

## **Tasmanian Liquor and Gaming Commission**

### **Appeal against a determination of the Commissioner for Licensing made 19 May 2020**

**Zexing (Sky) Wang**

**Appellant**

**V**

**Commissioner for Licensing**

**Respondent**

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### **Background**

1. The Appellant applied to the Commissioner for Licensing for special licences seeking authority for the sale of Japanese sake, Korean soju and Chinese white spirits and beer for consumption off the premises at two locations: Asian Town, 13 Gregory Street, Sandy Bay and Asian Town CBD, 74 Elizabeth Street, Hobart.
2. Asian Town, Gregory Street is located within the Sandy Bay shopping precinct; Asian Town CBD is in the centre of the city. Both premises operate as Asian grocery stores selling a range of mostly pre-packaged Asian foods. The client group is mostly Chinese, Japanese and Korean community members and also interested locals. The appellant claims to want to enhance cultural diversity by offering unique Asian products.
3. The appellant in his application seeks to make available products that he says are not easily available in the off licensed premises in the nearby vicinity. He states that alcohol has quite an important role in Asian cultures, particularly cooking.
4. He further states that customers from Japan are really fond of low alcoholic soft drinks and customers from Korea are fans of soju. Many of his customers ask if he has their home alcoholic beverage.
5. The Asian liquor products he wishes to sell, he claims, could not be found in a number of other local liquor outlets.
6. The Commissioner determined on 19 May 2020 to refuse the applications for a special licence for both premises with a written decision containing a statement of reasons sent to the applicant (the appellant).
7. On 2 June 2020, the appellant appealed in writing to the Commission pursuant to section 211 of the *Liquor Licensing Act 1990* (Tas) (“the Act”).

## **The appeal**

8. The Commission determined that the appeal would be heard solely on the basis of written evidence pursuant to section 213 (4A) of the Act. The written evidence considered is set out in attachment A to this decision.
9. The appellant was advised on 4 June 2020 that any further documentation was to be provided to the Commission by 22 June 2020. Additional documentation was provided and is included in attachment A.
10. After hearing an appeal, the Commission may under section 214 (1) (c) of the Act confirm the Commissioner's determination, or alternatively revoke the determination, or alternatively direct the Commissioner to take such action as the Commission considers appropriate.
11. The Commission considered the appeal on 6 July 2020.

## **Grounds of appeal**

12. The appellant raises the following grounds:
  - 12.1 The Commissioner was wrong in law and fact in finding that the products the appellant applied for are available in a number of premises nearby.
  - 12.2 The Commissioner was wrong and or failed to take into account that the types of products to be stocked were different from a cultural perspective and a customer perspective from the products that are available in nearby premises.
  - 12.3 The Commissioner should have found benefit to the community through the supply of subject alcohol meeting the cultural requirements of the appellant's customers.
  - 12.4 The Commissioner did not "turn his mind" to the trade surrounding the provision of particular Chinese white spirits.
  - 12.5 The Commissioner failed to differentiate from a cultural perspective the differences in certain Asian alcohol beverages, namely Chinese beer, Chinese white spirits, Japanese sake, Japanese beer and Korean soju.

## **Legislation**

13. Section 24(A) of the Act provides that:

"(1) In considering an application for a liquor licence, the Commissioner or the Commission must make a decision which, in the opinion of the Commissioner or the Commission, is in the best interests of the community."
14. The term "best interests of the community" is defined in section 3 of the Act, and the prescribed interests are in Regulation 4 of the Liquor Licensing Regulations 2016 and are:

“(a) the general costs and benefits to the community of the supply, or proposed supply, of liquor;

(b) whether the supply or proposed supply of liquor might cause undue offence, annoyance, disturbance or inconvenience to people who, in the area of the supply or proposed supply –

(i) reside or work; or

(ii) attend schools or other facilities frequented by children; or

(iii) attend hospitals or facilities where people receive treatment for alcohol dependence or other addictions; or

(iv) attend places of worship;

(c) possible adverse effects on the health and safety of members of the public due to the supply of, or proposed supply of, liquor.”

15. The Commissioner determined that neither of the premises was a supermarket for the purposes of section 25A of the Act. The Commissioner further was of the view, and the Commission agrees, that the relevant consideration in this particular case, is the balance between the general costs and benefits to the community of the proposed supply of liquor products as outlined in the application.

16. It has long been recognised that alcohol consumption in Australia is a serious health issue. The Commission is well aware of this matter. The Tasmanian drug strategy 2013-2018 records that about half the Tasmanian population exceeds the single occasion risk guideline for consuming alcohol (more than four standard drinks on any one occasion), and this rate has not changed significantly over the last six years (ABS 2019). This demonstrates just one part of the “general costs” aspect of the “best interests” test. This is also an obvious reason why the supply of alcohol in Tasmania is regulated in a managed and controlled manner.

17. The Commission mentions this to reinforce that it is not only the benefit to the community that must be factored into this balancing exercise.

18. The Commission considers that these appeals provide an opportunity to reinforce some other important matters.

19. The best interests of the community are not served by all retail outlets adding liquor to their stock as a matter of convenience or to increase revenue. This is demonstrated in the previous Board and Commissioner decisions Salamanca Fresh Davey Street 2013, Augustus Chocolates 2018, Mount Nelson General store 2019, TCM Market 2019 and Moonah Caltex 2020.

20. The best interests of the community are not served simply by making available in individual retail outlets certain specific liquor products or brands that are favoured by one part of the community. In its decision in QiE Asian Grocer 2019, the Commission noted that because particular products are not readily available, then a special licence *can be* granted. This was in the context of an earlier observation in that decision that the non-availability of particular products *may* form part of the broader consideration of best

interests of the community. The Commission did not say that, in such circumstances, a licence *will be* granted.

21. The Commission continued in that decision:

“It necessarily follows that once a special licence is granted, that availability of such products is increased. The argument about availability is therefore one that must be considered on a case-by-case basis, and by its very nature will be more difficult to be satisfied once a special licence has already been granted.”

The Commission considers that any such argument will be much more difficult where existing licenced premises begin to offer, or offer more of, those products.

22. Finally, the Commission does not consider that it is in the best interests of the community for it to have access to every type of alcoholic product, or every brand, at various retail outlets in Tasmania. There are many varieties and brands of Australian wines that are not available in retail outlets in Tasmania; so too European wines and American wines, Scotch whisky and American whiskey, vodka, ouzo, brandy and many other products. The Commission is well aware of the availability of on-line purchasing from retailers, importers and producers outside of Tasmania.

23. The Commission considers that essentially the grounds for appeal can be summarised as relating to issues associated with the general availability of the subject liquor in nearby licensed premises; and the failure to differentiate between different types and brands of liquor from a cultural and popular perspective.

## **Ground 1**

24. This ground raises the issue of the availability of the subject liquor products – namely Japanese sake, Korean soju, Chinese white spirits and beer - in nearby licensed premises. Evidence was given for the appellant by a legal practitioner who attended various licensed premises and apparently asked whether they had certain products or could order any. This form of evidence, which was not before the Commissioner, seems to be relied upon to show that there is a market need for which a special licence is necessary. The Commission does not accept that to be the case.

25. Korean soju was available when the appellant’s legal representative visited the Cool Wine store on 18 June 2020.<sup>1</sup> In the same street, QiE Asian Grocer is licensed to sell Korean soju.

26. Sake and Chinese beer was available at a number of premises.

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<sup>1</sup> (Not properly declared) Statutory Declaration of Jessica Reardon (22 June 2020) submitted as part of appellant’s supplementary documentation – Attachment A

27. While availability seems lower in the Sandy Bay precinct, Japanese sake is available at four licensed premises in the suburb and Chinese beer is available at Aberfeldy BWS.
28. Chinese white spirit appears to be the product with more limited availability. It can be placed on order at Cool Wine as confirmed by the appellant's legal representative.<sup>2</sup>
29. The Commission notes that evidence does not disclose whether the individual premises were asked if they had enquiries from other persons about any of these products, and whether they were told that the questions were being asked of them for the purposes of advancing an appeal against a determination to refuse a special licence. The Commission proceeds on the basis that these questions were not asked.
30. The Commission is not satisfied that one person asking certain questions about availability of certain products on a particular day demonstrates a genuine market. The Commission agrees with the statement by the Commissioner in his decision that:
- “There must be a true community benefit in that product being available, including a genuine market and a reasonable expectation that existing licensed premises have not moved, or will not move, to address that market, such that only through [the special licence being applied for] could the community benefit be met.”
31. There is evidence that the products for which this application is made are available, or can be ordered, at existing licensed premises, and the Commission is not satisfied that the reasonable expectation referred to is established. That evidence is also consistent with existing licensed premises moving to address any such market. Evidence that a supplier does “not order them in” is not evidence that the supplier will not move to address any market for them.
32. The Commission is not satisfied that particular alcohol products must be available in retail outlets near to where particular customers live, or may otherwise shop. This no doubt is convenient, but as explained above, is not the relevant test.
33. The Commission rejects the troubling submission made on behalf of the appellant that “unless there is some spread of the different varieties and styles then proper choices are not being made available to the Appellant's customers and indeed are impossible for them to obtain legally.” “Proper choice” is simply a convenience factor. The Commission rejects completely the statement that it is not possible to obtain products legally. It carries the inference that customers will endeavour to import products themselves. In the circumstances of the broad availability of international liquor at large national bottle shop chains of which the Commission is well aware, and of the

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<sup>2</sup> Statutory Declaration – as above

availability of on-line purchases for retailers, importers and producers outside of Tasmania, again of which the Commission is well aware, this suggestion is extraordinary.

34. Ground 1 is not made out.

### **Grounds 2, 3 and 5**

35. The issues surrounding the cultural differentiation of certain types of liquor products in grounds 2, 3 and 5 are conflated and considered here together. They essentially deal with the same matters.

36. The appellant submits that the Asian liquor that is available nearby, does not meet his customers' preferences/tastes and this is a relevant cultural issue that the Commissioner failed to take account of and the Commission must now do so.

37. The appellant has applied to sell Japanese sake, Korean soju and Chinese white spirits and beer. The Commission has found that these generic liquor products - as applied for - are available, or can be available, from some outlets in Hobart. If particular types/brands of these products sought by the appellant's customers are not specifically available in existing licensed premises that does not represent cultural discrimination. As in all retail markets, customers can express their taste preferences for particular varieties where similar products are available for sale, or can be available for sale.

38. This ground is not made out.

### **Ground 4**

39. It is unclear exactly what the issue is in ground 4. It would appear that the appellant is saying that the Commissioner failed to understand that there is a demand from his Chinese customers for "particular" Chinese white spirits that is not currently being met. This might relate to the issues above – that is, demand for a brand of spirit – or be more general regarding a lack of availability at the other licensed premises nearby. In either case, it is not the Commission's view that every individual customer demand for a particular product needs to be met by the granting of a new liquor licence. The Commission repeats what is said about community benefit in paragraph 30.

40. So far as concerns the Sandy Bay premises, the appellant has put forward additional information regarding two premises in the Sandy Bay precinct, namely that Wing and Co Asian grocery is for sale and that Sandy Bay Korean Mart intends to close and relocate. The result of this, it is submitted, is that convenient access to relevant alcohol would be diminished, strengthening the arguments about insufficient supply in the Sandy Bay precinct.

41. A copy of an ABC news item supplied by the appellant as supplementary information records the decision of the current owners of Wing and Co to sell the business hoping it would “continue to run as an Asian grocer”. It is not licensed to sell liquor.
42. The Commission has satisfied itself that the Sandy Bay Korean Mart is closed at the current premises. However, a liquor licence granted to a licensee for particular premises is able to be transferred and the Commission is aware that it is not uncommon practice for a licence to be transferred to a new operator as part of the sale/tenancy transaction. The Commission is not satisfied that the licence that subsists for these premises is of no effect.
43. Notwithstanding this, some of the products applied for are available in venues in the Sandy Bay precinct or within a short travel distance. This additional information does not change the Commission’s view on the particular grounds of appeal set out above.

## **Conclusion**

44. The Commissioner must make a decision that is in the best interests of the community, pursuant to section 24A (1). In doing so, he must weigh up the general costs and benefits to the community of allowing such as licence.
45. The type of liquor sought by the original application is Japanese sake, Korean soju and Chinese white spirits and beer and the Commission is satisfied that these general products are available, or can be available, in store in the general Hobart area.
46. The appellant claims that the products sought are “*not easily available* in the numerous off licence premises in the *vicinity* of the applicant’s premises”. There is nothing in any previous decisions of the Licensing Board or the Commissioner for Licensing, or in the Act requiring that regulated alcohol products need to be easily available or “nearby” anything.
47. The Commission’s view is that the requirement for a true community benefit does not lead to every individual demand for different types (or brands) of products needing to be satisfied. The Commission’s strong view is that the system of licensing in Tasmania does not contemplate a regime where individual demand for a particular type or brand of product that is not currently available at a particular outlet or outlets will result in a special licence being granted for that product to a new entrant.

## **Decision**

48. The Commission confirms the decision of the Commissioner for Licensing (made 19 May 2020) to refuse the grant of a special licence to Mr Zexing (Sky) Wang for Asian Town CBD and also for Asian Town Sandy Bay.

Decision made by the Commission on 6 July 2020.

Jenny Cranston (Chair), David Hudson (Member), Andrew Walker (Member)

## ATTACHMENT A

### TASMANIAN LIQUOR and GAMING COMMISSION Appeal hearing - Asian Town Sandy Bay and Asian Town CBD

Monday, 6 July 2020

The Commission considered the following documentation:

1. Separate submissions from Asian Town to the Commissioner to determine their Sandy Bay application on 8 May 2019 and CBD application on 10 October 2019.
2. Reasons for Decision - Commissioner for Licensing - Asian Town CBD and Asian Town Sandy Bay - dated 19 May 2020 (sent to the appellant on 20 May 2020).
3. Email dated 20 May 2020 from Licensing Operations to the appellant reiterating right of appeal and providing 14 days from date of email to lodge an appeal.
4. Appeal lodged by the appellant's legal representative on 2 June 2020.
5. Extract – sections 213 and 214 of the *Liquor Licensing Act 1990*.
6. Letter from the Commission dated 4 June 2020 to the appellant advising of the date and time of the appeal hearing and allowing further submissions by 22 June 2020.

#### **Supplementary material provided by appellant 22 June 2020:**

7. A final submission dated 22 June 2020 from Mr Graeme Bradfield, Solicitor for the appellant from Tierney Law.
8. A copy of an ABC news article, dated 6 February 2020 '*Fong family to sell Wing and Co Asian Grocery in Hobart after 60 years*'
9. A Statutory Declaration dated 22 June 2020 provided by Ms Jessica Reardon a legal practitioner from Tierney Law.