

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: ALDI FOODS PTY LIMITED

OTHER PARTIES: MCCUSKER CENTRE FOR ACTION ON ALCOHOL AND YOUTH (OBJECTOR)
DR MELISSA STONEHAM ON BEHALF OF THE MILLS & WARE COMMUNITY GROUP (OBJECTOR)
BRENDON CANT (OBJECTOR)
CHIEF HEALTH OFFICER (INTERVENOR)

PREMISES: ALDI SOUTH FREMANTLE

PREMISES ADDRESS: 24/219 (LOT 303), HAMPTON ROAD, SOUTH FREMANTLE

APPLICATION ID: A180692358

NATURE OF APPLICATION: APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF REASONS: 22 MARCH 2019

Introduction

- 1 On 11 January 2019, a notice pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) was sent to the parties advising them that after consideration of the evidence and submissions presented, I had determined that the grant of the application was not in the public interest and therefore the application was refused.
- 2 Pursuant to s 18AA(3), the applicant has requested written reasons for the decision. These are those reasons.

Background

- 3 ALDI Foods Pty Ltd (the applicant) lodged an application for the conditional grant of a liquor store licence for premises to be located at 24/219 Hampton Road, South Fremantle and to be known as ALDI South Fremantle. The application was made pursuant to ss 47 and 62 of the Act.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. Objections to the grant of the application were lodged by the McCusker Centre for Action on Alcohol and Youth (MCAAY), Dr Melisa Stoneham on behalf of the Mills & Ware Community Group and Brendon Cant. The Chief Health Officer (CHO) lodged a notice of intervention as permitted under s 69 of the Act.
- 5 The application was determined on the written submissions of the parties in accordance with ss 13 and 16 of the Act. In addition, this decision has been prepared and should be

read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹

Brief overview of the applicant's proposal

- 6 The applicant seeks to establish what can be described as a typical ALDI liquor store at its supermarket in Hampton Road, South Fremantle. The proposed liquor store will have the following key features:
- there will be a small browse/display area of approximately 21m², together with a single licensed checkout;
 - there will be about 95 non-refrigerated liquor products on offer; and
 - some of the liquor products will be unique to the applicant.
- 7 The applicant lodged a detailed Public Interest Assessment (PIA) to support its application. The PIA provided information on the applicant's background and its supermarket operations together with details of its liquor model. Information was also submitted on the nature and character of the locality surrounding the proposed liquor store and the likely impact that the grant of the application would have on the amenity of the area.
- 8 The applicant also submitted the following reports:
- a locality report prepared by Deep End Services (DES report); and
 - a survey of consumer requirements within the locality prepared by Patterson Research Group (Patterson report).
- 9 According to the applicant, the combined grocery and liquor service that it seeks to offer will provide an important diverse service to the people living and working in the locality and any potential risks associated with the operation of the premises will be minimised due to the low risk elements and features of the proposed liquor store.

Brief overview of the objections

McCusker Centre for Action on Alcohol and Youth

- 10 According to MCAAY, the locality surrounding the proposed liquor store is such that an additional liquor outlet would likely increase alcohol-related harm in the surrounding community. MCAAY expressed concerns about the existing levels of alcohol-related harm in the locality, the socio-economic standing of suburbs within the locality and the existing packaged liquor outlet density.
- 11 It was submitted that while the City of Fremantle is above average in socio-economic standing, there are pockets within the locality, including the suburbs of Hamilton Hill and Hilton, that have a low socio-economic index. There are also significant social housing development projects within the locality, including Beaconsfield and Hilton.

¹ Refer s 16(7) of the Act.

12 It was further submitted by MCAAY, that:

- a higher proportion of people in South Fremantle and O'Connor drink alcohol at risky levels compared to the State and Greater Perth;
- the City of Fremantle has a significantly higher rate of alcohol-related hospitalisations compared to the State average;
- the existing outlet density in the locality is high;
- the proposed placement and layout of the liquor store within a supermarket and near groceries would contribute to the normalisation of alcohol through the treatment of alcohol as a normal grocery item;
- alcohol harms cost the WA community about \$3.1 billion per year in terms of policing, hospitalisations, road crashes and ambulances;
- children and young people will be exposed to alcohol promotion while assisting their parents with grocery shopping. Research shows that exposure to alcohol promotion shapes young people's attitudes and behaviours towards alcohol;
- the applicant intends to sell very low-priced liquor, which given the profile of the locality, may be harmful to the surrounding community;
- there is a well-developed body of evidence based on Australian and international research indicating that alcohol availability is related to alcohol consumption and harms;
- the applicant's advertising practices are inconsistent with the statements in the PIA.

Dr Stoneham

13 It was submitted by Dr Stoneham that:

- the location of the liquor store in the supermarket will normalise alcohol as part of an everyday shop;
- Fremantle has a significantly higher rate of alcohol-related harm compared to the State;
- in East Fremantle/Fremantle, 29.8% of persons aged 15 and over consume alcohol at risky levels which is above the State rate (19.5%) and Greater Perth (18.9%);
- in Fremantle/O'Connor, 28.7% of persons aged 15 and over drink alcohol at risky levels, which is above the State rate and the Greater Perth rate;
- there is at least one Halfway house near the proposed liquor store; and
- there are 27 liquor outlets licensed to sell packaged liquor in the locality including nine liquor stores, five hotels and 13 taverns. Further, there is already a Dan Murphy's liquor store and a Liquorland store within the same shopping complex as the proposed ALDI liquor store.

Brendon Cant

14 According to Mr Cant, there are already intoxicated people 'topping up' with takeaway liquor who roam the nearby streets. Given the existence of two liquor stores in the shopping centre, the grant of a further liquor store licence at the centre would not be in the public interest.

Brief overview of the intervention

15 The CHO made representations that:

- ALDI South Fremantle intends to provide the public with consistently low-priced alcohol products from within its supermarket;
- the association of alcohol products with everyday grocery items can lead to increased consumption and harm;
- there is a relationship between low cost liquor, consumption and increased alcohol-related harm;
- there are at-risk groups that are likely to patronise ALDI South Fremantle;
- areas within the locality experience a level of disadvantage; and
- if the application is granted, the imposition of conditions that separate the sale and display area of alcohol from the sale and display of general grocery items would be an important harm minimisation approach.

16 It was submitted by the CHO that it is relevant to consider the context of the environment that the proposed liquor store will be operating in because this will provide some reference to the potential for alcohol-related harm to occur if the application is granted. In this regard, the CHO provided the following information relating to the locality surrounding the proposed liquor store:

- for the period 2011-2015, in South Fremantle:
 - the hospitalisation rate for residents for 'all alcohol-related conditions' was significantly higher (1.20 times) than the corresponding State rate, with three specific conditions being prevalent;
 1. alcoholic liver disease (2.42 times);
 2. alcoholic mental disorders and neurological disorders (1.58 times); and
 3. other alcohol-related diseases (1.39 times);
 - for the same period, for male residents, alcoholic liver disease and alcoholic mental and neurological disorders were significantly higher (2.94 and 1.78 times, respectively) than the corresponding State rate; and
 - for female residents, alcoholic mental and neurological disorders was significantly higher (1.32 times) the State rate;
- for the period 2011-2015, in Fremantle:
 - the hospitalisation rate for residents for 'all alcohol-related conditions' was significantly higher (1.79 times) than the corresponding State rate, with eight specific alcohol-related conditions being significantly higher than the State rate;
 1. alcoholic mental and neurological disorders (3.09 times);
 2. other digestive system diseases (3.07 times);
 3. self-inflicted injuries (2.01 times);

4. alcoholic liver disease (2.31 times);
 5. poisoning (1.84 times);
 6. assaults/abuse (1.82 times); and
 7. other alcohol-related injuries (1.29 times);
- hospitalisation rate for male residents for 'all alcohol-related conditions' was significantly higher (1.96 times) than the corresponding State rate, with six specific alcohol-related conditions being significantly higher than the state rate:
1. alcoholic mental and neurological disorders (3.65 times);
 2. other digestive system diseases (3.49 times);
 3. alcoholic liver disease (2.63 times);
 4. self-inflicted injuries (2.28 times);
 5. assault/abuse (1.95 times); and
 6. other alcohol-related injuries (1.31 times),
- the hospitalisation rate for 'all alcohol-related conditions' for female residents was significantly higher (1.50 times) than the corresponding State rate, with three specific conditions being significantly higher than the state rate;
1. alcoholic mental and neurological disorders (2.24 times);
 2. other digestive system diseases (2.03 times); and
 3. self-inflicted injuries (1.83 times).
- for the period 2013-2015, the total hospitalisation rate for 'all alcohol-related conditions' for residents of Hamilton Hill was significantly higher (1.23 times) than the corresponding State rate, with acute and chronic conditions being significantly higher (1.18 and 1.33 times, respectively) than the corresponding State rate;
 - for the period 2013-2015, alcohol-related hospitalisation rate for residents of North Coogee were similar to the State rate;
 - the suburbs of Hamilton Hill, Hilton and Beaconsfield are all relatively disadvantaged with low SEIFA² rankings (3, 3 and 4 respectively), the suburb of White Gum Valley records an average ranking of advantage/disadvantage (5) while the suburbs of South Fremantle (7), Fremantle (7) and North Coogee (10) are relatively advantaged, with above average rankings; and
 - the suburbs of Hamilton Hill, Hilton and Beaconsfield all experience unemployment rates (9.7%, 8.2% and 8.1% respectively) higher than the State rate (7.8%) and these suburbs also have lower median weekly incomes (\$608, \$692 and \$689 respectively) than the State rate (\$724).
- 17 The CHO submitted that at-risk groups are more sensitive to features such as the price of alcohol which can influence the amount of alcohol consumed, and related harm. Therefore, the increased availability of, and access to, low-priced liquor at the applicant's

² Socio-economic Indexes for Areas released by the Australian Bureau of Statistics

store may disproportionately increase the risk of harm to vulnerable members of the locality.

- 18 According to the CHO, this application presents harm and ill-health concerns based on the proposal for cheap liquor products to be available within the ALDI South Fremantle supermarket environment. It was submitted that the applicant's proposal is of particular concern when considered alongside the potential for this application to increase the availability of low priced alcohol products into the community which already experiences a level of alcohol-related harm and ill-health. The CHO recommended various conditions for the licence if the application is granted.

Determination

- 19 The applicant sought a liquor store licence to sell and supply packaged liquor from an area inside its supermarket, which forms part of the shopping precinct known as the South Fremantle Marketplace.
- 20 There is no presumption in favour of granting a liquor licence under the Act. An applicant for the grant of a liquor store licence must satisfy the licensing authority that the grant of the application is in the public interest.³ Therefore, an applicant must adduce sufficient evidence to discharge this burden.
- 21 On a proper construction of the Act, the application must be determined in accordance with the evidence (including notorious facts) submitted by the parties and the criteria imposed by the Act itself. In this regard, Buss J in *Woolworths v Director of Liquor Licensing*⁴ set out some of the relevant provisions of the Act:
- the primary objects of the Act are set out in section 5(1) (a), (b) and (c) of the Act;
 - by section 5(2), in carrying out its functions under the Act, the licensing authority shall have regard to the primary objects of the Act and to certain secondary objects, which include facilitating the use and development of licensed facilities, reflecting the diversity of the requirements of consumers in the State;⁵
 - by section 5(3), if, in carrying out any of its functions under the Act, the licensing authority considers that there is any inconsistency between the primary objects and the secondary objects, the primary objects take precedence;
 - by section 38(2) of the Act, an applicant who makes an application for a liquor store licence must satisfy the licensing authority that the granting of an application is in the public interest;
 - the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;⁶
 - the factual matters which the licensing authority is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act set out in sections 5(1) and 5(2);

³ Ss 38(1) and (2) of the Act and Reg 9AE of the *Liquor Control Regulations 1989*

⁴ [2013] WASCA 227

⁵ s 5(2)(a)

⁶ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210

- the factual matters which the licensing authority is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act; and
 - the requirement to have regard to the primary and secondary objects in sections 5(1) and 5(2) is mandatory whereas section 38(4) is permissive.
- 22 In respect of an objector and intervenor, s 73(10) of the Act states that the burden of establishing the validity of any objection lies on the objector, while an intervenor carries no onus to establish their assertions of fact or opinion.⁷
- 23 Therefore, the statutory duty imposed on the licensing authority involves two aspects. First, the licensing authority must evaluate the evidence before it and make findings and draw conclusions from the evidence, including by reference, and secondly, the licensing authority must apply the public interest criteria, in accordance with the statutory requirements, to the relevant circumstances of the case before it and in particular, to the findings it has made and the conclusions it has drawn.⁸
- 24 When I consider the applicant's evidence, in particular the DES report and the Patterson report, together with the notorious fact that in contemporary Australian life one-stop shopping in large suburban shopping centres is of great importance⁹, I find that the grant of the application would promote object 5(1)(c) of the Act.
- 25 However, this finding on its own is not determinative of the application. The application must also be considered with regard to the other objects of the Act.
- 26 One of the primary objects of the Act is to minimise harm or ill-health caused to people, or any group of people due to the use of liquor.¹⁰ None of the primary objects of the Act take precedence over each other, however, where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case¹¹ and it is a matter for the licensing authority to decide what weight to give to the competing interests and other relevant considerations.¹²
- 27 Where object 5(1)(b) is relevant to the determination of an application there are four steps to be undertaken, namely:¹³
- make findings that specifically identified the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - make findings about the likely degree of harm to result from the grant of the application;
 - assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and

⁷ *Re Gull Liquor* (1999) 20 SR (WA) 321.

⁸ [2013] WASCA 227

⁹ [2013] WASCA 227

¹⁰ Object 5(1)(b)

¹¹ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

¹² *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASC 356

¹³ *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 per Allanson J

- weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the applicant has satisfied the licensing authority that it was in the public interest to grant the application.
- 28 Evidence has been presented by the parties on the economic and social profile of the locality surrounding the proposed liquor store. The evidence from the CHO in particular, as detailed at [16] above, indicates that the locality surrounding the proposed liquor store presently experiences rates of alcohol-related harm significantly above the State rates.
- 29 In response to the submissions of the CHO, the applicant submitted that while it accepts that the sale and supply of liquor has the potential to cause some risks, the nature of the applicant's proposal presents only a low risk. It was further submitted that hundreds of ALDI stores operate with a liquor service around the country and in NSW, notwithstanding that alcohol has been sold in grocery stores for many years, including ALDI stores, there was a reduction in daily alcohol use between 2011 (9.8%) and 2015 (7.5%) and a decrease in the proportion of people who reported drinking at levels that put them at long term risk of harm from 31.4% in 2006 to 25.9% in 2015.
- 30 However, notwithstanding this submission from the applicant, the applicant has failed to acknowledge that many of its applications in NSW for a liquor licences have been refused because of concerns about the likely negative impact that the operation of an ALDI liquor store may have on the local community.
- 31 Each application must be considered on its merits. The profile of the locality in which the liquor store is to be located and the existing level of alcohol-related harm in the locality are factors to be taken into consideration when determining the merits of the application and the overall public interest. As noted by Wheeler J in *Executive Director Public Health v Lily Creek International & Ors* [2001] WASCA 410, regard must be had to the proved circumstances of the particular area in relation to which the application is made.
- 32 Based upon the evidence presented in this case, I find that there is a high level of pre-existing alcohol-related harm in the in the locality surrounding the proposed liquor store. In addition to this high level of alcohol-related harm, there are other risk factors present in the locality which are relevant when assessing the vulnerability of the community to the likely negative impacts of alcohol use and the likely degree of harm to result from the grant of the application. This includes:
- the suburbs of Hamilton Hill, Hilton and Beaconsfield are socio-economically disadvantaged, with below average SEIFA rankings;
 - the suburbs of Hamilton Hill, Hilton and Beaconsfield all experience high unemployment rates;
 - the suburbs of Hamilton Hill, Hilton and Beaconsfield have lower median weekly incomes than the State rate; and
 - public housing makes up 7.0% of all dwellings in the primary sector and 8.3% in the secondary sectors – both levels above the Perth average of 2.9%.

- 33 The DES report indicates that the suburb of Beaconsfield and part of Hamilton Hill form a major component of the primary catchment area for the ALDI supermarket (and therefore the liquor store) while the secondary catchment area includes the remainder of Hamilton Hill and Hilton.
- 34 Assessing the likely harm to result from the grant of the application is, by necessity, a matter of prediction, however, in making such an assessment I am not required to find as a fact that harm *will* occur because of the grant of the application, or to find a causal link. Ipp J in *Lily Creek*¹⁴ stated that:
- “whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to at 516 in Malec v JC Hutton Pty Ltd, is essentially a matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.”*
- 35 I find that at-risk persons from the suburbs of Beaconsfield, Hamilton Hill and Hilton will be attracted to the applicant’s supermarket, which according to the applicant’s evidence is perceived as a cheap supermarket. These at-risk persons will then be exposed to the risk of unplanned or opportunistic purchases from the proposed liquor store, which provides consistently low-priced liquor which is on display immediately adjacent to the grocery checkouts. As noted by the CHO, at-risk groups are more sensitive to features such as the price of alcohol which can influence the amount of alcohol consumed, and related harm. Eighty per cent of respondents to the Patterson report indicated that competitive prices and specials are appealing attributes of a liquor store. The CHO also submitted that increased availability and access to low-priced liquor may disproportionately increase the risk of harm to vulnerable members of the locality.
- 36 The applicant’s stock list indicates that many wine products cost under \$10 per bottle, with some as low as \$2.69; a four-litre cask of wine costs \$8.99, a twelve pack of beer is \$11.99 or a four pack of cider \$6.99. The grant of this application will increase the physical availability of alcohol, and ease of access to alcohol, in a community experiencing high rates of alcohol-related harm with large areas of social disadvantage. The provision of consistently low-priced liquor resulting from the grant of this application may also put downward pressure on the price of alcohol in the area.
- 37 According to the DES report, there are presently 27 packaged liquor outlets in the locality, which includes a large destination outlet (Dan Murphy’s) adjacent to the proposed ALDI liquor store and a Liquorland outlet, within the same shopping complex. The DES report states that Dan Murphy’s offers volume, range and price over a wide catchment area while Liquorland has a small convenience-based range drawing off Woolworth’s customer traffic. The DES report describes the applicant’s proposal as targeting existing grocery buyers with a strong emphasis on convenience, quality and value. In my view, these

¹⁴ Supra

features of the applicant's proposal presently exist at the South Fremantle Marketplace shopping complex.

- 38 I find that the evidence establishes that consumers in the locality are presently well catered for with respect to access to packaged liquor and the convenience of one-stop shopping already exists at the shopping complex. Whilst these conclusions do not automatically infer that the application should therefore be refused, they are, however, factors which help inform the overall determination of whether the grant of the application is in the public interest.
- 39 The Patterson report indicates that only 18% of respondents purchase packaged liquor most or all of the time when shopping for groceries. Most respondents (55% all or most of the time) purchase their liquor on a special trip to a walk-in and browse facility, and this rises to 73% for most or at least half the time, for liquor purchases.
- 40 Not surprisingly, the Patterson Report reveals that respondents consider convenience to be an important attribute of a liquor store. As noted above, the locality, and the shopping complex satisfies that public consideration. Also, as noted by the Liquor Commission in LC 18/2015:

“Convenience is just one factor to be considered when considering the requirement of consumers for liquor - under the current Act it must be considered having regard to the proper development of the liquor industry, the other objects of the Act and, of course, the public interest.

It is accepted in the community, as evidenced by the many and varied shopping centres and precincts, that there may be some level of inconvenience experienced in purchasing liquor.

Liquor is a product that may have negative consequences in the community and is subject to extensive regulation as to its sale, supply and consumption. These controls and restrictions exist for the benefit of the community and whilst some members of the community may express a desire for more convenience, the Commission is entrusted with the responsibility of making a determination on whether the public interest is served by any proposal to widen or extend the level of convenience currently enjoyed by the public by the extension or granting of certain licences.

Many shopping centres and precincts, for example, have independent liquor stores quite removed from the local supermarket, and, for that matter, removed from the bakery, post office, bank, butcher or other retail outlets or public utilities regularly frequented as part of a person's or family's weekly or regular shopping expedition. Some liquor stores are even located in relatively isolated areas separate from a shopping centre or precinct.

A liquor outlet at every corner delicatessen or beside every supermarket or regularly visited retail outlet to satisfy the convenience of some members of the public is not what the community would countenance or expect, and would not be, in the Commission's view, in accordance with the provisions and intent of the Act."

- 41 In circumstances where there is already a high level of alcohol-related harm in the community, it may be that even the smallest risk of a further increase in harm is considered not acceptable. Edelman J in **Liquorland (Australia) Pty Ltd v Executive Director of Public Health** [2013] WASC 51) stated:

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

- 42 In my view, it is likely that over time, liquor sold and supplied from the applicant's premises will contribute to the already high rates of alcohol-related harm being experienced in some parts of the surrounding locality. I do not accept the applicant's submission that the low risk features of its application will sufficiently mitigate the risks associated with the grant of this application.
- 43 Consequently, when I weighed and balanced the positive and negatives aspects of this application, in the context of the public interest considerations, I was of the view that the likely negative outcomes for this locality, given the existing high rates of alcohol-related harm and the presence of other risk factors outweighed the marginal benefits that the grant of the licence would have for ALDI shoppers. As I have already observed, the locality is presently well catered for in terms of access to packaged liquor and there are two existing packaged liquor outlets at the South Fremantle Marketplace shopping complex, both of which can provide one-stop shopping convenience for patrons.
- 44 In consideration of the evidence presented, and the findings I have made about the locality surrounding the proposed liquor store, I concluded that the applicant had failed to discharge its onus under s 38(2) of the Act and satisfy me that the grant of the application was in the public interest. The application was therefore refused.

45 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.

46 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING