

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: VHT Perth Pty Ltd
*(represented by Mr Peter Fraser of Dwyer Durack
Lawyers)*

Interveners: Chief Health Officer

Objectors: Commissioner of Police
*(represented by Mr Sam Pack of State Solicitor's
Office)*

Mrs Tindara Tarricone (Licensee Objector)
(represented by Mr Ian Curlewis of Lavan)

Commission: Mr Michael Egan (Presiding Member)
Dr Eric Isaachsen (Member)
Ms Elanor Rowe (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.

Premises: VHT Perth Pty Ltd, 412 William Street, Perth

Date of Hearing: 10 May 2018

Date of Determination: 29 May 2018

Determination:

The application is granted, subject to the following conditions:

- 1) Only Asian liquor products are permitted to be sold at the premises.
- 2) The sale of beer is prohibited.
- 3) The sale of packaged liquor is restricted to products with a retail value of at least \$20 per bottle/vessel.
- 4) The licensee is permitted to trade only:
 - a) Monday to Friday, 9:00am – 6:30pm;
 - b) Saturday, 8:00am – 6:30pm; and
 - c) Sunday, 10:00am – 6:00pm.
- 5) The licensed area within the supermarket, to consist of a single aisle with an area no greater than 30m², is to:
 - a) be separated from the non-licensed aisles by a solid non-transparent barrier;
 - b) have a gated entry/exit point;
 - c) have a dedicated point of sale with at least one other checkout of the supermarket to be located outside the licensed area; and
 - d) display liquor only upon shelving or within a two door fridge.
- 6) The words “liquor store” is the only exterior advertising that is authorised.
- 7) CCTV system:
 - a) A CCTV system is to be in place and operational at all times covering the internal access/egress of each entrance and exit of the premises.
 - b) These cameras must allow clear identification of patrons.
 - c) Staff members are to be fully trained in the operation of the system.
 - d) The system must comply with the Director’s Policy relating to CCTV.
 - e) Images recorded via CCTV system must be retained for 28 days and must be made available for viewing or removal by the police or other persons authorised by the Director.

Authorities referred to in Determination

- *Australian Leisure & Hospitality Group Pty Limited v Commissioner of Police & Ors* [2017] WASC 88
- *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

Background

- 1 On 23 December 2016, VHT Perth Pty Ltd (“the applicant”) applied for a liquor store licence in respect of premises at 412 William Street, Perth (“the applicant’s premises”) pursuant to sections 47 and 62 of the Liquor Control Act 1988 (“the Act”).
- 2 The applicant applied for the same licence in 2011, but the application was refused in 2012.
- 3 The Commissioner of Police (“the Police”) and Mrs Tindara Tarricone, the licensee of the Lake Street Liquor Supply, Lake Street, Perth (“the Licensee Objector”), have both lodged a Notice of Objection pursuant to sections 73 and 74 of the Act.
- 4 The Chief Health Officer (“the CHO”) has lodged a Notice of Intervention pursuant to section 69 of the Act.
- 5 On 21 July 2017, the delegate of the Director of Liquor Licensing (“the Director”) refused the application (decision reference A000223363).
- 6 The applicant has applied to the Liquor Commission (“the Commission”) pursuant to section 25 of the Act for a review of the Director’s decision.
- 7 The Commission conducted a hearing of the application on 10 May 2018.

Evidence and Submissions from the Applicant

- 8 The applicant operates an Asian supermarket and is seeking approval to establish a liquor store in an area within the supermarket of approximately 30m² to complement the services currently provided to customers.
- 9 The supermarket, which has been operating for over 30 years and is well known for its wide range of Asian foods, is located in the suburb of Perth bordering Northbridge, one of Perth’s main entertainment precincts.
- 10 The applicant’s customer base comprises persons of Asian ancestry as well as the wider community living and working nearby and outside the locality.
- 11 The proposed liquor store consists of a single aisle within the supermarket, and would be separated from the main part of the supermarket by a non-transparent barrier (in the form of a solid wall) preventing a view of the liquor products from the supermarket proper.
- 12 Access into the proposed licensed premises would be restricted to one entry/exit point with a dedicated checkout for use by customers purchasing packaged liquor.

Public Interest Assessment

- 13 The Public Interest Assessment (“the PIA”) accompanying the application indicates, among other things:
- a. the applicant’s customer base is heavily weighted towards migrants from Asian countries; however, the applicant anticipates a broader customer base to comprise:
 - i. existing customers of the supermarket;
 - ii. tourists and visitors in nearby short stay holiday accommodation;
 - iii. residents and visitors who wish to take packaged liquor to local BYO restaurants and cafes, social events or for consumption at home; and
 - iv. local business and corporate clients;
 - b. apart from a reference to “liquor store” on the exterior of the supermarket, no advertising would be undertaken;
 - c. the proposed trading hours would be:
 - i. Monday to Friday: 9.00am – 6.30pm;
 - ii. Saturday: 8.00am – 6.30pm; and
 - iii. Sunday: 10.00am – 6.00pm;
 - d. the type of packaged liquor products intended to be stocked would be predominantly Asian spirits, wine and beer (amounting to approximately 90% of all stock) with the remainder of the stock a selection of mainstream well known Australian brands of products;
 - e. a customer survey conducted by the applicant and letters of support from individuals and businesses demonstrate that a section of the public will patronise the proposed liquor store;
 - f. the demographic of the locality reflects a high level of Asian residents with an affluent aging population;
 - g. by reference to the country of origin of residents within the City of Vincent and the City of Perth, the two local authorities governing the locality, it is evident a significant portion of the population is of Chinese, Malaysian, Korean and Vietnamese ancestry; and
 - h. cultural diversity is a prominent feature in the City of Perth’s vision to create a vibrant and cosmopolitan place to live and work.
- 14 The Applicant contends that higher density residential development and population growth in both the City of Perth and City of Vincent is expected to continue and that the proposed store, located in what is seen by many as Perth’s second Chinatown, will meet a demand for Asian packaged liquor products, from both locals and tourists, which is not currently being met.

- 15 Although the applicant acknowledges alcohol-related harm is being caused in the locality, the applicant submits that the harm is not specific to any particular “at risk” group and is not being experienced at a level that would not be reasonably expected in an entertainment precinct with a high concentration of licensed premises.
- 16 The applicant also highlights that no objections have been lodged by potential “at risk” groups. Furthermore, the applicant’s premises are not expected to attract persons or groups who are associated with anti-social behaviour, such as may occur at “on-premises” licensed premises, and there is no evidence to suggest that the products to be stocked by the applicant are attractive to “at risk” groups.
- 17 In response to the crime statistics presented by the Police, the applicant rejects the relevance and probative value of the Police comparisons with other localities utilising a rate of the number of offences per 1000 head of population as the residential population of Perth and Northbridge is a fraction of the total number of persons attracted to Northbridge and the Perth CBD on a daily basis.
- 18 In addition, the applicant submits that the Police data for 2016 for alcohol-related domestic assaults, non-domestic assaults and threatening behaviour does not reflect a high rate of offending in Perth or Northbridge.
- 19 The applicant also submits that the absence of information about where alcohol-related offences are occurring (i.e., on or off licensed premises) is relevant to a consideration of the likely risk of harm from the grant of the application, as the proposed store will:
 - a. only comprise a small “footprint” of some 30m²;
 - b. carry predominantly Asian liquor products;
 - c. service a significant number of customers from outside the locality; and
 - d. cease trading at 6.30pm (and 6.00pm on Sunday).

Service Providers

- 20 In response to letters from the Salvation Army, Mission Australia, the St Vincent de Paul Society and Ruah Community Services (“the Service Providers”) submitted into evidence by the Police, the applicant engaged directly with the Service Providers with a view to identifying and responding to the Service Provider’s apparent concerns about the proposal.

Salvation Army

- 21 The Salvation Army expressed concern about the homeless within Perth gaining access to liquor and indicated that it would be unwise to have an additional liquor store in the locality.

- 22 In response to additional information provided by the applicant, the Salvation Army has advised:

“The Salvation Army does not formally object to the liquor licence, however we do draw attention to the existence of homelessness and other social dynamic within the Perth CBD and outlying suburbs which creates the need for centralised social services in these areas. The Salvation Army’s experience indicates that given the range of vulnerabilities that present, alcohol can be counter-productive or even destructive to the recovery process of those people we seek to assist. Therefore we suggest careful consideration of all factors.”

- 23 The applicant also points out that with the high number of existing liquor licences in Northbridge and Perth and the fact the proposed store is 1km from the Perth CBD, there is no evidence homeless persons would “migrate” to the proposed store to purchase liquor.

Mission Australia

- 24 Mission Australia, which provides services to young people experiencing problems with alcohol and substance abuse with a centre approximately 1.8km from the proposed store, expressed concern about the grant of any further liquor licences in the area, but was not aware of the specifics of the proposal.
- 25 Upon explanation and follow up by the applicant, Mission Australia acknowledged that the proposed store would most probably not have a significant impact.

St Vincent de Paul Society (WA) Inc (“the SVdeP Society”)

- 26 The SVdeP Society, which operates the Passages Resource Centre expressed concern about the proximity of the proposed store (the centre is 750 metres from the applicant’s premises) on vulnerable young people to whom they provide services, but when spoken to by the applicant appeared less concerned having regard to the fact the store primarily sells groceries with liquor intended as a complementary service.

Ruah Community Services (“Ruah”)

- 27 Apparently Ruah, which provides services to homeless people experiencing problems associated with alcohol and drug abuse, has a policy of not supporting liquor licence applications in general and expressed concern about the extended hours of operation on their client’s health, aggression and anti-social behaviour.
- 28 However, the applicant points out that the proposed store will not stay open beyond 6.30pm and the Ruah centre is open from 9.00am until 1.00pm from Monday to Friday.

Other Service providers

- 29 Despite approaches by the applicant to other service providers, local businesses and welfare groups, no objections have been received.

- 30 Further, in response to communication from the applicant, a number of local businesses have expressed the view they experience little negative interaction with public intoxication, anti-social behaviour or homeless people.

Additional Conditions on Licence if granted

- 31 In advance of the Commission hearing, the applicant proposed that a number of additional conditions be imposed on the licence if the application is granted, the most significant of which are:
- a. only Asian liquor products be permitted to be sold at the premises;
 - b. the sale of beer be prohibited;
 - c. the sale of packaged liquor be restricted to products with a retail value of at least \$20 per bottle/vessel; and
 - d. at least one checkout of the supermarket be located outside the licensed area.
- 32 The applicant explained at the Commission hearing that this proposal had been prompted and formulated after a review of a recent decision of the licensing authority in *Wines of While* (decision reference A000238281 dated 31 January 2018).
- 33 In that decision, the Director granted an application to enable the licensee to sell a range of “natural wines”, but in response to a concern about the potential impact of cheap and popular packaged liquor on the local community imposed a condition that the sale of packaged liquor be restricted to bottles of wine with a retail value of at least \$20 per bottle.

Evidence and Submissions from the Police

- 34 The Police assessed the application and the PIA and commented as follows:
- a. the inadequate assessment of “at-risk” groups undeniably present, and the significant levels of crime occurring, in the locality falls short of meeting the onus on the applicant to demonstrate that the grant of the application is in the public interest;
 - b. rather than demonstrate a consumer requirement for the proposed service, the applicant’s survey denotes no more than a general acceptance or arguably a lack of negative perception towards the proposed service and has failed to clearly demonstrate the extent to which the grant of the application will meet a consumer requirement beyond that already provided in the locality;
 - c. liquor stores within the locality such as Dan Murphy’s and Lion Oriental Foods Co. already provide a wide range of Asian liquor products which suggests that consumers of the proposed products are adequately cater for;

- d. the stated target market has not been demonstrated and there is no evidence the proposed store is catering for anyone other than some individuals wishing to purchase their liquor in conjunction with Asian groceries at the supermarket;
- e. the total number of offences in the suburbs of Perth and Northbridge for domestic assaults, alcohol-related domestic assaults and alcohol-related threatening behaviours has been trending upwards;
- f. the rate of offending is significantly higher relative to Perth, Fremantle and the Metropolitan Region (adopting rates of relevant offences per 1000 head of population);
- g. the frequency of Police attendances in Perth and Northbridge far exceed the rates reflected in Metropolitan WA and the State;
- h. a recent study into alcohol-related harms in WA electoral districts together with recent media reports reveals an elevated level of harm and ill-health in the locality; and
- i. in addition to “at risk” groups such as tourists and young children, a number of service providers for people affected by alcohol abuse and addiction are located within a 2km radius of the proposed premises, four of whom have provided letters outlining concerns, namely, the Salvation Army, Mission Australia, the SVdeP Society and Ruah.

35 The Police have also reported on the level of:

- a. drink driving in the locality and submit it is inevitable that any packaged liquor outlet will escalate the occurrence of drink driving; and
- b. attendances by St John Ambulance in the Perth CBD for assaults and intoxication cases (between January 2015 and December 2016) and submit the statistics reveal an elevated level of harm within Perth and Northbridge which is a drain on all emergency services.

36 Notwithstanding these earlier submissions, the Police have advised that, having regard to the additional conditions proposed by the applicant (refer paragraph [31] above), the Police do not oppose the grant of the application.

Submissions from the Licensee Objector

37 In support of the various grounds of its objection, the Licensee Objector submits:

- a. as there is no material change in the alcohol-related harm and ill-health occurring in Northbridge since the applicant’s previous application was refused in 2012, the approval of the application continues to be inconsistent with the public interest;
- b. the target market of the applicant is identifiable as “non-English speaking migrants” and the applicant is seeking to target this group in an area already experiencing alcohol-related harm without identifying any harm minimisation measures to ensure this group is not put at further risk;

- c. the consumption of liquor at nearby BYO restaurants could cause significant offence, annoyance, disturbance and inconvenience to those restaurateurs and their clients due to the “quick and easy” access to a significant amount of liquor; and
 - d. public drunkenness could become a serious issue lessening the amenity of the locality.
- 38 In its preliminary submissions to the Commission for the purposes of this review, the Licensee Objector re-iterated its earlier submissions in further detail with references to:
- a. the statistics provided by the Police in support of its contention the locality is suffering from a significant level of alcohol-related harm and ill-health; and
 - b. the number and proximity of alcohol and drug treatment centres and the known positive relationship between the availability of alcohol and associated harm and ill-health in support of its contention the grant of the application will contribute further to harm and ill-health in the locality.
- 39 While accepting that section 25(2c) of the Act prevents new evidence being adduced before the Commission, the Licensee Objector further submits that, if the Commission is minded to grant the application, the Commission, as a specialist tribunal with its own knowledge of the industry, should have regard to the conditions imposed on the licence of a similar specialist supermarket in another suburb (*Tokyo Mart Pty Ltd v Director of Liquor Licensing* LC 38/2017) and impose no less onerous trading conditions in respect of this application. Those conditions include, but are not limited to:
- a. the supply of liquor products other than those of authentic Asian origin be prohibited; and
 - b. liquor must be sold ancillary to the purchase of food products and signage reflecting this condition must be displayed.
- 40 In its responsive submission and in response to the applicant’s proposed additional conditions if the application is granted, the Licensee Objector contends:
- a. the applicant’s consumer survey, 40 letters of support and 19 proofs of evidence in support of the application were all obtained by misrepresenting to the public what products the applicant intends to stock and that had the revised trading conditions been known it is entirely feasible the level of support would not have been provided;
 - b. for the Commission to have regard to the revised trading conditions would be inconsistent with section 25(2c) of the Act as they were not before the Director;
 - c. having regard to the revised conditions would set an undesirable precedent from a public policy perspective enabling applicants to seek more liberal trading conditions at first instance and, if unsuccessful, “offer up a range of trading conditions to the Liquor Commission in order to obtain a licence”;

- d. as some types of Asian liquor have a significantly higher alcohol content than wine, the \$20 threshold on price would increase the availability of high strength liquor and likely contribute further to alcohol-related harm in the area;
- e. the “diminished” application is defective and the evidence in support of the application is unsound as the application as it now stands was not advertised to the public at the outset; and
- f. the Licensee Objector is materially prejudiced in having to respond to an entirely different application without the capacity to lead new evidence.

41 As a consequence, the Licensee Objector contends the applicant has failed to demonstrate that the grant of the application is in the public interest.

Submissions from CHO

42 The CHO has made a number of representations supported by research and academic studies regarding the potential for the application to cause harm or ill-health to people due to the use of liquor.

43 The CHO submits that the association of the sale of packaged liquor with general grocery items can reinforce alcohol as a non-harmful product and establish its cultural place as part of everyday life, shaping attitudes and behaviours towards alcohol, and can lead to increased consumption and harm.

44 Notwithstanding the proposal to separate liquor products from the remainder of the supermarket by a non-transparent barrier, the CHO has, nevertheless, expressed concern that the applicant intends to accommodate liquor and grocery items at the dedicated liquor checkout.

45 The CHO further submits that:

- a. increasing the availability of packaged liquor in an environment already experiencing alcohol-related harm poses a greater risk of additional harm;
- b. whilst the applicant has indicated current demand for Asian packaged liquor products is not being met, a nearby Asian grocery store with a special facility licence to supply Asian alcohol products for cooking has applied for a licence to supply mainstream and Asian packaged liquor products; and
- c. based on the Police data, the proportion of assaults in Perth (33% of 767) and Northbridge (47% of 402) recorded as alcohol-related between January and December 2016 is high and although alcohol-related harm is associated with liquor consumed on licensed premises in an entertainment area, people drinking packaged liquor also contribute to alcohol-related harm.

46 The CHO has recommended that if the application is granted a number of specified conditions be placed on the licence to mitigate the risk of harm referred in the intervention.

Determination

- 47 In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227, Buss JA set out the statutory framework for a determination of an application of this nature. In essence, His Honour stated the relevant provisions of the Act and the role of the Commission in determining the application in the following terms:
- a. the primary objects of the Act are set out in section 5(1) (a), (b) and (c) of the Act;
 - b. by section 5(2), in carrying out its functions under the Act, the Commission shall have regard to the primary objects of the Act and to certain secondary objects, which include facilitating the use and development of licensed facilities, reflecting the diversity of the requirements of consumers in the State (section 5(2)(a));
 - c. by section 5(3), if, in carrying out any of its functions under the Act, the Commission considers that there is any inconsistency between the primary objects and the secondary objects, the primary objects take precedence;
 - d. by section 38(2) of the Act, an applicant who makes an application for a liquor store licence must satisfy the Commission that the granting of an application is in the public interest;
 - e. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210);
 - f. the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act set out in sections 5(1) and 5(2);
 - g. the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;
 - h. the requirement to have regard to the primary and secondary objects in sections 5(1) and 5(2) is mandatory whereas section 38(4) is permissive;
 - i. on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - i. 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; and
 - ii. facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

- 48 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- a. the grant of the application would not be in the public interest; or
 - b. 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; or
 - c. if the application were granted:
 - i. undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
 - ii. the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened; or
 - d. the grant of the application would otherwise be contrary to the Act.
- 49 Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 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, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (*Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- 50 The task before the Commission is to assess whether the applicant has discharged its onus and demonstrated that the grant of the application is in the public interest and in doing so to weigh and balance the competing objects of the Act, specifically, in this case, the primary objects (sections 5(1)(b) and 5(1)(c)), and the secondary object (section 5(2)(a)), and have regard to section 38 of the Act.
- 51 Neither of the primary objects takes precedence over the other, but to the extent that the Commission considers there is any inconsistency between the primary objects and the secondary objects, the primary objects take precedence.

Section 5(1)(c) of the Act

- 52 Section 5(1)(c) states one of the primary objects of the Act is to:

“cater 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.”

- 53 As the Commission has stated previously, catering for the requirements of consumers of liquor means more than simply making liquor and related services available or providing liquor and related services for consumers (*Australian Leisure and Hospitality Group Pty Ltd vs Commissioner of Police and Others* LC 26/2017 at [96]).
- 54 The requirement of consumers necessitates a consideration of a wide range of matters including the nature and character of services sought by consumers, matters of taste, convenience, shopping habits and shopping preferences to name but a few.
- 55 Further, as Her Honour Baker-Smith J held in *Australian Leisure & Hospitality Group Pty Limited v Commissioner of Police & Ors* [2017] WASC 88, section 5(1)(c) of the Act requires that the issue of catering for consumer requirements must not be considered in isolation, but in the context of the potential and opportunity for the proper development of the liquor, tourism and hospitality industries in the State.
- 56 To demonstrate a consumer requirement for the liquor services proposed, the applicant has presented a range of evidence, which includes a consumer survey and letters of support (“consumer evidence”).
- 57 The consumer evidence demonstrates that a selection of the applicant’s existing customers and individuals and businesses from within, and external to, the locality support the application.
- 58 Notwithstanding that a number of existing liquor stores in the locality sell Asian liquor products, respondents to the survey indicate, among other things, that they find it difficult to conveniently source a good range of Asian alcohol in the area.
- 59 The respondents have also indicated that they would find it convenient to purchase packaged liquor with their groceries at the applicant’s premises.
- 60 While the consumer evidence is of some assistance to the Commission in assessing the application in the context of section 5(1)(c) it is by no means determinative.
- 61 Further, as the Commission has stated previously, convenience is just one factor to be considered in determining whether the proposal caters for the requirements of consumers as envisaged by section 5(1)(c) of the Act (*Liquorland (Australia) Pty Ltd v Commissioner of Police & Others* LC 18/2015 at [125]).
- 62 The reputation, period of operation and popularity of the applicant’s supermarket reveals there is a high demand for the speciality Asian groceries offered for sale. This fact is supported by the evidence from consumers and from the characteristics and demographic makeup of the locality. The evidence also suggests there is a relatively high level of visitation to the locality by tourists from Asian countries and members of the Asian community living outside the locality.
- 63 The Licensee Objector has submitted that the evidence in support of the applicant’s submission that the proposed liquor store caters for the requirements of consumers is unsound because of the more restrictive conditions now being proposed by the applicant.

- 64 The contention of the Licensee Objector appears to be that as the applicant is no longer proposing to sell beer and is proposing to limit sales of packaged liquor to items of \$20 and above, the respondents to the survey and the authors of the letters of support may not support the revised application.
- 65 The Commission rejects this submission.
- 66 Certainly, the respondents to the survey were responding to a proposal to sell a range of Asian alcohol as well as popular Australian beers and WA wines and spirits.
- 67 It may be the case that some of the respondents viewed the application positively because of the convenience it would provide if shopping for these Australian and WA products. However, it is clear that there is a considerable level of support, among respondents to the survey and others, for speciality Asian liquor products to be available for purchase in the applicant's supermarket.
- 68 Notwithstanding that some Asian liquor services are already available in the locality, the Commission is satisfied that the broad range of Asian liquor products now proposed to be stocked by the applicant will provide more diversity for consumers of liquor. The Commission is also satisfied that the proposal is consistent with the proper development of the liquor and tourism industries by providing further culturally diverse services in Perth.

Section 5(1)(b) and section 38(4) of the Act

- 69 Section 5(1)(b) states one of the primary objects of the Act is to:

“minimise harm or ill-health caused to people, or any group of people, due to the use of liquor”.

- 70 Section 38(4) of the Act states the matters the Commission may have regard to in determining whether granting an application is in the public interest include:

“(a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and

(b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and

(c) 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

(d) any other prescribed matter.”

- 71 When considering whether the grant of an application will cause harm or ill-health to people or any group of people due to the use of liquor, the decision of Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 provides instruction on the reasoning process that the Commission should follow, that being:

- a. make findings that specifically identify the existing level of harm and ill-health in the locality due to the use of liquor;
- b. make findings about the likely degree of harm to result for 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 relevant factors to determine whether it is in the public interest to grant the application.

Existing level of harm and ill-health in the locality due to the use of liquor

- 72 The Commission acknowledges the critique by the applicant of the computation of relative statistics by the Police in the Police's endeavour to provide the Commission guidance on the level of alcohol-related offences in Perth and Northbridge compared to other suburbs and the State average.
- 73 The locality in which the applicant's premises are located attracts a very high number of local people and tourists from outside the locality on a daily basis and the relative statistics provided by the Police are not particularly helpful.
- 74 Nevertheless, the Commission is satisfied that there is an elevated level of alcohol-related harm in the locality in various forms due to the use of alcohol.
- 75 Whilst concerning, this is reflective of the character of the area as an entertainment precinct comprising many different types of licensed premises such as hotels, restaurants, nightclubs and small bars as well as liquor stores.
- 76 The Crime Data (IMS) reported by the Police for Northbridge and Perth between January 2014 and December 2016 show an increase of 11 persons in relation to alcohol related threatening behaviour (Northbridge) and an increase of 31 persons in relation to alcohol related domestic assaults (Perth). The number of alcohol related non-domestic assaults was static in both localities.
- 77 The IMS demonstrates the existing level of alcohol related harm and ill-health from the Police viewpoint. The Commission notes the effect this has on the demands on the Police, and also notes the far greater increase in absolute numbers, and percentage contribution to that demand, from the non-alcohol related domestic assaults, non-domestic assaults and threatening behaviour in the localities of Northbridge and Perth.

Likely degree of harm to result from the grant of the application

- 78 An assessment of the likely increase in harm and ill-health to result from the grant of the licence involves a consideration of:
- a. the location and nature of the proposed store and the type and price of liquor products proposed for sale;

- b. the consumers, including “at risk” groups, from within and outside the locality likely to patronise the proposed store; and
 - c. the proposed hours of trading.
- 79 The applicant’s premises are located in what is known or regarded by many as Perth’s second Chinatown. The immediate area surrounding the applicant’s premises comprises, principally, Asian speciality and convenience stores and restaurants.
- 80 The proposed store will offer a wide range of speciality Asian liquor products, within the applicant’s supermarket demarcated and separated from the supermarket proper and will not advertise externally other than by use of a sign with the words “liquor store”.
- 81 The internal design of the proposed liquor store separates grocery products from liquor products by virtue of a non-transparent barrier between the two sections.
- 82 The main categories of customers who would utilise the proposed store appear to be those who purchase:
- a. groceries and liquor at the same time for consumption at home;
 - b. liquor only, either for consumption at home or in the locality at restaurants or elsewhere; and
 - c. liquor for business purposes, such as licensed restaurants.
- 83 The approval of an additional specialised Asian liquor store of the type and size proposed would appear to the Commission to present a low risk of an increase in harm and ill-health among, or attributable to, the customers likely to frequent the proposed store and consume their liquor at home.
- 84 The Licensee Objector has submitted that “the application seeks the grant of a licenceto sell packaged liquor (including high strength alcohol products) primarily to a target market that the licensing authority deems to be at risk from alcohol-related harm and ill-health (migrant groups from non-English speaking countries, homeless people, tourists and Aboriginal people) in a locality that is well known to suffer from some of the highest rates of alcohol-related harm and ill-health in the metropolitan area” and that “such a proposal is in conflict with the objects of the Act.....”.
- 85 There is no evidence to suggest that members of the community with a non-English speaking background, either within or outside the locality, are experiencing any more or less harm than other members of the wider community from the use of Asian liquor products or alcohol generally. The Commission is not satisfied that this segment of the applicant’s target market is at a high risk or any material risk of an increase in harm or ill-health from alcohol related products.
- 86 Clearly, if the application is granted there will be a proportion of customers who consume liquor purchased at the applicant’s premises at nearby restaurants.

- 87 However, the businesses canvassed by the applicant, which include a number of restaurants, have indicated that they experience little interaction with public intoxication or anti-social behaviour.
- 88 While additional harm from the introduction of another liquor store into the locality may occur, in the Commission's view, the risk in this case is considered to be low having regard to:
- a. the small size of the store;
 - b. the type of specialty Asian liquor products to be sold;
 - c. the relatively niche market for the liquor products;
 - d. the absence of any discounting or promoting of liquor at low prices or at a discount for buying in bulk; and
 - e. the limited hours of operation of the store.
- 89 It is apparent from the evidence, in particular the initial objection and accompanying material lodged by the Police, that there are a number of community service providers within the 2km radius of the applicant's premises.
- 90 As the Commission has previously stated, it is important for applicants to engage with key stakeholders and "at risk" groups within the local community affected by an application to understand and assist the Commission assess the potential social and economic impacts of an application, including the potential for any increase in harm or ill-health and how that potential harm might be mitigated (*Australian Leisure Hospitality Group Pty Ltd v Commissioner of Police & Others* LC03/2016 at [229]).
- 91 The applicant did engage with several of the Service Providers who expressed concerns to the Police and was thus able to provide helpful information to assist the Commission make a reasoned assessment of the likely impact of the grant of the application on potentially high risk groups.
- 92 Of the Service Providers contacted by the applicant, two within relative close proximity to the applicant's premises, the Salvation Army (200m) and the Women's Health and Family Services (400m) have indicated they do not object to the proposal.
- 93 Of the remainder, Ruah is approximately 1km away and provides services to homeless people experiencing problems with alcohol and drug use. The level of their services in 2016 amounted to over 30,000 presentations with a daily average of over 120 clients in the four hours the service is open (9.00am – 1.00pm).
- 94 Ruah's concerns are general in nature and relate to the provision of additional liquor outlets, and the potential impact of extended hours of operation. There was no evidence that Ruah's clients, or homeless people in general, are likely to patronise a specialist Asian liquor store in preference to those offering a wider range of more mainstream liquor products.

- 95 The Licensee Objector has submitted the applicant's change in proposed licence conditions would potentially have the effect of encouraging "at risk" persons to purchase and consume liquor with a high alcohol content. This submission is not supported by any evidence and is rejected.
- 96 In the Commission's view the likely degree of harm that would result from the grant of the licence is considered to be low.

Likely degree of harm to result from the grant of the application against the existing degree of harm

- 97 Although the Commission considers that the likely degree of harm resulting from the grant of the application is low, this finding needs to be considered against the Commission's finding that there is currently an elevated level of harm in the locality due to the use of liquor.
- 98 As Mr J Edelman commented in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51 at [55] in relation to the risk of harm:

"In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing "at risk" persons who might be further affected."

- 99 In the Commission's view, considered in isolation, the low likelihood of harm assessed for this application against the existing level of harm will not give rise to an unacceptable burden or level of harm in the locality or the community more broadly.
- 100 However, a measured or even cautious approach is required in assessing all the relevant aspects of the application to determine if the grant of the application is in the public interest.

Likely degree of harm, so assessed, together with any relevant factors to determine whether it is in the public interest to grant the application

- 101 As indicated, the locality in which the applicant's premises are located is multicultural in nature with a relatively high proportion of people with Asian ancestry and background.
- 102 Having regard to the consumer evidence and the demographics and characteristics of the locality, the Commission is satisfied that:
- a. there is a high demand for Asian groceries and specialty Asian liquor products; and
 - b. those members of the community with an Asian background who patronise the applicant's supermarket and have done so for many years, find that specialty Asian liquor products, or at least the wide range proposed by the applicant, are not readily available in the area.

- 103 The locality is of not inconsiderable significance to the State's tourism industry and the provision of speciality Asian liquor products along with the existing Asian groceries would be

expected to provide a welcome service to tourists from Asian countries staying in, and visiting, the locality.

- 104 The Commission also notes the vision of the City of Perth is to create a vibrant and cosmopolitan place to live and work. In the Commission's view, the grant of the application is consistent with, and may contribute to, that objective.
- 105 There is very little evidence to suggest that the grant of the application would lessen the amenity of the locality or cause offence, annoyance, disturbance or inconvenience to people residing or working in the vicinity of the applicant's premises.
- 106 In weighing and balancing the positive and negative aspects of the application, while the Commission is concerned about the level of harm and ill-health occurring in the locality, the Commission is satisfied, having regard to the characteristics and nature of the proposed store and the Commission's finding on the likely level of increase in harm, that the benefits of the proposal in the form of an increase in diversity and choice, particularly for those members of the community with Asian ancestry and tourists visiting from Asian countries outweigh the level of harm and ill-health likely to arise from the grant of the application.
- 107 The grant of the application will also potentially contribute to the proper development of the liquor industry and tourism industries by enhancing culturally diverse services in what is recognised as a multicultural precinct and major tourist attraction for Perth.

Licensee Objector's submissions

- 108 Although the Commission has commented on aspects of the Licensee Objector's submissions, there are two other aspects that warrant comment.
- 109 The Licensee Objector has submitted that the applicant's proposal for additional conditions on the liquor store licence, if granted, undermines the application process and would set an undesirable public policy precedent if the Commission were to accept the proposed conditions and grant the application.
- 110 The Licensee Objector has submitted that the adoption of the additional conditions has changed the nature of the application to such an extent that the applicant could be said to have misrepresented its proposal to members of the public and interested parties.
- 111 The Commission rejects this submission. There is no evidence that the applicant has acted other than in good faith in response to a level of concern expressed about increasing the availability of cheap alcohol in the circumstances of a recent decision of the licensing authority.
- 112 The Commission notes that, prior to the applicant's decision to adopt additional conditions, the Licensee Objector recommended to the Commission that if the licence were to be granted the Commission should impose conditions no less onerous than in a previous application of a similar nature (refer [39] above).

- 113 It seems inconsistent to the Commission that the Licensee Objector has proposed what are arguably more onerous or restrictive conditions, yet contends that those conditions now proposed by the applicant undermine the entire application process and should be rejected on public policy and procedural grounds.
- 114 In the Commission's view, in the circumstances of this application, the adoption of the additional conditions by the applicant, which the Commission notes are intended to mitigate the risk of harm, is not inconsistent with the imposition of conditions recommended by the CHO or the Police in any other application where the conditions were not necessarily known by the public or interest groups or contemplated by the parties prior to the hearing and determination of the application by the Commission.
- 115 The Licensee Objector has also submitted that it has been materially prejudiced because it has been unable to lead new evidence in response to the proposed additional conditions.
- 116 It is by no means clear to the Commission what additional evidence the Licensee Objector would propose to lead if the conditions had formed part of the original application or had been proposed earlier.
- 117 In any event, the Commission is satisfied that the additional conditions do not affect the findings of the Commission.
- 118 More specifically, the Commission does not accept the contentions of the Licensee Objector that:
- a. the consumer evidence is affected to an extent that it does not assist the Commission in assessing the application having regard to section 5(1)(c) of the Act;
 - b. the Service Providers would have formed a different view of the application; or
 - c. the threshold price of \$20 per item will somehow result in the consumption of liquor with a higher alcohol content than would otherwise be the case but for the proposed additional condition.
- 119 It follows that the Commission is not satisfied that the Licensee Objector has discharged its onus under section 73(10) of the Act.
- 120 Having carefully evaluated the evidence and although finely balanced, the Commission is satisfied that the applicant has discharged its onus and demonstrated that the grant of the application is in the public interest.
- 121 Accordingly, the application is granted, subject to the conditions proposed by the applicant, namely:
- 1) Only Asian liquor products are permitted to be sold at the premises.
 - 2) The sale of beer is prohibited.
 - 3) The sale of packaged liquor is restricted to products with a retail value of at least \$20 per bottle/vessel.

- 4) The licensee is permitted to trade only:
 - a) Monday to Friday, 9:00am – 6:30pm;
 - b) Saturday, 8:00am – 6:30pm; and
 - c) Sunday, 10:00am – 6:00pm.
- 5) The licensed area within the supermarket, to consist of a single aisle with an area no greater than 30m², is to:
 - a) be separated from the non-licensed aisles by a solid non-transparent barrier;
 - b) have a gated entry/exit point;
 - c) have a dedicated point of sale with at least one other checkout of the supermarket to be located outside the licensed area; and
 - d) display liquor only upon shelving or within a two door fridge.
- 6) The words “liquor store” is the only exterior advertising that is permitted.
- 7) CCTV system:
 - a) A CCTV system is to be in place and operational at all times covering the internal access/egress of each entrance and exit of the premises.
 - b) These cameras must allow clear identification of patrons.
 - c) Staff members are to be fully trained in the operation of the system.
 - d) The system must comply with the Director’s Policy relating to CCTV.
 - e) Images recorded via CCTV system must be retained for 28 days and must be made available for viewing or removal by the police or other persons authorised by the Director.



MICHAEL EGAN
PRESIDING MEMBER