

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Tokyo Mart Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack)
- First Intervener:** Director of Liquor Licensing
(represented by Mr Tom Pontre of State Solicitor's Office)
- Second Intervener:** Commissioner of Police
(represented by Mr Ed Fearis of State Solicitor's Office)
- Commission:** Mr Eddie Watling (Deputy Chairman)
Mr Alex Zilkens (Member)
Ms Mara Barone (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for a liquor store licence.
- Premises:** Fuji Mart Subiaco, Shop 13-14, Subiaco Square Shopping Centre, 29 Station Street, Subiaco
- Date of Hearing:** 11 October 2017
- Date of Determination:** 20 December 2017

Determination:

The decision of the Director of Liquor Licensing is quashed and the applicant is hereby granted a licence to operate a liquor store from the area highlighted in red in the plan dated 4 August 2016 attached to the letter from Cullen Macleod received by the Director of Liquor Licensing on 4 August 2016, subject to the following conditions:

- 1) The licensee is permitted to trade only during such times as the remainder of the store (in which the licensed area is located) is trading as a Japanese supermarket;
- 2) The licence is conditional on the remainder of the store operating solely as a Japanese supermarket;
- 3) The supply of liquor products other than those of authentic Japanese origin is prohibited;
- 4) The licensed area within the supermarket must be delineated and separated from the remainder of the supermarket by way of a physical barrier, signage and clear demarcation on the floor;
- 5) Only staff are permitted to handle liquor products until the items are sold;
- 6) All sprits and alcohol equal to or higher than 19% alcohol per volume must be displayed behind lockable glass cabinets and be accessible only by authorised staff;
- 7) At least one checkout of the supermarket must not be located in the licensed area and at least one checkout must be located in the licensed area;
- 8) Liquor must be sold ancillary to the purchase of food products and signage reflecting this condition must be displayed;
- 9) The applicant will not have any external promotions, or provide any advertising or incentives to encourage the sale of cheap or discounted liquor.
- 10) 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 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 the 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

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Commissioner of Police v Bloo Moons Pty Ltd* (LC 05/2010)
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Executive Director of Health v Lily Creek International Pty Limited & Ors* (2000) WASCA 258
- *Woolworths v Director of Liquor Licensing* [2013] WASCA 227
- *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police & Ors* [2017] WASC 88
- *Liquorland (Australia) Pty Ltd v Commissioner of Police & Others* (LC 18/2015)
- *MYD Korea Pty Ltd v Director of Liquor Licensing* (LC 21/2015)

Background

- 1 This is an application brought under section 25 of the *Liquor Control Act 1988* (“the Act”) for review of a decision of the Director of Liquor Licensing.
- 2 On 4 August 2016, Tokyo Mart Pty Ltd (“the applicant”) lodged an application, supported by a Public Interest Assessment (“the PIA”), for the grant of a liquor store licence pursuant to section 47 of the Act for premises situated at Shop 13-14 Subiaco Square Shopping Centre, 29 Station Street Subiaco (“the premises”) known as Fuji Mart Subiaco (“Fuji Mart”).
- 3 The size of the licensed area within the premises is to be approximately 2 metres by 1.3 metres and will offer approximately 60 liquor products, predominantly featuring traditional Japanese sake and fruit wines, with a selection of Japanese beers. The grant of the liquor store licence is sought to complement the range of Japanese products, principally imported food and grocery items, many exclusive to the applicant.
- 4 The total area of the premises is 162m² inclusive of the stock, loading, cool-room and office areas. The shop floor area is 126m² with relatively small volumes of stock sold through the grocery store due to the specialist nature of the goods.
- 5 On 22 September 2016, the Commissioner of Police (“the Police”) lodged a Notice of Intervention.
- 6 On 28 September 2016, the Chief Health Officer (“CHO”) lodged a Notice of Intervention.
- 7 The parties filed the following submissions addressed to the Director of Liquor Licensing (“the Director”):
 - a. the Police’s submissions dated 12 September 2016 on the cover and 21 September 2016 at the end (“Police’s first submissions”);
 - b. the CHO’s submissions dated 28 September 2016 (“CHO’s first submissions”);
 - c. the applicant’s submissions dated 29 November 2016 (“applicant’s first submissions”);
 - d. the CHO’s responsive submissions dated 13 December 2016 (“CHO’s second submissions”);
 - e. the Police’s responsive submissions dated 13 December 2016 (“Police’s second submissions”); and
 - f. the applicant’s responsive submissions dated 20 December 2016 (“applicant’s second submissions”).
- 8 On 22 May 2017, the Delegate of the Director of Liquor Licensing (“the Director”) refused the application, being application A000210271.
- 9 On 21 June 2017, the applicant lodged with the Liquor Commission of WA (“the Commission”), an Application for Review of the decision of the Director.
- 10 On 7 July 2017, a Notice of Intervention was lodged by the Director.

- 11 The Commission received submissions and responsive submissions from each of the applicant, the Director and the Police, being:
- a. the applicant's submissions dated 27 September 2017 ("the applicant's third submissions");
 - b. the applicant's responsive submissions dated 4 October 2017 ("the applicant's fourth submissions");
 - c. the Director's submissions dated 27 September 2017 ("the Director's first submissions");
 - d. the Director's responsive submissions dated 4 October 2017 ("the Director's second submissions");
 - e. the Police's submissions dated 27 September 2017 ("the Police's third submissions"); and
 - f. the Police's responsive submissions dated 4 October 2017 ("the Police's fourth submissions").
- 12 No further submissions were received from the CHO.
- 13 The applicant has consented to the following conditions being imposed if a licence is granted: (paragraph 9 applicant's third submission, paragraph 33 Police's third submission and paragraph 24 applicant's fourth submission:
- a. The licensee is permitted to trade only during such times as the remainder of the store (in which the licensed area is located) is trading as a Japanese supermarket;
 - b. The licence is conditional on the remainder of the store operating as a Japanese supermarket;
 - c. The supply of liquor products other than those of authentic Japanese origin is prohibited;
 - d. The licensed area within the supermarket must be delineated and separated from the remainder of the supermarket by way of a physical barrier, signage and clear demarcation on the floor;
 - e. Only staff are permitted to handle liquor products until the items are sold (i.e. a patron would not be permitted to enter the licensed area, select a bottle of sake and bring it to the till; they would be required to advise a staff member of their selection who would then bring that product to the till);
 - f. All spirits and alcohol equal to or higher than 19% alcohol per volume must be displayed behind lockable glass cabinets and be accessible only by authorised staff;
 - g. At least one checkout of the supermarket must not be located in the licensed area and at least one checkout must be located in the licensed area;

- h. Liquor must be sold ancillary to the purchase of food products and signage reflecting this condition must be displayed;
- i. The applicant will not have any external promotions, or provide any advertising or incentives to encourage the sale of cheap or discounted liquor of which will encourage excessive consumption.
- j. CCTV system
 - i. 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;
 - ii. These cameras must allow clear identification of patrons;
 - iii. Staff members to be fully trained in the operation of the system;
 - iv. The system must comply with the Director's Policy relating to CCTV;
 - v. Images recorded via the 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.

14 On 11 October 2017, the Commission held a hearing of the application for review.

Framework on which Commission must base its decision

- 15 The principles that apply to the Commission's review pursuant to section 25 of the Act of a decision of the Director are well established.
- 16 The Commission is obliged to consider afresh the whole of an application in the course of any review proceedings before it: *Commissioner of Police v Bloo Moons Pty Ltd* LC 05/2010.
- 17 The Commission is to undertake this review having regard to the material that was before the Director, on its merits, and by way of rehearing: *Hancock v Executive Director of Public Health* [2008] WASC 224, [53].
- 18 The decision that the applicant was dissatisfied with in this case was a decision to refuse an application for the grant of a liquor store licence. The Commission must now determine whether the applicant should be granted the liquor licence it has applied for.
- 19 The function of the Commission in the context of an application for a review pursuant to section 25 of the Act was summarised by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 at [22] – [23]:
 - a. By section 16, section 30A, section 33 and section 38, the Commission is required to hear and determine the application in accordance with the Act.
 - b. By section 38(2), the Applicant has to 'satisfy' the Commission that the granting of the Application is 'in the public interest'.

- c. The expression ‘in the public interest’ imports a discretionary value judgment, confined only by the scope and purposes of the statute.
 - d. In determining whether it is satisfied that the granting of the application is ‘in the public interest’, to the extent that those matters arise on the evidence (including notorious facts) before the Commission, the Commission is:
 - i. bound to take into account those matters relevant to the objects of the Act; and
 - ii. entitled to take into account those matters set out in section 38(4).
 - e. The Commission’s obligation to take into account the public interest in that manner is not diminished by section 33(1). The absolute discretion in that section is subject to the Act. Section 33 does not confer on the Commission an arbitrary or unlimited power, or permit the Commission to grant or refuse an application other than consistently with the objects and other provisions of the Act.
- 20 The Commission must have regard to both the primary and secondary objects of the Act, set out at sections 5(1) and 5(2) of the Act respectively, giving precedence to the primary objectives in the event of any inconsistency between them, per section 5(3) of the Act: *Carnegies* (supra) at [65] – [68].
- 21 The primary objects of the Act, set out at section 5(1) of the Act, are:
- a. to regulate the sale, supply and consumption of liquor;
 - b. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - c. to cater for the requirements of consumers 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.
- 22 The secondary objects of the Act, set out at section 5(2) of the Act, are:
- a. to facilitate the use and development of licensed facilities ... reflecting the diversity of the requirements of consumers in the State; and
 - b. to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - c. to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
- 23 Section 38(2) of the Act requires the applicant to satisfy the Licensing Authority that granting the application is in the public interest.
- 24 Section 38(4) provides that the matters the Licensing Authority may have regard to in determining whether the grant of 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;
- b. the impact on the amenity of the locality in which the licenced premises or proposed licenced 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 licenced premises or proposed licenced premises.

- 25 Where there is a prospect of harm or ill-health being caused by the grant of a licence, and that grant will advance section 5(2) objects, the resolution of the conflict that then arises will depend on the degree of importance that is to be attributed to each of the relevant factors in the particular circumstances (bearing in mind that the object under section 5(1)(b) is to be accorded primacy). The Licensing Authority may decide that the possibility of harm or ill-health is so remote or so insignificant that it should not be taken into account. It may be that a possibility of harm or ill-health of a particular serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse the grant absolutely. The decision in each case will depend on the particular circumstances: *Executive Director of Health v Lily Creek International Pty Limited & Ors* (2000) WASCA 258 at [21] – [22].
- 26 The *Liquor and Gaming Legislation Amendment Act 2006* (WA) amended section 38 of the Act to remove the ‘needs test’ that had previously applied and introduced the ‘public interest test’: *Woolworths v Director of Liquor Licensing* [2013] WASCA 227.
- 27 The Act now requires a balancing of the various factors reflected in the objects of the Act: *Carnegies* at [53].

What is the “proper development of the liquor industry, the tourism industry and other hospitality industries in the State”?

- 28 During the hearing on 11 October 2017, the Commission invited submissions from the parties regarding the “proper development of the liquor industry, the tourism industry and other hospitality industries in the State” and particularly whether the Commission is to consider precedential effects on possible future similar applications.
- 29 The applicant referred to *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police & Ors* [2017] WASC 88 (“ALH decision”) at 101 where Banks-Smith J, on the topic of the proper development of the liquor industry, commented on the importance of the Commission properly regarding “the introduction of a different offering in terms of consumer choice and diversity”.
- 30 In the *ALH* decision, the Commissioner of Police argued that the Liquor Commission was required to first find that the proposed liquor licence would “cater for the requirements of consumers for liquor and related services” and then, only if the application met that first hurdle, consider whether the “proper development of the liquor industry” etc would limit the meaning of catering so as to further restrict what liquor licence applications could succeed.

- 31 At [66] – [67], Banks-Smith J rejected that argument and found that:
- a. the Commission must have regard to “the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for consumer requirements”;
 - b. the Commission must not consider “catering for consumer requirements” in isolation; and
 - c. the words “proper development of the liquor industry, the tourism industry and other hospitality industries in the State” invite a broader ambit of matters to be considered as part of assessing the diversity of consumer requirements and how they are to be catered for.
- 32 Pursuant to *Woolworths* (supra) [89], the Commission must determine “whether, in all the circumstances, it [is] in the public interest to grant the application, *particularly in order to contribute to the proper development of the liquor industry in a manner which reflect[s] the diversity of consumer requirements*” [emphasis added].
- 33 In response to the Commission’s invitation for submissions regarding the “proper development of the liquor industry, the tourism industry and other hospitality industries in the State”, the Director submitted that:
- a. Liquor Commission decisions do not operate as a precedent in the same manner as judicial decisions, noting that all applications must turn on the circumstances present in each case; however
 - b. administrative consistency may mean that once a particular form of reasoning is accepted in one matter, it will likely be accepted in future similar matters;
 - c. when considering whether the grant of a particular application would be consistent with the “proper development” of the relevant industries, the Commission may properly consider whether the reasoning the Commission is considering adopting would continue to be consistent with the proper development of the relevant industries, having regard to the likelihood that similar reasoning may be accepted in future cases as a matter of administrative consistency; and
 - d. if the adoption of similar reasoning in similar application in the future would result in improper development of the relevant industries, the Commission may reconsider its underlying reasoning.
- 34 The Commissioner of Police, in response to the Commission’s invitation for submissions regarding the “proper development of the liquor industry” etc, endorsed the submissions of the Director of Liquor Licensing.

Factors that demonstrate the proposed licence would cater for the requirements of consumers

Applicant's submissions – Catering for requirements of consumers

- 35 The applicant's first submissions include the following (all supported by evidence as indicated) regarding the premises, the proposed liquor store and the public benefit the applicant submits that the proposed liquor store will produce:

"2.1 The Applicant is an experienced and established retailer of specialty Japanese grocery stores throughout Australia (PIA clause 1.2). Its business focuses on the sale of authentic quality Japanese food products and ingredients. As an ancillary service it provides at all of its existing stores (except the Premises), a selection of high quality Japanese liquor products to complement the grocery side of its business." (PIA clauses 3.2, 3.3, 3.5, 3.6, 3.7 and 4.6).

...

"4.2 The inclusion of a liquor store area in the Premises has been approved by the local authority (the City of Subiaco)." (Section 40 certificate).

"4.3 The Premises is strategically and appropriately located in Subiaco, in a dedicated retail precinct. It is located near to the Subiaco train station and there is nearby parking, which means it is also easily accessible." (MA Report clauses 2.1 and 2.2).

"4.4 The products to be stocked by the Applicant are authentic products, exclusive to the Applicant." (PIA clauses 3.7 and 4.4, statement of Hiroshi Umeda clause 4).

"4.5 There is a limited range of authentic Japanese liquor products in the Locality, and indeed the Perth Metropolitan area (Review of other liquor stores; First Market Survey Q%(b); letter from Japanese Consulate). There is also a lack of knowledgeable staff who can explain the differences in Japanese liquor products and how Japanese liquor fits in with the Japanese culture and cuisine (Letter from the Japanese Consulate; statement of Hiroshi Umeda clause 4.2). The proposed liquor store will provide these currently absent services and facilities and introduce a significant new development in liquor retailing into the area."

"4.6 Already the Premises has a strong customer patronage and serves around 1,200 customers per week (PIA clause 3.11). A large proportion of these customers are Japanese people or people with Japanese heritage. (PIA Clause 3.11) There is overwhelming support from these customers for the proposed liquor services and facilities at the Premises." (First Market Survey; Second Market Survey).

"4.7 There are currently more than 8,000 Japanese citizens resident in Western Australia and the vast majority live in Perth (Letter from Japanese Consulate). Japanese food, culture and cuisine is also becoming very popular generally, as demonstrated by the success of the Applicant's stores throughout Australia and its non-Japanese customer base." (statement of Hiroshi Umeda clauses 2.4, 3.1 and 3.3).

"4.8 It is evident from the success of the Applicant's business model in other parts of Australia that the inclusion of a complementary range of Japanese liquor items, caters to the requirements of its customers (PIA clause 4.6). The Applicant also has a

demonstrated track record of selling liquor as part of its business in a sound and responsible manner.” (PIA clause 8.3).

- 36 The surveys referred to in the applicant’s first submissions were:
- a. a survey of 129 members of the public in close proximity to the store conducted on 30 May 2015; and
 - b. a second survey taken throughout the month of May 2016 (one year after the opening of the Fuji Mart store) of 100 customers of the store,
- copies of which were provided to the Commission.
- 37 At paragraph 50 of the applicant’s third submissions, the applicant submitted that the responses of tourists to the surveys cannot be discounted as consumers.
- 38 Given the primary object at section 5(1)(c) of the act includes having “regard to the proper development of ... the tourism industry ...”, the Commission accepts the applicant’s submission that the responses of tourists to the surveys should not be discounted.
- 39 The applicant’s second, third and fourth submissions generally support the applicant’s submissions we have quoted above.

Intervenors’ submissions – Catering for requirements of consumers

- 40 In the Police’s first submissions, in relation to whether the liquor store caters for the requirements of consumers, the Police submitted that:
- a. the locality has 14 packaged liquor outlets, 8 of which are located within a 1 kilometre radius of the premises;
 - b. it is open to the Director to find that the locality is already well-represented by packaged liquor outlets and that the requirements of the consumer is already met;
 - c. Lion Oriental Food, located 2.6 kilometres from the premises, lists a range of 65 Japanese liquor products on its website, compared with the range of 60 products that Fuji Mart proposes to stock; and
 - d. Dan Murphy’s Hyde Park is located 3.8 kilometres (by road) from the premises and lists 162 different Japanese liquor products on its website.

Admissibility of website information – not determined

- 41 In paragraph 56 of the applicant’s third submissions, the applicant noted that “no claim is made on the [Dan Murphy’s] website that such products will be available within any one store” and then went on to quote what was stated on the Dan Murphy’s website, a reference to which was footnoted in the Police’s first submissions.

42 There was some debate during the hearing before the Commission as to whether the content of the Dan Murphy's website may be considered by the Commission in light of the requirement of section 25(2c) of the Act, which provides:

"When conducting review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision."

43 The applicant submitted that by referencing the website in the Police's first submissions, the Police put the content of that website into evidence before the Director.

44 The Police submitted that merely referencing the website did not put the content of the website into evidence and that, accordingly, the Commission could not consider the content of the website.

45 The Commission does not think it necessary to determine this issue in this matter. The only evidence before the Commission regarding what Japanese liquor Dan Murphy's Hyde Park provides is assertions by the Police supported by the footnote referencing the Dan Murphy's website. If, as was submitted by the Police, this Commission cannot refer to the website, then there would appear to be little evidence before the Commission of the range of Dan Murphy's Japanese liquor products and of how much of that range would be available to a customer in-store.

46 Paragraph 72 of the Director's first submission states that "a wide variety of Japanese liquor products are available in the locality", referring to Dan Murphy's Hyde Park, Lion Oriental Food and Liquor Barons Crossway Subiaco (which had a range of only 12 Japanese liquor products).

47 However, the evidence before the Commission does not reveal such a large supply of Japanese liquor in the Subiaco locality that the proposed store would not cater to the requirements of consumers at all, or only to a small degree.

48 The evidence before the Commission of existing Japanese liquor stores does not persuade the Commission that granting the proposed licence may lead to 'a proliferation in the sale of Japanese liquor items', as was suggested at paragraph 25 of the Police's third submission and at paragraph 39 of the Director's first submission.

49 The Commission notes para 57 of the Police's first submissions referring to the Commission's decision in *Liquorland (Australia) Pty Ltd v Commissioner of Police & Others* (LC 18/2015) to refuse to grant a liquor store licence for premises to be known as "Liquorland South Bunbury". In that decision, the Commission stated, at para 143:

"As with convenience, the provision of a wider or alternative range of liquor products, of itself, is not a strong reason, or even a reason, to introduce another liquor store into a shopping centre or precinct. Each case will depend upon its circumstances. Different liquor stores sell a variety of different liquor products. The community does not expect nor, in the Commission's view, is it in the public interest for liquor store licences to be granted in close proximity to other liquor outlets simply because someone identifies one or more product lines or different types of liquor that are not currently catered for either in a shopping centre or precinct or some other setting. The benefits that such a proposal

is likely to deliver to some consumers has to be balanced against what is in the best interests of the liquor industry and the community.”

- 50 The decision in the *Liquorland* case was made in circumstances where:
- a. the store was to be a typical liquor store, rather than a specialty store as is the case in this matter;
 - b. the respondents to the telephone survey regarding the *Liquorland* application generally did not regard a wider range of products as a reason for supporting the proposed store; and
 - c. there was public opposition to the application and a significant number of respondents to the telephone survey that did not support the proposed *Liquorland* store,

and can be distinguished from the present case, where surveys recorded overwhelming support for the store with substantial respondents appreciating the wider range of products that the store would provide.

- 51 The numerous customer surveys indicating a desire for *Fuji Mart* to sell Japanese liquor and the anecdotal evidence of Hiroshi Umeda, of the success of the sale of alcohol in the applicant's other Australian stores indicate that the proposed liquor store will, to a substantial degree, 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”

- 52 Attached to the applicant's first submissions was an undated letter to the Director from Tatsuo Hirayama, Consul-General of the Consulate-General of Japan in Perth, who wrote:

*“There has been some concern that there are too few retail outlets in Western Australia that can explain correct storage methods of sake, etc., along with a lack of understanding of Japanese culture or the products themselves. ... If a store, like *Fuji Mart*, is allowed to stock a variety of Japanese alcoholic beverages, the Consulate-General of Japan would indeed look forward to using their services for events such as those described earlier.”*

- 53 There is evidence before the Commission that the proposed liquor licence would give consumers of Japanese liquor the ability to buy their liquor from a Japanese specialist store selling exclusive, authentic products, where sales persons have specialist knowledge regarding Japanese liquor and also speak Japanese. This goes further than it simply being convenient to buy liquor from the same place where grocery items are purchased.
- 54 Put at its lowest point, it appears to the Commission that introducing a liquor store selling only Japanese liquor into a Japanese specialty store that specialises in selling Japanese goods does not offend the proper development of the liquor industry, and may even contribute to the proper development of both the liquor industry and the tourism industry. This is a factor in favour of granting the application.

55 Further, the proposed store is markedly different from Dan Murphy's and Lion Oriental Foods. This difference in sales methodology appears to "reflect the diversity of the requirements of consumers in the State", being a secondary objective of the Act pursuant to section 5(2)(a). This is a further factor in favour of granting the application.

Factors relating to harm and ill-health

'Normalisation'

56 In the CHO's first submissions, it has been asserted that selling liquor alongside grocery items presents liquor as a harmless, 'everyday' commodity; in other words, 'normalising' alcohol.

57 In the CHO's second submissions it has been asserted that a condition ensuring that liquor products are separated from grocery products at the premises may assist to minimise alcohol-related harm [due to 'normalisation'].

58 At paragraph 73 of the Director's first submissions it was also asserted that the evidence demonstrates that there would be little segregation between the licensed area and the grocery items. However, the Commission is satisfied by the evidence before it (assisted by the applicant's consent to installation of a locked glass cabinet and a separate checkout for liquor) that there will be sufficient segregation between the licensed area and the grocery items.

59 Both intervenors made further oral submissions during the hearing regarding how the sale of liquor alongside grocery items may 'normalise' alcohol consumption. These oral submissions generally repeated what was contained at Attachment 1 of the CHO's first submissions.

60 The applicant's second submissions included, as an annexure, extensive opposition to the CHO's submissions regarding normalisation.

61 The Commission accepts the submission at paragraph 2(d) at page 1 of Annex 1 to the applicant's second submissions that, "Such issues are unlikely [to] exist at the proposed liquor store given it is a small store which is not designed for customers to perform their bulk food shopping".

62 The Commission is satisfied that the specialty nature of both the proposed liquor store and the surrounding grocery store would significantly reduce, possibly to a point where it is entirely inconsequential, any 'normalisation' effect that the grant of the proposed application would otherwise have.

63 Further, the Commission notes the applicant's assertion that it has not, in its trading history of its other licensed premises in other parts of Australia, received any complaints or been issued with any fines or infringements relating to selling alcohol to a person who is less than 18 years of age: statement of Hiroshi Umeda, paragraph 6.4.

Increase in local harm and ill-health as a result of introduction of liquor stores

- 64 In the Police's first submissions, the Police:
- a. submitted that as the density of packaged liquor outlets increases in a locality, it could be expected that assaults recorded by police would rise, hospitalisation caused by assaults would rise, family incidents would rise and hospitalisation due to alcohol-specific chronic disease would rise; and
 - b. recited extensive data of relevant crime in the locality and discussed the efficacy of various crime-prevention measures of stopping or deterring such crime.
- 65 The Commission is satisfied by the applicant's submissions, such as those at paragraph 3.1(e) of the applicant's second submissions, that the specialty nature of the product and the store will serve to minimise the likelihood of a general increase in assaults, hospitalisation, family incidents and alcohol-specific chronic disease occurring as a result of the grant of the licence.
- 66 In the Police's third submissions, the Police noted that there is likely to be an increase in thefts from Fuji Mart as a result of the proposed liquor store. However, the conditions to the proposed licence that the applicant has consented to, namely:
- a. keeping alcohol equal to or higher than 19% alcohol by volume behind lockable glass cabinets and accessible only by authorised staff;
 - b. installation of CCTV; and
 - c. the prohibition of sale of liquor products other than authentic Japanese-origin liquor products,
- should significantly ameliorate the risk of such crime.

Comparison with 'analogous' matter 'MYD Korea'

- 67 The Commission notes the Director's submission, at paragraph 49 of the Director's first submissions, that *MYD Korea Pty Ltd v Director of Liquor Licensing* (LC 21/2015) was an analogous matter and is authority for the proposition that the convenience of purchasing liquor with other food or grocery products in the same store is not, of itself, a persuasive factor in demonstrating the public interest.
- 68 *MYD Korea* was a case where the applicant sought the grant of a liquor store licence to operate from the same premises as 'Nungcool Butchers' in East Victoria Park. The case can be distinguished from the present case because:
- a. there was no indication of consent to conditions clearly separating the liquor goods from the other goods of the store through the use of a separate register, making normalisation a significantly larger issue than it is in the present case;

- b. the liquor to be sold, and the surrounding store, were not specifically of one culture but simply 'Asian', making the "niche" product or store argument less compelling;
- c. despite representations to the contrary in the application, the sale of alcohol was clearly not intended to be secondary to the purchase of Asian grocery items, given that it was proposed that the trading hours extend to 9.00pm, extending the existing trading hours of the store by 20 hours per week;
- d. the applicant did not agree to the imposition of a condition limiting advertising, to the contrary, the applicant sought the same ability to advertise as a general liquor store, including elements such as product availability and special offers;
- e. there was evidence that 6 liquor outlets in the area sold the same or similar liquor products; and
- f. the application lacked the level of demonstration of public desire for the product that the present case presented.

Conclusion – licence granted subject to conditions

- 69 The Commission is satisfied that it is in the public interest to grant the liquor licence to the applicant subject to the following conditions:
- a. The licensee is permitted to trade only during such times as the remainder of the store (in which the licensed area is located) is trading as a Japanese supermarket.
 - b. The licence is conditional on the remainder of the store operating solely as a Japanese supermarket.
 - c. The supply of liquor products other than those of authentic Japanese origin is prohibited.
 - d. The licensed area within the supermarket must be delineated and separated from the remainder of the supermarket by way of a physical barrier, signage and clear demarcation on the floor.
 - e. Only staff are permitted to handle liquor products until the items are sold.
 - f. All spirits and alcohol equal to or higher than 19% alcohol per volume must be displayed behind lockable glass cabinets and be accessible only by authorised staff.
 - g. At least one checkout of the supermarket must not be located in the licensed area and at least one checkout must be located in the licensed area.
 - h. Liquor must be sold ancillary to the purchase of food products and signage reflecting this condition must be displayed.
 - i. The applicant will not have any external promotions, or provide any advertising or incentives to encourage the sale of cheap or discounted liquor.

j. CCTV system

- i. 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.
- ii. These cameras must allow clear identification of patrons.
- iii. Staff members to be fully trained in the operation of the system.
- iv. The system must comply with the Director's Policy relating to CCTV.
- v. Images recorded via the 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.

Enforceability of condition that liquor must be sold ancillary to the sale of food products

- 70 At paragraph 131 of the Police's first submissions, the Police requested conditions be imposed on any licence granted. Those conditions included that, "Liquor to be sold ancillary to the purchase of food products and signage reflecting this condition to be displayed", being one of the conditions this Commission has determined be imposed on the licence.
- 71 At paragraph 9.3 of the CHO's second submissions, the CHO stated, "I have concerns regarding the applicant's suggested condition '(b) Liquor products may only be sold in conjunction with the sale of grocery items', as this condition is not consistent with the core harm and ill-health representations of the intervention regarding the co-location of alcohol and grocery items, and the effect this may have on levels of consumption and associated harm".
- 72 The CHO's submission goes to the potential for the grant of the proposed licence to contribute to the normalisation of alcohol. As stated at paragraph 62 above, the Commission is satisfied that the specialty nature of the product and store will sufficiently minimise any normalisation effect the sale of alcohol in conjunction with grocery items would otherwise have.
- 73 At paragraph 97 of the Director's first submissions, the Director asserted that a condition allowing the sale of liquor only to those persons purchasing groceries "may be contrary to the provisions of the Act, which permit a licensee to, during permitted hours, sell liquor on and from the premises "to any person".
- 74 Section 64(1) of the Act provides:
- "Subject to this Act, in relation to any licence, or to any permit, the licensing authority may at its discretion impose conditions –*
- (a) in addition to the conditions specifically imposed by this Act; or*
 - (b) in such a manner as to make more restrictive a condition specifically imposed by this Act ..."*

75 Section 64(3) provides:

“Without derogating from the generality of the discretion conferred on the licensing authority, the licensing authority may impose conditions which it considers to be in the public interest or which it considers desirable in order to –

(ca) ensure that liquor is sold and consumed in a responsible manner; or

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

76 The Commission is satisfied that section 64 empowers the Commission to impose a condition on the grant of the licence requiring the licensee to sell liquor only in conjunction with the sale of food items.

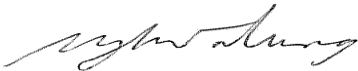
77 The Commission is of the view that a condition that the sale of liquor be ancillary to the sale of food desirable so as to ensure that the proposed store remains a specialty store that offers specialty liquor as an ancillary good, rather than becoming a specialty liquor store that also sells specialty goods of the same theme. However, the Commission notes that if the Commission were not able to impose this condition on the licence, the Commission would have granted the proposed license anyway, subject to the remaining conditions.

Decision

78 The decision of the Director is quashed and the applicant is hereby granted a licence to operate a liquor store from the area highlighted in red in the plan dated 4 August 2016 attached to the letter from Cullen Macleod received by the Director of Liquor Licensing on 4 August 2016, subject to the following conditions:

- a. The licensee is permitted to trade only during such times as the remainder of the store (in which the licensed area is located) is trading as a Japanese supermarket.
- b. The licence is conditional on the remainder of the store operating solely as a Japanese supermarket.
- c. The supply of liquor products other than those of authentic Japanese origin is prohibited.
- d. The licensed area within the supermarket must be delineated and separated from the remainder of the supermarket by way of a physical barrier, signage and clear demarcation on the floor.
- e. Only staff are permitted to handle liquor products until the items are sold.
- f. All sprits and alcohol equal to or higher than 19% alcohol per volume must be displayed behind lockable glass cabinets and be accessible only by authorised staff.
- g. At least one checkout of the supermarket must not be located in the licensed area and at least one checkout must be located in the licensed area.
- h. Liquor must be sold ancillary to the purchase of food products and signage reflecting this condition must be displayed.

- i. The applicant will not have any external promotions, or provide any advertising or incentives to encourage the sale of cheap or discounted liquor.
- j. CCTV system
 - i. 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
 - ii. These cameras must allow clear identification of patrons.
 - iii. Staff members to be fully trained in the operation of the system.
 - iv. The system must comply with the Director's Policy relating to CCTV.
 - v. Images recorded via the 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.



EDDIE WATLING
DEPUTY CHAIRPERSON