

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: ALDI FOODS PTY LTD

PREMISES: ALDI WATTLE GROVE LIQUOR STORE

PREMISES ADDRESS: LOT 34 338 HALE ROAD, WATTLE GROVE

APPLICATION ID: A000196411

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 2 AUGUST 2016

Introduction

- 1 This is an application by ALDI Foods Pty Ltd ('the applicant' or "ALDI") for the conditional grant of a liquor store licence for premises to be known as ALDI Wattle Grove Liquor Store and located at Lot 34, Hale Road, Wattle Grove. 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. Ms Julie Stafford from the McCusker Centre for Action on Alcohol and Youth (MCAAY) lodged an objection to the application as permitted under ss 73 and 74 of the Act, while the Executive Director Public Health (EDPH) lodged a notice of intervention under s 69.
- 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.

Legislative framework

- 4 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 (refer s 38(2) of the Act). An applicant must therefore adduce sufficient evidence to discharge this burden.
- 5 In determining whether the grant of an application is 'in the public interest' I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
- 6 The burden of establishing the validity of any objection lies on the objector (s 73(10)), however, an intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321);

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- 7 The factual matters which I am bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5 (refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227).
- 8 The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;
 - to minimise harm caused to people, or any group of people, due to the use of liquor; and
 - 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.
- 9 The secondary objects of the Act are:
- to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
 - to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
- 10 The licensing authority is also entitled (but not bound) to take into account the factual matters set out in s 38(4) of the Act as part of the public interest considerations.
- 11 Section 16 provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case. The licensing authority should also act without undue formality and is not bound by the rules of evidence.
- 12 Section 33(1) provides that licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest. Further, s 33(2)(a) provides that an application may be refused, even if the applicant meets all the requirements of the Act. In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, EM Heenan J described the 'absolute discretion' provided for under s 33(1) in the following terms:

The 'absolute discretion' to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA356

[6] - [7] (Wallwork J) and Palace Securities v Liquor Licensing(1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231; (2002) 25 WAR 511, [52] - [55]; O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 and Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380, 400.

Overview of the evidence and submissions of the parties

The applicant

- 13 The proposed liquor store will be part of a new ALDI supermarket in Wattle Grove. The ALDI supermarket will be the anchor tenant at the newly constructed Wattle Grove Shopping Centre (the Centre).
- 14 The applicant seeks to licence a small browse/display area of approximately 30m² within the supermarket. The range of liquor products comprises a selection of wines, beers, spirits, ciders and liqueurs, which will include ALDI exclusive products, made-to-order for ALDI stores. The in-store liquor range, which may vary from time to time as new products become available, will generally consist of the following:
 - 60 different wines – red, white, sparkling and fortified;
 - 16 different beers – full medium and light strength;
 - 15 different spirits – bourbon, brandy, gin, scotch, vodka and liqueurs; and
 - 4 different ciders.
- 15 The licensed display area will take the shape of a square and the displays will form a simple U shape at the front of the store near the checkouts. The checkout nearest the browse/display area will be licensed. According to the applicant, this design enables convenience and a high level of surveillance of the area. The liquor area has no presence outside of the ALDI supermarket, as there is no external access, facade or signage.
- 16 There is no cool room or other refrigeration in the liquor area, with all products being stocked and sold at room temperature. It was submitted that this unique feature further confirms the intention that the liquor service is genuinely designed to complement the supermarket and provide a one-stop ALDI shop. It was submitted by the applicant that there are many aspects of the ALDI liquor store model which differ from other packaged liquor outlets:

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- the combination of the ALDI Liquor Store with the ALDI supermarket. A one-stop shopping convenience;
 - 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 the liquor store.
- 17 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA provided details on the intended manner of trade under the licence, demographic profile of the local community and addressed the matters set out in s 38(4) of the Act.
- 18 The locality surrounding the proposed liquor store includes the suburbs of Wattle Grove, Forrestfield, Kenwick, East Cannington, Welshpool and Beckenham; however the store is expected to draw the majority of its customers from Wattle Grove. In this regard, the suburb of Wattle Grove has nearly doubled in size since 2006 and is predicted to continue increasing onto the foreseeable future. Currently, there are no packaged liquor outlets in Wattle Grove. It was submitted that given this dramatic increase in population, there is a need for the number and range of service providers in the area to also increase to meet demand.
- 19 According to the applicant, the socio-economic data for the area indicates that it is comparable with the State average, if not slightly better, given the lower rate of unemployment and overall, a higher rate of weekly income.
- 20 In terms of existing outlet density, the applicant advised that there is a liquor store and two taverns in Forrestfield and a liquor store in Beckenham.
- 21 The applicant engaged the Patterson Research Group to conduct a survey of the consumer requirement for the proposed liquor store. In summary, this survey reflected strong community support for the grant of the application, with 80% of respondents who purchase package liquor indicating their possible use of the proposed store.
- 22 Consequently, it was submitted by the applicant that even though some liquor store licence applications have been refused, the licensing authority has seen fit to grant many new liquor store licences around the State and this confirms there is indeed scope for doing so where it is demonstrated to be in the public interest after consideration of each case on its own merits. In respect of this application, it was submitted that the benefits to the local community outweigh any potential negative impact that might result from the grant of the application.

The McCusker Centre for Action on Alcohol and Youth

23 It was submitted by MCAAY that the grant of the application would not be in the public interest due primarily to the concern that the sale of alcohol inside a supermarket may contribute to normalising alcohol use among young people. There are also concerns about the potential negative impact on 'at risk' groups within the locality, because it is indicated in the applicant's PIA that:

- the proportion of young people aged 14 years or younger is higher within the locality than the State average (21.8% vs 19.7%);
- the proportion of young people aged 19 years or younger is higher in the locality than the State average (28.55 vs 26.3%);
- the average age of persons in Wattle Grove specifically, and the locality is lower than the State (Wattle Grove – 31; locality – 34; WA – 36); and
- the proportion of couple families with children is much higher within the locality than the State average (47.5% vs 44.9% and even higher in Wattle Grove (53.6%).

24 Whilst acknowledging that the applicant has sought to introduce a small degree of separation between the licensed area and the rest of the supermarket, it was nonetheless submitted by MCAAY that the proposed layout of the liquor display area inside the supermarket would contribute to the normalisation of alcohol through the treatment of alcohol as a normal grocery item.

25 According to MCAAY, alcohol is no ordinary commodity such as bread or milk, and the sale and use of alcohol comes at an enormous 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.

- 26 Consequently, 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. It was also submitted that supermarkets are a place where children and young people are likely to visit with or without their parents and the layout of the proposed liquor store means children will be exposed to the sale and promotion of alcohol in places where they would not normally see it. 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.
- 27 According to MCAAY, the current situation in Western Australia is such that alcohol is not sold inside supermarkets. Liquor stores have separate registers and entry points from supermarkets. MCAAY believes it is important that this situation remains in place in WA. The grant of this application would set a precedent for the sale of alcohol within other WA supermarkets. 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. There is also increasing concern in France for example, about binge drinking by young people.
- 28 MCAAY also expressed concern about ALDI's intention to sell very low priced alcohol at its stores. 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?’

- 29 Although the applicant will only have a limited range of stock, certain products may be in high demand due to their low cost and this could lead to a large volume of these products being stocked and sold at the store.
- 30 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.

The Executive Director Public Health

- 31 The EDPH intervened in the application to make representations that:
- 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;
 - the association of alcohol products with everyday grocery items can lead to increased consumption and harm;
 - there is a relationship between price, consumption and harm, and ALDI Wattle Grove intends to provide the public with low priced 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.
- 32 It was submitted by the EDPH that 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. The applicant’s proposed manner of trade therefore increases the potential reach of alcohol-related harm because of 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.

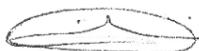
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- 33 Further, the EDPH submitted that the integration of alcohol within the supermarket could lead to the normalisation of alcohol as an ordinary product similar to grocery items, which may result in increased consumption and harm. The perception of 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 the applicant proposes to provide the public with low priced liquor products.
- 34 The EDPH also noted that 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.
- 35 The EDPH submitted that impulse and unplanned purchases of alcohol may also be encouraged as a result of convenience and 'visual reminders', with ALDI customers purchasing alcohol when they would otherwise not have been considering such purchases. Studies have claimed 44% of alcohol purchases are unplanned and much of what is classified as impulse buying should be termed reminder/suggestion purchasing. 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.
- 36 Research literature has shown an increase in alcohol consumption and harm when alcoholic products are sold from within supermarkets, therefore it was submitted by the EDPH that limiting the sale of alcohol from within the supermarket environment is an important harm minimisation strategy.
- 37 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.

Determination

- 38 The onus falls upon the applicant to satisfy me that the grant of the application is in the public interest: s 38(2). In this regard, I am required to consider the application in the context of the objects of the Act.
- 39 The applicant seeks to establish a small packaged liquor outlet adjacent to the checkouts of an ALDI supermarket which will be built as part of the new Wattle Grove Shopping Centre development. The browse/display area will be segregated from the grocery and household items of the supermarket. There are currently no packaged liquor outlets in the suburb of Wattle Grove, which is dissected by Tonkin Highway and bounded by Roe Highway to the north. This requires residents to traverse these highways in order to access a packaged liquor outlet in either Forrestfield or Beckenham.
- 40 Although the suburb of Wattle Grove has a higher percentage of children and young people compared to the State average, overall, the locality surrounding the proposed liquor store is not disadvantaged as evidenced by the SEIFA index, with a lower rate of unemployment and higher rate of weekly income compared to the State average. The applicant's evidence indicates that whilst there is some crime occurring in the locality, the rate of criminal activity in Wattle Grove is low.
- 41 There is good community support for the grant of the application, as evidenced by the applicant's survey data, which is objectively reasonable given the lack of existing packaged liquor outlets in Wattle Grove and the level of inconvenienced currently experienced by shoppers in the area. The suburb of Wattle Grove has nearly doubled in size since 2006 and is predicted to continue to grow into the foreseeable future. The new Wattle Grove Shopping Centre will provide retail services to this growing population.
- 42 Although the applicant submitted that the grant of the application will provide one-stop shopping convenience for ALDI customers, in my view, the applicant is confusing the concept of one-stop shopping as discussed by Buss JA in *Woolworths v Director of Liquor Licensing* [2013] WASCA 227, with one-trolley shopping as alluded to by the Court of Appeal in *Woolworths (WA) Limited v Liquorland (Australia) Pty Ltd, Jeffrey Charles Digwood & Ors* WASC 119 of 1993. However, given the facts and circumstances of this application, nothing turns on this point.
- 43 One of the objects of the Act is to cater to the requirements of consumers for liquor and related services, whilst having regard to the proper development of the liquor industry: object 5(1)(c). In the context of the evidence submitted by the applicant in this case, I find that the grant of the applicant would be consistent with object 5(1)(c). I note that what the applicant proposes in terms of the provision of packaged liquor is not merely duplicating existing liquor services in the area or in the new Wattle Grove Shopping Centre.

- 44 However, in view of the evidence submitted by the objector and intervener, the normalisation of alcohol amongst young people and the integration of alcohol within a supermarket environment is a matter for genuine concern, particularly in the context of the harm minimisation object of the Act: object 5(1)(b). The provision of mainly cheap liquor is also a matter for consideration, due to the evidence which establishes a link between price, availability and harm in the community. Nonetheless, it should be noted that the Act is not predicated on a concept of prohibition and object 5(1)(b) is directed towards minimising alcohol-related harm, not the prevention of harm absolutely (refer Ipp J in *Executive Director Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258). The word 'minimise' is consistent with the need to weigh and balance the competing interests in any given case.
- 45 In assessing the risks associated with the grant of this application, I must assess the risk, not in some abstract sense, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made (refer Wheeler J in *Executive Director Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- 46 Although the grant of the application may pose some risk to the local community, particularly in view of the evidence submitted by the objector and intervener, in weighing and balancing the competing interests in this application, I am satisfied that the positive benefits to the local community outweigh the potential risks and the grant of the application is therefore in the public interest. I arrive at this conclusion taking into account the proved circumstances of the particular area in relation to which the application is made, as briefly summarised at [39] to [41] above.
- 47 Consequently, I am satisfied that the applicant has discharge its onus under s 38(2) of the Act and therefore the application is approved. However, it should be borne in mind that alcohol is no ordinary commodity and should not be perceived as just another grocery item. The sale, supply and consumption of alcohol is regulated for good reason. While most people consume alcohol responsibly, the abuse of alcohol results in a significant burden on the community in terms of disease, crime, violence and death. As point out by MCAAY, the direct cost of alcohol-related problems to the Australia community in 2010 was estimated at \$14.352 billion.
- 48 In response to the concerns raised by MCAAY and the EDPH, the applicant submitted that the liquor area will be physically separated and segregated from the remainder of the supermarket and only one checkout will be licensed. To ensure the segregation of the liquor store from the general supermarket and mitigate some of the risks identified by MCAAY and the EDPH, I am of the view that the licence should be subject to the following conditions:
- 1) The licensed browse/display area must, other than the entrance, be separated from the supermarket by a solid fixed and non-transparent structure of at least 2.5 metres high.

- 2) All liquor must be paid for before the patron leaves the licensed premises.
 - 3) The licensee is prohibited from selling refrigerated liquor products.
 - 4) There is to be no external advertising of liquor products on the facade of the licensed premises.
 - 5) The browse/display area is to be closed off when not open for trade.
- 49 Therefore a liquor store licence is conditionally granted to the applicant subject to the following:
- (a) a Certificate under s 39 of the Act being lodged before the operation of the licence;
 - (b) compliance with the Local Government Act 1960, Health Act 1911 and any written law relating to the sewerage and drainage of these premise;
 - (c) all work being completed within 12 months in accordance with the plans and specifications dated 29 February 2016.
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements being satisfactorily completed and the Director of Liquor Licensing being notified in writing at least 21 days prior to applicant wishing to trade under the licence;
 - (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the applicant seeking confirmation of the grant on or before **1 August 2017** pursuant to s 62(4)(c) of the Act.
- 50 Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
- 51 The applicant is reminded that trading **may not** commence without the prior written approval of the licensing authority.
- 52 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.
- 53 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