

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Seoul Mart Southlands Pty Ltd
(represented by Mr Kris Joohyung Ahn of No Borders Migration Advocates)
- Interveners:** Director of Liquor Licensing
(represented by Mr Brendyn Nelson of State Solicitor's Office)
- Executive Director of Public Health
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Mr Michael Egan (Member)
Mr Paul Heaney (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988*, for a review of a decision by the delegate of the Director of Liquor Licensing to refuse an application for the grant of a liquor store licence for premises to be known as *Seoul Mart Southlands*.
- Premises:** Seoul Mart Southlands
Southlands Shopping Centre, Willetton
- Date of Determination:** 2 August 2016
(on papers)
- 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
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384

Background

- 1 On 7 June 2016, Seoul Mart Southlands Pty Ltd (“the applicant”) applied to the Liquor Commission (“the Commission”) pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) for a review of a decision by the delegate of the Director of Liquor Licensing (“the Director”) to refuse the grant of an application for a liquor store licence.
- 2 The initiating application for the liquor store licence, dated 14 December 2015, was accompanied by a Public Interest Assessment (“PIA”) in which the applicant outlined its proposal by reference to the provisions of the Act.
- 3 After seeking clarification from the applicant on certain aspects of the application, the Commissioner of Police (“the Police”) determined not to intervene in the application, however, did make reference to trading hours and the proposed liquor location within the store.
- 4 The Executive Director of Public Health (“EDPH”) lodged a notice of intervention pursuant to section 69(8a)(b) of the Act on 24 February 2016.
- 5 The decision of the Director, with reasons, was published on 11 May 2016.
- 6 The applicant has elected to have this review determined on the papers.

Submissions on behalf of the applicant

- 7 The applicant operates a Korean/Asian grocery outlet in Southlands Shopping Centre, Willetton, which comprises a wide range of retail outlets, including a Coles and Woolworths supermarket.
- 8 The applicant’s proposal is to “broaden the business through product differentiation” by offering specialty Asian alcohol to the local community, of which, the applicant submits, based on ABS data, almost 20% are of East, Southeast and South Asian origin.
- 9 Again, according to the applicant, “there is limited supply of Asian alcohol in the locality (and the rest of Australia) which constrains cultural diversity” and inconveniences “many Asian cultures”.
- 10 As an example, the applicant points to the limited accessibility to Korean wine, which, as an ancillary to a meal, is usually a popular custom in Korea.
- 11 Whilst the initial PIA indicates that the alcohol beverages to be offered by the applicant will be predominantly, but not restricted to Asian alcohols, the revised proposal is to offer traditional Asian liquors only.
- 12 According to the intervention from the EDPH, the applicant, in response to the EDPH’s request to clarify aspects of the application, provided a list of Asian

alcoholic beverages to be sold at the applicant's store. The list comprises 20 Korean and 32 Japanese liquor products including wine, beer and sake.

- 13 The liquor products would be displayed in a refrigerator located behind the service counter and the licensed area would amount to no more than 5%, and more likely no more than 2%, of the floor area of the store. The refrigerator would be locked when not in use. It is not evident if all the liquor products in the abovementioned list will be offered for sale and on display at the same time.
- 14 The applicant contends that the licence, if granted, would cater for the requirements of consumers of liquor having regard to the proper development of the liquor, tourism and hospitality industries in the State, by:
 - a) providing product specialisation and diversity of alcohol beverage in the community;
 - b) providing an "authentic taste of Asian beverage";
 - c) ensuring "customers are served with healthy competition which will benefit the local community"; and
 - d) catering to the 20% of the suburb's population who are of East, Southeast and South Asian origin, as well as introducing "non-Asians" to authentic international drinks.
- 15 The PIA details the existing nine liquor stores within the locality and indicates that the applicant is "unaware of any liquor store in the vicinity that sell(s) traditional Asian alcohol". The applicant contends:
 - a. the "Bottle-O" liquor store specialises in beer from a limited number of countries: China, Japan, Australia, Ireland, Germany and USA;
 - b. Dan Murphy's only has "a few types of Asian alcoholic beverages";
 - c. Hi Mart sells alcoholic beverages in addition to a large number of different food products, but these are limited to Korean wines; and
 - d. Liquorland does not provide any Asian alcoholic beverage.
- 16 Elsewhere in the PIA, the applicant states, "there is only one other licensed premises which sells Asian liquor", namely Hi Mart, and that "For this reason, Hi Mart has been trading like a monopoly of Asian liquor....".
- 17 The applicant proposes to introduce a range of measures to mitigate the risk of any increase in harm, adverse impact on the amenity of the locality or offence, annoyance, disturbance or inconvenience that may result from the grant of the application, including:
 - a) an appropriate Code of Conduct and House Management Policy;

- b) staff training in the responsible service of alcohol;
 - c) customer identification; and
 - d) a customer feedback system to monitor “any alcohol-related occurrences and inappropriateness of staff member (sic)”.
- 18 The applicant also points out in the PIA that the types of liquor to be offered for sale are “not the casual liquors that are consumed like beer, but rather cultural liquors like wine” which are “consumed lightly than (sic) other casual alcohol and are less prone for (sic) any binge drinking”.
- 19 Further, in light of the proximity of a number of schools in the area, the applicant has agreed to the recommendation of the EDPH that, if the licence is granted, there be no advertising of alcohol products external to the applicant’s premises.
- 20 In its submission accompanying the application for a review of the Director’s decision to decline the grant of the liquor store licence, the applicant highlighted its acceptance of all of the recommendations of the Police and the EDPH relating to the hours of trading (in compliance with the Act on Christmas Day, Good Friday and Anzac Day), the storage and display of liquor products behind the service counter and the restriction of any advertising external to the premises.
- 21 Further, whilst acknowledging no new evidence may be submitted in support of the application, the applicant referred to two previous decisions of the licensing authority to grant a restaurant licence and a wholesaler’s licence, which the applicant contended gave rise to an apparent “inconsistency between the decisions made by the Department of Racing Gaming and Liquor with regards to the prior applications for granting liquor licences” and a “potential bias in the decision with regards to the applicant’s application”.
- 22 The applicant has also made reference to two further decisions of the licensing authority in its subsequent submissions highlighting the security and responsible service of alcohol policies and initiatives adopted in each of those applications, and the similarity of those measures to the measures put forward in the present application, again suggesting there may have been “potential bias” or a failure to factor in all relevant aspects of the application given the “vastly different” outcomes from previous decisions in favour of applicants despite similar circumstances (to the present application).
- 23 In both submissions accompanying the application for a review, the applicant reiterated its intention to promote and enhance cultural diversity in the local community.

Submissions on behalf of the EDPH

- 24 The purpose of the intervention lodged by the EDPH is to make representations on:
- a) the harm and ill-health concerns indicated by the literature regarding the integration of alcohol sales along side grocery items; and
 - b) the potential negative impacts on children from the exposure to alcohol advertising.
- 25 The concerns expressed by the EDPH will be mitigated to the satisfaction of the EDPH by the imposition of conditions:
- a) restricting liquor sales to Asian liquor products only, thereby providing a specific focus on the applicant's niche customer base by providing Asian food products with the sale of liquor products being a secondary focus;
 - b) restricting the licensed area to not more than 5% of the store, thus limiting the focus on alcohol;
 - c) locating the stock and display of liquor products for sale in a refrigerator behind the sales counter, mitigating the risk of impulse or unplanned purchases and of creating the perception of alcohol as a non-harmful product given its visual association with grocery items; and
 - d) prohibiting advertising external to the applicant's premises thereby reducing any exposure of school children to alcohol advertising along the main access roads used by children on their way to and from school.
- 26 The EDPH refers to research in Australia and elsewhere in support of its recommendations and considers that unless conditions are formalised there is no legal requirement for the premises to operate as proposed.
- 27 The EDPH notes that the proposed conditions are consistent with the applicant's intended manner of trade and operation.
- 28 In response to the review application and accompanying submissions by the applicant, the EDPH refutes any suggestion the Director's decision to reject the application has the consequence of "encouraging an ongoing monopoly" (as submitted by the applicant in respect of the Hi Mart store) and rejects the allegation of bias. Both propositions, the EDPH submits, are a product of the applicant's failure to establish through objective evidence that the application is in the public interest.

Submissions on behalf of the Director

- 29 The Director has lodged a notice of intervention in these review proceedings pursuant to section 69(11) of the Act, which entitles the Director to “introduce evidence, make representations and examine or cross-examine any witness, on any question or matter”.
- 30 In support of the contention that the applicant has failed to discharge its onus to show the grant of the licence applied for is in the public interest, the Director submits that the applicant has not adduced any objective evidence to demonstrate the existence of a consumer requirement in the locality of the premises.
- 31 More specifically, the Director contends, by reference to previous Commission decisions, that the convenience of purchasing liquor products with other grocery items at the same store is not, of itself, a persuasive factor in demonstrating a consumer requirement and that the private interests of the applicant should not be confused with the public interest.
- 32 Further, the Director submits that the proposal to merely satisfy a desire on the part of the applicant’s existing customers, who are likely to represent a relatively small number of people, for an improvement in the level of convenience is not consistent with the proper development of the liquor industry.
- 33 The Director also points out that the applicant failed to adduce any objective evidence to support the application despite correspondence to the applicant from the Director on 17 December 2015 and 1 April 2016 highlighting, and providing a copy of, the Director’s Policy on Public Interest Assessments and emphasising the need to provide objective evidence (not assumptions, opinions, speculation and generalised statements) and to address the objects of the Act and matters in section 38(4) to demonstrate the application is in the public interest.
- 34 In response to the allegation of a potential bias in the decision of the Director, the Director submits that the allegation is baseless as the application for the liquor store licence is fatally flawed by reason of the lack of evidence and no evidence has been provided to substantiate the allegation.

Determination

- 35 Under section 25(2c) of the Act, when considering 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.
- 36 On a review under section 25 of the Act, the Commission may –

a. affirm, vary or quash the decision subject to the review; and

- b. *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; and*
- c. *give directions –*
 - i. *as to any question of law, reviewed; or*
 - ii. *to the Director, to which effect shall be given; and*
- d. *make any incidental or ancillary order.*

37 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (*Hancock v Executive Director of Public Health, [2008] WASC 224*).

38 Pursuant to section 38(2) of the Act, an applicant for the grant of a licence (of the type here applied for, namely a liquor store licence) must satisfy the licensing authority that granting the application is in the public interest.

39 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.

40 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*).

41 The Commission also notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:

- i. *“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.*
- ii. *The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of*

the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”

42 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (*Palace Securities Ltd supra*).

43 The primary objects of the Act are:

- a. *to regulate the sale, supply and consumption of liquor; and*
- b. *to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
- c. *to cater for the requirements of consumers of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*

44 The secondary objects of the Act are:

- a. *to facilitate the use and development of licensed facilities, including their use and development for the performance of live music, reflecting the diversity of the requirements of consumers in the State; and*
- b. *deleted*
- c. *deleted*
- d. *to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and*
- e. *to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.*

45 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was considered by Heenan J in *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384 [32]*:

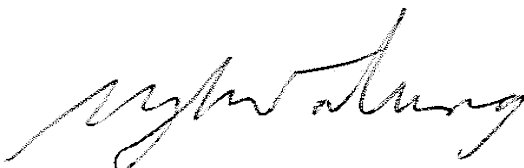
- i. *“[Section] 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest to*

make those objects the exclusive consideration nor the sole determinants of the public interest’.

- 46 The applicant is proposing to add liquor products to the range of grocery products it currently sells at its Seoul Mart Southlands store.
- 47 The liquor products will be limited to Korean and Japanese liquor such as wine, beer and sake.
- 48 The licensed area to be set aside for the display of the liquor products is very modest comprising a refrigerator behind the service counter.
- 49 The applicant indicates in the PIA that it “does not wish to convert itself as another full liquor store” but submits the application, if granted, will enable it to sell traditional Asian liquors to its customers “as it plays an important cultural role”.
- 50 Cultural diversity is a recurring theme in the application not only in respect of the applicant’s existing customers, but also the community more broadly.
- 51 Notwithstanding the limited nature of the proposed licensed area and liquor products to be offered for sale, the applicant is required under the Act to demonstrate that the grant of the application is in the public interest.
- 52 The objects of the Act most relevant to the present application are sections 5(1)(c), and 5(2)(a) together with section 38(4).
- 53 Although the applicant has made a number of statements and assertions, and expressed opinions in support of the application, no objective evidence has been presented to demonstrate that the grant of the application will cater for the requirements of consumers of liquor having regard to the proper development of the liquor, tourism and hospitality industries in the State.
- 54 The availability in the applicant’s store of a range of Korean and Japanese liquor products might at first appear to provide an improved level of convenience for the applicant’s existing customers; however, no evidence has been adduced of the number or characteristics of the applicant’s existing customers, their preferences in liquor, their purchasing habits, their desire to purchase liquor at the applicant’s store and, if so, the types of liquor products sought, the extent to which their requirements are not currently being met elsewhere in the locality or why the existing liquor store outlets in the locality, two of which are in, or form part of, the Southlands Shopping Complex, would not respond to requests from customers for specific types of Asian liquor.
- 55 As the Director commented in his decision, the applicant’s own evidence suggests that Asian wines, beers and spirits are currently available from some of the liquor stores operating in the locality.

- 56 In addition, only limited information has been provided on the demographic characteristics of the local community. Although 20% of the population of the suburb of Willetton is apparently of East, Southeast and South Asian origin, no further details are provided to assist the Commission in assessing to what extent there is a consumer requirement among, or how the proposal may benefit, that segment of the community or in assessing the impact of the proposal on the local community more generally.
- 57 In fact, the list of products approved in the deed of extension and variation of lease – clause 7 1. - (a) submitted as part of the applicant’s PIA, exclusively lists Korean and Japanese liquor products, yet there is no indication as to the extent of these nationalities within the referred to 20% of the population of Asian origin.
- 58 Furthermore, it is not possible for the Commission to make an informed assessment of the level of support for the proposal among the applicant’s customers, businesses within the Southlands Shopping Complex or the local community, and whilst the applicant has emphasised the intention and objective of promoting and enhancing cultural diversity, no detail has been provided of how this might be achieved (apart from simply stocking a range of traditional Asian liquor products in its store).
- 59 Equally, offering a range of traditional Asian liquor products in an environment such as the applicant’s grocery store might at first appear to be enhancing the diversity of the liquor industry in the State; however, again, the Act stipulates that the use and development of licensed facilities should reflect the diversity of the requirements of consumers (section 5(2)(a)) and there is little or no evidence to assist the Commission in assessing what the requirements of consumers are or whether this statutory objective would be met by the grant of the licence.
- 60 In respect to this absence of appropriate and adequate objective evidence, it is pertinent to repeat the comments of the Director in his decision at paragraph [37]:
- “The licensing authority cannot run an application, objection or intervention on behalf of a particular party (refer LC 44/2010). 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.”
- 61 The applicant has demonstrated its preparedness to adopt harm minimisation and responsible service of alcohol measures, of its own motion and in liaison with the Police and the EDPH, and it is evident from the EDPH intervention and correspondence with the Police that neither the Police nor the EDPH have any residual concerns about the risk of an unacceptable increase in the level of harm provided the licence, if granted, were subject to the conditions recommended by the EDPH.

- 62 As indicated above, the applicant bears the onus of establishing to the satisfaction of the Commission that the grant of the application is in the public interest.
- 63 In the Commission's view, the evidence submitted in support of the present application falls far short of what is required under the Act and the applicant has failed to discharge that onus.
- 64 Accordingly, the application is refused and the Director's decision affirmed.
- 65 Whilst not relevant to a consideration of the merits of application, it is incumbent on the Commission to respond to the submission from the applicant that the decision of the Director may give rise to a perception of bias having regard to previous decisions of the licensing authority.
- 66 As has been submitted to this review by the Director, any allegations of apprehended bias must be firmly established when made against Courts or administrative decision makers, and no evidence has been provided to substantiate such a claim.
- 67 The references by the applicant to previous decisions of the licensing authority and to different outcomes to the present application as support for such a contention may have arisen out of a misunderstanding of the Act, but the analysis and submissions by the applicant are misconceived and wrong.
- 68 Not only do the decisions referred to by the applicant relate to different types of liquor licence and hence are subject to different considerations under the Act, but the circumstances of each application are different and each application is accompanied and determined by reference to evidence specific to the application.
- 69 The Director's decision is properly considered and well reasoned, and the Commission rejects any suggestion that any actual or perceived bias has arisen as a result of the decision of the Director to reject the application.



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