

## **DECISION OF DIRECTOR OF LIQUOR LICENSING**

**APPLICATION ID:** A000210271

**APPLICANT:** TOKYO MART PTY LTD

**PREMISES:** FUJI MART SUBIACO

**PREMISES ADDRESS:** SHOP 13-14 SUBIACO SQUARE SHOPPING CENTRE,  
29 STATION STREET, SUBIACO

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

**DATE OF DETERMINATION:** 22 MAY 2017

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### **Introduction**

1. On 4 August 2016, an application was made by Tokyo Mart Pty Ltd (the Applicant) for the grant of a liquor store licence for premises to be known as Fuji Mart Subiaco and situated at Shop 13-14 Subiaco Square Shopping Centre, 29 Station Street, Subiaco.
2. The application, made pursuant to s 47 of the *Liquor Control Act 1988* (the Act), was advertised in accordance with instructions issued by the Director of Liquor Licensing (the Director), which resulted in the lodgement of notices of intervention by the Commissioner of Police (CoP) and Chief Health Officer (CHO), pursuant to the provisions of s 69 of the Act.
3. Pursuant to ss 13 and 16 of the Act:
  - (a) a document exchange was initiated between the parties to ensure that each party was given a reasonable opportunity to present its case; and
  - (b) the application will be determined on the written submissions of the parties, which have been summarised below.

### **The Application**

4. According to the Applicant, Fuji Mart (and its associated brand name Tokyo Mart) is a popular and established Japanese grocery store brand, that was first established in Sydney in 1976 and currently has five stores operating across Australia, including Fuji Mart Subiaco, which opened in May 2015.
5. The grant of a liquor store licence is sought to complement a wide range of Japanese products, predominantly food and grocery items, although some homewares items are also sold at the store, which serves approximately 1,200 customers a week. The Applicant also submitted that the store is unique because it provides predominantly imported goods, many of which are exclusive to the Applicant and therefore not otherwise available in Australia.

6. The proposed store will comprise a small area of the store and offer approximately 60 liquor products, predominantly featuring traditional Japanese sake and Japanese fruit wines, with a small selection of Japanese beers to be offered. Subsequent submissions confirmed that the footprint of the liquor store would be approximately 2 metres by 1.3 metres, which would be roped off from the rest of the store by way of post and rope barriers. A sign attached to the barricade rope would inform customers that liquor is available for purchase with the assistance of a staff member, who would then take the liquor to the point of sale and hold it there, until the customer is ready to finalise their purchase.
7. Attachment 2 to the Applicant's PIA, listed the proposed liquor stock for the store as:
  - (a) five Japanese beers;
  - (b) three Japanese plum wines;
  - (c) 23 Japanese sakes;
  - (d) nine Japanese spirits; and
  - (e) two Japanese whiskeys.
8. Mr Hiroshi Umeda, a director of the Applicant confirmed that most liquor products will be exclusive:

“Our Sake is covered by a sole agency agreement with the Japanese supplier. This means that we are the only outlet in Australia to promote and sell this Sake brand. The same goes for the other liquor products (Japanese whiskey, spirits, etc.)”
9. In his statement, Mr Umeda also noted that:
  - (a) the Applicant forms part of the JunPacific Group, which has been in business since the mid 1970s and supplies both retail and wholesale Japanese products and is also actively involved in the Japanese community;
  - (b) it is part of the Applicant's and the JunPacific Group's business plan to have a wholesale and retail outlet in all major cities in Australia and in order to ensure consistency in standards and branding across Australia, all outlets need to stock and sell all lines, including liquor;
  - (c) first and foremost, the Fuji Mart store is a grocery store and not a liquor store;
  - (d) due to its specialty products, the store attracts people from all over Perth, but most particularly Japanese people, people who have Japanese heritage or enjoy Japanese cuisine; and
  - (e) *Fuji Mart Subiaco* is not the only Japanese grocery store in Subiaco and the Nippon Food Supply Supermarket is located in close proximity <sup>1</sup> .

10. In Annexure 6 to the Applicant's PIA, Mr Grevin Chen, a Senior Sales Manager for Jun Pacific WA, which is part of the Jun Pacific Group, undertook a review of "liquor shops" within a three-kilometre radius of the Applicant's premises <sup>2</sup>, which acknowledged that Japanese liquor products were already currently available from licensed premises and that most shops carry Japanese beer. Japanese liquor products are available from:
- (a) BWS Subiaco, which located in the same shopping mall as the proposed premises, which sells Japanese whiskey and beers;
  - (b) Liquor Barons Subiaco, at the corner of Bagot Road and Rokeby Road, Subiaco, which sells some Japanese sake and spirits;
  - (c) Subiaco Hotel Bottle Shop, 465 Hay Street, Subiaco, which carries three Japanese premium whiskey products; and
  - (d) Vintage Cellars Subiaco, 95 Nicholson Road, Shenton Park (approximately 2.5 km from the proposed premises), which sells Japanese whisky and sake.
11. It was further submitted that while Japanese liquor has been accepted in the Subiaco area, the Perth market does not have one professional liquor shop that carries varieties of Japanese liquor, rather the existing range and selection, which is very small and with only a few products imported from Japan.
12. The application was also supported by:
- (a) two market surveys, with the first survey of 129 customers undertaken on the opening day of the store on 30 May 2015 and the second, of 100 customers, which was carried out in May 2016; and
  - (b) a report by MGA Town Planners, which examined town planning matters relevant to the public interest.
13. In conclusion, the Applicant submitted that:
- (a) there is a consumer requirement for the store to stock the proposed liquor products, as evidenced by the feedback of existing customers and the two market surveys, which correspond with the Applicant's experience at its existing stores in other parts of Australia;
  - (b) the grant of the licence will also provide greater opportunity and exposure to a greater range of select and high quality Japanese liquor products, which are not available elsewhere in Australia; and

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<sup>1</sup> (at approximately 900 m) at the Crossways Shopping Centre, located at the corner of Bagot and Rokeby Roads, Subiaco

<sup>2</sup> A similar exercise was undertaken by MGA Town Planners, although that analysis was restricted to only a two-kilometre radius of the Fuji Mart.

- (c) overall, the nature and style of the proposed liquor store is not high risk, given that only a select number of products will be offered, which are intended to be served as a complement to Japanese food.

### The Interventions

14. The intervention of the CoP, lodged on 22 September 2016, sought to provide evidence and information to assist in the determination of the application and, if the application is approved, to recommend trading conditions to assist in minimising the potential harms and anti-social behaviour attributable to licensed premises.
15. In response to the Applicant's assertion that it will ensure that appropriate measures will be in place to minimise the risk of harm and adverse issues resulting from the sale of liquor at the store and that it does not anticipate any negative issues will arise, the CoP submitted that a number of studies have examined the effect of outlet density, which indicates that it leads to increased consumption and to a positive correlation with violence and crime.
16. The CoP also noted that the Applicant's analysis of liquor stores had failed to take into account Lion Oriental Food and Dan Murphy's at the Hyde Park Hotel. In this regard it was submitted that:
- (a) Lion Oriental Food, which is located 2.6 km from the proposed premises, currently has 65 Japanese liquor products on offer, including:
- (i) 36 sake products;
  - (ii) 12 shochu products;
  - (iii) nine umeshu products; and
  - (iv) eight beers; and
- (b) Dan Murphy's at the Hyde Park Hotel, at a distance of 3.2 kilometres from the proposed premises, offers 162 different Japanese liquor products, including:
- (i) 27 beer products;
  - (ii) two plum wine products;
  - (iii) 66 sake products;
  - (iv) 54 Japanese spirits; and
  - (v) 13 Japanese whiskey products.
17. While acknowledging that both Dan Murphy's at the Hyde Park Hotel and Lions Oriental Food are located just outside of the two-kilometre radius specified for the locality in the Director's *Public Interest Assessment* policy, the CoP submitted that they are still relevant to the application, particularly when consideration is given to the

customer surveys, which indicate that 86% of respondents reside outside of the locality. In forming this view, the CoP also referred to previous decisions of the licensing authority to confirm that the locality is only referred to in the Act in ss 38(4)(b) and 74(1)(g)(ii) and only in relation to the impact on the amenity of the locality.

18. Given the amount of Japanese liquor products already available in Subiaco and surrounding areas, the Commissioner also referred to previous findings of the Liquor Commission to establish that the:
  - (a) provision of a wider or alternative range of liquor products is not considered, of itself, to be a strong reason, or even a reason to introduce another liquor store into a shopping centre or precinct; and
  - (b) convenience of purchasing liquor products at delicatessens, butchers or other retail outlets was not a sufficient reason to grant an application for a liquor store licence<sup>3</sup>.
19. In relation to alcohol related harm, the Commissioner submitted that an audit was recently conducted of stealing offences at liquor stores in the Subiaco area (i.e. within a one kilometre radius of Fuji Mart Subiaco) between January 2014 to August 2015, using both police systems data and information sourced from incident registers maintained by relevant licensees. The results of the audit established that:
  - (a) there were 226 stealing offences, involving 405 offenders, with offender information subsequently broken down into information on offenders by gender, age and ethnicity, where that information was available; and
  - (b) thefts from liquor stores were more prevalent for those stores located close to the railway line, which is relevant because of the close location of Fuji Mart Subiaco to Subiaco train station.
20. Based on that analysis, the Commissioner submitted that the proposed store would undoubtedly be exposed to some level of theft and a high percentage of the offenders are likely to be juveniles and/or aboriginal persons, both of whom are identified as 'at-risk' groups for alcohol-related harm<sup>4</sup>. Accordingly, the CoP submitted that:
  - (a) there is an over-reliance by the Applicant on its store layout design and CCTV system as primary, stand alone crime prevention measures, particularly given that these measures offer little deterrence to recidivist offenders amongst the relevant 'at-risk' groups; and
  - (b) the Applicant's intention to delineate the proposed licensed area using a post and rope barrier system would be manifestly inadequate and to maintain the appropriate supervision of the licensed area to minimise alcohol-related harm, it is essential that the licensed area be correctly delineated by a solid and fixed

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<sup>3</sup> See *MYD Korea Pty Ltd v Commissioner of Police and Others* (LC 21/2015).

<sup>4</sup> See the Director's *Public Interest Assessment* policy.

structure or that spirits or other stock containing a high concentration of alcohol per volume be secured behind lockable glass cabinets.

21. Further, the CoP submitted that while the Census figures depict a low representation of relevant at-risk groups (i.e. aboriginal people and juveniles and young people), it does not take into consideration the number of transient or homeless people who frequent the locality, whereas the police offence data was able to take these matters into consideration.
22. In the event that the licence is granted, several trading conditions were recommended by the Commissioner.
23. The intervention by the CHO make representations on:
  - (a) harm and ill-health concerns regarding the integration of alcohol sales alongside grocery items; and
  - (b) to recommend trading conditions that may assist to minimise alcohol-related harm if the licence is granted, by:
    - (i) ensuring that liquor products are separated from grocery products available for purchase at the premises; and
    - (ii) supporting the Applicant's proposed and intended manner of operation, both now and into the future.

### **Determination**

24. As this is an administrative decision and not a judicial one, rather than referring in detail to the entirety of the evidence before me, I have sought to set out what I consider to be the relevant material facts. I have also sought to outline the process of my reasoning from consideration of those material facts to conclusion. Where there has been a conflict in submissions that has been significant to the outcome, I have set out the differing positions advanced by the parties and provided reasons why I have preferred one position over another <sup>5</sup>.
25. At the outset, it should be noted that there is no presumption in favour of the grant of the application; but rather the Applicant must adduce sufficient evidence to discharge its burden under ss 5 and 38(2) of the Act.
26. Interveners, however, carry no burden of proof (see Greaves J, *Re Gull Liquor* (1999) 20 SR (WA) 321), but rather provide submissions to assist the licensing authority to make an informed decision.

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<sup>5</sup> Therefore, in accordance with the observations of Martin CJ in *Hancock -v- Executive Director of Public Health* [2008] WASC 224, these reasons are not "to be construed minutely and finely with an eye keenly attuned to the perception of error."

27. 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 authority to assess the probability of the existence of the facts asserted in each case (refer Liquor Commission of Western Australia decision in *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17of 2010)).
28. In *Woolworths v Director of Liquor Licensing*<sup>6</sup> Buss JA set out the statutory framework for the determination of an application under the Act in the following terms:
- (a) by section 38(2) of the Act, an applicant must satisfy the licensing authority that the granting of an application is in the public interest;
  - (b) the expression “in the public interest”, imports a discretionary value judgment<sup>7</sup>;
  - (c) the factual matters that I am bound to consider, are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
  - (d) the Act’s primary objects relate to:
    - (i) regulating the sale, supply and consumption of liquor;
    - (ii) minimising harm or ill-health caused to people or any group of people due to the use of liquor; and
    - (iii) catering 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;
  - (e) the factual matters that I am entitled to consider, are the following matters, as set out s 38(4) of the Act:
    - (i) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
    - (ii) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
    - (iii) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and

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<sup>6</sup> [2013] WASCA 227

<sup>7</sup> *O’Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of “the public interest” will ordinarily be confined only by the scope and purposes of the statute.

- (iv) any other prescribed matter <sup>8</sup>; and
- (f) section 5(2) is mandatory, whereas section 38(4) is permissive.
29. 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.
30. Determining whether the grant of an application is “in the public interest” requires the licensing authority 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* <sup>9</sup> and *Palace Securities Pty Ltd v Director of Liquor Licensing* <sup>10</sup> . In *McKinnon v Secretary, Department of Treasury* <sup>11</sup> , Tamberlin J said:

“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.

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.”

31. Section 33(1) of the Act gives the licensing authority 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 Limited v Director of Liquor Licensing* <sup>12</sup>, where he said:

“The ‘absolute discretion’ to grant or refuse an application of any ground or for any reason that the Commission considers in the public interest, s 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: *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 [6] - [7] (Wallwork J) and *Palace Securities v Liquor Licensing* (1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). 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

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<sup>8</sup> NB: no other matter has been prescribed.

<sup>9</sup> [2007] WACA 175.

<sup>10</sup> (1992) 7 WAR 241.

<sup>11</sup> [2005] FCAFC 142.

<sup>12</sup> [2012] WASC 384.



does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231; (2002) 25 WAR 511, [52] - [55]; *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 and *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380, 400."

32. The Applicant is seeking a liquor store licence to offer exclusively Japanese liquor products in association with Japanese groceries and other home ware items currently being sold to the public at the premises.
33. Two market surveys were undertaken with the aim of establishing that the grant of the application will further the objects of the Act, specifically one of the primary object as set out in s 5(1)(c) of the Act, to cater to the requirements of consumers.
34. In the first survey of 129 customers, which was undertaken on the opening day of the store on 30 May 2015, I have noted that only 11 consumers indicated that they reside in Subiaco. Many of these consumers also indicated that they were already purchasing Japanese liquor products from other licensed premises, such as Dan Murphy's, Liquorland and Lion Oriental Food.
35. Likewise, the second survey of 100 customers, which was carried out in May 2016, showed that 56 respondents could purchase Japanese liquor products from a local licensed premises, with a further 13 respondents indicating that they purchased products directly from Japan or online. Additionally, a further 11 respondents indicated that they had never purchased Japanese liquor, while 16 failed to respond to the relevant question.
36. In my view, these surveys are deficient for the following reasons. First, they could not be said to be a representative view of members of the local community, given the small number of respondents who reside there and particularly when some respondents reside in Mandurah, Port Hedland and as far away as Toowong, Queensland. Second, the Applicant identified that some respondents were confused by some of the questions, which is evident in some of the responses, such as:
  - (a) Sunakada, from Como, who indicated that while he/she doesn't currently drink and/or want to try Japanese liquor products and did not think that having a range of Japanese liquor products at the Fuji Mart was a good idea; nonetheless indicated that they would purchase Japanese liquor from the Fuji Mart if it were available; and
  - (b) Elvira, from West Perth, who indicated that while he/she doesn't currently drink and/or want to try Japanese liquor products and would not purchase Japanese liquor from the Fuji Mart if it were available; but considered that having a range of Japanese liquor products at the Fuji Mart was a good idea.

37. Furthermore, some responses, such as from Thomas, from West Perth, contained obvious errors, such as indicating that he currently buys his Japanese liquor products from the Applicant's store.
38. All the respondents were customers of the Fuji Mart and it is understandable and not unexpected that these customers would express support for the application. However, the Applicant must demonstrate that the grant of the application is in the public interest, not simply that it may satisfy their customers' needs or preferences. In this regard, convenience is just one factor when considering the requirements of consumers and a liquor store at every supermarket or regularly visited retail outlet to satisfy the convenience of some members of the public would not accord with the provisions and intent of the Act.
39. The Applicant has submitted that it will only be offering approximately 60 varieties of Japanese liquor products, some of which will be exclusive to the Applicant's stores.
40. Conversely, the CoP identified, that both Lion Oriental Food (located 2.6 km from the proposed premises) and Dan Murphy's at the Hyde Park Hotel (located 3.2 kilometres from the proposed premises) stock more varieties of Japanese liquor products than that proposed by the Applicant; which may be a relevant matter when it is considered that the customer surveys indicate that 86% of respondents reside outside of the locality and who it may be inferred, travel to and from the Fuji Mart by car.
41. While I acknowledge that both Dan Murphy's at the Hyde Park Hotel and Lions Oriental Food are located just outside of the two-kilometre radius specified for the locality in the Director's *Public Interest Assessment* policy, I agree with the observations of the CoP that "locality" is only referred to in the Act in ss 38(4)(b) and 74(1)(g)(ii) and then only in relation to the impact on the amenity of the locality<sup>13</sup>.
42. In relation to the Applicant's proposed stock list, one of the customers surveyed, Andrew from Bedford, commented that while he does not drink "sake and shochu, etc. as often as some other alcohol, but my desired products aren't included on the [proposed stock] list." In my view, this is indicative of the fact that the Applicant's limited stock list will not cater to the requirements of consumers, even those consumers who frequent the Applicant's store for Japanese grocery products.
43. In my view, the Applicant has not clearly demonstrated to what degree the granting of this application will contribute to meeting a consumer requirement beyond that already being provided for within the locality and more broadly across the metropolitan area. Furthermore, I am not satisfied that any increase in diversity has been demonstrated to the requisite degree.
44. Apart from convenience, it is apparent that the primary basis upon which the Applicant contends that the application should be granted is:

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<sup>13</sup> For example, see *Springbok Foods Pty Ltd v Commissioner of Police* (LC 26/2014).

- (a) because it is part of the business plan of the Applicant and the Jun Pacific Group to have a wholesale and retail outlet in all major cities in Australia; and
  - (b) to ensure consistency in standards and branding across Australia, all outlets need to stock and sell all lines, including liquor.
45. In my view, these contentions are more concerned with the Applicant's own commercial interests, which do not equate with the public interest for the purposes of s 38(2) of the Act.
46. I think it is also relevant to observe the statement of Mr Umeda that first and foremost the Fuji Mart store is a grocery store and not a liquor store. As a result of this approach, the manner in which the Applicant proposes to operate a liquor store and a grocery store on the same premises presents some uncertainties. This uncertainty may be a product of the fact the application is for a very small portion of the existing premises to be licensed. Nevertheless, the Applicant should be clear about the operational and regulatory requirements relevant to the proposed premises.
47. In this regard, the long title of the Act provides that it is an Act to *inter alia* regulate "the use of premises on which liquor is sold" including, "to provide for orders that may prohibit persons from being employed at, or entering, licensed premises." Therefore, as part of the Act's regulatory provisions, there are a number of offences relating to the conduct of persons on licensed premises.
48. The Applicant proposes a very small licensed premises of approximately only 2 metres by 1.3 metres within a general grocery store, where stock will be displayed in two small cabinets, one of which will be refrigerated. The Applicant further proposes to cordon off the licensed area from the rest of the grocery store by a post and rope barrier system, which will prevent customers from entering the licensed premises; with the selection of liquor being facilitated by the Applicant's staff, who will then sell or supply the liquor at the store's cash registers.
49. Although there was no information contained within the PIA about unaccompanied juveniles frequenting the proposed licensed premises, the Statement of Evidence by Mr Umeda noted, in regard to Fuji Mart stores across Australia, that ten per cent of the Applicant's customers fall into the 15 to 20-year-old age bracket. Accordingly, I have inferred from this evidence that juveniles frequent the Fuji Mart to purchase grocery items.
50. The Act's provisions relating to the limited circumstances when unaccompanied juveniles are permitted on licensed premises are clear. In this regard, I draw the Applicant's attention to s 121(4) of the Act, which provides that where a juvenile enters or remains on any part of licensed premises —
- (a) the licensee;

- (b) any employee or agent of the licensee who permits the juvenile to enter or remain on that part of the licensed premises; and
- (c) the juvenile,

each commit an offence and are subject to a range of prescribed penalties.

51. I also note that there are some exceptions to this prohibition, including s 121(5)(a)(i) of the Act, which does not prohibit juveniles from being permitted entry to, or remaining on, a place where the sale and supply of liquor is authorised if the juvenile is accompanied by, and under the supervision of, a responsible adult.
52. In my view, uncertainty is created by the fact that both of the premises' cash registers are proposed to be defined within the licensed area, which therefore raises questions as to whether or not unaccompanied juveniles would be able to lawfully utilise the Fuji Mart's cash registers to make non-liquor purchases.
53. Similar provisions exist in s 115 of the Act, regarding:
  - (a) permitting drunkenness or violent, quarrelsome, disorderly or indecent behaviour, to take place on licensed premises;
  - (b) permitting any reputed thief, prostitute or supplier of unlawful drugs to remain on the licensed premises; or
  - (c) permitting or suffering to be conducted on the licensed premises any gaming or betting which contravenes s 110(1) of the *Gaming and Wagering Commission Act 1987* or any other activity which contravenes a provision of another written law.
54. Furthermore, Part 5A of the Act deals with prohibition orders, whereby persons can be prohibited by an order from entering specified licensed premises; licensed premises of a specified class or any licensed premises, with s152M of the Act further providing that it is an offence for a responsible person, as defined by s 3 of the Act, to permit a person who is subject to a prohibition order to enter or remain on licensed premises contrary to the order.
55. The Applicant's lack of submissions about these matters and how they might logically be applied to a very small licensed premises, suggests to me that insufficient consideration has been given to the regulatory requirements and the associated impacts that will apply to the proposed operation of the business. In forming this view, I note that the Applicant is legally represented and consider that its representatives should be aware of both the Act's provisions relating to the conduct of business under a licence and attendant offence provisions.
56. Further, there are several previous decisions of the licensing authority regarding applications for the grant of liquor store licences for very small liquor stores, with a

similar focus on cultural liquor products, particularly those of the Liquor Commission, where it was found that:

- (a) the design of very small licensed premises pose difficulties with regulation;
- (b) 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; and
- (c) 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.

57. Therefore, while I am aware that each application must turn on the facts of the specific application and that reference to previous Commission decisions is of limited utility<sup>14</sup>, I have, due to the high relevance of these matters to the present application, observed the Commission’s comments and findings in:

- (a) *Seoul Mart Southlands Pty Ltd v Director of Liquor Licensing* (LC 14/2016);
- (b) *Paul Jacobus Van Den Berg and Una Van Der Berg v Commissioner of Police & Others* (LC 10/2016);
- (c) *MYD Korea Pty Ltd v Commissioner of Police & Others* (LC 21/2015);
- (d) *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014);
- (e) *Springbok Foods Pty Ltd v Commissioner of Police* (LC 26/2014); and
- (f) *Jun Chul Seo v Director of Liquor Licensing* (LC 31/2011).

58. Given that these determinations are freely available from the Liquor Commission’s website, I consider that there is a good deal of precedent in the form of the Commission’s previous decisions for the Applicant’s legal representatives to have been aware of the issues raised in these relevant determinations and to address those matters through its PIA and other submissions, which it has not done.

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<sup>14</sup> See *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 07/2017).

59. Additionally, s 77(1) of the Act provides that it is an offence for an owner, occupier or licensee of licensed premises to make any alteration in any licensed premises, without the prior approval of the Director. In this regard, s 77(3) of the Act provides that an alteration shall be deemed to have been made if it comprises or consists of a change to the use of any premises or facilities. In my view, the definition of such a small licensed area wholly within another business would effectively mean that the licensing authority would have no control over the use of rest of the building in which the licensed premises is situated. As such, while the Applicant's store may currently be set up as a grocery store, there would be nothing to prevent a change in use of the premises around the licensed area to a use that is incompatible with the sale of packaged liquor, such as a restaurant or cafe (refer ss 65(1)(c) and 110(4) of the Act and associated offences.)
60. In *Woolworths Limited -v- Director of Liquor Licensing*<sup>15</sup>, Heenan J noted that when determining applications under the Act, it is necessary to observe not only the object set out in s 5(1)(c), but that:
- “... 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 a 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 the requirements in this State. These considerations are inextricably linked with the public interest and cannot be properly addressed or applied without regard to it.”
61. Therefore, on the evidence before me, I make the following findings of fact:
- (a) the application relates to a very small operation within a Japanese grocery store, which will involve a discrete location within the grocery store where alcohol will be available for sale;
  - (b) the size of the proposed licensed area will be very small, approximately only 2 metres by 1.3 metres, which will include two stock display units (one refrigerated) and the grocery store's cash registers;
  - (c) there will be a post and rope barrier system provided to prevent people from walking into the proposed licensed area and the only people who would be permitted to enter and remain on the proposed licensed premises would be the Applicant's staff;
  - (d) the proposed licensed premises will offer approximately 60 liquor products, being mainly traditional Japanese sake and Japanese fruit wines, with a small selection of Japanese beers and some products that will be exclusive to the Applicant; and

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<sup>15</sup> [2012] WASC 384.

- (e) notwithstanding the exclusive nature of some of the products to be sold by the Applicant, when compared with the amount of Japanese liquor products already available in other licensed premises in relatively close proximity to the proposed store, the grant of the licence would not significantly add to the diversity of products on offer or allow greater choice for consumers of liquor.
62. Both interveners raised the issue of alcohol-related harm and while I am aware that alcohol can cause harm and ill-health, in considering the primary object of the Act expressed in s 5(1)(b), I am required to consider each application in accordance with the test outlined by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*<sup>16</sup>, being to:
- (a) make findings that specifically identify the existing level of harm and ill-health in the relevant area, due to the use of liquor;
  - (b) make findings about the likely degree of harm to result from the grant of the application;
  - (c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
  - (d) weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the Applicant has satisfied the authority that it was in the public interest to grant the application.
63. The relevant representations of the CHO regarded harm and ill-health concerns on the integration of alcohol sales alongside grocery items and those of the CoP suggested that the locality:
- (a) is subject to a large number of transient people who would not be captured in Census and other data, including persons from identified 'at-risk' groups for alcohol-related harm;
  - (b) a recent audit of stealing offences at liquor stores in the Subiaco area (i.e. within a one kilometre radius of Fuji Mart Subiaco) for the period of January 2014 to August 2015, established there were 226 stealing offences, involving 405 offenders;
  - (c) thefts from liquor stores located close to the railway line were more prevalent, which is relevant because of the close location of Fuji Mart Subiaco to Subiaco train station; and
  - (d) the Applicant's proposed crime prevention measures may offer little deterrence to recidivist offenders from the most relevant 'at-risk' groups.

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<sup>16</sup> [2015] WASC 208.

64. However, on the evidence before me, I consider that:
- (a) the existing levels of harm and ill-health in the locality are no higher than other areas in Western Australia;
  - (b) there is nothing to suggest that the granting of the licence will result in an increase in harm and ill-health, with the small size of the proposed premises, the nature of its operation and the limited number of products being significant factors in reaching this conclusion; and
  - (c) there is nothing to suggest that there will be an increase in harm and ill-health in the locality to such a degree that would be considered unacceptable.
65. In responding to the intervention by the CHO, the Applicant consented to the imposition of a condition on the licence to limit the purchase of liquor products in conjunction with the sale of grocery items only. In my view, the imposition of such a condition would be contrary to the provisions of s 47(1) of the Act, where the licensee of a liquor store is, during the permitted hours, authorised to sell packaged liquor on and from the premises to **any** person [emphasis added]. Accordingly, I consider that such a condition may subvert the licence classification system set out in the Act.
66. I also find that to grant the application in the manner sought would be contrary to the Act's regulatory object. In my view, it would not be in the public interest to grant a liquor licence, where:
- (a) the licensee would have all the benefits associated with the sale and supply of liquor, but due to the nature of its extremely small size and/or location wholly within another store/business, would be unfettered by some of the regulatory controls that are usually imposed on the whole of the premises<sup>17</sup> by the Act; and
  - (b) the licensing authority would have no regulatory control over the future use of the shop/business in which the licensed premises is wholly located and therefore little or no influence on whether those uses (should the business operating around the liquor store change) would be compatible with the sale and supply of packaged liquor or the Act's objects.
67. Each application must be considered on its merits and determined on the balance of probabilities pursuant to s 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, which in these proceedings relate to the objects of regulating the sale, supply and consumption of liquor and catering 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. When such

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<sup>17</sup> In this regard, s 3 of the Act defines "licensed premises" as the "premises specified or defined by the licensing authority in relation to a licence, protection order or permit as the **building** (emphasis added) or place to which that licence, order or permit applies.



circumstances arise, the licensing authority needs to weigh and balance those competing interests <sup>18</sup> .

68. Having regard to the totality of the evidence, I am not satisfied on balance that the Applicant has discharged the onus prescribed by s 38(2) of the Act that the granting of the licence is in the public interest. The benefits of convenience shopping are outweighed by the statutory policy of regulation and the measured approach espoused by Heenan J to the proper development of the liquor industry and the facilitation of the use and development of licensed premises to reflect the diversity of the requirements in this State. The application is therefore refused.
69. 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.
70. 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

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<sup>18</sup> *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258.