

## DECISION OF DIRECTOR OF LIQUOR LICENSING

**APPLICANT:** LOLBA HOLDINGS PTY LTD  
(Represented by Canford Hospitality Consultants Pty Ltd)

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

**PREMISES:** CU MART COCKBURN  
UNIT 40/12 JUNCTION BOULEVARD, COCKBURN CENTRAL

**APPLICATION REF:** A845709931

**DECISION OF:** BRETT SNELL, DEPUTY DIRECTOR LIQUOR CONTROL  
AND ARBITRATION

**DATE OF DECISION:** 21 APRIL 2020

**DATE OF REASONS:** 4 JUNE 2020

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1. On 20 December 2019, Lolba Holdings Pty Ltd (Applicant) made application to the Director of Liquor Licensing (Director), pursuant to s47 of the *Liquor Control Act 1988* (Act), for the grant of a liquor store licence in respect of premises to be known as *CU Mart Cockburn* and situated at Unit 40/12 Junction Boulevard, Cockburn Central.
2. On 21 April 2020, I determined the application on the written submissions of the Applicant and published a notice of decision, pursuant to s18AA of the Act, in which I refused the application on the basis that the Applicant had failed to discharge its onus under s36B(4) of the Act.
3. On 23 April 2020, the Applicant requested written reasons for the notice, in accordance with s18AA(4) of the Act. Accordingly, my reasons for refusing the application follow.
4. As this is an administrative decision, rather than referring in detail to the entirety of the evidence before me, I will set out what I consider to be the relevant material facts. Further, I have considered all of the information submitted by the Applicant and the fact that I have not referred to a specific submission or piece of evidence does not mean that I have not taken it into account.
5. The notice of application lodged on behalf of the Applicant was supported by a Public Interest Assessment (PIA), which explained that the proposed liquor store will occupy a portion of the existing *CU Mart Grocery Store*, a Korean and Japanese Grocery Store. It was also submitted that the proposed liquor store would only stock imported Korean and Japanese liquor, most which will be exclusive to the Applicant and therefore not readily available elsewhere in the locality.
6. A draft stock list<sup>1</sup> identified the following nine proposed liquor products:
  - (a) Korean Soju;

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<sup>1</sup> Provided as attachment 3 to the PIA

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- (b) Korean Hite/Cass Beer;
  - (c) Korean Rice Wine;
  - (d) Japanese Sake;
  - (e) Japanese Plum Wine;
  - (f) Korean Blackberry Wine;
  - (g) Fruit Soju;
  - (h) Plum Soju; and
  - (i) Japanese Beer.
7. The Applicant also indicated that:
- (a) the proposed liquor store would accommodate new products as they are launched, citing the example of a Korean Apple Soju, which has recently been released and will be featured;
  - (b) as 'a modern flexible and agile retail business', the Applicant would respond to the changing requirements of its clientele; and
  - (c) consumer demand will dictate which Asian liquor products are included in the product range and if a particular product is not popular it will be removed and alternative Korean or Japanese liquor products may be added.
8. The Applicant also submitted that Cockburn Central town centre:
- (a) has a vibrant mix of residential, retail and commercial properties and being located right next to the Cockburn Central Train Station, has frequent and fast access to the Perth CBD; and
  - (b) is surrounded by restaurants and cafés and is intended to serve as a regional centre for the area.
9. The Applicant also submitted that Cockburn Gateway Shopping Centre, located across the road from the proposed premises, 'has over 170 stores anchored by ALDI, Target, Big W, Coles and Woolworths.'
10. Under the heading 'The history of the site and Motivation for this Application' the Applicant also submitted that *CU Mart Cockburn* is one of seven Korean supermarkets in Perth<sup>2</sup> and the only one that is not licensed.
11. Further, according to the Applicant, all supermarkets in Korea sell liquor and no special licence is needed. As a result, customers of *CU Mart Cockburn* have an expectation of being able to acquire their packaged liquor requirements at the CU Mart with their

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<sup>2</sup> The other Korean supermarkets are *Cellarbrations at CBD*, at 556 Hay Street, Perth; *Top Mart – City*, at 133 Barrack Street, Perth; *Seoul Mart Victoria Park*; *HanGaWee Market*, in Cannington; *Hi Mart*, in Willetton; *Fuji Mart Subiaco* and *VHT Perth Pty Ltd*, at 412 William Street, Perth.

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groceries. Therefore, the Applicant made the decision to seek a liquor store licence to add value to its service.

12. The relevant locality, as specified in Director's *Public Interest Assessment*<sup>3</sup> policy, was a three-kilometre radius of the proposed premises, which the Applicant noted included the suburbs of Cockburn Central, Success, Atwell, South Lake, Jandakot, Banjup, Beeliar and Yangebup.
13. In relation to those matters prescribed in s 38(4) of the Act, the Applicant submitted demographic information on the locality before concluding that it was stable and mature, with a below average representation of groups identified as being at risk of alcohol-related harms.
14. In accordance with the Director's *Public Interest Assessment* policy, the Applicant identified the following liquor stores and taverns in the locality:

Licence Ref	Licence Type	Premises Name	Address
6030003111	Liquor Store	<i>First Choice Liquor Market Jandakot</i>	810 North Lake Road, Cockburn Central
6020096834	Tavern	<i>Cellarbrations at the Gate (The Gate Bar &amp; Bistro)</i>	816 Beeliar Drive, Success
6030048934	Liquor Store	<i>BWS - Beer Wine Spirits</i>	Store No 101 Cockburn Gateway Shopping City, 816 Beeliar Drive, Success
603210592717	Liquor Store	<i>Liquorland Gateway</i>	816 Beeliar Drive, Success
603211011317	Liquor Store	<i>ALDI Cockburn Gateway</i>	Cockburn Gateway Shopping City, 816 Beeliar Drive, Success
6030086322	Liquor Store	<i>Atwell Cellars</i>	Stargate Shopping Centre, 129 Lydon Boulevard, Atwell
6020030601	Tavern	<i>The Berrigan Bar and Bistro</i>	Lot 758 Berrigan Drive, South Lake

15. To establish that the grant of the licence would provide for the requirements of consumers, the Applicant surveyed 67 people who were existing customers of the *CU Mart* or who lived, worked and/or visited the locality.
16. Many of the surveyed consumers who supported the application did so because of:
  - (a) the benefits associated with one-stop shopping;
  - (b) the grant of the application would cater the specific needs of the strong Asian community in Cockburn; and
  - (c) that a local liquor shop supplying Korean take-away liquor would provide more choice and convenience.

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<sup>3</sup> Published 29 May 2019

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17. In relation to the provisions of s36B(4) of the Act, the Applicant submitted that:
- (a) 53 of the 67 consumer questionnaires indicated that respondents do not to shop for and satisfy their Asian packaged liquor requirements in the locality;
  - (b) many consumers submitted that Korean liquor is not readily available; *Dan Murphy's* does not sell Korean Liquor and no liquor shops sell Asian liquor;
  - (c) as a specialty store specifically trading Korean and Japanese imported grocery and being the only Korean and Japanese food store in Cockburn area, CU Mart has 'effective accessibility in catering the target clients who seeks Asian liquor'; and
  - (d) the Applicant will stock imported Korean and Japanese liquor, most of which will be exclusive to CU Mart Cockburn and therefore will not be readily available in other liquor stores in the locality.
18. The Applicant also visited the existing packaged liquor premises to search for the liquor products that it proposed to stock and noted it was generally unavailable. Accordingly, the Applicant submitted that:
- (a) *First Choice Jandakot* stocks Japanese Sake and Japanese Plum Wine;
  - (b) *BWS Gateway* stocks Japanese Sake and Japanese Beer;
  - (c) *Liquorland Gateway* stocks Japanese Beer;
  - (d) *Atwell Cellars* stocks Korean Hite Beer and Japanese Beer; and
  - (e) *Cellarbrations at The Gate (The Gate Bar & Bistro)* stocks Korean Soju and Japanese Beer.
19. The Applicant also observed that:
- (a) none of the licensed premises have the full range of the selected liquor products;
  - (b) none of the licensed premises offer the convenience of having a full range of the selected liquor products in combination with Asian food/groceries;
  - (c) some of those available liquor products were not clearly marked and were stocked on high shelves which made accessing them difficult;
  - (d) many of the respondents to its consumer survey indicated that they currently travel to Perth City (24 respondents), Carousel Shopping Centre (eight respondents), Victoria Park (six respondents) and Willetton (four respondents) to purchase their packaged liquor requirements; and
  - (e) there is no other Asian liquor store/ grocery store within 5km of the proposed Cu Mart Cockburn.
20. In the Second Reading Speech on the introduction of the *Liquor Control Amendment Bill 2018*<sup>4</sup>, the Minister for Racing and Gaming stated that:

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<sup>4</sup> See Western Australian *Parliamentary Debates* (Hansard), Legislative Assembly, 20 February 2018] p324-325

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*'...the McGowan government is concerned about the impact that a proliferation of large packaged liquor outlets can have on the community. To address this issue, the act will be amended so that the licensing authority will not be able to hear or determine an application if the proposed premises is larger than a prescribed size and an existing packaged liquor outlet that also exceeds the prescribed size is located within a prescribed distance. In addition, to prevent the further proliferation of small and medium packaged liquor outlets across the state, the act will be amended so that the licensing authority must not grant an application unless it is satisfied that existing premises in the locality cannot reasonably meet the requirements for packaged liquor.'*

21. This intent is reflected in the insertion of s36B into the Act. The term **local packaged liquor requirements** is defined in s36B(1) of the Act to mean 'the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated.'
22. Section 36B(2) provides that the term **packaged liquor premises** means any application for the grant or removal of:
- (a) a hotel licence without restriction;
  - (b) a tavern licence;
  - (c) a liquor store licence; and
  - (d) a special facility licence of a prescribed type.<sup>5</sup>
23. Subsection (3) relates to those larger packaged liquor premises over a prescribed size<sup>6</sup> and provides that:

*'The licensing authority must not hear or determine an application to which this section applies if —*

- (a) *packaged liquor premises are situated less than the prescribed distance from the proposed licensed premises; and*
- (b) *the area of the retail section of those packaged liquor premises exceeds the prescribed area; and*
- (c) *the area of the retail section of the proposed licensed premises exceeds the prescribed area.'*

24. In contrast, s36B(4) applies to all proposed packaged liquor outlets, providing that:

*'The licensing authority must not grant an application to which this section applies unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.'*

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<sup>5</sup> No type of special facility licence has yet been prescribed for this purpose

<sup>6</sup> Reg 9AAA of the *Liquor Control Regulations 1989* prescribes an area of 400 m<sup>2</sup>

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25. It would therefore appear that the insertion of s36B signifies a legislative intention that there be a particular restraint on the grant of licences for packaged liquor premises. Accordingly, since 2 November 2019, applicants seeking the grant of a licence for a packaged liquor premises must discharge the following two distinct onuses under the Act:
- (a) first, they must overcome the restrictions on the grant or removal of a licence imposed by s36B<sup>7</sup>; and
  - (b) secondly, they must demonstrate that the grant of the licence is in the public interest, as required under s38(2).
26. As to the provisions of s36B(4), which are relevant to this application, an applicant must satisfy the licensing authority as to whether or not the local packaged liquor requirements can reasonably be met by existing packaged liquor premises in the locality.
27. Consequently, the following key questions arise:
- (a) what are the local packaged liquor requirements?
  - (b) what packaged liquor services are already provided by existing packaged liquor premises in the locality?
- and
- (c) what constitutes 'reasonably', in terms of whether the local packaged liquor requirements can reasonably be met by existing packaged liquor premises in the locality?
28. As a result, it became necessary to examine the Applicant's evidence to determine whether a finding could be made that it had discharged its onus under s 36B(4).
29. To establish the packaged liquor requirements for the locality the Applicant surveyed a total of 60 consumers and amongst other questions, specifically asked them:
- (a) how often they shopped at the CU Mart?;
  - (b) if, to the respondent's knowledge, there was anywhere else in the locality where they could shop for Korean and Japanese liquor and grocery products at the same time and place (i.e. one stop shop);
  - (c) where they currently purchase their packaged Korean and Japanese liquor from; why they patronise those packaged liquor premises and whether they are conveniently located for their purposes;
  - (d) whether they are satisfied with the packaged liquor service and facilities available in Cockburn Central; and
  - (e) what items of the Applicant's proposed product range they would be interested in purchasing.

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<sup>7</sup> Refer Clause 1 of Schedule 1C to the Act – Transitional provisions relating to the *Liquor Control Amendment Act 2018*

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30. I note that 95% of respondents (or 57 out of 60) indicated they would be interested in purchasing Asian liquor products at the same time as shopping for their Asian groceries. As a result, I accepted that the Applicant's consumer evidence signified a local packaged liquor requirement in the locality.
31. However, in my view, the Applicant's analysis of the local packaged liquor requirements was extremely limited, in that instead of focussing on the wider availability of Korean and Japanese wines, spirits or beers that may already be offered for sale by the seven identified packaged liquor premises in the locality, it only provided a cursory overview of whether or not they offered the same products that are proposed by the Applicant.
32. As a result, I cannot be satisfied as to how much Korean and Japanese liquor is offered for sale as packaged liquor in the locality. Consequently, I am of the view that the Applicant provided insufficient evidence to facilitate a proper assessment of the extent of the current packaged liquor services offered by existing packaged liquor services in the locality.
33. In my view, the Applicant's submissions in respect of the provisions of s36B(4) appeared to be more directed to establishing consumer shopping preferences, which are more correctly related to the purposes of s38(2), rather than to the issue of access to packaged liquor itself, under s36B(4); such as whether the existing packaged liquor premises offered the convenience of having a full range of the selected liquor products in combination with Asian food/groceries.
34. In this regard, the fact that some consumers might find it more convenient to purchase liquor from the Applicant's proposed premises is not a relevant consideration under s36B(4), without further consideration of whether those requirements cannot reasonably be met by existing packaged liquor premises in the locality. This is because consumer convenience is not the issue under s36B(4).
35. Further, I consider that the Applicant provided little or no evidence as to why the existing premises could not reasonably meet the consumer requirement for packaged liquor in the locality, other than whether or not they also offered the same liquor products proposed to be offered by the Applicant.
36. The Applicant also attempted to ventilate assertions that accessing some of the available relevant liquor products in the locality was unreasonable because it was not clearly marked and/or was stocked on high or low shelves, on the basis that retailers generally place the stock they want to move at eye level; whereas stock placed on the uppermost or lowest shelves denotes stock that is slow moving and on which the retailer is not focusing.
37. However, I do not accept that such marketing practices equates to unreasonableness in terms of whether or not the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor premises in the locality.
38. In this regard, in *Re: Hangawee Outlet Northbridge*<sup>8</sup> the Delegate of the Director observed that the word 'reasonably' does not invoke a particularly high threshold, with

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reference to the explanation given by Malcolm CJ in **Charlie Carter Pty Ltd v Streeter & Male Pty Ltd**<sup>8</sup>:

‘The word ‘reasonable’ imports a degree of objectivity in that the word reasonable means ‘... sensible; ... not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate’: see *Shorter Oxford Dictionary*, at p1667.’

39. Further, in **Liquorland (Australia) Pty Ltd and Ors v Austie Nominees Pty Ltd**<sup>10</sup> it was found that access to packaged liquor would not be considered ‘reasonable’ if the requirement ‘cannot be provided without occasioning substantial difficulty or substantial inconvenience to the relevant public.’
40. In my view, it is not impracticable or unreasonable for consumers to access liquor products that may be stocked on high or low shelves in the liquor display shelving.
41. In forming this view, I am uncertain of what the Applicant means when it submitted that liquor products are not clearly marked, as this assertion was not fully explained in the submissions and photographic evidence provided by the Applicant clearly showed labels on the relevant shelving. Further, I do not consider that issues relating to where liquor products are placed on shelving is commensurate with those contemplated by King CJ in **Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd & Ors (No 2)**<sup>11</sup>, where it was held that an existing outlet could not meet the demand in the area for wines because, although there was an ample quantity and good range in stock, the stock was not in a practical sense accessible to shoppers because it was kept in boxes in the store room.
42. It is my view that liquor products displayed on high or low shelving is still practicably accessible to shoppers and it could not be considered to be unreasonable for shoppers to browse for and access liquor products so displayed.
43. The enactment of s36B introduces a significant change to the Act by which the proliferation of packaged liquor outlets is sought to be prevented by reference to whether existing packaged liquor premises are already meeting the local packaged liquor requirements.
44. In this regard, the Applicant submitted that the proposed premises is located across the road from the Cockburn Gateway Shopping Centre and I have observed that three of the existing packaged liquor premises identified by the Applicant, namely *BWS Gateway*, *Liquorland Gateway* and *The Gate Bar and Bistro*, are located at the Cockburn Gateway Shopping Centre. Consequently, Japanese and Korean liquor is already available to be purchased from across the road (from the proposed premises.)

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<sup>8</sup> A122893507, dated 4 March 2020

<sup>9</sup> (1991) 4 WAR 1

<sup>10</sup> [1999] Library 990160

<sup>11</sup> (1981) 28 SASR 458



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45. Therefore, the facts that some consumers choose to travel to other suburbs to purchase their packaged liquor requirements and do not appear to have knowledge that Korean and Japanese liquor products are already available for purchase within the locality, leads me to conclude that some of the Applicant's assertions about the local packaged liquor requirements may be somewhat overstated.
46. Further, it is the interests of the requirements of consumers for packaged liquor which is relevant under s36B and not the wishes of the Applicant to add value to its supermarket business or to compete against the other seven Korean supermarkets in Perth, which are already licensed.
47. Section 5(2) of the Act provides that in carrying out its functions, the licensing authority shall have regard to the primary objects of the Act and also to the secondary objects.
48. Accordingly, it was my view that refusing the application would:
- (a) promote the regulation of the sale, supply and consumption of liquor, consistent with object 5(1)(a);
  - (b) assist in minimising the adverse impact that packaged liquor outlets can have on the community<sup>12</sup>, consistent with object 5(1)(b); and
  - (c) cater for the requirements of consumers - for local packaged liquor requirements - and promote the proper development of the liquor industry - by preventing the proliferation packaged liquor outlets across the State - consistent with object 5(1)(c).
49. Consequently, the application was refused.
50. Having concluded that the Applicant failed to discharge its onus under s 36B(4) of the Act, it was not necessary for me to consider whether the Applicant had demonstrated that the grant of the application was in the public interest as required under s 38(2). As such, I make no findings in this regard.
51. If the Applicant is dissatisfied with the outcome, it may seek a review of the Decision under s25 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.
52. This matter has been determined by me under delegation pursuant to s 15 of the Act.



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<sup>12</sup> Refer Explanatory Memorandum on Liquor Control Amendment Bill 2018, <https://www.parliament.wa.gov.au>