

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: TOOKFE PTY LTD

OTHER PARTIES: TINDARRA TARRICONE (OBJECTOR)
CHIEF HEALTH OFFICER (INTERVENOR)
COMMISSIONER OF POLICE (INTERVENOR)

PREMISES: HANGAWEE OUTLET NORTHBRIDGE

PREMISES ADDRESS: 2/145 NEWCASTLE STREET PERTH

APPLICATION ID: A122893507

MATTER: APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR
STORE LICENCE

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 13 FEBRUARY 2020

DATE OF REASONS: 4 MARCH 2020

Introduction

- 1 On 13 February 2020, I issued a notice pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) advising the parties that after consideration of the evidence and submissions, I had determined that the applicant had failed to discharge its onus under s 36B(4) and consequently the application was refused.
- 2 Pursuant to s 18AA(3), the applicant has requested written reasons for the decision. These are those reasons.

Background

- 3 The applicant, Tookfe Pty Ltd, lodged an application for the conditional grant of a liquor store licence for premises located at Unit 2, 145 Newcastle Street, Perth and to be known as HanGaWee Outlet Northbridge. The application was made pursuant to ss 47 and 62 of the Act.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. An objection to the grant of the application was lodged by Ms Tindarra Tarricone, licensee of the Lake Street Liquor Supply. The Chief Health Officer and the Commissioner of Police both intervened in the application.
- 5 The application was determined on the written submissions of the parties, as permitted under ss 13 and 16 of the Act. In addition, these written reasons have been prepared and should be read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹

Brief overview of the application

- 6 The applicant currently operates a Korean minimart and seeks to add value to its service to the local and wider community by providing a small range of Korean liquor products for sale. According to the applicant, its proposal is for a boutique-type liquor service which will complement and add value to the existing range of food and beverage products on offer.
- 7 The proposed licensed area, to be located behind a cashier/point of sale area, would comprise an area of about 3.64m², offering refrigerated and non-refrigerated products. The applicant's proposed stock list comprised of seven liquor products in total.
- 8 The applicant lodged a Public Interest Assessment (PIA) to support its application. The PIA included 642 survey forms, of which, according to the applicant, 545 respondents supported the idea of purchasing Korean alcoholic beverages from the applicant's minimart store. It was submitted that the main reasons cited by respondents for this support include:
- a desire to use the liquor products for cooking;
 - a desire to "enrich cultural diversity in Australia"; and
 - a desire to purchase Korean liquor products in a convenient location.

The objection

- 9 The objection was based on the three following grounds:
- the grant of the application would not be in the public interest (s 74(1)(a) of the Act);
 - the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor (s 74(1)(b) of the Act); and
 - the grant of the application would otherwise be contrary to the Act (s 74(1)(j)).
- 10 According to the objector, the applicant's reliance on the grant of the application providing a convenient service for its customers is misplaced and not consistent with the views expressed by the Liquor Commission in LC 18/2015, where it was observed that convenience alone was not a reason to grant a licence. The objector was also critical of the applicant's PIA because it failed to properly identify the existing licensed premises in the locality surrounding the proposed liquor store and did not mention two premises in close proximity that specialise in Asian liquor products.
- 11 It was also submitted by the objector that the applicant's assessment of the locality surrounding the proposed liquor store is fundamentally flawed because the applicant only reviewed data for the suburb of Perth and it did not consider data for Northbridge, which presently experiences significant alcohol-related harm.

The interventions

¹ S 16(7) of the Act.

Chief Health Officer

- 12 The Chief Health Officer (CHO) made submissions and representations on the following matters:
- the applicant seeks to provide alcohol products within the existing Korean minimart;
 - alcohol is a key contributor to issues experienced by at-risk groups in the locality;
 - the sale and consumption of packaged liquor is associated with a range of harms, including domestic violence, road crashes and hospitalisations; and
 - the association of alcohol products and grocery items can lead to increased consumption and harm.
- 13 It was submitted by the CHO that the application presents harm and ill-health concerns based on the impact the co-location of packaged liquor products and grocery items may have on levels of consumption and harm, particularly in an area frequented by at-risk groups who currently experience alcohol-related harm. It was recommended by the CHO that if the application was approved, conditions should be imposed on the licence to minimise the risk to the community.

Commissioner of Police

- 14 The Commissioner of Police (the Commissioner) provided evidence and submissions on:
- the existing alcohol-related harm and crime data for the locality;
 - outlet density and existing packaged liquor availability in the area; and
 - the applicant's consumer survey.
- 15 It was submitted by the Commissioner that crime data reveals existing high levels of harm in the locality which may outweigh any minor benefit to the requirements of the consumer and the development of the liquor and hospitality industries. Further, it was submitted that the applicant will not be offering anything new to the liquor industry that is not already sufficiently catered for within the locality. According to the Commissioner, Korean alcohol products can already be purchased from nearby liquor stores, or in the alternative, delivery of that product via online sales.

Section 36B(4) of the Act

- 16 On 2 November 2019, s 36B(4) of the Act was proclaimed. This section provides 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.”

- 17 This amendment to the Act was Parliament's response to decisions of the licensing authority and the Supreme Court relating to the grant of new packaged liquor licences. It was envisaged that the introduction of the Public Interest Test in the 2007 amendments to

the Act would be a mechanism to control the proliferation of packaged liquor outlets and outlet density, however this did not eventuate.

- 18 In the Second Reading Speech on the introduction of the *Liquor Control Amendment Bill 2018*, the Minister for Racing and Gaming outlined the Government's concerns over the impact the proliferation of packaged liquor outlets was having on the community. The Government consequently sought to create a direct restraint on the grant of new liquor licences authoring the sale of packaged liquor. To achieve this policy objective, s 36B was inserted into the Act. One of the clear aims of this new provision is to "enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality."²
- 18 Section 36B(4) is mandatory in its terms. The licensing authority must not grant an application to which the section applies, unless satisfied that the existing packaged liquor outlets cannot reasonable satisfy the local packaged liquor requirements. Consequently, an applicant for the grant of a new liquor store licence must adduce sufficient probative evidence to discharge it onus under s 36B(4), otherwise, the application must be refused.

The applicant's evidence and submissions in respect of s 36B(4)

- 19 On 4 November 2019, the applicant (and the other parties) were advised of the new requirements under s 36B(4) of the Act and afforded an opportunity to lodge further evidence and submissions on this issue specifically, and on the application more generally. In response, the applicant submitted a report from Bodhi Alliance (the Bodhi report), which stated that it had been engaged to undertake an amenity audit and social impact assessment regarding the application.
- 20 The Bodhi report provided information on:
- locality context;
 - premises and proposed licensed operations;
 - community profile;
 - outlet density and exposure;
 - amenity impacts; and
 - public interest.
- 21 The applicant also lodged closing submissions in support of the application. In its closing submissions, the applicant acknowledged the requirements of s 36B(4) of the Act. The applicant also made submissions in respect of the objection and interventions and concluded that the potential risks and concerns raised by the objector and intervenors are adequately addressed and minimised by reason that the applicant has indicated it will accept and comply with the recommendations proposed by the Chief Health Officer to support the minimisation of harm and ill-health concerns. It was further submitted that the grant of the application will advance the public interest by supporting the multi-cultural

² Explanatory Memorandum, *Liquor Control Amendment Bill 2018*

nature of the district and assisting the migrant communities, specifically the Korean, to maintain identity and social connection to their culture and location.

Determination

- 22 In addition to the normal administrative requirements, applicants for the grant of a new liquor store licence have two very distinct obligations under the Act which must be discharged before the application can be approved. The first is overcoming the restraint imposed by s 36B and second, by demonstrating that the grant of the licence is in the public interest as required under s 38(2).
- 23 In my view, the applicant appeared to have misconstrued its obligation under s 36B(4) of the Act.
- 24 There are three key questions that arise out of s 36B(4):
- what are the local packaged liquor requirements?
 - what packaged liquor services are currently provided by the existing premises in the locality? and
 - can the existing packaged liquor premises in the locality reasonably meet those local packaged liquor requirements (or not).
- 25 Consequently, it was necessary to examine the applicant's evidence to determine whether a finding could ultimately be made that the applicant had discharged its onus under s 36B(4) of the Act.
- 26 The applicant undertook a survey and received 642 responses. According to the applicant, 545 respondents supported the idea of purchasing Korean alcoholic beverages from the applicant's proposed liquor store. The survey consisted of six rudimentary questions:
- Do you frequently visit shops along Newcastle Street, Roe Street and William Street?
 - Are you interested in purchasing Korean alcoholic beverages (e.g. soju)?
 - Would you be interested in purchasing Korean alcoholic beverages from our store in Perth?
 - Please give a short explanation supporting your response to question 3
 - Which suburb do you live in?
 - Which suburb do you work in?
- 27 Based upon the applicant's evidence, and in particular the survey data, albeit that it was a fairly basic survey, I find that there is a local packaged liquor requirement for Korean liquor.
- 28 The applicant's PIA and the Bodhi report provided some information relating to outlet density in the locality and the existing packaged liquor outlets. The applicant stated in its PIA that there were seven premises geared towards Korean cuisine; six restaurants and Top Mart City liquor store. The applicant submitted that although Top Mart City is engaged

in the sale of Korean alcoholic beverages in the suburb of Perth, there were several factors which favour the grant of the applicant's application:

- Top Mart City liquor store is located a considerable distance (850 metres) by footpath from HanGaWee Outlet;
- the introduction of an additional liquor store focused on the sale of Korean alcoholic beverages will encourage healthy consumer choice;
- the premises will service and complement the Northbridge precinct take-away-food culture; and
- the grant of the application will allow the current demand for Korean liquor, as evidenced in the survey, to be met.

29 The Bodhi report identified 21 packaged liquor outlets in the locality and stated that three premises offer Korean packaged liquor products: VHT Perth, Hi Mart, and Dan Murphy's Hyde Park. However, the objector submitted that the Bodhi report failed to make any reference to Lion Oriental Food Co, a liquor store which, according to the objector, has a wide range of Asian Liquor products, including Korean liquor products. Notwithstanding, it is unclear from the Bodhi report how it was determined which premises in the locality offered Korean packaged liquor (particularly given the failure to identify Lion Oriental Food Co) and whether all 21 packaged liquor outlets were audited to determine whether any of the other packaged liquor outlets in the locality provided Korean packaged liquor or not. There was no detailed analysis of the packaged liquor offering at these premises.

30 Consequently, I am of the view that the applicant has provided insufficient evidence to properly identify the existing packaged liquor services in the locality, specifically regarding Korean liquor. This made it difficult, if not impossible to make any expressed finding in respect of the packaged liquor services that are currently provided by the existing premises in the locality. However, the evidence did indicate that there are, at a minimum, four premises in the locality that provide packaged Korean liquor.

31 Further, and most significantly, the applicant provided little or no evidence as to why the existing premises could not reasonably meet the consumer requirement for Korean packaged liquor in the locality. The fact that some consumers may find it more convenient to purchase liquor from the applicant's premises (as evidenced by the survey data) is not the issue under s 36B(4).

32 The word "reasonably" does not invoke a particularly high threshold. In *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd*³, Malcolm CJ noted that:

"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: Shorter Oxford Dictionary at 1667"

³ (1991) 4 WAR 1

- 33 In *Liquorland (Australia) Pty Ltd and Ors v Austie Nominees Pty Ltd*⁴ it was found that it is not “reasonable” if the requirement cannot be met without “occasioning substantial difficulty or substantial inconvenience”.
- 34 The applicant provided no probative evidence to demonstrate that consumers would experience substantial difficulty or substantial inconvenience if the application was not granted.
- 35 When I assessed the applicant’s evidence overall, including the PIA, the Bodhi report and applicant’s various submissions, I formed the view that the applicant had failed to provide sufficient evidence to discharge its onus under s 36B(4) of the Act, and I was not satisfied that the local packaged liquor requirements (in this case, Korean liquor) could not reasonably be met by the existing packaged liquor premises in the locality. This is particularly relevant given the applicant only proposes to provide seven Korean liquor products.
- 36 Consequently, the application was refused.
- 37 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). Therefore, I make no findings in this regard.
- 38 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.
- 39 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

⁴ (1999) 20 WAR 405