

Tasmanian Liquor and Gaming Commission

Appeal against a determination of the Commissioner for Licensing made 21 May 2019

Xuan Zhao

Appellant

V

Commissioner for Licensing

Respondent

Reasons for Decision

1. On 11 January 2019, the Appellant applied to the Commissioner for Licensing for a special licence seeking authority for the sale of liquor products from China, Korea and Japan off his premises which currently operates as QiE Asian Grocery (store) located at shop 5, 118 Elizabeth Street, Hobart.
2. The premises are located close to the central business district of Hobart and currently sell mainly Asian food and ingredients that are dry, frozen and chilled.
3. The appellant seeks to expand his product range to include Asian liquor products that he contends will enrich consumer choice. He states that his major target group is Asian people living in Hobart; the majority of his customers reside in the city.
4. The products he wishes to sell, as set out in his application, are Japanese Sake, Korean Soju and fruit rice wine and fruit beer, and Chinese traditional wine.
5. The Commissioner determined on 21 May 2019 to refuse the application for the special licence with a written decision containing a statement of reasons sent to the applicant (the appellant).
6. On 12 June 2019, the appellant made an appeal in writing to the Commission pursuant to section 211 of the *Liquor Licensing Act* 1990 (Tas) ("the Act").
7. The Commission considered the appeal on 5 August 2019 having determined it 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 these reasons.
8. At the commencement of the hearing, the Commission was notified that the appellant was present and wished to provide additional material. The appellant had previously been advised in two written communications that any further documentation was to be provided to the Commission by 22 July 2019. He claimed that he did not understand this and the Commission exercised its discretion by agreeing that he could appear before the Commission and present the additional documentation. This additional documentation included in attachment A.

Grounds of appeal

9. The appellant raised the following grounds:

- 9.1 The Commissioner incorrectly said that the appellant has not contributed to the local liquor industry;
- 9.2 The Commissioner incorrectly said that consumers can purchase the same products from nearby liquor outlet (sic) or online;
- 9.3 The Commissioner incorrectly said that sell (sic) liquor will increase our general cost;
- 9.4 The process in making the decision is not correct as the appellant believes that the interview by an inspector and the site visit by the Commissioner had raised no issues related to the reasons for refusal; that no community objections had been raised against the application; and that the time taken to deliver an outcome is longer (5 months) than other licence decisions for neighbouring premises (2 months).

Legislation

10. 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.”

11. 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.”

12. The Commissioner 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.

Ground 1

13. The appellant states in his submission that the Commissioner mentioned that he (the appellant) does not contribute to the local liquor industry. What the Commissioner actually said was:

“With respect to that object of the Act relating to the responsible development of the liquor and hospitality industries, I would note that a speciality grocer of this sort could not be said to be part of the hospitality industry and the importation and sale of the internationally produced liquor could not make any significant contribution to the development of the liquor industry.”

14. The appellant has missed the point in failing to place the Commissioner’s words within the context of the objects of the Act to which he clearly refers. Section 2A provides that:

- 1) the object of the Act is to regulate the sale, supply, promotion and consumption of liquor so as to –
- (b) facilitate the responsible development of the liquor and hospitality industries in a way that is in the best interests of the community.

15. The Commission is of the view that the importation of selected liquor products from overseas countries for sale in a small section of a grocery store with a limited clientele could well benefit a small number of clients and could presumably add to the profitability of the store in question but that does not facilitate the development of the Tasmanian liquor industry in general. The Commissioner’s finding was appropriate.

Ground 2

16. This ground raises the issue of the availability of certain products from particular countries. The Commission does not accept that all of the items that are referred to in the appellant’s application are not available in retail premises in Hobart. Japanese sake is a product that the Commission is aware is available in a number of premises nearby to the appellant’s premises and further afield.

17. Further if the appellant wished to sell Japanese and Chinese beer, the Commission is aware that these products are similarly available in the area, and in the case of Japanese beer, widely available in Hobart.

18. If Japanese sake and Japanese and Chinese beer, for example, were the only subject of the appellant’s application, the Commissioner would have been correct in his finding.

19. However, the appellant seeks to sell a range of Korean liquor products which the Commission is satisfied are not readily available, if at all, in retail outlets in Hobart.

20. The Commissioner makes the point that the products are available online from Australian sellers and this may well be correct. However, this goes to the issue of whether online purchasing provides the level of convenience that the application is seeking to provide to members of the community. Online purchasing may add costs to the purchase of the product and may require larger volumes to be purchased (e.g. by the carton). This would not, in the Commission's view, necessarily be consistent with one of the objectives of the Act being to promote responsible consumption. Further, online purchasing would likely require a level of planning for the purchase and delivery that would not necessarily compare favourably to the ability to purchase the same product from a nearby store. This is contextual, related to an individual purchaser's circumstances.
21. On balance, the Commission finds that the Commissioner was incorrect in saying that "international liquor products are already available from nearby liquor outlets". The appellant does not seek to sell international liquor products in general but a specific set of liquor products from only three countries related to the other products he sells in his store. Some (but not all) of these are not readily available from nearby outlets.
22. This matter is discussed further below in the context of the extent to which convenient access to the liquor products in question is in the best interests of the community.

Ground 3

23. This ground is not made out because the appellant misunderstands the Commissioner's comments relating to costs. The Commissioner is referring to the costs versus the benefits to the community of allowing the application. They do not refer to the appellant's costs in terrestrial based sales versus online sales. Purchasing products on line could well be more expensive (higher cost) but this is not what the Commissioner said nor meant by his comments regarding cost.

Ground 4

24. This ground raises the issue of the processes followed by the Commissioner and his officers in assessing the application.
25. An interview with a compliance inspector is a part of a process of gathering information to assist the Commissioner to make a decision. The inspector is not the decision maker and any comments made by him are contextual and hypothetical. A site inspection is also part of the process of gathering information and the Commissioner is not required to provide comments at this visit of any sort. He most certainly would not advise at this meeting the reasons for the rejection of the application as he is still forming his view. In any case, there is no evidence that conflicting or contradictory statements were made by anyone.

26. The fact that no objections were received against the application does not take away from the primary consideration of the Commissioner to make a decision which is in the best interests of the community (section 24A (1) of the Act).
27. The time taken for delivering a decision compared to other decisions is irrelevant.

Conclusion

28. The Commissioner must make a decision that is in the best interests of the community, pursuant to section 24A (1). In doing so, he has weighed up the general costs and benefits to the community of allowing such as licence.
29. The type of liquor sought by this application is limited and the Commission is not satisfied that all these products are readily available in store in the general Hobart area - some are (for example, Japanese sake and Japanese and Chinese beer) and some are not (all subject Korean liquor and Chinese traditional wine). This, in the Commission's view, is a relevant consideration.
30. The Commissioner notes that numerous decisions in the past by the Licensing Board and the Commissioner have been clear that the community's best interests are not necessarily served by retail outlets adding liquor to their collateral as a matter of convenience or to increase their revenue base. The Commission agrees with this general principle. In our view, convenience alone is not a pre-determinative factor.
31. The Commissioner stated that he does not see the QiE Asian Grocery store as having any particular characteristics that distinguish it such that it would be in the best interests of the community. The Commission members visited the store (separately on 20 July, 22 July and 1 August 2019) and it is our view that the particular nature of the store is distinguishable – it is a specialty Asian grocery store in which the appellant wants to add selected Asian (specifically from 3 countries) liquor to its product line as a complementary offering to customers. The convenience of this is clear, especially if one considers the general lack of availability of any of the subject Korean liquor products or traditional Chinese wine. The Commission is satisfied that these products are complementary to the other products within the appellant's store.
32. The Commissioner has previously (2017) granted a special licence¹ where he found community benefit in providing for the sale of limited liquor products (specifically Polish) alongside the specialty produce (particularly Polish smallgoods and some packaged foods of largely European origin) normally sold in the store in question. This is, in the Commission's view, an analogous situation.

¹ Ziggy's (2017) Commissioner for Licensing Written Decision 14092017

33. In his decision granting an off-licence for Hop, Vine and Still², which is located close to the appellant's store, the Commissioner recognised distinguishing factors in product offerings as an acceptable argument:

I accept the applicant's contention that the proposed off-licence would provide benefit to the community, including to tourists, by offering the option of high-end and emerging liquor products. It would be distinct from the existing off-licences in the area, which focus on stocking popular liquor brands, and offer regular specials and bulk discounts.

34. In the Commission's view, the non-availability of particular products from certain overseas countries may form part of the broad consideration of what is in the best interests of the community as a whole. In this particular case, allowing the sale of a limited range of specific liquor products from particular countries not generally available in store in Hobart would appear to offer to members of the community an advantage that would be to their benefit.

35. It is the view of the Commission that in this case, because particular products are not readily available, then a special licence can be granted. It necessarily follows that once a special licence is granted, the availability of such products is increased. Further, off-licence premises in the locality may decide to add such products to their lines. 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.

36. It is important for all parties – including any future applicants for special licences – to note that the Commission is not here making a general determination about retail outlets seeking special licences for the sale of liquor. This appeal is about i) specific products from specific countries that are (ii) generally physically unavailable and (iii) where the retail outlet in question offers a complementary array of food related produce (iv) in a distinguishable outlet.

Decision

37. The Commission directs the Commissioner for Licensing to grant a special licence to the appellant, Mr Zhao Xuan, to sell liquor products from his premises, QiE Asian Grocery at 118 Elizabeth Street, Hobart with the following conditions:

- 1) The liquor products to be sold are limited to:
 - Korean soju;
 - Korean fruit rice wine and fruit beer; and
 - Traditional Chinese wine (non-grape).

- 2) The products may only be sold between the hours of 10.30 a.m. to 7.30 p.m.

² Hop, Vine and Still (2018) Commissioner for Licensing Written Decision 20180215

- 3) The sale area is limited to a space, not to exceed 2 metres by 2 metres by 2 metres, at the back of the store on the right hand side as indicated in the drawing supplied in the application.

Decision made by the Commission on 20 August 2019.

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

ATTACHMENT A

Appeal hearing - Qi'E Asian Grocery

12 noon - Monday, 5 August 2019

The Commission considered the following documentation:

1. Reasons for Decision - Commissioner for Licensing - Qi'E Asian Grocery - dated 21 May 2019 (sent to the appellant on 27 May 2019).
2. Email dated 31 May 2019 from Licensing Operations to the appellant reiterating right of appeal and providing 14 days from date of email to lodge an appeal.
3. Email dated 12 June 2019 from the appellant taken to be the appeal document
4. Extract - sections 213 and 214 of the *Liquor Licensing Act 1990*.
5. Memorandum to the Commissioner for Licensing dated 7 May 2019 from Liquor and Gaming Branch providing advice on application
6. Application form dated 11 January 2019 accompanied by associated documentation provided by applicant/appellant in support of the application
7. Letters to the appellant and the Commissioner for Licensing advising of the date and time of the appeal hearing, dated 4 July 2019.

Supplementary material provided by appellant 5 August 2019 at the time of the hearing

8. A couple of pages of BWS advertising of Asian liquor products labelled "unavailable"; a double sided page of GOOGLE "Asian liquor online shopping" information; and an ABC news article entitled "*How the plan to boost Hobart's international student population is driving change at UTAS*" dated 24 March 2019.