



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>MJ Trading Services Pty Ltd v Independent Liquor &amp; Gaming Authority [2018] NSWCATAD 260</b>
<b>Hearing dates:</b>	22 August 2018
<b>Date of orders:</b>	08 November 2018
<b>Decision date:</b>	08 November 2018
<b>Jurisdiction:</b>	Administrative and Equal Opportunity Division
<b>Before:</b>	S Leal, Senior member
<b>Decision:</b>	The decision of the respondent on 26 March 2018 to refuse to grant the applicant a packaged liquor licence is affirmed.
<b>Catchwords:</b>	ADMINISTRATIVE REVIEW – application for packaged liquor licence – whether premises are a ‘general store’ – meaning of ‘in the neighbourhood’ – whether no other take-away liquor service reasonably available to the public.
<b>Legislation Cited:</b>	Gaming and Liquor Administration Act 2007 Gaming and Liquor Administration Regulation 2016 Liquor Act 2007 (NSW) Liquor Regulation 2008
<b>Cases Cited:</b>	Armstrong v Edgecock (1984) 2 NSWLR 536 Australian Education Union v Department of Education and Children’s Services (2012) 248 CLR 1 Cross v McHugh [1974] 1 NSWLR 500 Hastings Co-operative Ltd v Port Macquarie Hastings Council [2009] NSWCA 400 Maryland Development Co Pty Ltd v Penrith City Council & Anor [2001] NSWLEC 135 Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137 Morgan v Goodall (1985) 2 NSWLR 655 State of Chamber of Commerce and Industry and Anors v Cth of Australia (1987) 163 CLR 329
<b>Texts Cited:</b>	Macquarie Dictionary Online Pearce & Geddes “Statutory Interpretation in Australia”, 6th ed. (2006), Chatswood,
<b>Category:</b>	Principal judgment

<b>Parties:</b>	MJ Trading Services Pty Ltd (Applicant) Independent Liquor & Gaming Authority (Respondent)
<b>Representation:</b>	Solicitors: Garry Seo & Associates (Applicant) Lindsay Taylor Lawyers (Respondent)
<b>File Number(s):</b>	2018/00125399
<b>Publication restriction:</b>	Nil

## REASONS FOR DECISION

### Introduction

- 1 MJ Trading Services Pty Ltd ('MJ Trading Services'), who is the applicant in this matter, owns the Lidcombe-based business, City Hanho. City Hanho sells groceries and other household items, with a strong emphasis on goods imported from Korea. To enable City Hanho to also stock Korean alcohol, MJ Trading Services applied to the Independent Liquor and Gaming Authority ('ILGA') for a packaged liquor licence. The application was refused because ILGA was satisfied that City Hanho is a general store and was not satisfied that, in the neighbourhood of City Hanho, no other take-away liquor service was reasonably available to the public. For these reasons, ILGA found that the applicant could not meet the exemptions contained in section 31 of the *Liquor Act 2007* ('the Liquor Act'), which sets out restrictions on the granting of packaged liquor licences.
- 2 In its subsequent application for review to this Tribunal, MJ Trading Services submitted that City Hanho is not a general store but rather a speciality store and, on that basis, falls outside the restrictions contained in section 31 of the Liquor Act.
- 3 Relevantly, section 31 of the Liquor Act provides as follows:
  - (1) A packaged liquor licence must not be granted for premises that comprise a general store unless the Authority is satisfied that:
    - (a) in the neighbourhood of the premises concerned, no other take-away liquor service is reasonably available to the public, and
    - (b) the grant of the licence would not encourage drink-driving or other liquor-related harm.
  - ....
  - (3) In this section:  
**general store** means a convenience store, mixed business shop, corner shop or milk bar that has a retail floor area of not more than 240 square metres and that is used primarily for the retail sale of groceries or associated small items.
- 4 The following issues arise in this case:
  - whether this Tribunal has the power to review the decision to refuse the applicant a packaged liquor licence;
  - if so, whether City Hanho is a general store; and

- if so, what is the neighbourhood of City Hanho; and
- whether, in the neighbourhood of City Hanho, there is no other take-away liquor service reasonably available to the public.

5 For the reasons set out below, I have decided to affirm the decision of ILGA to refuse a packaged liquor licence to MJ Trading Services.

**Does the Tribunal have the power to review the decision to refuse the applicant a packaged liquor licence?**

6 The ILGA is empowered to grant or refuse a liquor licence to an applicant (section 45 of the Liquor Act). This is a decision able to be reviewed by this Tribunal. (section 13A of the *Gaming and Liquor Administration Act 2007* and regulation 7 of the *Gaming and Liquor Administration Regulation 2016*).

**Is City Hanho is a general store?**

- 7 As set out above, a packaged liquor licence cannot be granted for a general store unless ILGA, and on review this Tribunal, is satisfied that in the neighbourhood of the premises concerned, no other take-away liquor service is reasonably available to the public.
- 8 A general store 'means a convenience store, mixed business shop, corner shop or milk bar that has a retail floor area of not more than 240 square metres and that is used primarily for the retail sale of groceries or associated small items.' (s31(3) of the Liquor Act )

*Convenience store, mixed business shop, corner shop or milk bar*

- 9 Because of the wide range of products it sells, City Hanho is, in MJ Trading Services' submission, neither a convenience store, mixed business, corner store or milk bar.
- 10 According to MJ Trading Services, whilst the size of City Hanho is less than 240 square metres, it is not a store that sells only groceries or associated small items but rather a specialty supermarket store that sells approximately 1900 items imported from South Korea as well as local products. In support of its case, MJ Trading Services has tendered a petition signed by over 300 people stating that 'for all the people with Korean background, the Korean grocery stores are regarded as specialty stores where we..visit at least once or twice a week to buy special products imported from South Korea.'
- 11 Whilst accepting that much of the case law defines a supermarket as a general store, MJ Trading Services submits that this should not be used to interpret the meaning of 'general store' for the purposes of s31 of the Liquor Act. It is the applicant's contention that despite its premises being less than 240 square metres (namely, 180 square metres), the large number of products sold by City Hanho should allow it to escape being defined as a 'general store.'

In evidence before me are photographs of City Hanho, an inventory of products sold there and statements provided by clients of City Hanho. This material has been of assistance to me in considering whether City Hanho meets the definition of a general store for the purposes of s31 of the Liquor Act.

- 13 Whilst the Liquor Act states that a general store means 'a convenience store, mixed business shop, corner shop or milk bar that has a retail floor area of not more than 240 square metres and that is used primarily for the retail sale of groceries or associated small items,' it does not separately define convenience store, mixed business shop, corner shop or milk bar.'
- 14 To assist me in the definition of these terms, I have considered the ordinary and grammatical meaning of the words having regard to their context and legislative purpose: *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [26]. In determining the ordinary and grammatical meaning, the dictionary meaning of the words may be considered: *State of Chamber of Commerce and Industry and Anors v Cth of Australia* (1987) 163 CLR 329 at 348.
- 15 A 'milk bar' is defined by the Macquarie Dictionary Online as 'a shop, often with an open front where milk drinks, ice cream, sandwiches etc are sold. On the evidence before me, I am not satisfied that City Hanho meets the definition of a milk bar. There is no evidence of milk drinks, ice cream or sandwiches being sold there.
- 16 A convenience store is 'a small shop which is open longer than the usual trading hours and offers a range of food and domestic items most commonly in demand.' Whilst on the evidence before me, the daily trading hours of City Hanho are long, namely 8am to 10pm, I am not satisfied that City Hanho 'offers a range of food and domestic items most commonly in demand.' Given that its July stocktake revealed a total of 1896 different products stocked by City Hanho, I am satisfied that the provision of services by City Hanho goes well beyond those items most commonly in demand. For this reason I am not satisfied that City Hanho meets the definition of 'convenience store.'
- 17 A 'corner shop' is defined by the Macquarie Dictionary Online as a corner store, being 'a small local shop selling a range of goods for domestic consumption.' On the evidence before me, I am satisfied that City Hanho would meet the definition of a corner shop. In terms of size, it is approximately 180 square metres, which is within the 240 square metres stipulated by s31 of the Liquor Act as being a marker of premises that may comprise a general store. I am satisfied from the inventory provided to me and clarification given by the applicant that the products sold at City Hanho are groceries, many of which are imported from Korea and some of which are more locally sourced. There is no dispute that City Hanho offers a wide range of products.
- 18 The 2016 census results confirmed that 16% of those people living in Lidcombe at the time of the census identified as being of Korean ancestry. On the evidence before me, I am satisfied that City Hanho caters at the very least to its Korean population living within Lidcombe. This is confirmed by the addresses provided by those people who signed the petition in support of City Hanho, revealing the majority of them to be

residing in Lidcombe. There is no evidence that the products of City Hanho are used for non-domestic consumption, particularly as many of the products, such as meat and fresh fruit and vegetables, are perishable and require quick consumption. For these reasons I am satisfied that City Hanho is a small local shop selling a range of goods for domestic consumption and so meets the definition of a 'corner shop.'

19 A mixed business is 'a small grocery shop, which also sells a selection of other merchandise.' According to the Macquarie Dictionary Online, a grocery is a commodity sold by grocers and a grocer is a dealer in general supplies for the table, as flour, sugar, coffee, etc., and in other articles of household use.

20 On the evidence before me, I am satisfied that City Hanho sells groceries, including flour, coffee and sugar in addition to 'a selection of other merchandise' including eye masks, bandages, black spoon and fork case sets, frying pans and ramen wave cookers. On this basis, I am satisfied that City Hanho also meets the definition of a mixed business.

*That has a retail floor area of not more than 240 square metres*

21 It is not in dispute that City Hanho has a retail floor area of approximately 180 square metres.

*Used primarily for the retail sale of groceries or associated small items*

22 It is the submission of MJ Trading Services that City Hanho is not a general store because although its size is less than 240 square metres, it is not a store that sells only groceries or associated small items. According to MJ Trading Services it is, instead, 'a speciality supermarket store that sells more than or close to 1000 items of products imported from South Korea as well as local products.'

23 I accept that City Hanho sells a wide range of products. On the evidence before me, however, I am satisfied that these products fit the definition of groceries – namely general supplies for the table and other articles of household use – or associated small items. It does not matter that many of these items are imported from Korea. Regardless of their origin, the items are primarily food stuff, including sauces, oils, meats, fresh vegetables and fruit, or associated small items including cutlery, cleaning items and beauty products.

24 On the evidence before me, including the stocktake list as at July 2018 and photographs taken of the premises, I am satisfied that the premises of City Hanho are used primarily for the retail sale of groceries or associated small items.

*General store/supermarket*

25 According to MJ Trading Services, City Hanho is a 'specialty supermarket'. As 'specialty supermarket' is not defined in s31, however, the question remains whether City Hanho nevertheless fits the definition of a general store.

26

A supermarket was found to be a general store In *Maryland Development Co Pty Ltd v Penrith City Council & Anor* [2001] NSWLEC 135. At paragraphs [116] and [117] of the decision, Sheahan J held that:

Quite obviously some traditional types of shops, eg chemist, butcher, etc have changed their complexion over the years. Whereas historically we generally saw single-product line shops for such goods as cakes, groceries, meat, clothing, hardware, newspapers, etc, we now see wide ranges of those lines sold from a single location in what could be called a 'general store.' The task of characterisation, in the present era, as in the past, poses questions of fact and degree. *Shire of Perth v O'Keefe* [(1963) 110 CLR 529].

Where a large 'general store' sells a general range of merchandise, including foodstuffs and homewares, it may be referred to colloquially as a supermarket. 'Supermarket' is not a planning term; labelling the proposed development as a 'supermarket' is irrelevant; a supermarket is a shop and may be a 'general store'. A 'department store' is probably also a 'general store.'

The concept of the general store has thus evolved over time as a response to changing needs, and how a facility looks in comparison to a supermarket is irrelevant. The traditional general store was always a one-stop destination.

27 At paragraph [125] of the decision, Sheahan J said that:

A general store must have a greater range and variety of product lines than a speciality shop. The range and variety depends upon the needs of those the store exists to serve, and the modern methods adopted for retailing. It is not, therefore surprising that a general store in an urban areas will have a predominance of a variety of food related product lines available for its local and passing customers.

28 In *Hastings Co-operative Ltd v Port Macquarie Hastings Council* [2009] NSWCA 400, the Court of Appeal upheld a decision that a supermarket was a general store.

29 In light of these authorities, I am satisfied that the description of City Hanho as a supermarket does not preclude it from meeting the definition of a general store.

30 I am not persuaded by the applicant's argument that because City Hanho sells items predominantly imported from Korea, it is not a general store.

31 There is a large Korean population in Lidcombe, where the premises of City Hanho are situated. According to the 2016 Australian census, 16% of the population of Lidcombe are of Korean background. By comparison, in Australia generally, only 0.4% of the population identify as being of Korean background. It is to be expected that a general store would stock products of appeal to its local community. In light of the large Korean population in the Lidcombe area, it is not surprising that City Hanho would cater to the taste of its demographic. The fact that City Hanho stocks many products from Korea – in addition to products that are not imported from Korea - does not impede City Hanho from meeting the definition of a 'general store.'

### Conclusion

32 As set out above, I am satisfied that City Hanho meets the definition of a general store for the purposes of s31 of the Liquor Act. This is because it is a corner shop or a mixed business shop of not more than 240 square metres; and that is used primarily for the retail sale of groceries or associated small items. As set out above, the fact that the applicant has described City Hanho as being a speciality supermarket does not stop it from meeting the definition of a general store.

## What is the neighbourhood of the premises?

### *'In the neighbourhood'*

33 According to s31(1) of the Liquor Act, a packaged liquor licence must not be granted for premises that comprise a general store unless the Authority (or on review this Tribunal) is satisfied that in the neighbourhood of the premises concerned, no other take-away service is reasonably available to the public.'

34 The words 'in the neighbourhood' are not defined in the Liquor Act.

35 According to MJ Trading Services, when defining 'in the neighbourhood', regard should be had to the definition of 'neighbouring' as set out in the *Liquor Regulation 2008* in the context of 'neighbouring premises' to be 'within 100 metres of the boundary of the premises to which the application applies.'

36 I reject this approach as it seeks to rely on the *Liquor Regulation 2008* in order to interpret its parent Act which is not the correct approach to statutory interpretation.

37 This was confirmed in *Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137 at [41] per Tobias JA:

in my opinion it is well established that as a general rule it is impermissible to call in aid in the construction of an Act delegated legislation made under that Act: Pearce & Geddes "*Statutory Interpretation in Australia*", 6th ed. (2006), Chatswood, [3.41] pp.104-105 and the cases there cited.

38 In determining the meaning of 'in the neighbourhood' I have instead considered the dictionary meaning of the words. (see *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [26])

39 'Neighbourhood' is defined in the Macquarie Online Dictionary as follows:

*noun* 1. the region near or about some place or thing; the vicinity.

2. a district or locality, often with reference to its character or inhabitants: *a fashionable neighbourhood*.

3. a number of persons living near one another or in a particular locality: *the whole neighbourhood was there*.

4. *Town Planning* the number of dwellings which will require and support communal facilities such as shops, a school, etc.

5. *Obsolete* neighbourly feeling or conduct.

6. nearness; proximity.

–*phrase* 7. **in the neighbourhood of**, nearly; about.

40 One of the objects of the Liquor Act is 'to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community.' (s3(1)(a) of the Liquor Act). To secure the objects of the Act, due regard must be had to the 'need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.' (s3(2)(c) of the Liquor Act).

In light of the meaning of the words within the context of the objects of the Liquor Act, I am satisfied that 'neighbourhood' should be defined as a district or locality by reference to its inhabitants.

42 This follows the reasoning in *Armstrong v Edgecock* (1984) 2 NSWLR 536 at 541 that: 'the search for the neighbourhood of the premises will require a finding of the community in which the premises are to be found.' (see also *Morgan v Goodall* (1985) 2 NSWLR 655)

43 In *Armstrong v Edgecock*, Glass JA said at [542]:

The extent of the area from which the premises, if licensed, would draw their custom is now an irrelevant consideration. On the other hand, it would be relevant to consider topographical and geographical features, transport facilities, communal activities and residential aggregations in determining the extent of the neighbourhood....Two attributes can I think be predicated of the neighbourhood test. It will denote an area smaller than the trading area which has hitherto been the goal of magisterial determination. Secondly, the neighbourhood of the premises will remain constant regardless of the nature or scale of the trading conducted in them.

44 Accepting the reasoning in *Armstrong v Edgecock*, the Court of Appeal in *Morgan v Goodall* found (per Samuels JA at 657):

What constitutes a 'neighbourhood' for present purposes was considered at some length in *Armstrong v Edgecock* [1984] 2 NSWLR 536. It is clear from that case, and in particular from what was said by Hutley AP (at 541 and 542) that it means a territorial areas displaying certain common topographical and social features and enjoying common facilities which enable it to be regarded as a community. Section 45(2) requires the area to be identified which satisfies the description 'the neighbourhood of the premises to which the application related'. Hence those premises become the focal point of the inquiry, and influence (if they do not determine) the fixing of the boundaries of the neighbourhood; and it is the needs (for liquor) of the public in that neighbourhood which must then be considered. It is clear, therefore, that 'neighbourhood' means an area defined according to the relevant tests and by reference to the position of the premises.

45 In light of these decisions, I find that in determining the neighbourhood of the premises, I should have regard to transport facilities, pattern of movement of those living close to the premises, and the existence of institutions which make a locality, such as schools, churches and clubs, as well as a consideration of topographical and geographical features.

46 ILGA has proposed the following geographical location as being the relevant neighbourhood, namely that part of Lidcombe bounded by Olympic Drive, East Street (which borders Rookwood cemetery), Keating and Child Streets and Victoria Street.

47 An acceptance of this would require a finding, under the interpretation set out in *Armstrong v Edgecock* that this geographical location is capable of sustaining a community. The photographs provided by the respondent point out those premises such as schools and churches and clubs and childcare and aged-care centres as evidence that this proposed area is capable of sustaining a community.

48 For the reasons set out above, I accept that the areas of the neighbourhood within which City Hanho sits are as set out by ILGA, and are bordered by Olympic Drive, East Street (which borders Rookwood cemetery), Keating and Child Streets and Victoria Street.



**In that neighbourhood, is no other take-away liquor service reasonably available to the public?**

49 Under the provisions of section 31 of the Liquor Act, I am satisfied that it is sufficient for there to be only one other take-away liquor service within the neighbourhood to enliven the prohibition on granting a licence. The question is not whether liquor is reasonably available in the neighbourhood but whether there is another service which is reasonably available.

50 There is no dispute that within the neighbourhood of (and a short walk from) City Hanho, as described above, there are four take-away liquor services, namely,

- The Railway Hotel
- The Royal Oak Hotel
- The Lidcombe Hotel; and
- Juju Markt

51 Juju Markt holds a packaged liquor licence authorising the sale of liquor between 10am and 10pm. The Railway Hotel and Royal Oak Hotel each operate pursuant to a hotel licence, which allows them to sell liquor from a dedicated bottle shop between 6am and 11pm between Monday to Friday and 8am to 11pm on Saturdays and Sundays. At the Lidcombe Hotel, liquor can be sold over the counter between 12 midday and 10pm on Mondays to Saturdays and 12 midday to 8pm.

52 In determining what is meant by 'reasonably available', consideration should be given to the location of the service in the neighbourhood and its convenience to persons who might be able to use the facility. (see *Cross v McHugh* [1974] 1 NSWLR 500 at 502)

53 Because the applicant proposes to use the requested packaged liquor licence to sell speciality Korean alcohol only, the applicant submits that the Royal Oak Hotel (which is the closest service) should not be counted as a take-away liquor service that is 'reasonably available' as it does not cater to the Korean market.

54 According to ILGA, however, the uniqueness or exclusiveness of the liquor products proposed to be sold at City Hanho is not a relevant consideration in the interpretation of s31 of the Liquor Act. In ILGA's submission, the wording of the provision is clear and refers to the reasonable availability of any other take-away liquor service and does not permit a narrower or different interpretation such as the reasonable availability of the same or a similar type of take-away liquor service.

55 I agree that the wording of s31 of the Liquor Act is clear and that the words 'no other take-away service' make no reference to the type of liquor sold in such a service. For this reason, I find that the type of liquor sold at a take-away service is not relevant to the determination of this question.

56 In any case, it is not disputed that Juju Markt does stock a range of Korean alcohol and is a 270m walk from City Hanho.

57

On the evidence before me, I am satisfied that there are other take-away liquor services within the neighbourhood, namely Juju Markt and the Royal Oak Hotel, and that both services are reasonably available to the public.

58 For this reason, I cannot be satisfied that in the neighbourhood of City Hanho, no other take-away service is reasonably available to the public.

## Conclusion

59 For the reasons set out above:

- I am satisfied that the premises of City Hanho comprise a general store for the purposes of s31(1) of the Liquor Act;
- I am not satisfied that in the neighbourhood of the premises of City Hanho, no other take-away liquor service is reasonably available to the public. (s31(1)(a) of the Liquor Act)

60 In light of my findings in relation to s31(1)(a) of the Act, I do not need to consider 31(1)(b) of the Act, namely whether I am satisfied the grant of the licence would not encourage drink-driving or other liquor-related harm.

61 On this basis, I am not satisfied that an exemption on the prohibition on granting a licence as set out in s31 of the Liquor Act is available to MJ Trading Services.

62 The correct and preferable decision is, therefore, to affirm the decision of ILGA to refuse a licence to MJ Trading Services.

## Orders

- (1) The decision of the respondent on 26 March 2018 to refuse to grant the applicant a packaged liquor licence is affirmed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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Decision last updated: 08 November 2018