

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

**REASONS FOR DETERMINATION OF MR EDDIE WATLING (DEPUTY
CHAIRPERSON) AND MR MICHAEL EGAN (MEMBER)**

Background

- 1 On 4 February 2016, the Liquor Commission of Western Australia (“the Commission”) determined to refuse an application lodged by Australia Leisure Hospitality Group Pty Ltd (“the applicant”) under the *Liquor Control Act 1988* (“the Act”) for approval to redevelop the Peninsula Tavern, Maylands and accompanying BWS bottle shop at 233 Railway Parade Maylands (“the Commission’s original decision”).
- 2 The details of the application are set out in the Commission’s original decision (decision reference LC 03/2016).
- 3 On 30 March 2017, the Supreme Court of Western Australia upheld an appeal against the Commission’s original decision, and on 31 March 2017 ordered that the decision be quashed and be remitted for reconsideration pursuant to section 28(5)(c) of the Act (*Australian Leisure & Hospitality Group Pty Limited v Commissioner of Police* [2017] WASC 88 (“the Supreme Court decision”)).
- 4 On 6 June 2017, the Commission made orders relating to the reconsideration of the remitted decision, including orders for the filing of further evidence and submissions.
- 5 The Commission conducted a hearing on 26 April 2018.
- 6 The reconsideration of the remitted decision necessitates a consideration of all the materials relating to the original application, the Supreme Court decision and the new evidence and submissions subsequently received from the parties.
- 7 Much of the evidence and many of the submissions of the various parties are summarised in the Commission’s original decision.

Submissions on behalf of the Applicant

- 8 In addition to relying upon:
 - a. the original evidence submitted to, and submissions made at the initial hearing before, the Commission; and
 - b. the further evidence and submissions filed by the applicant pursuant to the orders of the Commission of 6 June 2017,the applicant submits that, in the broadest terms, the Supreme Court determined that the appeal against the Commission’s original decision be upheld because:

- a. the Commission's original decision reflected error in the proper understanding and application of the statutory object mandated by section 5(1)(c) of the Act; and
 - b. the Commission failed to afford the applicant procedural fairness by failing reasonably to give the applicant notice of the significance of the concern relating to the impact of traffic movements.
- 9 In this respect, the applicant references the particular grounds upon which the appeal succeeded in relation to section 5(1)(c), specifically:
- a. In assessing whether the application was in the public interest, the Commission misconstrued its statutory function in applying the primary and secondary objects of the Act by:
 - (i) requiring the applicant to demonstrate that the application satisfied an overwhelming or strong requirement of consumers for liquor and related services in the form proposed by the application; and
 - (ii) failing to take into account of the requirements of consumers by reference to the proper development of the liquor industry.
 - b. In assessing whether the application was in the public interest, the Commission failed properly to exercise its statutory function by giving proper, genuine and realistic consideration to the manner in which the application contributed to the objects of the Act by:
 - (i) constituting a significant new and qualitative different (as opposed to merely bigger) development in liquor retailing in the locality;
 - (ii) reference to the notorious success of Dan Murphy's in other locations, the reasons for that success and the inferences that can be drawn from those reasons in circumstances where the Commission found that those other locations shared similar demographic features as the locality the subject of the application;
 - (iii) providing such a facility within a significant and otherwise self-contained inner-city suburb;
 - (iv) the positive impact on the amenity of the locality arising from the redevelopment of and improvements to premises and in particular the evidence that:
 - the population of the locality grew from 26,857 in 2006 to 31,345 in 2014 and is projected to reach 120,000 by 2031; and
 - a large format liquor store such as a Dan Murphy's is well suited to a trade area population of over 40,000 persons.
 - c. In assessing whether the application was in the public interest, the Commission erred by failing to take account of, or give proper consideration to, relevant factors, namely those factors set out in Ground 2 (referred to in paragraph (b) above).

10 The applicant submits that section 5(1)(c) of the Act requires the Commission to have regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for the requirements of consumers for liquor and related services, and that consumer requirements are not to be considered independently of those matters.

11 The applicant also highlights the conclusion of Baker-Smith J at paragraph [101] of the Supreme Court decision:

'Whilst the Commission may not view all matters raised by the appellant to be relevant to its decision making process, it is obliged to turn its attention to catering for consumer requirements and with regard to proper development. Some matters will be particularly important in that process. It is not appropriate that the court prescribe what they might be. It is a matter for the Commission and will depend upon the circumstances of any application. However, in this case, it would seem that the changing demographic of the community and the introduction of a different offering in terms of consumer choice and diversity are important matters for evaluation and the Commission ought to have proper regard to them, which means not only stating conclusions but revealing an analysis of the relevance of those matters.'

12 In support of the applicant's innovative business model and the success of the Dan Murphy's liquor stores, the applicant points to the following reports and materials published since the originating application was made:

- a. Australian Consumer Drinking Habits and Trends 2017 Preferences and Trends;
- b. Australian Food and Drink Report Q1 2017;
- c. State of the Industry Report March 2016;
- d. Roy Morgan Research; and
- e. House of Brands Survey September 2013 to June 2015.

13 Further, the applicant refers to a MGA Town Planner's Report submitted in evidence dated July 2017 ("updated MGA Report"), which:

- a. shows that the population has increased in each suburb comprising the locality between 2001 and 2016, with the total population in the locality increasing by 5.1%; and
- b. supports the proposition the locality is continuing to experience 'gentrification' as a result of proximity to the Perth CBD and Swan River.

14 With regard to the Commission's initial findings and observations, the applicant makes various submissions by reference to the further evidence submitted subsequent to the Supreme Court decision, including, but not limited to:

- a. *The location of the proposed Dan Murphy's store in relation to the Maylands town centre*
By reference to the updated MGA Report evidencing that the proposed redevelopment is approximately 100m (walking distance) from the IGA Express supermarket on Eighth Avenue (on the opposite side of the railway line separating the proposed redevelopment from the Maylands commercial centre), the applicant submits that:
- (i) the proposed redevelopment, and the proposed Dan Murphy's liquor store are a distance comparable to that normally covered by customers visiting an enclosed shopping centre; and
 - (ii) as a consequence, customers would be able to undertake their grocery and liquor purchases as part of one shopping experience.

Additionally, in support of this contention, the applicant points to the statement in the Maylands Activity Centre Urban Design Framework to the effect that the railway reserve precinct plays a significant role in the connectivity of the land uses (either side of the reserve) and that while the physical connection (between the applicant's premises and the main commercial centre of Maylands) is limited to a pedestrian underpass (i.e., under the railway line) the visual relationship across the reserve provides a sense of attraction between the two sides of the reserve.

b. *Traffic Impact*

Again, by reference to an updated traffic assessment dated July 2017 ("updated Riley Report"), the applicant submits that the proposed redevelopment will not impact adversely on the surrounding road network as the updated Riley Report demonstrates that the forecast traffic volumes are well below the recommended 10% capacity, being 5%, 3% and 2% for Ninth Avenue, Railway Parade East and Railway Parade West respectively, with Railway Parade being classified as a "district distributor A" road.

c. *Benefit of the Dan Murphy's to the redeveloped tavern*

The benefits that the Dan Murphy's store would be expected to bring to the proposed redevelopment have been further outlined by the applicant's National Property Manager and are stated to include:

- (i) customers being offered a broad range of wines, spirits, craft beers, ciders and ready to drink premixes while they visit the tavern for a meal; and
- (ii) the tavern manager having flexibility to create an interesting and more appealing wine list that is able to be changed on a more regular basis.

d. *Interface Management Plan*

Building on its commitment to engage with the community and groups and persons with an interest in the proposed redevelopment, the applicant submits it has sought to further address the concerns expressed by those groups and persons by taking additional steps to implement the Interface Management Plan ("the IMP") proposed in the originating application.

The IMP was developed having regard to the experience of the applicant and Woolworths in implementing a similar plan in a similar demographic area to Maylands, i.e. in Nowra, NSW.

The applicant provided a copy of the IMP and the project information pamphlet to stakeholders, and the applicant's National Property Manager invited those stakeholders to contact him to discuss their concerns.

The applicant has also offered to contribute a \$50,000 one off payment, followed by a \$5,000 annual payment, to the City of Bayswater to assist with the practical implementation of harm minimisation strategies identified to improve security, such as the strategies detailed in the 2017 Crime Prevention through Environmental Design Report completed by the respondents.

e. *Harm and Ill Health*

Further to the evidence relating to the harm and ill-health impacts already submitted in support of the application, the applicant submits that the additional evidence provided by the Chief Health Officer ("the CHO") in regard to alcohol related hospitalisations applicable to the locality are potentially inaccurate on the basis that they are presented as whole numbers rather than aetiological fractions calculated through a variety of sources.

According to the applicant, a further issue identified in the expert report is that the complex calculations for arriving at these fractions are unknown and their accuracy is unable to be verified.

Other evidence highlighted by the applicant includes:

- (i) the studies into the impact of the Balga, Albany and Mandurah Dan Murphy outlets and the conclusion that neither the emergency department nor the road crash analyses suggest any statistical significant changes that might be associated with the introduction of the Dan Murphy's liquor stores;
- (ii) the critique of the research into the relationship between, and the effects of, the availability of alcohol on levels of harm and ill-health submitted by the applicant in the Leisure Inn Hotel Rockingham Redefinition/Alteration;
- (iii) an article entitled "Alcohol Outlet Density: the challenge of linking research findings to policy - 2014" which provides a brief summary of research literature that links the density of alcohol outlets at a local level to alcohol related problems and highlights the research limitations involved in linking an increase in alcohol availability to an increase in alcohol related harm;
- (iv) an article in *The Age* newspaper in 2015 titled "*Inner-city liquor freeze has no impact on alcohol harm*" which contends that a freeze to liquor licences across inner Melbourne failed to make any significant impact on alcohol related health problems;
- (v) the comprehensive social impact statement titled "Social Impact Statement – Liquor Licence Redefinition: Leisure Inn Rockingham" submitted in evidence in that application which examined, among other things, the relationship between outlet density, availability, price and harm;

- (vi) a community survey conducted in Ballina, NSW which identified that very few people changed the manner in which they consumed alcohol during the period in which Dan Murphy's had operated; and
 - (vii) a report titled "Factors that Foster or Inhibit Alcohol-related Violence" in which it is contended that there is no simple causative relationship between alcohol consumption and violence.
- f. *Proximity of the proposed Dan Murphy's store to the Train Station and other places frequented by at risk persons*
- In response to the concerns expressed by the interveners and objectors to the application, including the various providers of services to "at-risk" members of the community ("the Service Providers"), that the proximity and visibility of the proposed Dan Murphy's store from the train station will present a serious risk of an increase in the level of alcohol related harm and ill-health, the applicant submits that there is already a liquor store with highly visible large signage proximate to the train station in the form of the current Peninsula Tavern BWS liquor store.
- Further, the applicant submits that the current meeting place frequented by at-risk persons, known as The Rise, is closer to two existing liquor stores than to the Peninsula Tavern.
- g. *Ms Lisa Baker, MLA, Social Media Campaign/Survey*
- The applicant submits that the survey initiated by Ms Baker seeking views and feedback from members of the local community in respect of the proposed redevelopment should be disregarded on the basis that the survey was not properly constructed, independently conducted or objective. The applicant also contends that the survey presents inaccurate information and points out that the statements provided are neither signed nor dated by the apparent respondents.
- h. *Ancillary Benefits*
- In addition to the evidence accompanying the originating application of the benefits expected to flow from the proposed redevelopment, the applicant highlights the further evidence, filed in support of the application, of the expected ancillary benefits, including the employment, training and tourism benefits, should the application be granted.

Evidence and submissions from the CHO

- 15 Subsequent to the Supreme Court decision, the CHO filed additional evidence comprising updated data relating to alcohol treatment episodes and alcohol-related hospitalisations as well as a range of articles and reports in response to claims made by the applicant in support of the application, including but not limited to, the following:
- a. an article titled "Are Alcohol Outlet Densities Strongly Associated with Alcohol- related Outcomes" – A Critical Review of Recent Evidence (2016), 35 Drug and Alcohol Review 55-57;

- b. an article titled “A Critique of (Dr Anne) Fox’s industry-funded report into the Drivers of Anti-social Behaviour in the Night-time Economies of Australia and New Zealand (2016), Society for the Study of Addiction;
 - c. a statement of Dr Michael Livingston dated 14 August 2017;
 - d. a statement of Dr Tanya Chikritzhs dated 21 August 2017; and
 - e. an epidemiological review and report entitled “A Study of the Balga, Albany and Mandurah Dan Murphy’s Outlets in Western Australia (2011)”, Department of Health, Western Australia.
- 16 The CHO also refers to the statements from a number of Service Providers in the locality, and highlights the updated statements obtained by the Commissioner of Police (“the Police”) from representatives of those Service Providers as evidence of the potential for an increase in alcohol related harm should the application be granted.
- 17 Having regard to the totality of the evidence, including the new evidence filed since the Supreme Court decision, the CHO submits that it remains open to the Commission to find that:
- a. the physical characteristics and manner of promotion and operation of the proposed Dan Murphy’s store will be markedly different from the existing BWS bottle shop and that the impact of the proposed Dan Murphy’s liquor store is likely to be more significant and wide ranging;
 - b. in addition to sections of low socioeconomic and disadvantaged people living in the locality, there are at-risk groups who may be considered to be particularly vulnerable to the harms associated with low cost and readily available alcohol;
 - c. the size and design of the proposed Dan Murphy’s store, the brand positioning, lowest price guarantee for alcohol types and discounts on bulk purchases will result in the sale of more liquor, including unplanned and opportunistic purchasing and the consequential consumption of more liquor within the locality;
 - d. the low price positioning of the proposed store will have an impact on low income areas where the vast majority of consumers will attempt to maximise quantity of purchase for a given dollar amount and will have a particular impact on heavy or high volume drinkers, as well as the broader community;
 - e. time and inconvenience may not be a factor for those people who are motivated to acquire the most liquor at the cheapest price;
 - f. the marketing and brand positioning of the proposed Dan Murphy’s store as a provider of the lowest cost alcohol, the provision of a wide range of cheap alcohol and the likelihood the clients of Service Providers are on limited incomes all point to the fact the price of alcohol available is likely to be a more significant purchasing consideration than any inconvenience that may be experienced by, for example, an extended journey to the store; and

- g. the clients of Service Providers identified amongst the evidence will be attracted to the proposed Dan Murphy's store because of its reputation as a provider of alcohol at the cheapest price, even at additional inconvenience, to maximise the purchasing power of their, often limited, financial resources.
- 18 Consistent with above findings, the CHO submits it is also open to the Commission to find that the likelihood of an adverse impact of the proposed Dan Murphy's store on clients of the Service Providers identified in the evidence will be high and the extent of the potential harm significant, not only to the individuals concerned, but also to the agencies responsible for running their programs and the community in general.
- 19 Consequently, the CHO submits that the potential resultant harm and ill-health to these at-risk groups is likely to be a significant factor to be weighed in the balancing exercise by the Commission in determining the application.

Evidence and submissions from the Ms Lisa Baker MLA

- 20 On 28 July 2017, Ms Baker submitted further evidence in support of her original objection consisting of:
- a. the results of an Online survey, Postal survey and Phone survey;
 - b. statements from:
 - (i) the City of Bayswater;
 - (ii) AFL Pty Ltd, licensee of De Vine Cellars, bottle shop and liquor store in the Maylands commercial centre;
 - (iii) 55 Central, a provider of services to the homeless and people at risk of homelessness, including crisis accommodation and community support ("55 Central");
 - (iv) CROFT, a not-for-profit organisation that supports homeless men and women by providing crisis accommodation ("CROFT");
 - (v) the Shopfront, a drop-in referral centre for people living with homelessness, mental health conditions and alcohol and drug addiction ("the Shopfront");
 - (vi) St Luke's Anglican Church; and
 - (vii) the Salvation Army; and
 - c. a report titled, *Crime Prevention Through Environmental Design, Audit Maylands Business District – January 2017*.

- 21 Ms Baker submits that section 40 of the Act requires the application for the change in use or condition of any licensed premises to be supported by a certificate from the local authority, and refers to a statement by the former Mayor of the City of Bayswater in which he indicates:

'The City of Bayswater does not support the Dan Murphy's liquor store proposed for the Peninsula Tavern site located at 223 Railway Parade in Maylands in Maylands...The community has expressed ongoing anxiety about the potential for alcohol related anti-social behaviour and its impact on community safety within the Maylands town site, particularly given the scale and nature of the proposed liquor barn.'

'The concerns and objections of residents, raised in response to the development application for the Dan Murphy's store, prompted the City to initiate Amendment 50 to the City's Town Planning Scheme 24.'

- 22 Amendment 50 defined liquor stores large and small by reference to size (above or below 300m²) and the accompanying liquor licence, namely a liquor store licence; however, notwithstanding this amendment, the Joint Development Assessment Panel approved the proposed redevelopment on the basis it was a redevelopment of premises operating under a tavern licence (not a liquor store licence).
- 23 A further amendment to the Town Planning Scheme, Amendment 74, approved in August 2017 amends the definition of liquor stores large and small to apply to premises able to sell packaged liquor under any category of licence and would, if the current application were lodged subsequent to this amendment, extend to the applicant's licensed premises and the proposed development.
- 24 Ms Baker also points out that under the Act a hotel is not permitted to have a separate business selling only packaged liquor, as she contends is the case with Dan Murphy's liquor stores operating from hotel premises owned by the Australia Leisure Hospitality Group Pty Ltd.
- 25 In response to the community consultation session undertaken by the applicant in September 2017, Ms Baker submits that the consultation did not give due consideration to the concerns of stakeholders on the size of the Dan Murphy's store, giving the appearance that the process was tokenistic as previous community concerns had not been reflected in any changes made.
- 26 In her lengthy submission, Ms Baker refers to the high concentration of liquor outlets in the locality, the demographic profile of the area and the potential negative impact on the nearby Service Providers and submits that the locality of Maylands is identified by Curtin University and Central 55 as one of the three 'hot spots' for street drinking and associated problems in the metropolitan area.
- 27 In response to the applicant's submission that the survey undertaken on behalf of her constituents was not properly conducted, Ms Baker contends that the survey was initiated at the request of many community members, that it provided the facts relating to the proposed redevelopment and that it gave the community an option to comment if they had an alternative view.

- 28 According to Ms Baker, it is clearly evident from her survey as well as the survey undertaken by the applicant that while members of the local community do not have an issue with the redevelopment of the Peninsula site, they do have an issue with the size of the proposed Dan Murphy's liquor store.
- 29 Ms Baker submits that the offer by the applicant of an upfront payment of \$50,000 to the City of Bayswater with a further annual payment of \$5,000 for the benefit of local community organisations assisting at-risk groups is a clear acknowledgement that there is already an existing problem in the locality with alcohol-related harm. In any event, Ms Baker submits, such an amount grossly undervalues the cost of services and support provided by not-for-profit community based organisations dealing with addiction and alcohol related harm.
- 30 In summary, Ms Baker submits that the likelihood of adverse impacts of the proposed redevelopment on the clients of the Service Providers is high and the potential harm is significant, not only to the individuals concerned, but also to the general community, and requests that the Commission uphold its original position and refuse the application.

Evidence and submissions from the Police

- 31 The Police have previously expressed minimal concerns regarding the upgrading of the tavern component of the proposed redevelopment, but submit that the negative effects of the intended manner of trade and marketing of the proposed Dan Murphy's store are not in the public interest, particularly in light of the locality. The Police are, therefore, opposed to the expansion and rebranding of the BWS store to a Dan Murphy's store.
- 32 Having considered the further evidence submitted by the applicant, the Police submit that there is no basis for the Commission to disturb the findings made in the Commission's original decision.
- 33 The Police have filed various witness statements from representatives of the Service Providers which deal with the various at-risk groups in the locality, namely, statements from:
- a. Mr Damien Walsh, the Director of Shopfront;
 - b. Mr Peter Duncan, the Manager of Non-Residential Services at Cyrenian House, an agency which provides alcohol and other drug treatment services ("Cyrenian House");
 - c. Mr Stephen Conway, the Parish Priest at St Luke's Anglican Church in Maylands;
 - d. the Manager of CROFT; and
 - e. Ms Maria McAtackney, the Chief Executive Officer at Nyoongar Outreach Services.

- 34 The Police submit that the evidence of the Service Providers is blunt and reinforces the original findings of the Commission. In the view of the Police, it is clear from the Service Providers' statements that they are:
- a. opposed to the proposed Dan Murphy's store on the basis of the large volume of alcohol and cheaper liquor prices that the store would bring to the locality, with the price of alcohol being a significant attraction to at-risk persons which is likely to result in higher rates of drinking;
 - b. opposed to the proposed Dan Murphy's opening time, which is earlier than the existing BWS store, on the basis this may result in at-risk persons drinking earlier, adversely impacting the services the Service Providers provide; and
 - c. concerned about the adverse harm impacts given the close proximity of the proposed Dan Murphy's store to the train station.
- 35 In reference to the Commission's original decision, the Police submit that the Commission criticised the applicant's contention that its IMP would manage the risk to the at-risk groups when there had been no consultation or engagement about the plan, its operation or its likely effectiveness with the Service Providers.
- 36 In response to the applicant's further evidence on the IMP, the Police submit that it is evident from the statements of the Service Providers that the applicant neither consulted, nor engaged, with the Service Providers:
- a. in the 398 days between 25 February 2016 (the date on which the applicant lodged its appeal against the Commission's original decision) and 30 March 2017 (the date of the Supreme Court decision); or
 - b. in the further 124 days between 30 March 2017 and 1 August 2017 (the date by which the Commission ordered all further evidence in the application to be filed).
- 37 Further, the Police submit that it was only on or about 14 August 2017, after the Police served on the applicant copies of the statements of the Service Providers in which the applicant's failure to engage with the Service Providers was noted, that the applicant sent copies of a two (2) page form letter to each of the Service Providers, attaching a copy of its IMP.
- 38 Moreover, supplementary statements from the Service Providers indicate that the Service Providers do not consider the IMP genuinely addresses the concerns they have expressed about the proposed Dan Murphy's store and that a subsequent proposed meeting with the Service Providers by the applicant was only scheduled after the close of evidence.
- 39 In any event, the Police submit, the view of the Service Providers is that the IMP would be ineffective in mitigating the harms that would be caused by the proposed Dan Murphy's store, harms that, in the view of the Service Providers, would result from the availability of cheap alcohol, the sale of alcohol in bulk, the location and opening hours of the proposed liquor store, shoplifting, and the inability of the applicant to manage problems beyond the boundary of the licensed premises.

- 40 The Police point out that the evidence filed by the applicant on the traffic impacts of the proposed redevelopment indicates that traffic movements would more than double from the current level - an increase of 101.95% - and that it is open to the Commission to find that such an increase, even assuming an improvement in residential amenity due to late night traffic, would negatively impact the amenity of the locality and/or cause offence, annoyance, disturbance or inconvenience to people who reside or work in the vicinity.
- 41 The Police note that it is not erroneous for the Commission to consider whether granting the application would cater for the requirements of consumers for liquor and related services; rather, it is only erroneous to consider the requirements of consumers in isolation without regard to the developmental significance of the application (section 5 (1)(c) of the Act and Supreme Court decision).
- 42 In considering the developmental significance of the application, the Police respond to the material and submissions presented by the applicant as follows:

a. *Unique offering of the proposed Dan Murphy's store*

The Police accept that the proposed Dan Murphy's store would stock a wider range of products than are currently available in the locality, which would bring marginal benefits to the locality and, therefore, promote the object of section 5(1)(c) of the Act.

However, this benefit should not be overstated as the sales data for Dan Murphy's stores in North Perth, Morley, Midland and Balga shows relatively common purchases across these stores, and liquor purchase patterns in Maylands would be expected to be much the same, delivering a marginal benefit only as consumers are likely to simply buy more of the existing products already supplied at the existing BWS, but at cheaper prices.

Furthermore, and importantly, the availability of cheaper alcohol at the proposed Dan Murphy's store will undoubtedly result in a significant detriment in terms of the serious harm and ill-health caused to the various at-risk groups in the locality.

In addition, bearing in mind that on the applicant's own evidence consumers generally drive to Dan Murphy's stores, for those consumers who wish to sample a wider product range, this option is already available at minimal inconvenience at the surrounding Dan Murphy's stores, with the Dan Murphy's Hyde Park store 4.4 km away, and the Dan Murphy's Morley store 5.6 km away.

b. *Change in retail culture*

The Police submit that there is no evidence (as opposed to assertions) that opening the proposed Dan Murphy's store earlier than the current BWS store would contribute to a positive change in retail culture as submitted by the applicant. In fact, the evidence of the Service Providers is that it would be undesirable to open the liquor store earlier.

c. *Introduction of responsible management practices*

Whilst the Police accept the applicant has responsible trading and staff training policies and procedures, and, if the application were granted, would operate in accordance with those policies and procedures, the Police point out that the applicant is currently the

operator of the Peninsula tavern and that, in this respect, any additional benefit would be marginal.

Attraction of people to the Maylands entertainment precinct and flow on benefits

The Police refer to the finding of the Commission in the Commission's original decision that there is limited evidence to support a proposition the proposed development would lead to flow on benefits in terms of future development in the immediate area, and submit that, in any event, such considerations are not contemplated by section 5(1) and (2), or section 38(4) of the Act and are, therefore, irrelevant.

The Police further submit that, even if potential flow on effects were relevant, no new evidence has been filed to cause the Commission to remake its findings in the Commission's original decision, where the Commission effectively concluded, in respect of this issue, that there will be marginal flow on benefits only from the proposed development.

d. *Changing the attitude of consumers and drinking culture*

In response to the applicant's contention that the introduction of Dan Murphy's stores have, and have the potential to, change drinking culture, the Police refer to the earlier finding of the Commission, specifically:

'...the Commission has not been presented with any credible evidence to demonstrate that the brand positioning and advertising of Dan Murphy's has contributed to a change in the Australian drinking culture to one more akin to the Mediterranean drinking culture',

and, again submit that there has been no further evidence filed which would cause the Commission to re-make this finding.

43 In summary, the Police submit that:

- a. assessed against the primary object, section 5(1)(c), of the Act, granting the application would bring marginal benefit;
- b. however, having regard to the primary object, section 5(1)(b), of the Act, it is clear that significant harm or ill-health would result from granting the application;
- c. in weighing and balancing the relevant considerations (including the other objects of the Act, and the matters specified in section 38(4)), it is clear that the granting of the application is not in the public interest; and
- d. consequently, the Commission should remake the finding that:

'...the Commission is not persuaded that the benefits of the proposed development as enunciated by the applicant outweigh the serious potential harm and ill-health that is likely to be caused to the various 'at risk' groups in the locality'; and

- e. the application should be refused.

Evidence and submissions from the City of Bayswater (“the City”)

- 44 Whilst not a party to the initial hearing of this application, the City lodged a Notice of Intervention on 18 April 2018 and was represented at the re-hearing.
- 45 The City’s Notice of Intervention indicates that two amendments have been made to the City’s Town Planning Scheme No 24 (“TPS 24”) which relate to liquor stores, specifically, scheme amendments 50 and 74 (referred to at paragraphs 22 and 23 above).
- 46 According to the City, these scheme amendments were introduced to provide more certainty and clarity on the City’s position on liquor stores as a result of community concerns, particularly in relation to large format liquor stores and their impact on the local area.
- 47 The City advises that amendments 50 and 74 have resulted in large liquor stores, as defined under TPS 24, becoming a prohibited use at the site on which the proposed redevelopment is situated, which falls within Special Control Area 7 and is zoned Medium and High Density Residential.
- 48 Consequently, the City requests the Commission to consider the appropriateness of granting the redefinition application in the context of the recent changes to the local planning framework and the nature of the development proposed.

Evidence and submissions from objector Ms Janette Wheare

- 49 Ms Wheare lodged a further submission following the Supreme Court decision reiterating her concerns that a grant of the application would result in a potential increase in liquor outlets through other pending applications and an increase of ‘through’ traffic to this residential area.

Evidence and submissions from other objectors

- 50 No further submissions were received from the other initial objectors and none of the other objectors were in attendance at the re-hearing.

Determination

- 51 This is a reconsideration of the Commission’s original decision following a successful appeal by the applicant and involves a consideration of all the evidence lodged, and submissions made, by all the parties both prior to the Commission’s original decision and subsequent to the Supreme Court decision.
- 52 The outcome of the Supreme Court decision is summarised by the applicant as follows:
- a. In the broadest terms, the Supreme Court determined that the appeal against the Commission’s decision ought to succeed because:
 - (i) the Commission’s original decision reflected error in the proper understanding and application of the statutory object mandated by section 5(1)(c) of the Act; and

- (ii) the Commission's failure to afford the applicant procedural fairness by failing reasonably to give the applicant notice of the significance of the concern relating to the impact of traffic movements.

53 In respect of section 5(1)(c) of the Act, Her Honour, Banks-Smith J concluded:

'Taking into account the respective submissions of the parties, I do not consider the reasons reveal that the Commission gave proper, genuine and realistic consideration to the matters relevant to the section 5(1)(c) object when the scope of that object is properly understood.

I accept that to some extent the reasons refer to matters that might also be relevant to the question of proper development of the industry. For example, development is touched on in reference to adding diversity of products, but that reference of itself does not reflect the level of evaluation that is required, particularly when the value accorded diversity is apparently diminished by way of the assumption as to common purchasing patterns.

I also acknowledge that it is not necessary for the Commission to refer to every matter to which it gives consideration.

However, the Commission's reasoning focuses on the sales data and purchasing habits and what it sees as a lack of requirement for the store. Consistent with the intent of the legislation, consumer requirements must be considered in a broader context. Those requirements may be diverse.' (the Supreme Court decision at ([97] – [100]).

54 To demonstrate that the grant of the application is in the public interest, the applicant relies on both the evidence and submissions made at the initial hearing before the Commission, and further evidence and submissions filed pursuant to the orders of the Commission made on 6 June 2017 as well as submissions made at the rehearing on 26 April 2018.

Section 5(1)(c) of the Act

55 The application relates to a composite development comprising both the redevelopment of the Peninsula Tavern and the replacement of the existing BWS liquor outlet with a much larger, and more contemporary Dan Murphy's outlet (offering a different and more expansive experience for consumers of liquor and related services).

56 All the parties to the proceedings agree that the redevelopment of the existing premises is desirable and would, except for the concerns expressed about the potential harm and ill-health resulting from the proposed introduction of the Dan Murphy's outlet, be a positive outcome for the local community. There is evidence that the two components of the redevelopment complement one another, but much of the evidence has focused on the proposed Dan Murphy's outlet.

57 The applicant's new evidence is outlined and commented upon below.

58 The applicant submits that the Dan Murphy's component of the proposed redevelopment represents an important innovation in the Western Australian (and indeed Australian) liquor

industry and has submitted further evidence to demonstrate the significance of that innovation, particularly to an inner-city locality with an increasing population and gentrification of its social demographic.

- 59 The applicant has referred to outcomes of an “Australian Consumer Drinking Habits, Preferences and Trends, Marketing Analysis Report 2017” (based on a survey of 1,000 consumers), including the following specific outcomes:
- a. most alcohol is bought from retail alcohol chains such as BWS or Liquorland, or from Dan Murphy’s;
 - b. alcohol is purchased from retail chains once a month or more by 20.5% of respondents, and once a week or more by 6.8% of respondents; and
 - c. the frequency of alcohol purchasing from Dan Murphy’s broken down by age, gender and education and drinker types.
- 60 The Commission also notes from this report that:
- a. alcohol consumption at home increases by age;
 - b. heavy and moderate drinkers do the majority of their drinking at home; and
 - c. a significant percentage of consumers (around 25% for beer and wine consumers) have no preference for a specific brand of the type of alcohol they drink, but usually buy based on price.
- 61 Clearly, if the outcome of the survey reported upon is representative of consumers, drinking packaged liquor is a significant part of the Australian drinking culture and a significant proportion of Australian consumers purchase liquor at Dan Murphy’s stores.
- 62 References by the applicant to new evidence in the form of a publication titled “Australia Food & Drink Report Q1 2017” indicate a preference by consumers away from beer towards wine, with wine sales expected to continue to outperform over the next five years. This preference for wine is also apparent in the most recent State of the Industry Report.
- 63 The view of the author of the Australia Food & Drink Report is that alcohol consumption in Australia will remain on the decline over the next five years due to rising health awareness among consumers, government campaigns advocating responsible alcohol consumption and adverse taxation positions.
- 64 The applicant points to the author’s view that “premiumisation” will be a key driver of growth as consumers shift their focus from quantity to quality. The Commission also notes from this report that Australian wine is considered very affordable relative to its quality level with both domestic and international consumers increasingly drinking affordable Australian wine.
- 65 Although there may a trend towards premium quality wine, however that is defined, it is clear that for a relatively sizeable proportion of the population, price is an important consideration influencing consumers’ purchasing decisions.

- 66 Further, any trends at a broader level across Australia and internationally, must be considered in the context of the demographic makeup and profile of the locality under consideration.
- 67 A “House of Brands” survey undertaken to “understand the profile of an average Dan Murphy’s shopper” reveals that Dan Murphy’s regular shoppers are significantly less likely to be low income (with 22% below a \$50,000 household income level and 63% between \$50,000 and \$150,000), are likely to be over 35 years old and prefer Dan Murphy’s over other brands.
- 68 There is no doubting that customers of all income levels purchase alcohol, and a significant proportion purchase alcohol, at Dan Murphy’s stores. Even accepting the “average” profile of the Dan Murphy’s shopper, again, as with other factors, the demographic makeup, profile and characteristics of the locality must be considered.
- 69 The updated MGA Report highlights, among other things, the increasing levels of income in Maylands and the locality to demonstrate the locality is continuing to experience “gentrification”.
- 70 Whilst a level of gentrification appears to be occurring, at least in some parts of the locality, the Commission notes there remains a high level of rental properties (over 50% in Maylands) with the level of home ownership and homes being purchased significantly lower than both Greater Perth and the State. According to the report, this is a reflection of the type of housing stock in the locality featuring a higher number of apartments being rented by young persons.
- 71 The Commission also notes the anecdotal evidence of the Manager of Cyrenian House in his statement of 27 July 2017, to the effect that:
- a. Maylands is a low rental area;
 - b. there is a lot of units in the Maylands area that are cheap to rent;
 - c. in the last year or so the rental prices in Maylands are among the cheapest;
 - d. there are a lot of homeless people about the Eighth Avenue precinct in Maylands; and
 - e. there are a lot of indigenous people in the Maylands area with whom Cyrenian House deal.
- 72 Collectively, this evidence seems to reflect the conclusion reached by the Commission in the Commission’s original decision that the demographic profile of the locality can best be summarised as comprising a mix of relatively affluent residents and a not insignificant proportion of disadvantaged residents with a relatively high number of rental properties (see paragraph [275] of the Commission’s original decision).
- 73 The updated MGA Report also contends that residents regularly visiting the IGA Express store on Eighth Avenue who wish to purchase packaged liquor may walk 100 metres to the proposed Dan Murphy’s store using the underpass at the railway station, as such a distance is normally covered by customers visiting enclosed shopping centres.
- 74 Additionally, it is contended that those visiting the Dan Murphy’s store by vehicle for larger purchases can also access groceries if required on foot or by vehicle.

- 75 Transitioning between Eight Avenue and the proposed Dan Murphy's store via the underground railway tunnel, which often experiences levels of anti-social behaviour, as well as the requirement to navigate a public street cannot, in the Commission's view, be equated to walking to a Dan Murphy's store within a suburban shopping complex.
- 76 In the Commission's original decision (at paragraph [258]), the Commission commented on the potential flow-on effects from the proposed development.
- 77 At the Commission hearing, the representative for the Police submitted that this is an irrelevant consideration not provided for in the Act. Nevertheless, and without accepting that submission, the Commission acknowledges the further submissions in the updated MGA Report about the provisions of the relevant planning scheme in and around the proposed development.
- 78 However, the Commission sees no reason to change its conclusion that any potential flow on benefits, in the form of additional commercial development, resulting from this redevelopment are speculative and cannot be given any significant weight.
- 79 In addition to the updated MGA Report, the applicant has submitted an MGA Social Impact Assessment in respect of an application for a Dan Murphy's store in Rockingham ("the Rockingham MGA Report").
- 80 The exact relevance of the Rockingham MGA Report to this particular application, apart from the additional analysis of the academic research and studies, is not entirely clear. The Police have submitted that a close reading of this report reveals a purported independent expert who is in fact acting as an advocate for the applicant, and the Police provide examples of statements in the report in support of this contention.
- 81 Whilst the Rockingham MGA Report may contain statements supportive of the Rockingham proposal, in the view of the Commission the evidence does not support a conclusion that the statements in the report are other than the opinion of the author of the report having examined the material relevant to that locality and that application.
- 82 In the Commission's view, the Rockingham MGA Report is not particularly helpful in this application as the locality is different and each application is dependent on its own circumstances. As one example, the Commission found in the Rockingham application that the premises are in a commercial precinct in a developing regional City centre of considerable size with limited physical exposure to the premises of organisations providing services to at-risk groups.
- 83 To the extent the report critiques the academic research and studies, the Commission prefers the wide body of research submitted, and referred to, by the CHO which has established that although the relationship may be complex and may vary in magnitude over time and place, there is a relationship between the availability, level of consumption, and harm and ill-health resulting from the use of alcohol and that the price of alcohol can be expected to impact levels of consumption.

- 84 The applicant has also introduced new traffic assessment evidence in the form of the updated Riley Report and submits that the expected impact from the proposed development is most appropriately assessed by reference to the capacity of the surrounding road network to accommodate any increase in traffic volumes.
- 85 The updated Riley Report concludes that the forecast traffic movements are well below the relevant Western Australian Planning Commission (“the WAPC”) Guidelines and will have no material traffic impact. Indeed, the report concludes that during the Friday evening peak period the increase in traffic on Ninth Avenue will most likely go unnoticed.
- 86 Notwithstanding what appear to the Commission to be discrepancies in the traffic generation rates adopted in this report compared to the original report, and the paucity of explanation of why the daily, and in particular peak hour, traffic generation rates of a supermarket would equate to a destination liquor store not in a shopping precinct and which, at least in part, expects patronage from commuter and passing trade, the Commission accepts, in the absence of evidence to the contrary, that any increase in traffic will be within the WAPC guidelines and is not expected to cause any detrimental impact on the locality.
- 87 The National Property Manager for the applicant has lodged an additional statement addressing the integration of the proposed Dan Murphy’s store at the redeveloped Peninsula Tavern and the benefits to the tavern component of the redevelopment of having a large, diverse and accessible range of products on site.
- 88 The Commission notes there is no evidence other than this statement about the significance and the extent to which customers of the redeveloped tavern are likely to avail themselves of the broader range of liquor products at the Dan Murphy’s store.
- 89 Nevertheless, the Commission accepts this may be a benefit to some customers, although the extent of that benefit to customers frequenting the tavern (as opposed to the liquor store) is unknown.
- 90 The National Property Manager has also outlined the success of its IMP in Nowra, NSW.
- 91 The Commission has previously highlighted the importance of community and key stakeholder engagement, which, among other things, assists the Commission to assess the potential social and economic impacts of an application.
- 92 The Commission has received extensive submissions from the parties on the steps taken, and the effectiveness of the steps taken, by the applicant, subsequent to the Commission’s original decision, to consult with some of the key stakeholders in the locality, including the Service Providers.
- 93 Those consultations have not been particularly fruitful and the applicant’s assessment of the process is that “it is plain that the various stakeholders have no genuine interest in the process of engagement because they are implacably opposed to the application”.
- 94 It appears to the Commission that, for whatever reason, the claim by the applicant in its original submission about operating the Dan Murphy’s store with a much greater focus on the management of disadvantaged and vulnerable segments of the population in accordance with

the IMP, is unlikely to be realised if the application is granted. Certainly, this appears to be the view of the Service Providers.

- 95 Irrespective of whether or not that outcome is achievable, the Commission repeats its view that community engagement with key community groups, not just at-risk groups, during the formative stages of a proposal of the nature proposed would be expected to identify areas of concern and facilitate a process and framework for addressing those concerns. The applicant's Creating Communities Report recommended as much (see [53] of the Commission's original decision).
- 96 Whilst it is unfortunate this outcome has not been achieved, the Commission ascribes no responsibility for that apparent failure. However, the fact an IMP acceptable to the applicant and the key stakeholders and interest groups may not, or is unlikely to be achievable, is of concern and exposes the risks of harm associated with the use of the proposed new Dan Murphy's store to the clients of Service Providers and other at-risk and vulnerable persons.
- 97 The applicant has also pointed to the fact that driving to either of the existing Dan Murphy's stores in Hyde Park and Morley would necessarily require customers to travel through built up residential areas leading to considerable inconvenience.
- 98 Although the Commission acknowledges that submission, as has been submitted in the updated Riley Report, the capacity of the road network seems more than capable of handling additional traffic.
- 99 Furthermore, as is stated in the original MGA Report, the trade areas of Dan Murphy's stores generally overlap and people choose to visit different outlets for a variety of reasons. The example given in that report is of somebody living in Maylands who may choose to visit the large shopping centre at Morley and while at the centre visit the Dan Murphy's store. Similarly, the report states, people may choose to visit a particular outlet because it is convenient to their commuting route.
- 100 Clearly, Dan Murphy's customers are not unaccustomed to, or deterred from, travelling by car to a destination style liquor store. Indeed, this would seem to be the preferred or most common means of accessing a Dan Murphy's store.
- 101 The Commission is also of the view that the benefits to be derived by consumers of liquor and liquor related services must be considered in the context of the consumer evidence and the particular circumstances of the locality under consideration.
- 102 The locality is currently well serviced by a range of different types of liquor outlets accommodating a fairly wide range of preferences, with consumers, or at least those surveyed, relatively satisfied with the range and price of products, and the parking and service offered at the store of their choice.
- 103 Further, whilst Dan Murphy's stores offer a far more extensive range of products and a "browsing" experience, the expectations of consumers in this locality for premium products, having regard to the Dan Murphy's sales data in, and the demographics of, other suburbs such as Balga, Midland and Morley is perhaps not expected to be as significant as in a more affluent locality.

- 104 Whilst it is difficult to assess the significance of browsing to consumers generally and in this locality in particular, the Commission accepts that the ability to browse, and have access to a wide range of products appears to be important, at least to existing and prospective Dan Murphy's customers.
- 105 The Commission also accepts that the Dan Murphy's stores have proven to be popular elsewhere.
- 106 The Dan Murphy's component of the proposed redevelopment is clearly a destination liquor store that will be frequented, primarily by car, and will attract customers from further afield than the 3 km radius assigned to the locality for the purposes of considering the impact of the application if granted.
- 107 The applicant contends that the introduction of Dan Murphy's stores in Australia has contributed to a change in the drinking culture in Australia more in keeping with the "Mediterranean drinking culture". This contention is based on the provision and promotion of the wide range of liquor products, including premium wines (and the browsing experience) and, at least partly, on the evidence presented by the applicant of a study undertaken, and paper titled "Sociocultural Factors that Foster or Inhibit Alcohol-related Violence", by Dr Anne Fox, in which Dr Fox:
- a. concludes, among other things, that "it is the wider culture that determines the drinking behaviour, not the drinking" and that "you can't change a culture by simply changing drinking"; and
 - b. comments that while "it is justifiable to explore the effectiveness of small measures such as advertising restrictions, increases or decreases in price, relaxation or restriction of hours,...such things tinker at the margins of culture and it is doubtful that they will alter the culture of violence and anti-social behaviour in any meaningful way".
- 108 Dr Fox makes a number of interesting points about the role alcohol plays in the relationship between alcohol and violence in any culture. However, the Commission notes the critique of Dr Fox's contentions undertaken by Nicki Anderson and Kypros Kypri (presented by the CHO) and prefers the conclusion of Messrs Anderson and Kypri.
- 109 Although the Commission acknowledges that drinking preferences in Australia may be changing, with wine becoming more popular, the Commission is not satisfied:
- a. the introduction and business model of Dan Murphy's stores has contributed to a change in the Australian drinking culture as contended; or
 - b. the evidence base that has been built up over the many years of research into the relationship between the availability of alcohol and associated harm and ill-health is not a relevant consideration in the Commission's task of predicting the likely impacts of granting a liquor licence application.
- 110 At the Commission hearing, the representative of the Police put the proposition that section 5(1)(c) of the Act requires the Commission to consider whether the proposed redevelopment is appropriate for the locality rather than the State more broadly.

- 111 The Commission is not sure of the distinction that was being made and the proposition was not pursued to any significant degree. However, the Commission has taken the view that the words of the section are plain, and clear, and the issue to be determined is whether the proposed redevelopment of the existing tavern and bottle shop caters for the requirements of consumers for liquor and related services having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 112 The evidence filed by the applicant with respect to, and the notorious fact of, the popularity of the success of Dan Murphy's stores demonstrates that the proposed new development would be popular, would introduce a broader range of product at cheaper prices and would enhance the diversity of liquor products and services in the locality.
- 113 Accordingly, subject to a consideration of any additional alcohol-related harm and ill-health that may result from the grant of the application, the Commission is satisfied that the proposed redevelopment, both the redeveloped tavern and the proposed Dan Murphy's store, would deliver a range of benefits to the community by catering for the requirements of consumers for liquor and related services and would contribute to the proper development of the liquor industry.

Harm and ill-health – section 5(1)(b) and section 38(4)

- 114 In considering and determining the impact the grant of an application may have on the levels of harm and ill-health in a locality and more broadly in the community, and whether the grant of an application is in the public interest, Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 ("*Carnegies*") has provided the Commission with guidance, specifically, that the Commission must:
- a. make findings that specifically identify 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 and ill-health to result from the grant of the application;
 - c. assess the likely degree of harm and ill-health to result from the grant of the application against the existing degree of harm; and
 - d. weigh the likely degree of harm and ill-health, so assessed, together with any other relevant factors to determine whether the applicant has satisfied the Commission that it is in the public interest to grant the application.

Existing level of harm and ill-health

- 115 The Commission has received further evidence and submissions on the current level of harm and ill-health in the local community and the likelihood of an increase in harm and ill-health, over and above that currently experienced in the locality, if the application is granted.
- 116 The applicant has challenged the accuracy and relevance to the locality of the CHO's evidence on alcohol-related hospitalisations.

- 117 Although the Commission accepts that the method of calculating the level of alcohol-related hospitalisations is complex and is prone to an element of uncertainty, the Commission accepts the evidence of the CHO on the estimate of alcohol-related hospitalisations to the extent the data applies to the suburbs comprising the locality.
- 118 The total hospitalisation rate for all alcohol-related conditions and some specified alcohol-related conditions between 2011 and 2015 were significantly higher than the corresponding State rate.
- 119 The CHO has also reported that between January 2014 and December 2016 a greater portion of Maylands residents sought treatment for alcohol as a primary drug of concern (36.4%) as against the East Metropolitan Health Region (27.5%) and the State (29.6%).
- 120 In addition to this higher level of alcohol-related harm and ill-health in the locality, or certainly in Maylands, the Police have also reported in its original intervention and objection that there was an increase in the level of alcohol-related offences reported to Police between 2012 and 2013 (refer to paragraphs [283] and [284] of the Commission's original decision).
- 121 It is clear to the Commission that within the locality and, more specifically, within Maylands, there is currently a relatively high level of alcohol-related crime and ill-health.
- 122 This evidence is consistent with the evidence of Ms Baker and the various Service Providers, for example, that of 55 Central relating to the initiative known as "Crossroads", a project established to address street drinking in Maylands, a location considered to be one of the three hotspots for street drinking in the Perth metropolitan area. Both Ms Baker and the Service Providers report high levels of anti-social behaviour and street drinking in Maylands in the vicinity of the railway station and the popular gathering place for vulnerable members of the community known as The Rise.

Likely degree of harm to result from the grant of the application

- 123 Having assessed the existing level of alcohol-related harm and ill-health in the locality, the Commission must turn its mind to the likely degree of harm and ill-health that may result if the application is granted.
- 124 The applicant has lodged a number of submissions and reports in support of the contention that there is no established link between alcohol and harm in various contexts or evidence of a specific link between the introduction of a large format liquor store and increased harm.
- 125 Among other reports, is a report prepared by Data Analysis Australia ("DAA") dated November 2010, which was referred to in the Public Interest Assessment accompanying the originating application. The CHO has highlighted what the CHO considers to be limitations in the report.
- 126 Having reviewed the report in its entirety and the CHO's response, including an analysis of the report by Messrs Somerford (Principal Epidemiologist) and Bangor-Jones, (Acting Principal Medical Officer) from the Department of Health, the Commission remains of the view

that no significant weight can be attached to the DAA report as an indication of the likely increase in harm and ill-health in the locality if the application is granted.

- 127 A further report lodged by the applicant prepared by DAA relates to a critique of an intervention and objection lodged by the CHO and Police respectively in response to a recent application for a Dan Murphy's store in Rockingham.
- 128 The DAA report is critical of a number of aspects of the CHO and Police evidence, including:
- a. the accuracy and relevance of the study conducted by the Police on the impact of the introduction of a Dan Murphy's store in Balga;
 - b. the difficulty in applying academic articles to the specific context of an application in which one is judging the likely magnitude of any impact;
 - c. references to studies of outlet density and harm which have not considered outlet type or size – it is contended in the DAA report that these studies are not particularly relevant to a circumstance where a Dan Murphy's store is replacing a BWS store; and
 - d. the absence of studies examining correlations between changes in the size and range of products offered by a store and levels of harm.
- 129 The CHO filed statements from authors of the academic studies critiqued in the DAA report. Disregarding the Balga Study which the Commission considers cannot be relied upon, but having regard to the research material, including the responses from the authors of the study critiqued, on balance, the Commission is not satisfied any significant weight may be attached to the DAA report in the context of this particular application.
- 130 Academic studies into the relationship between an increase in the availability, and economic availability, of alcohol and an increase in consumption and associated harm or ill-health, are often general in nature.
- 131 However, that is not to say that the very extensive research that has been conducted in multiple jurisdictions over an extended period is not helpful in assisting the Commission make predictive judgements about the likely impact of the grant of an application on levels of harm and ill-health in the community.
- 132 The applicant contends that, whilst accepting it is not possible to exclude the possibility of increased harm, the absence of any professional assessment evidencing a link between the introduction of large format liquor stores and increased harm given the number of stores that have been operating for over two decades suggests that no causative link has been established. This conclusion, the applicant contends, is supported by the decrease in alcohol consumption over that period in Australia.
- 133 The reasons for a reduction in the consumption of alcohol per capita at a national level (if not in Western Australia) are not entirely clear, and it is certainly not clear that heavy or various at-risk drinkers are consuming less alcohol.

- 134 In the Commission's view, without further research and analysis the proposition that the introduction of large format liquor stores has not contributed to an increase in the consumption of alcohol and associated harm at any level is speculative and not particularly helpful to the Commission in this specific application.
- 135 However, even if the Commission were wrong in this assessment, the Commission must nevertheless consider the likely impact on the particular population and at-risk groups within the locality in which the proposed redevelopment is located.
- 136 Among its many submissions, the applicant has submitted that the level of social disadvantage in the locality could well represent many if not most inner city suburbs throughout Australia and that if pockets of at-risk groups accommodated by institutions within otherwise gentrifying inner-city suburbs present an insuperable barrier to the innovation of a Dan Murphy's store, then only the most homogenously affluent and "pristine" suburbs will be entitled to such a facility.
- 137 The Commission has a statutory responsibility to assess the risk of harm and ill-health likely to arise from the grant of an application in the relevant locality to which the application relates, whatever the characteristics of the locality.
- 138 If, as in this application, the locality comprises of a mix of advantaged and disadvantaged people, the Commission will properly assess, as best it can on the evidence available, the risk of harm and ill-health likely to arise from the grant of the application, over and above the existing level of alcohol-related harm and ill-health in the locality, weigh and balance that harm against the positive aspects of the application, including the contribution of the redeveloped premises to the proper development of the liquor industry in the State, and determine whether or not the grant of the application is in the public interest.
- 139 As was helpfully acknowledged at the Commission hearing by the applicant's representative, the Commission has been provided with a great deal of evidence, much of which is a matter of opinion and much of which contains an extensive amount of statistics, and it is important not to lose sight of the principal issue to be determined in this application.
- 140 In the Commission's view, it is unhelpful to comment on all that evidence in minute detail. This does not detract from the fact that the Commission has endeavoured to carefully consider and weigh all the evidence and arrive at a decision based on the guidance provided by both Allanson J in *Carnegies (supra)* and Baker-Smith J in the Supreme Court decision.
- 141 It is also relevant to observe that unlike some applications in which the Commission is making predictions of harm and ill-health based on research evidence not specific to the locality and limited direct evidence on the expected impact of the grant of an application on those living and resorting to the locality, in this application, the evidence of the experience and opinion of the Service Providers, which is both credible and cogent, highlights a very serious risk of harm of considerable magnitude.

142 In addition to the comments set out in the Commission's original decision (at paragraph [303]), some of the comments from representatives of the Service Providers include:

a. Mr Damien Walsh, the Director of Shopfront:

- (i) our concern (with the Dan Murphy's store) would be the large volume and range of alcohol...and the cheaper prices;
- (ii) in my view, if you can buy alcohol cheaper our clients will consume more and become intoxicated quicker;
- (iii) (on earlier opening hours and the lunch time service Shopfront provides)..if our clients are able to access liquor at 9am, it is likely they will be coming into the lunch service intoxicated;

b. Mr Peter Duncan, Cyrenian House:

- (i) to me, it's (Dan Murphy's) like a liquor warehouse, it's quite cheap...in my view, that's where the most affected people will go to get their alcohol;
- (ii) price will be the really big factor as to why they go to Dan Murphy's as will the availability of alcohol and the hours the store will be open (two hours earlier);
- (iii) this is particularly concerning as the store will be located near the railway;
- (iv) I think the price of alcohol is really important to people addicted to alcohol...they will know the price differences between all of the liquor stores;

c. Mr Stephen Conway, the Parish Priest at St Luke's Anglican Church in Maylands:

- (i) at the moment there is no temptation for these people (clients of Shopfront and the Service Providers) to choose liquor over
- (ii) food and help, but when the Dan Murphy's goes in there will be, in my view, a massive increase in harm;
- (iii) Maylands has established services for the poor, disadvantaged and people with drug and alcohol addiction.....the proposed Dan Murphy's will be in direct conflict to the established services;

d. the Manager of CROFT:

- (i) if our clients have a couple of bucks in their pocket, they will see the (Dan Murphy's) store when they get off at the Maylands train station and spend it on alcohol;
- (ii) it is well known by our clients that Dan Murphy's offers very cheap alcohol;
- (iii) (our clients) have limited income but what they have they will spend on alcohol....they will travel that little bit further to get most for their limited money;
- (iv) if our clients can afford more alcohol they will buy more alcohol, not necessarily a better type of alcohol...they will buy as much as they can with whatever money they have;

- e. Ms Maria McAtackney, the Chief Executive Officer at Nyoongar Outreach Services:
- (i) our clients go to where the bulk of the alcohol is, where it's cheaper;
 - (ii) cheaper prices ...means our clients will buy more alcohol;
 - (iii) the brand or quality of alcohol doesn't matter...it's all about how much alcohol they can get for what money they have;
 - (iv) our clients know about Dan Murphy's...for example, the one in Highgate next to Robinson Park, when they opened it was a major, major issue;
 - (v) it is well known that the Dan Murphy's shop was (sic) cheap alcohol and within our organisation it is well known that Dan Murphy's sell cheap alcohol;
 - (vi) the distance they (have) to walk isn't an issue.

143 In summary, the Commission is satisfied and finds:

- a. although the proposed Dan Murphy's store is replacing the existing liquor store, the new store is manifestly different from the BWS store, and the business model under which Dan Murphy's stores operate, including the brand positioning and lowest price guarantee, is likely to result in the sale and consumption of more liquor in the locality, giving rise to an increase in alcohol related harm and ill-health albeit to a level that cannot be quantified;
- b. again, although difficult to quantify, there is a not insignificant risk that the increase in the availability of alcohol, in particular alcohol that is readily available at the lowest price, will have a detrimental impact on some low socioeconomic and disadvantaged people residing in the locality, particularly those vulnerable people, and heavy drinkers, who seek to maximise their alcohol purchases with their limited financial resources; and
- c. persons reliant on, and utilising, the services provided by the Service Providers are particularly at risk of harm given the clear evidence their alcohol purchases are influenced by price and the reputation of Dan Murphy's lowest price guarantee, even if a level of inconvenience is associated with their purchases.

144 Following a reconsideration of all the evidence, including the new evidence, the Commission is of the view that the likelihood of an adverse impact of the proposed Dan Murphy's store on clients of the Service Providers identified in the evidence will be high and the extent of the potential harm significant, not only to the individuals concerned, but also to the agencies responsible for running their programs.

145 Indeed, the additional evidence filed by the Service Providers is even more compelling in providing their opinion of the likely impact of the opening of the Dan Murphy's component of the redevelopment on their clients and on their organisations.

146 The Commission acknowledges that there are liquor stores in the locality selling cheap liquor, but it is clear from the evidence of the Service Providers that the distinguishing feature of the

Dan Murphy's store is its reputation and marketing strategy as the liquor store providing alcohol at the cheapest price.

147 The Commission has not been persuaded on the evidence that the "transformation of the BWS store into an upmarket and more tightly supervised Dan Murphy's will make it less likely that at-risk people will be attracted to the premises".

148 Having regard to the research and other evidence related to harm and ill-health, the demographic composition of, and characteristics of some of the people who frequent, the locality, and Maylands more specifically, and the business model and location of the proposed Dan Murphy's store, the Commission finds that the introduction of the Dan Murphy's store is likely to lead to an increase in the consumption of alcohol within the locality and an increase in the levels of harm and ill-health over and above that currently experienced in the locality due to the use of liquor.

149 The extent of the increase in harm and ill-health is difficult to determine, but certainly in respect of some of the lower socioeconomic groups, but more significantly the clients of the Service Providers, the likelihood of an increase in harm and ill-health is considered by the Commission to be high and the resultant harm and ill-health significant.

Harm and ill-health likely to result from the grant of application assessed against the existing level of harm and ill-health.

150 Whilst the predictability of the increase in harm and ill-health across the community due to the increased economic availability of liquor likely to result from the introduction of a Dan Murphy's store is imprecise, the direct evidence of the Service Providers and those involved in addressing, and familiar with, the social impacts of alcohol on the local community is clear – the impact on the clients of the Service Providers and the operation of the Service Provider agencies themselves is likely to be significant.

Likely degree of harm assessed against other relevant factors to determine if the grant of the application is in the public interest

151 The Act does not envisage or require that the grant of an application should not result in any increase in harm or ill-health in a locality or community, but recognises that, whilst an application might result in some harm and ill-health, the benefits to consumers and the liquor, tourism and hospitality industries, and hence the community, of granting the application may outweigh the potential for such an increase in harm and ill-health.

152 As indicated in these reasons, the Commission recognises there are a number of benefits associated with the proposed redevelopment and must, as best it can, endeavour to balance those benefits against what the Commission views as the likely increase in harm and ill-health over and above that already occurring in the locality and community due to the use of liquor.

153 While it is difficult to quantify the extent of the harm and ill-health likely to arise within the locality and at the broader community level as result of an increase in the consumption of alcohol due to the increased economic availability of alcohol, the Commission has arrived at what appears to be an inescapable conclusion that the level of harm likely to be caused to

those at-risk persons utilising the services of the Service Providers will be significant if the application is granted.

Is the grant of the application in the public interest?

154 In this application, the onus is on the applicant to demonstrate that the grant of the application is in the public interest.

155 In essence, therefore, the task before the Commission is to balance the objectives of the Act set out in sections 5(1)(b) and 5(1)(c) and determine if the applicant has discharged that onus.

156 Recapping, the Commission is of the view that:

- a. the proposed redevelopment will cater for the requirements of consumers and will, harm and ill-health considerations aside, contribute to the proper development of the liquor industry;
- b. whilst the locality is reasonably well serviced by a number of existing liquor stores, a number of benefits will result from the proposed redevelopment, including an improved and modern tavern and liquor outlet, a wider range of liquor products, diversity of choice and increased competition;
- c. there is an existing level of alcohol related harm and ill-health already occurring in the locality – this base level of harm and ill-health is not insignificant as is evidenced by, particularly, the data presented by the CHO, but also the data presented by the Police;
- d. the locality and, in particular, the area proximate to the train station and the Maylands commercial centre experiences a high level of street drinking, so much so that funding has been made available by the State Drug and Alcohol Office to fund a project (the Crossroads project) to address what is a serious public concern;
- e. an increase in harm and ill-health, which cannot be accurately quantified, but which is, nevertheless, a relevant consideration, will flow from the increase in the general availability (far exceeding the current BWS store) and economic availability of liquor in the locality due, principally, to the size, business model, including the well-known guaranteed lowest price offering, and location of the Dan Murphy's store;
- f. based on the clear and cogent evidence from Service Providers operating locally (some in relative close proximity to the proposed redevelopment) there is a high likelihood the proposed redevelopment, in particular that component of the redevelopment comprising the Dan Murphy's liquor store, will, in this locality, result in an increase in harm and ill-health to be caused due to the use of liquor to the at-risk groups examined in these reasons;
- g. the consequential harm and ill-health to these at-risk groups is likely to be significant; and,
- h. whilst the proposed Dan Murphy's store would be expected to provide a service to consumers of liquor from outside the locality (i.e. in addition to those residing in the locality), for example when commuting to and from Perth, or otherwise travelling

through, Maylands, the local community will bear the brunt of most of the consequential increase in harm and ill-health due to the use of liquor.

- 157 In balancing the competing objectives of sections 5(1)(b) and 5(1)(c), and having regard to the other objects of the Act, and the matters specified in section 38(4), the Commission is of the view, on the evidence presented, that the benefits to be derived from the grant of the application do not outweigh the potential for a significant increase in harm and ill-health due to the use of liquor, over and above that already occurring within the locality.
- 158 Moreover, the Commission is of the view that, as presented, the potential for a significant increase in the level of harm and ill-health if the application is granted is such that the application should be refused.
- 159 Accordingly, after a consideration and evaluation of all the evidence, the Commission is not satisfied, on the balance of probabilities, that the applicant has demonstrated that the grant of the application is in the public interest as required by section 38 of the Act.
- 160 The Commission was presented with evidence of the recent amendments to the City of Bayswater Town Planning Scheme and the introduction of amendments to the Act into State Parliament. Neither of these developments is considered by the Commission to be relevant, at this time, to this particular application.
- 161 At the rehearing of this matter a number of submissions were made regarding the extent to which the Commission is required to reconsider its earlier findings in light of the Supreme Court decision, particularly if those findings could be viewed as being unaffected by the Supreme Court decision.
- 162 The Commission did not commence its reconsideration of the remitted decision with any preconceived views of the evidence or the likely outcome of the application, but has considered and evaluated all the evidence and again undertaken the required balancing exercise to determine if the applicant has demonstrated that the grant of the application is in the public interest.
- 163 A number of objections to the application have been lodged under the Act. The objections vary in their range and scope. Clearly, a number of the objections would not meet the burden of establishing the validity of the objection as required by section 73(1) and 74(1) of the Act.
- 164 However, while the Commission has not found it necessary to determine if the objections from the various objectors have been established to the requisite degree under the Act, a number of the other objections, with incorporated statements from service providers, are comprehensive and the cumulative effect of their evidence is relevant to a consideration of whether the applicant has satisfied its onus of showing that the grant of the application is in the public interest. As Edelman J commented in *Liquorland (Australia) Pty Ltd V Executive Director Public Health* [2013] WASC 51 in respect of an application not dissimilar to that under consideration (at [30]):

'Each single objector might, individually, fail to satisfy an onus of establishing an objection, but the cumulative effect of the evidence might lead to the conclusion that an applicant has failed to satisfy its ultimate onus of showing that the application was

in the public interest. It was in this manner that the majority treated and relied upon the evidence of the service providers.'

As Edelman J also commented at [33]:

'...it was tentatively suggested by counsel for Liquorland that the Liquor Commission was required to make a determination of a ground of objection. There was no ground of appeal to this effect. And, as counsel properly accepted, there is nothing express in the Liquor Control Act which requires this conclusion. Rather, the provision in the predecessor legislation, which had previously required the Commission to make a determination concerning an objection, was not re-enacted when the Liquor Control Act was passed. Further, the Liquor Control Act specifically provides that an application may be granted even if a valid ground of objection is made out. Conversely, under s 33(2)(a), an application may be refused even if all requirements of the Liquor Control Act are met. There was no obligation upon the majority of the Liquor Commission to make a finding that any objection had or had not been proved.'

164 The evidence accompanying the intervention from the CHO is also highly relevant and consistent in identifying the potential harm and ill-health aspects associated with the granting of this application, which the Commission considers, having regard to all the evidence, has not been demonstrated by the applicant to be in the public interest.

165 The application is refused.



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