of petitions, surveys and social media interactions to have little weight and treated such evidence with a degree of caution (refer LC 12 of 2013) and in this case, I note that the Applicant's PIA does not indicate whether the relevant consumers

were provided with all or any of the relevant information (for example ss 5 and 38) in order for them to come to an informed view as to each of the factors set out in the Act. Accordingly, on this basis, I consider that the consumer questionnaires offer little in terms of probative evidence.

24. While I do not doubt 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 delicatessen, butcher or other convenience store, this 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.
25. Therefore, catering for the requirements of consumers under object 5(1)(c) must be considered in the context of the proper development of the liquor industry. According to the Applicant there are 13 packaged liquor outlets within a 2 km radius of the Applicant's proposed premises, six of which stock Asian liquor supplies. Of these, there is an existing liquor store approximately one kilometre away, which specialises in Korean and Japanese liquor products and while the applicant is dismissive of the existing premises in the area because their range of Asian products are, in its view, "limited and generic", I have noted that it also proposes to stock only a restricted range of liquor. I also consider, in terms of consumer convenience, that nothing turns on the fact that Seoul Mart Victoria Park, which is currently authorised to sell Asian liquor, is located approximately one kilometre away from Nungcool Butcher, when consideration is given to the Applicant's evidence of the distances travelled by some of its customers.
26. While the Commissioner has raised the issue of the Applicant relying upon the concept of one-stop shopping (as considered by Buss JA in *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227), I do not consider that the application is predicated on one-stop shopping, but more on consumer convenience. As I have already mentioned, whilst convenience is a matter for consideration, in the circumstances of these proceedings, it must be measured against the Applicant's submission in its response to the Commissioner's intervention that as a speciality store, it sells select meats and a limited range of Asian groceries.
27. The applicant's evidence does not satisfy me that the grant of this application is in the public interest when all the facts and circumstances of the case are considered, bearing in mind that the onus is upon the applicant to satisfy the licensing authority that the grant of the application is in the public interest. This burden of persuasion must be satisfied by evidence adduced in each particular case (refer *Woolworths Limited v Director of Liquor Licensing* [2012] WASC 384).
28. The Liquor Commission observed in LC 44/2012:

“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).”

29. The overall benefits to the general community would appear to be very marginal, with the focus of the application being on providing a service to customers of the Nungcool Butcher. In my view, this in itself, is not a sufficient reason to justify the granting of the application, particularly when considering object 5(1)(c) in the context of the proper development of the liquor industry. In this regard, Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, said:

“Whether any particular licence application will or will not contribute to the proper development of the liquor industry or whether it will facilitate the use and development of premises in a manner which reflects the diversity of the requirements of consumers in this State are questions of fact, degree and value judgement... I have previously concluded that the primary objects of the Act set out in s 5(1)(c) are not the only or the exclusive objects of the Act and, except to the extent of any inconsistency, do not restrict considerations of the public interest required by s 33(1) or s 38(2).

Because the appellant has emphasised the potential significance of the primary objects of the Act set out in s 5(1)(c), it is necessary to observe that another primary object specified by s 5(1)(a) is to regulate the sale, supply and consumption of liquor and that this statutory policy of regulation is entirely consistent with the measured approach to what may be regarded as contributing to the proper development of the liquor industry and to the facilitation of the use and development of licensed premises to reflect the diversity of requirements in this State. These considerations are inextricably linked with the public interest and cannot be properly addressed or applied without regard to it.”

30. It is therefore my view that the locality is already well serviced in terms of packaged liquor outlets, including outlets that sell and supply Asian liquor and I consider that the Applicant’s evidence is generally of little probative value. For example, the applicant asserts, amongst other things, that:
- (a) it will introduce quality Asian cuisine, culture and liquor to the broader population, but elsewhere states that it will only carry a limited product range and volume and that it does not propose to offer tastings on the premises, which leads me to question how it realistically intends to achieve its aim of introducing Asian liquor to the broader population;
 - (b) the grant of the application will provide convenience to patrons of Nungcool Butcher with the purchase of Asian liquor products to complement their Asian cooking and dining experience, however the public interest encompasses more than just catering to the patrons of a particular business; and

- (c) the proposed liquor store will benefit the amenity of the locality by providing a select range of liquor products that are not easily available in the locality.
31. However, alcohol is no ordinary commodity. In this case, the applicant appears to liken it to any other convenience store item and I consider that this approach is misguided. This whole application is predicated on merely providing a convenience to shoppers at the Nungcool Butcher, but does not appear to be catering to the broader community for liquor and related services.
32. Overall, I find the evidence submitted by the Applicant is not sufficient to discharge its onus under s 38 of the Act and the grant of the application would not be consistent with the proper development of the liquor industry. The application is therefore refused.
33. 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.
34. 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
16 April 2015