

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** ALDI Foods Pty Ltd
(represented by Mr Dan Mossenson of Lavan Lawyers)
- Interveners:** Director of Liquor Licensing
(represented by Ms Rachel Paljetak of State Solicitor's Office)
- Chief Health Officer
- Commissioner of Police
(both represented by Mr John Carroll of State Solicitor's Office)
- Commission:** Mr Seamus Rafferty (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Mr Paul Heaney (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for the conditional grant of a liquor store licence
- Premises:** ALDI Harrisdale Liquor Store
- Date of Hearing:** 22 February 2017
- Date of Determination:** 22 February 2017
- Date of Reasons of Determination:** 21 April 2017
- Determination:** The application for the conditional grant of a liquor store licence is approved.

Authorities referred to in this determination

- *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police [2017]* WASC 88
- *Woolworths Ltd v Director of Liquor Licensing 2013 WASCA 227*
- *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police [2016]* WASC 40
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015]* WASC 208

Background

- 1 On 23 September 2015, ALDI Foods Pty Ltd (“ALDI”) lodged an application for the conditional grant of a liquor store licence for premises to be known as *ALDI Harrisdale Liquor Store*. An objection was filed by the McCusker Centre for Action on Alcohol and Youth (“MCCAY”) and Notices of Intervention were filed by the Chief Health Officer (“CHO”) and the Commissioner of Police (“Police”).
- 2 Woolworths Limited (“Woolworths”) had made an application for the conditional grant of a liquor store licence within the same shopping centre development in which it was proposed that the ALDI store would operate. That application was lodged on 23 July 2015. The Delegate of the Director of Liquor Licensing (“the Delegate”) determined to deal with both applications together pursuant to s.16(12) of the *Liquor Control Act 1988*. (“the Act”)
- 3 In written reasons dated 11 May 2016, the Delegate granted the Woolworths application and refused the ALDI application.
- 4 By way of an application dated 10 June 2016, ALDI sought a review of the original decision to refuse the grant of the licence pursuant to section 25(1) of the Act.
- 5 The hearing of the application for review was conducted on 22 February 2017. The Director of Liquor Licensing elected to intervene in these proceedings and make representations as to why the application should be refused. The Police and CHO also intervened in the proceedings.
- 6 Although the applicant has lodged grounds in support of the review claiming error on the part of the Delegate of the Director, the Commission is not constrained by the need to find error on the Director’s part, but is required to undertake a full review of the materials before the Director at first instance and make its own determination on the basis of those materials.¹
- 7 However, the Commission is satisfied that there was a fundamental error made by the Delegate at first instance, that being that he did not consider the ALDI application on its own merits and chose to consider the applications of ALDI and Woolworths as competing

¹ Section 25(2c) of the Act

applications. Whilst the Act allows for applications to be heard together, there is nothing within the Act that specifies that in such a circumstance, the applications should be viewed as competing against each other. To the contrary, section 38(2) of the Act makes it clear that an applicant 'must satisfy the licensing authority that granting the application is in the public interest.'

8 The approach of the Delegate at first instance is reflected by the following comments in the written reasons for decision:

- a) 'On the basis that these two applications are for premises in close proximity to each other, I determined that they are competing applications which would be heard together.'²
- b) 'There are two competing applications, one by Woolworths and one by ALDI, for the conditional grant of liquor store licences at the new Harrisdale Shopping Centre.'³
- c) 'Each applicant espoused the benefits of their application over the competing application.'⁴
- d) 'In conducting that exercise, I have concluded that the Woolworths application will provide greater benefits to consumers in the locality....'⁵and explained why he preferred the Woolworths application over the ALDI application.

9 The Delegate stated that he could '...grant one, both or none of the competing applications'⁶, but it is evident from the totality of the reasons that the ALDI application was not properly determined on its merits in that the Delegate viewed the two applications as a competition and made a value judgement as to which application would better service the locality, as revealed by the comments made at paragraph 64 of the written reasons for decision.

10 Counsel for the Director submitted that the Delegate had not viewed these as competing applications and that the use of the word "competing" throughout his decision was an unfortunate choice of word.⁷ The Commission does not accept that submission.

² Decision of Director of Liquor Licensing dated 11 May 2016, paragraph 6

³ *supra*, paragraph 36

⁴ *supra*, paragraph 51

⁵ *supra*, paragraph 64

⁶ *supra*, paragraph 49

⁷ Transcript page 21, hearing 22 February 2017

Notwithstanding the fact that the evidence of each application was cross-admissible, both applications needed to be determined on their merits and that did not occur. It is apparent from the written reasons as a whole that the Delegate approached his task as approving one application over the other.

- 11 Counsel for the Director contended that the Commission should give less weight to the Patterson survey relied upon by the applicant.⁸ It was submitted that this survey predated the granting of the application made by Woolworths and as such, the granting of that licence impacted on the weight to be attributed to the survey.
- 12 Given that the Commission was of the view that the Delegate erred in his approach to the ALDI application, it would have been grossly unfair to give less weight to evidence relied upon by the applicant at first instance. As such, the Commission has considered the totality of the evidence relied upon by the applicant and the evidence that was relied upon by Woolworths, to the extent that it was referred to by the Delegate at first instance.
- 13 The Commission is required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.⁹ Having regard to that requirement, the Commission has given full weight to all of the evidence considered at first instance relevant to the application made by ALDI and not adopted the approach advocated by the Director, that being that less weight should be given to the evidence adduced by the applicant on the basis that there is now a BWS store operating in the locality. Had such an approach been adopted, it would have been totally unfair to the applicant.
- 14 The error made at first instance has solely impacted upon the weight given to evidence relied upon by the applicant.

Consideration of Woolworths Evidence

⁸ *supra*, transcript page 46

⁹ Section 16(7)(b) of the Act

- 15 Prior to the hearing of this application, representations were made by counsel for the Director in respect to the Commission considering the totality of the evidence adduced by Woolworths in support of their application at first instance. Given that the applications by Woolworths and ALDI were dealt with together, the evidence in respect to one application was evidence in respect to the other.¹⁰
- 16 The Commission advised the parties that it was not prepared to go through all of the evidence lodged in support of the Woolworths application on the basis that the reasons for decision adequately summarised the Woolworths evidence relied upon by the Delegate at first instance that was relevant to the ALDI application. At the hearing of the application for review, it was made clear that the Commission would have regard to the evidence relied upon by the Delegate as outlined in his written reasons in determining this application.¹¹
- 17 It is apparent that the Director wished to rely upon the Woolworths evidence in submitting that the Applicant had ‘failed to demonstrate the degree to which the grant of the Application would cater for the requirements of consumers for liquor.’¹² The written submissions lodged on behalf of the Director went on to state that, ‘there has to be evidence of some call by consumers for the products and services that will be offered at the proposed licensed premises.’¹³ This point was further developed at the hearing, in which counsel for the Delegate stated, ‘... but the point being is that that statement needs to be considered in that context that the Delegate wasn't just considering the evidence provided in support of the Aldi application, it was also in the context of the evidence put forward by Woolworths as to consumer requirement in considering that evidence as a whole.’¹⁴
- 18 At the hearing of the application for review, counsel for the Director raised the consideration of the Woolworths evidence as a preliminary issue. The Chairperson made the following observation during the course of submissions, ‘If you consider that your position is prejudiced and you wish to put any further submission before this Tribunal at the end of this hearing then you are entitled to do so. We'll discuss that at the end of your

¹⁰ Section 16(12) of the Act

¹¹ Transcript pages 20 and 32, hearing 22 February 2017

¹² The Director of Liquor Licensing's Outline of Primary Submissions dated 8 February 2017, paragraph 35(a)

¹³ *supra*, paragraph 45

¹⁴ Transcript page 20, hearing 22 February 2017

submissions.¹⁵ At the conclusion of her submissions, counsel for the Director stated, 'Accordingly, it is open to the Commission to affirm the decision of the Delegate. Unless there are any further questions, those are my submissions.'¹⁶ No attempt was made by counsel to develop the submission that had been foreshadowed earlier in the proceeding.

- 19 In any event, the submissions advanced on behalf of the Director were based on the misconception that section 5(1)(c) of the Act required an applicant to establish a need or call or requirement for liquor in the locality. The submissions ignored the wording of the provision which states that one of the primary objects of the act is, 'to cater for the requirements of consumers for liquor and related services, *with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*' [emphasis added]
- 20 As was noted by Banks-Smith J in *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police*¹⁷, 'catering for consumer requirements is not to be considered in isolation. The potential and opportunity for proper development of the industry (including change) is not to be ignored.'¹⁸
- 21 The comments made by Buss JA (as he then was) in *Woolworths Ltd v Director of Liquor Licensing*¹⁹ are instructive in determining what an applicant must prove in accordance with section 5(1)(c) of the Act. In that decision, Buss JA noted that:

I am satisfied that, contrary to the Commission's effective conclusion, the evidence adduced by the appellant before the Commission was capable, in law, of supporting a finding that there were relevant consumer requirements in the Bicton locality for the range of products and services which the appellant proposed to provide and that granting the appellant's application was in the public interest. The appellant's evidence indicated that:

- a) *the demographic profile of the Bicton locality included a high proportion of people who were within the main class of customer of the Dan Murphy's business;*

¹⁵ *supra*, page 33

¹⁶ *supra*, transcript page 59

¹⁷ [2017] WASC 88

¹⁸ *supra*, at [68]

¹⁹ [2013] WASCA 227

- b) *the Dan Murphy's business profile was popular elsewhere in suburban Australia;*
- c) *the proposed liquor store, in accordance with the Dan Murphy's business profile, would provide an unrivalled range of liquor products and services, this range having attracted substantial custom in other suburban areas; and*
- d) *the proposed store would represent a significant new development in liquor retailing in the Bicton locality and would cater for the diversity of consumer requirements.*²⁰

22 Section 5(1)(c) of the Act requires the Commission to evaluate whether the evidence before it is such that the granting of the application will cater for the requirements of consumers for liquor and related services and [emphasis added] provide for the proper development of the liquor industry. It does not require an applicant to establish that there is a need for liquor in the relevant location. As was noted by Martino J in *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police*²¹ the “needs test” no longer applies to applications of this nature.²²

23 Given the misinterpretation of section 5(1)(c) of the Act on behalf of the Director as reflected by the different interpretation adopted by Banks-Smith J, the submissions on behalf of the Director as to why the Commission should take into account the evidence pertaining to the Woolworths application are rejected. However, given that the Woolworths and ALDI applications were determined together, the evidence referred to by the Delegate in his determination relating to the Woolworths application will be taken into account in considering this application as to whether the applicant has proven on balance that the granting of the application is in the public interest.

Evidence and submissions from the applicant

24 The applicant proposes a small browse/display area within its supermarket operation in a new shopping centre precinct. The range of products that would be offered for sale are:

- a) 60 wines;
- b) 16 different beers;

²⁰ *supra*, at [86]

²¹ [2016] WASC 40

²² *supra*, at [28]

- c) 15 different spirits;
 - d) 4 ciders.
- 25 The evidence in support of the application included:
- a) A Public Interest Assessment (“PIA”) prepared by Lavan Legal;
 - b) Report by Patterson Research Group;
 - c) A number of other documents outlined in the Index of Documents.
- 26 The evidence established that the locality comprises the entire suburbs of Harrisdale and Piara Waters, approximately one-third of the suburb of Forrestdale and tiny portions of the suburbs of Canning Vale and Banjup. The suburbs of Harrisdale, Piara Waters and Forrestdale had more than tripled in population in the five years to 2014.
- 27 It was submitted on behalf of the applicant that:
- a) All licensing authority lodgment requirements had been complied with;
 - b) The applicant was a highly experienced operator and enjoyed an excellent track record and corporate reputation;
 - c) Was capable of providing the precise operation that it had proposed;
 - d) There would be benefit to the community in granting the application;
 - e) There were no known negative public interest considerations associated with the application;
 - f) It was in the public interest to grant the application.

Submissions from the Director

- 28 The submissions on behalf of the Director were in the following terms:
- a) The Delegate correctly determined the application;
 - b) The applicant had failed to demonstrate the degree to which the application would cater for the requirements for liquor;
 - c) There was insufficient evidence as to consumer requirement;
 - d) Convenience on its own was not enough to establish that the granting of the application was in the public interest;

- e) Consumer requirement was already met in the locality;
- f) The granting of the application would be contrary to the proper development of the liquor industry;
- g) Approving the application would give rise to a proliferation of liquor outlets which is inconsistent with the harm minimization principles enshrined in the Act.

Submissions from the Police

29 The submissions on behalf of the Police were outlined in brief written submissions dated 7 February 2017. It was submitted that:

- a) The evidence supported a conclusion that some level of public disorder or disturbance would likely result if the application is granted;
- b) If the application were granted, there should be a number of conditions imposed on the licence.

30 Reference was made to IMS data relevant to stealing and assault incidents within the locality.

Submissions from the CHO

31 The submissions on behalf of the CHO were:

- a) The sale of alcohol products alongside everyday grocery items can lead to increased consumption and harm;
- b) The association of the sale of packaged liquor with general supermarket goods can reinforce alcohol as a non-harmful product and establish its cultural place as part of everyday life, shaping attitudes and behaviours towards alcohol;
- c) There is a relationship between decreased price and increased consumption and increased harm;
- d) If the licence is granted there are a number of conditions that should be imposed on the licence.

Submissions from MCCAY

- 32 The Commission was provided with a letter from the Executive Officer of MCCAY dated 11 November 2015 outlining an objection to the granting of the application. It was contended that the granting of the application would not be in the public interest for the following reasons:
- a) Concerns at the normalisation of alcohol;
 - b) Potential impact on children and young people;
 - c) Precedent for sale of alcohol inside supermarkets in Western Australia;
 - d) Increase in the availability of cheap liquor;
 - e) Concerns about the access to alcohol by young people.
- 33 MCCAY indicated that they were not objecting to a liquor store within the area, 'but we are particularly concerned about the proposal for a liquor store within a supermarket and the potential precedent this may set for the sale of alcohol within other WA supermarkets.'

Evidentiary Findings

- 34 This application relates to a small operation within a supermarket facility. It will involve a discrete location within the supermarket in which alcohol will be available for sale. There will be a gate erected to prevent people from simply walking into the licensed area. The total size of the licensed premises will be 24 square metres, with no chilled alcohol available for sale.
- 35 The locality in which the proposed store would operate is fast growing and has seen significant population growth. The locality is not experiencing alcohol related harm at rates higher than other areas and there is no specific evidence to suggest that the granting of the licence will result in harm and ill-health to a level that would be deemed to be unacceptable.
- 36 The Commission notes the concerns of MCCAY in respect to this application, however the Commission is satisfied that there are conditions that can be imposed that will mitigate those concerns. The objection has not been made out having regard to the onus set out in section 73(10) of the Act.

37 The Commission also notes the assistance provided by the Intervenors in determining this application. However, much of the material put before the Commission relating to harm and ill-health was generic in nature (for example the extracts of articles referred to by counsel for CHO at the hearing of this application) and does not assist the Commission in determining this application. The Commission is aware that alcohol can cause harm and ill-health but in considering the primary object of the Act outlined in section 5(1)(b) of the Act it is required to consider each application in accordance with the test outlined by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*²³, that being:

- a) Make findings that specifically identified the existing level of harm and ill-health in the relevant area due to the use of liquor;
- b) Make findings about the likely degree of harm to result from the grant of the application;
- c) Assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
- d) Weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the appellant had satisfied the commission that it was in the public interest to grant the application.²⁴

38 Based on the totality of the evidence, the Commission considers that:

- a) The existing levels of harm and ill-health in the locality are no higher than other areas in Western Australia;
- b) There is nothing to suggest that the granting of the licence will result in an increase in harm and ill-health. The small size of the proposed premises, the nature of its operation and the limited number of products are significant factors in reaching this conclusion;
- c) Given the previous finding, there is nothing to suggest that there will be an increase in harm and ill-health in the locality to such a degree that would be considered unacceptable. The Director himself concedes this in the written submissions in which

²³ [2015] WASC 208

²⁴ *supra*, at [42]

it is stated that, '...the elevation in the degree of harm is unlikely to be significant due to the limited manner of trade proposed by the Applicant...' ²⁵.

- 39 It should also be noted that the primary object of the Act set out in section 5(1)(b) of the Act is to 'minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.' As such, the Commission considers that there are conditions that can be imposed to alleviate the concerns raised by the intervenors and objector.
- 40 In relation to the suggestion on behalf of the Director that an applicant must prove consumer requirement for packaged liquor products in the locality, the position of the Commission has been outlined earlier in these reasons. However, if the Commission had adopted the interpretation of section 5(1)(c) of the Act advocated on behalf of the Director, the Commission would still have granted the application on the basis that the results of the Patterson Research Group Report relied upon by the applicant establish that there is demand for liquor in the locality and that such demand would be serviced by the granting of the application.
- 41 As to the issue of proliferation, it should be noted that the following liquor outlets currently sell packaged liquor in the locality:
- a) Liquor Barons Forrestdale;
 - b) A drive-through facility at the CY O'Connor Pub;
 - c) Liquorland Southern River;
 - d) BWS Harrisdale.
- 42 The granting of a licence for the selling of packaged liquor in a floor space of 24 square metres would not result in a proliferation of liquor stores within the locality or a proliferation of liquor within the locality. To the contrary, given the nature of products to be sold by the applicant it will add to the diversity of products on offer and allow greater choice for consumers of liquor, thus being consistent with the primary object set out in section 5(1)(c) of the Act.

²⁵ The Director of Liquor Licensing's Outline of Primary Submissions dated 8 February 2017, paragraph 85.

Determination

43 Having considered all of the evidence relevant to this matter, the Applicant has discharged its onus prescribed by section 38(2) of the Act and the Commission is prepared to grant the application for the conditional grant of a liquor store licence for the following reasons:

- a) The locality is predominantly comprised of new and developing suburbs, being Harrisdale and Piara Waters;
- b) There has been significant population growth within the locality;
- c) The Applicant is an experienced operator;
- d) The Applicant is a responsible operator;
- e) The application relates to a very small floor space within a much larger supermarket;
- f) The range of products proposed to be sold is relatively small;
- g) There is a significant diversity between the products sold by ALDI and the BWS store that will operate in the same supermarket complex;
- h) The granting of the licence will result in the convenience of one-stop shopping for those who purchase items from the ALDI store;
- i) The survey results detailed in the Patterson Report show that 73% of respondents who purchase take-away liquor indicated that if they were shopping in an ALDI store, they would also buy their packaged liquor needs in the liquor section²⁶;
- j) The location of the licensed area is such that it will be separated from the rest of the supermarket, thus avoiding concerns of normalising liquor;
- k) The granting of the licence will promote competition;
- l) There are no harm or ill-health factors of such significance in the locality that would indicate that it is not in the public interest to grant the application;
- m) The granting of an application that relates to 24 square metres of floor space will not result in the proliferation of liquor stores or liquor itself in the locality.

44 The specific conditions imposed upon the licence are:

- a) The licensee is prohibited from selling refrigerated liquor products;
- b) There is to be no external advertising of liquor products on the facade of the licensed premises;

²⁶ Patterson Research Group Report, dated 21 August 2015, page 19

- c) The browse/display area is to be closed off when not open for trade;
- d) The licensee is to have and maintain a CCTV system in accordance with the policies of the Director of Liquor Licensing;
- e) The liquor display and sale area must be separated from the food/grocery display and sale area by barricading of non-see-through material over two (2) metres in height;
- f) The entry/exit point to the licensed area must have a gate.



SEAMUS RAFFERTY
CHAIRPERSON