

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: ALDI Foods Pty Ltd
(represented by Mr Dan Mossenson of Lavan)

Interveners: Director of Liquor Licensing
(represented by Ms Rachel Paljetak of State Solicitor's Office)

Chief Health Officer
(represented by Mr John Carroll of State Solicitor's Office)

Objectors: McCusker Centre for Action on Alcohol and Youth

Mostfun Enterprises Pty Ltd

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 Joondalup Liquor Store, Lakeside Joondalup Shopping City, 420 Joondalup Drive, Joondalup

Date of Hearing: 23 February 2017

Date of Determination: 23 February 2017

Reasons for determination: 17 August 2018

Determination: The application for the conditional grant of a liquor store licence is approved subject to conditions.

Authorities referred to in the determination:

- *Woolworths v Director of Liquor Licensing [2013] WASCA 227*
- *O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216*
- *ALDI Joondalup Liquor Store, Joondalup (A000191943)*

Background

- 1 ALDI Foods Pty Ltd (“ALDI”) seeks a review of the decision of the Director of Liquor Licensing (“the Director”) pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) in which an application for the conditional grant of a liquor store licence was refused on the basis that ALDI had not established that the granting of the licence was in the public interest.
- 2 The evidence relating to the application and a summary of the evidence and submissions of the various parties was adequately summarised in the decision of the Delegate of the Director of Liquor Licensing (“the Delegate”) dated 10 October 2016. For the purposes of this decision, the summary in the written reasons published on 10 October 2016 are adopted and are annexed to these reasons (**Annexure A**).

Summary of Argument

- 3 The position of ALDI is that it proposes to operate a small scale liquor store within an existing supermarket facility. It is contended that the liquor operation will provide convenience to those who purchase other items within the supermarket, offer a range of products that are not available in other licensed premises and will not cause undue harm and ill-health to those who make purchases from the proposed licensed premises. In summary, the applicant submits 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; and
 - f. it was in the public interest to grant the application.
- 4 At the hearing of the application, counsel for the applicant submitted that the following factors were relevant in determining whether it was in the public interest to grant the application:
 - a. ALDI operated 9000 stores in 13 countries;
 - b. ALDI operated over 360 stores in the eastern states;
 - c. all but one store in Victoria was licensed;
 - d. ALDI operated 19 stores in Western Australia;

- e. ALDI had broken the duopoly of Coles and Woolworths;
 - f. members of the public in Western Australia were entitled to be provided with the same service and facility as operated in Victoria and New South Wales;
 - g. the proposed licensed area would be a discrete area from the remainder of the supermarket;
 - h. the granting of the licence would promote competition;
 - i. there were no harm or ill health issues that would arise by granting the application; and
 - j. the granting of the licence would not result in proliferation of liquor within the community.
- 5 The Director intervened in these proceedings to make representations as to why the decision to refuse the application as first instance was correct. As was noted by counsel for the Director at the hearing of the application, *'I maintain my submission in relation to how the Act is to be interpreted, the reliability of the Patterson survey, and what regard the Commission can have to the applicant's business over east. I also rely on my submission that the essential premise of the application is based on convenience that Aldi can provide to its customers, and also - and this is one of the submissions that I will advance this afternoon in further detail - that there is a consumer requirement that is already being met at the locality.'*¹ The oral submission was consistent with the written submissions that had been filed prior to the hearing.
- 6 The position of the Chief Health Officer ("CHO") was summarised by counsel at the hearing as follows: *'The submissions of the Chief Health Officer are not an objection. The Chief Health Officer has not made a submission that the licence should not be granted. The Chief Health Officer has produced representations and evidence to say that harm and ill health are likely to arise by virtue of the grant.'*²
- 7 Two parties objected to the granting of the application at first instance, they being the McCusker Centre for Action on Alcohol and Youth ("MCAAY") and Mostfun Enterprises Pty Ltd ("Mostfun"), which operates the IGA Joondalup Liquor Store. Neither of these parties were represented at the hearing of the application, however the Commission has considered the issues raised by both parties in determining this application.

¹ Transcript of proceedings dated 22 February 2017

² Transcript of proceedings dated 22 February 2017

Statutory Framework

- 8 In *Woolworths v Director of Liquor Licensing*³ His Honour Buss JA (as he then was) set out the statutory framework for a determination of an application pursuant to section 25 of the Act in the following terms, namely:
- a. by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
 - b. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;⁴
 - c. the factual matters which the Commission 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, as set out in section 5(2) of the Act;
 - d. the factual matters which the Commission 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;
 - e. section 5(2) is mandatory whereas section 38(4) is permissive; and
 - f. on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

Basis of Decision at First Instance

- 9 In refusing the application at first instance the Delegate made the following relevant observations, namely:

'There are three existing liquor stores at the Centre together with a tavern, and whilst the tavern has no dedicated packaged liquor facility it is nonetheless permitted to sell

³ [2013] WASCA 227

⁴ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute. See *O'Sullivan* (216).

*packaged liquor. Further, in the area surrounding the Centre there are five other packaged liquor outlets and three large 'destination' liquor stores: Dan Murphy's Joondalup, Dan Murphy's Currambine and Dan Murphy's Wanneroo.*⁵

- 10 It was further noted that, *'the Centre and the surrounding locality are well catered for in terms of packaged liquor outlets.'*⁶
- 11 The apparent basis for refusing the application was that ALDI had not established that it was in the public interest for a conditional grant of a liquor store licence in circumstances in which the location was adequately serviced by other licensed premises. Reference was made to the issue of proliferation.

Determination

- 12 The Commission understands the issues relating to proliferation and concerns held by various parties in respect to this issue. However, the locality in which the proposed licensed premises will operate does not experience levels of harm or ill-health that would be objectively considered to be unacceptable based on the evidence before the Commission. Further, the granting of a licence that involves a very small store selling non-refrigerated products does not lead to a conclusion that the granting of the licence will result in an increase in harm and ill-health to levels that would objectively be considered to be unacceptable. In considering this issue, it should be noted that the locality in which the proposed licence would be granted does not experience levels of harm or ill health that would be considered to be unacceptable or above the averages experienced in other locations within Western Australia.
- 13 Ultimately, the Commission considers that the granting of the licence is consistent with the primary object set out in section 5(1)(c) of the Act and that none of the factors set out in section 38(4) of the Act are of such a nature as to conclude that the licence should not be granted. The applicant has discharged the onus prescribed in section 38(2) of the Act and established that it is in the public interest that the application be granted.
- 14 The Commission has determined that this application should be granted on the basis that:
 - a. there were no harm and ill-health issues within the relevant locality of such a nature that the granting of the application would not be in the public interest;
 - b. the Applicant is an experienced operator;
 - c. the Applicant is a responsible operator;
 - d. the application relates to a very small floor space within a much larger supermarket;

⁵ Paragraph 45 of decision dated 10 October 2016

⁶ Paragraph 58 of decision dated 10 October 2016

- e. the range of products proposed to be sold is relatively small;
 - f. the granting of the licence will result in the convenience of one-stop shopping for those who purchase items from the ALDI store;
 - g. the granting of the licence would promote competition; and
 - h. 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.
- 15 The Commission is not satisfied that the objectors have established on the balance of probabilities that the granting of the licence would not be in the public interest. The matters raised by MCAAY, whilst significant in general terms, do not specifically relate to the locality in which the proposed premises would operate and it could not be concluded on the material provided that harm and ill health of an unacceptable level would result from the granting of the application.
- 16 In respect to the Mostfun objection, the Commission is not satisfied on the balance of probabilities that the objection has been made out. The Commission is wary of objections made by competing liquor retailers, as there is clearly an inference open that the objection is based on self-interest. However, the submissions made by the objector are not supported by cogent evidence and the Commission is unable to make findings that the granting of the application is not in the public interest or that any of the other bases upon which the objection was made have been made out.
- 17 In respect to the two interventions, the Commission has carefully considered the submissions made on behalf of the Director and CHO. Those matters have been taken into account by the Commission, however the materials relied upon do not lead to a conclusion that the granting of the application will result in:
- a. the proliferation of liquor within the relevant location; and
 - b. harm and ill health of a level that would be considered unacceptable.
- 18 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;
 - 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; and
 - f. the entry/exit point to the licensed area must have a gate.
- 19 It should be noted that the granting of this application does not result in a conclusion that all future applications of this nature will be granted. Each application will be considered on its merits and factors relevant to each location to which an application relates will be taken into account, particularly issues of harm and ill health. Each application will be determined on its merits and in accordance with the relevant legislative provisions of the Act.
- 20 The application for review is granted and the licence is granted on conditions.



SEAMUS RAFFERTY
CHAIRPERSON

Annexure A: Summary of the application, evidence and submissions extracted from the decision of the Delegate of the Director of Liquor Licensing dated 10 October 2016 (decision number A000191943)

Introduction

- 1 ALDI Foods Pty Ltd (“ALDI” or “the applicant”) seeks a conditional grant of a liquor store licence for premises to be known as ALDI Joondalup Liquor Store and located at the Lakeside Joondalup Shopping Centre (the Centre), 420 Joondalup Drive, Joondalup. The application is made pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (the Act).
- 2 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 Ms Julia Stafford on behalf of the McCusker Centre for Action on Alcohol and Youth (MCAAY) and Mostfun Enterprises Pty Ltd (Mostfun), the licensee of IGA Joondalup Liquor. The Executive Director Public Health (EDPH) lodged a notice of intervention.
- 3 In accordance with the provisions of ss 13 and 16 of the Act, the application will be determined on the written material lodged by the parties.

Overview of the evidence and submissions of the parties

The applicant

- 4 ALDI proposes to establish a supermarket with a liquor store at the Centre to supplement its supermarket services with a take-away liquor service so as to create one-stop shopping convenience for its customers.
- 5 The purposed liquor store, located at the front of the supermarket, will incorporate a browse/display area of approximately 24m² together with a licensed checkout. Approximately 95 non-refrigerated liquor items will be available to the public, which will include some exclusive ALDI products.
- 6 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA provided information on the applicant’s proposed manner of trade, details of the locality surrounding the proposed liquor store, the social health indicators for the area, likely impact on the amenity of the neighbourhood, security and crime prevention initiatives and the low risk features of the application.
- 7 The applicant engaged Patterson Research Group to conduct a survey of adult residents in the area to gauge the level of support for the application. A total of 300 survey responses were collected by means of a hybrid research design, combining online self-completion and telephone interview. There was strong support from

respondents for the grant of the application, with 'increased convenience' being the main reason for this support.

- 8 According to the applicant, ALDI operating at the Centre will add enormous choice and diversity to the modern shopping destination and will fit perfectly into the mix of services and facilities there and help to advance the overall role and value of the Centre.
- 9 The applicant submitted that there are many aspects of the ALDI liquor store model which differ from other packaged liquor outlets:
 - the combination of the ALDI Joondalup Liquor Store with the ALDI supermarket. A one-stop ALDI shopping experience;
 - the exclusive ALDI product range;
 - the small size of the display/browse area;
 - the location of the display/browse area within the supermarket;
 - the absence of refrigeration; and the absence of external presence and advertising of liquor; and
 - the combined effect of the above features together with the overall manner of trade and ADLI's approach to harm minimisation.
- 10 In respect of the existing liquor outlets at the Centre, it was submitted that none of these are visible from the ALDI supermarket and are not capable of providing convenient one-stop shopping for people wishing to shop at ALDI. It was further submitted that the Act does not restrict the number of licences that can be granted in any one area and the grant of the application will add to competition in the area.

McCusker Centre for Action on Alcohol and Youth (MCAAY)

- 11 According to MCAAY, the sale of alcohol inside a supermarket may contribute to normalising alcohol use among young people. This is particularly relevant given the location of the proposed liquor store to the Edith Cowan University Campus. University students are known to have concerning drinking patterns and the increased availability of alcohol, and in particular cheap alcohol, is likely to have a negative impact on young people in the locality. Research shows that young people are particularly responsive to the price of alcohol.
- 12 It was further submitted that alcohol is no ordinary commodity, such as bread and milk and the harmful use of alcohol comes at a significant cost to society. The direct cost of alcohol-related problems to the Australian community in 2010 was conservatively estimated at \$14.352 billion, double the tax revenue from alcohol sales (\$7.075 billion). In terms of harm and ill-health:
 - it is estimated that 75% of all police responses in WA are alcohol-related;

- in 2014, an average of 12 ambulances a day were called to attend to Western Australians for the primary reason of alcohol intoxication (a total of 4,552 ambulance call-outs);
 - in 2014, there were 372 ambulance call-outs for alcohol intoxication for people aged 18 years or younger, including 10 children under 12 years, which equates to more than one WA child or teenager a day treated for alcohol intoxication by an ambulance; and
 - a study by the Australasian College for Emergency Medicine, which screened patients who presented to eight Australian and New Zealand emergency departments over one week in December 2014, revealed that overall, 1 in 12 presentations were alcohol-related and in peak times, 1 in 8 presentations were alcohol-related.
- 13 Supermarkets are places children and young people are likely to visit with or without their parents and the layout of the proposed liquor store means that children will be exposed to the sale and promotion of alcohol in places where they would not normally see it. According to MCAAY, the sale of alcohol within a supermarket has the potential for alcohol to be seen as part of a normal grocery shopping experience, which would appear to be the applicant's intent, as evidenced throughout its PIA. Although the applicant has indicated that juveniles loitering near the licensed area will be asked to move on, and no juvenile will be permitted in the licensed area unless accompanied by a responsible adult, MCAAY submitted that these controls are not sufficient. Research shows that alcohol promotion shapes young people's attitudes and behaviours, and contributes to the normalisation of alcohol use.
- 14 It was submitted that there is a commonly held, but flawed, belief that there would be benefits in moving to a "more European" approach, in which alcohol is widely available and children are introduced to alcohol at a young age which helps them learn to drink responsibly. However, this myth is not consistent with the available evidence. Recent research shows that young people who reported repeated drinking at home with their parents were more likely to report risky drinking in later adolescence than those who did not drink alcohol. It was submitted that increasing the availability of alcohol is likely to increase, rather than decrease, alcohol-related harms in Western Australia. It is important to also note that European countries including France, Italy and Spain experience higher rates of alcohol-related chronic diseases and road crashes than Australia.
- 15 ALDI's intention to sell very low priced alcohol at its stores was also a matter of concern for MCAAY. It was submitted that Woolworths and Wesfarmers are already in fierce competition when it comes to liquor prices, and the introduction of a third player may push the price of alcohol even lower, resulting in the greater economic availability of alcohol, and the potential increase in harm in the WA community. Research establishes that the price of alcohol has a significant impact on consumption and harm at the population level. When alcohol is more expensive, people drink less; and young

people are particularly responsive to price. It was submitted that ALDI is already aware of the appeal of cheap liquor to young people. In response to ALDI winning an award for its \$4.99 South Point Rose, the ALDI buying director said:

“We see our market as young consumers, and they might come in for a \$5 tempranillo, and they’ll think ‘well, I had a great experience, what else can I try?’”

- 16 According to MCAAY, packaged liquor accounts for 80.5% of all alcohol sold in Australia and the outlet density of packaged liquor facilities is positively associated with rates of assault, domestic violence, chronic disease and very heavy episodic drinking. A small percentage change in the availability of alcohol through packaged liquor outlets would be expected to have an identifiable impact on levels on alcohol consumption in WA. It was submitted that given the impact of cheap alcohol on alcohol-related harm, the introduction of another liquor outlet with such a strong focus on cheap alcohol may be harmful to the surrounding community, and in particular young people in the community.
- 17 It was submitted that the current situation in Western Australia is such that alcohol is generally not sold inside supermarkets with most liquor stores having separate registers and entry points from the supermarkets. Treating alcohol as just another ordinary commodity has the potential to negatively impact on the health and wellbeing of Western Australians.

Mostfun Enterprises Pty Ltd (Mostfun)

- 18 Mostfun objected on all of the grounds permitted under s 74(1) of the Act.
- 19 It was submitted that there are already three liquor stores at the Centre and a further five packaged liquor outlets elsewhere in Joondalup. In addition, there are two destination liquor stores in the locality, being Dan Murphy’s Joondalup and Dan Murphy’s Wanneroo. According to Mostfun, research demonstrates a strong correlation between liquor outlet density and alcohol-related harm in the community.
- 20 Mostfun also submitted that research indicates that the placement of alcohol alongside grocery items reinforces the idea that alcohol is a normal, non-harmful product and is comparable to other groceries and items purchased within a supermarket setting. This is particularly relevant in respect of children, who are acknowledged to be an ‘at-risk’ group for alcohol-related harm. Having liquor products available in a supermarket environment increases the reach of alcohol-related harm, as patrons, including children are more regularly exposed to alcohol products and to the sale and promotion of alcohol. A larger and more broad section of the public, including children, visit supermarkets due to the availability of a wide range of everyday ‘need’ items such as confectionary, snacks, soft drinks, fresh bread, milk, fruit and vegetable products.

- 21 According to Mostfun, ALDI will be providing cheap liquor which will add to the existing anti-social behaviour and alcohol-related problems currently being experienced in the Joondalup City Centre. It was submitted that the City of Joondalup has identified existing anti-social behaviour in the City Centre and developed a number of strategies to try and address the problem.

Executive Director Public Health (EDPH)

- 22 The EDPH intervened in the application to make representations regarding the risk of alcohol-related harm or ill-health specific to the application and the minimisation of that risk. The EDPH made submissions on the following:

- the association of the sale of packaged liquor with general supermarket goods, which can reinforce alcohol as a non-harmful product, and establish its cultural place as part of everyday life, shaping attitudes and behaviours towards alcohol;
- the association of alcohol products with grocery items can lead to increased consumption and harm;
- there is a relationship between price, consumption and harm, and ALDI Joondalup intends to provide the public with low priced liquor products; and
- if the licence is granted, the imposition of conditions that seek to separate alcohol from the general grocery items would be an important harm minimisation approach.

- 23 According to the EDPH, the integration of an alcohol browsing and sales area within the ALDI supermarket raises concerns regarding the potential for harm and ill-health to occur. Unlike separate dedicated liquor outlets, supermarkets are generally frequented by a larger and broader proportion of the population, including children, because of the daily 'need' type products for sale. ALDI's proposed manner of trade therefore increases the potential reach of alcohol-related harm due to the sale and promotion of alcohol in a setting and manner that would not normally occur in the community. It was also submitted that the applicant's proposed manner of trade has the potential to increase the exposure of alcohol to juveniles who may attend the store for general grocery supermarket items, either with or without a parent.

- 24 The EDPH also submitted that the integration of alcohol within the supermarket could lead to the normalisation of alcohol as an ordinary product similar to grocery items, which may result in increased consumption and harm. The perception of alcohol as an ordinary grocery product can lead to a view that alcohol is not a product that can contribute to harm, given the de-emphasis on the drug properties of alcohol in the retail setting. According to the EDPH, the continued exposure to the sale, promotion and use of alcohol, particularly when presented as an ordinary commodity, sends the message that alcohol is an important, necessary part of everyday life. Packaged liquor sales are linked to alcohol-related harm and ill-health and there is a correlation between price, consumption and harm, and in respect of this application, the applicant proposes to provide the public with low priced liquor products.

- 25 The manner and context in which alcohol is made available within the community shapes and reinforces the drinking culture, impacting on societal views of what is deemed normal in terms of drinking patterns and behaviour. Research literature indicates that limiting the sale of alcohol from within the supermarket environment is an important harm minimisation strategy.
- 26 The EDPH submitted that the ability to purchase alcohol alongside general grocery items could encourage impulse or unplanned purchasing as a result of convenience and 'visual reminders', with ALDI customers purchasing alcohol when they would otherwise not have been considering such purchases. For example, a study of New Zealand alcohol sales before and after the introduction of wine availability in grocery stores found the sales of wine increased by 17% at a time when consumption of other beverages did not change.
- 27 Research data also indicates that the sale of alcohol is price responsive, that is, a reduction in price can result in an increase in consumption, and vice versa. This is important given the applicant's proposal to generally provide low priced alcohol products, which may lead to increased consumption which could in turn impact on the health and wellbeing of not just those most at-risk, but also the broader community.
- 28 In view of the potential risks highlighted in his submissions, the EDPH submitted that if the application is granted, the following harm minimisation conditions should be imposed on the licence:
- there must be a dedicated point of sale within the liquor browse/display area for liquor sales only, with no grocery purchases permitted at the liquor checkout;
 - the liquor display and sales area must be separated from the food/grocery display and sale area by barricading of non-see-through material over 2 metres in height;
 - the entry/exit point to the licensed area must have a gate; and
 - the licensed area must be closed off when not open for trade.