

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: ALDI FOODS PTY LIMITED

OTHER PARTY: CHIEF HEALTH OFFICER (INTERVENOR)

PREMISES: ALDI KARRINYUP

PREMISES ADDRESS: KARRINYUP SHOPPING CENTRE, 200 KARRINYUP ROAD
KARRINYUP

APPLICATION ID: A539642730

MATTER: APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR
STORE LICENCE

DATE OF DETERMINATION: 16 JULY 2020

DATE OF REASONS: 21 OCTOBER 2020

Introduction

- 1 On 16 July 2020, I issued a notice pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) advising the parties that after consideration of the evidence and submissions, I had determined that the applicant had failed to discharge its onus under s 36B(4) of the Act and therefore the application was refused.
- 2 Pursuant to s 18AA(3), the applicant has requested written reasons for the decision. These are those reasons.

Background

- 3 ALDI Foods Pty Ltd (the applicant) lodged an application for the conditional grant of a liquor store licence for premises to be located at the Karrinyup Shopping Centre (the Centre), 200 Karrinyup Road, Karrinyup and to be known as ALDI Karrinyup.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. The Chief Health Officer lodged a notice of intervention.
- 5 The application was determined on the written submissions of the parties, as permitted under ss 13 and 16 of the Act. In addition, these written reasons have been prepared and should be read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹

¹ S 16(7) of the Act.

Brief overview of the application

- 6 The applicant seeks to establish a small liquor browse/display and checkout section of approximately 35m² within the ALDI Karrinyup supermarket, similar to other ALDI outlets that have been approved by the licensing authority.
- 7 According to the applicant, the ALDI range of liquor products comprises a modest selection of 95 items, comprising:
- 60 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
- 8 The range of liquor products will include some mainstream items and some products exclusive to ALDI. No refrigerated products will be available for sale. It was submitted by the applicant that one of the unique aspects of the ALDI liquor offering is the fact that it includes an exclusive range of products.

Section 36B of the Act

- 9 In 2007, section 38 of the Act was repealed and new provisions were inserted. The new provisions introduced the public interest test² and provided that an applicant who makes an application to which the section applies must satisfy the licensing authority that the grant of the application is in the public interest. The public interest test replaced what was colloquially referred to as the “needs test” contained in the repealed provisions of section 38. The old “needs test” included a restraint on the granting of liquor store licences.³
- 10 It was envisaged that the introduction of the public interest test in the 2007 amendments to s 38 of the Act would provide a mechanism to control the proliferation of packaged liquor outlets and outlet density⁴, however this did not eventuate. Consequently, the introduction of s 36B into the Act was Parliament’s response to decisions of the licensing authority and the Supreme Court relating to the grant of new packaged liquor licences. The Government has sought to create a direct restraint on the grant of new liquor licences authorising the sale of packaged liquor and to achieve this policy objective, s 36B was inserted into the Act.
- 11 Section 36B of the Act was proclaimed on 2 November 2019. Subsection (4) of section 36B provides that:

“The licensing authority must not grant an application to which this section applies unless satisfied that local packaged liquor requirements cannot be reasonably met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.”

² See s 38(2)

³ Section 38(2b) of the repealed provisions.

⁴ refer *Parliamentary Debates, WA Parliament, vol 409, p 6342*

12 “*Local packaged liquor requirements*” is defined in s 36B(1) to mean *the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated*. By virtue of s 36B(2), subsection (4) applies to an application for:

- (a) a hotel licence without restrictions;
- (b) a tavern licence;
- (c) a liquor store licence;
- (d) a special facility licence of a prescribed type.

13 Section 36B was inserted into the Act by s 18 of the *Liquor Control Amendment Act 2018 (WA)*. The related Explanatory Memorandum for the Bill relevantly provides:

As a strategy to minimise the adverse impact that packaged liquor outlets can have on the community, the Bill inserts new section 36B to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality. This will be complemented by additional amendments relating to large packaged liquor outlets being established in close proximity to an existing large packaged liquor outlet. (emphasis added.)

14 In the Second Reading Speech, the Minister for Racing and Gaming said:⁵

... to prevent the further proliferation of small and medium packaged liquor outlets across the state, the act will be amended so that the licensing authority must not grant an application unless it is satisfied that existing premises in the locality cannot reasonably meet the requirements for packaged liquor. (emphasis added.)

15 The following is apparent from s 36B:

- the section applies to the grant of a liquor store licence;
- section 36B(4) imposes on the licensing authority a mandatory consideration by the use of the words “*must not*”. Consequently, unless the condition set out in s 36B(4) is met, the application must be refused;
- the condition within s 36B(4) is that the licensing authority must be satisfied that the “*local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in*” the relevant locality; and
- the evidential and persuasive onus falls upon the applicant for the grant of the licence to satisfy the licensing authority.

16 In *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd*⁶, Malcolm CJ noted that:

“The word “reasonable” imports a degree of objectivity in that the word reasonable means “...sensible; ...not irrational, absurd or ridiculous; not

⁵ See Western Australian *Parliamentary Debates* (Hansard), Legislative Assembly, 20 February 2018 p324-325

⁶ (1991) 4 WAR 1

going beyond the limit assigned by reason; not extravagant or excessive; moderate: Shorter Oxford Dictionary at 1667”

The applicant’s evidence and submissions on s 36B(4)

- 17 It was submitted by the applicant that three key questions arise out of s 36B(4):
- what are the local packaged liquor requirements?
 - what constitutes ‘reasonably’ in terms of whether those “requirements cannot reasonably be met by existing packaged liquor premises? and
 - what evidence is needed to satisfy the licensing authority in order to answer those two questions in the affirmative?
- 18 According to the applicant, “packaged liquor” is not qualified in s 36B(4) as being any specific type or category of liquor, such as wine, beer or spirits which are defined as particular types of liquor in s 3 of the Act. Regarding “local packaged liquor requirements”, it was submitted that this includes the requirements of residents in the locality, people passing through the locality and all customers of ALDI, for any form of liquor that is sealed and packaged for takeaway purposes.
- 19 Consequently, it was submitted that the evidence provided by the applicant established that there are “local packaged liquor requirements” for the following which are not being met by existing premises:
- ALDI’s proposed liquor range, including mainly products exclusive to ALDI, together with award winning items and exceptional value;
 - ALDI’s related services including one-stop shopping and a wide range of non-liquor items including groceries and “special buys”; and
 - the convenience of the ALDI location.
- 20 In terms of whether the existing packaged liquor outlets in the locality can “reasonably” meet the local packaged liquor requirements, the applicant submitted that members of the public simply cannot access the ALDI liquor and related services that they want in any manner within the locality and therefore, those people experience substantial difficulty or substantial inconvenience. Further, in terms of what is reasonable, the applicant submitted that the grant of the application would be consistent with the objects of the Act.
- 21 According to the applicant, the licensing authority requires credible subjective evidence, which is objectively reasonable, from a representative sample of the relevant community as to what it needs, why those needs are unfulfilled at the moment and how or why ALDI will satisfy those needs in a safe and otherwise appropriate way in accordance with section 5 of the Act. It was submitted that the applicant has provided such evidence in the way of:
- its expert reports (the Patterson Survey of Consumer Requirements and the Deep End Services report);

- ALDI's unique features (including one-stop shopping; bespoke range; exclusive products; award winning items);
 - the statutory declaration of Jessica Jarmain regarding existing outlets in the locality; and
 - a spreadsheet showing price and product comparisons for a sample list of products inspected at existing outlets indicating that several products available at ALDI but not at existing stores and some ALDI products that are available at other stores, ALDI offers those products at a lesser price.
- 22 The applicant opined that there is a similarity between s 36B(4) and the old, repealed s 38(2b)(a) of the preceding *Liquor Licensing Act 1988*, and therefore it is appropriate to consider the case law determined under the old legislation. In particular, the applicant submitted that in relation to section 38(2b)(a) of the old legislation, one-stop shopping was a legitimate basis for the grant of a liquor store licence because it was ".....a reasonable requirement based on convenience for members of the public to purchase their liquor at the same time and the same place they do their shopping".
- 23 In summary, it was submitted that the ALDI site, exclusive product range, one-stop shopping convenience and unique combination of these aspects distinguish ALDI from the existing packaged liquor outlets in the locality.

Determination

- 24 The applicant seeks to establish a small packaged liquor outlet inside its supermarket at the Karrinyup Shopping Centre. By industry standards, the proposed outlet would be modest in size (35m² which includes a browse and checkout area) offering approximately 95 products, some of which are unique to the applicant. According to the applicant, the liquor service is designed specifically to complement and accompany the diverse and attractive ALDI supermarket services and facilities.⁷ The application is essentially predicated on providing a convenient liquor service to ALDI supermarket customers.
- 25 With the introduction of s 36B into the Act, applicants for the grant of a liquor store licence must satisfy the licensing authority in respect of two distinct mandatory tests under the Act before the application can be granted:
- the existing packaged liquor outlets in the locality cannot meet the local packaged liquor requirements (s 36B(4)); and
 - the grant of the application is in the public interest (s 38(2)).
- 26 The applicant submitted that there are similarities between s 36B(4) and the old, repealed s 38(2b)(a) of the Act⁸ and therefore issues such as one-stop shopping and convenience are relevant to the test under s 36B(4). I do not agree with that submission. In my view, matters of convenience, one-stop shopping, and shopping preferences fall within the scope of s 38(2) and whether the grant of the application is in the public interest; whereas

⁷ PIA at 2.9

⁸ S 38(2b)(a) was repealed in 2007 with the introduction of the public interest test under s 38.

- section 36B(4) is directed towards the requirement of consumers for packaged liquor itself and whether existing packaged liquor outlets in the locality can reasonably meet that requirement.
- 27 If the test under s 36B(4) was the same as the test under s 38(2), then s 36B(4) would be rendered otiose, and serve no meaningful purpose. Parliament specifically chose to create a new provision in the Act (s 36B) rather than amend s 38 and incorporate the matters to which s 36B(4) are directed under the public interest test contained in s 38(2) and 38(4).
- 28 Further, an analysis of the history of s 38(2) and the wording in s 36B(4) does not support the applicant's submission regarding the matters for consideration under s 36B(4).
- 29 When assessing whether the grant of an application is in the public interest (s 38(2)), the factual matters which the licensing authority is bound to take into account are those relevant to the objects of the Act, as set out in s 5.⁹
- 30 One of the primary objects of the Act is to cater to 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.¹⁰ In considering whether the grant of an application is in the public interest, the Supreme Court has held that one-stop shopping, shopper preferences and convenience are relevant matters under object 5(1)(c).¹¹
- 31 However, in my view, the word "requirement" in s 36B(4) should have a narrower interpretation than what has been applied to the word "requirement" in object 5(1)(c). I arrive at this conclusion for the following reasons.
- 32 First, the plain text in s 36B when considered in the context of the Act as a whole supports the narrow construction, particularly when compared to the text in object 5(1)(c). As I have noted, the Supreme Court has held that for the purposes of object 5(1)(c), and therefore the public interest test under s 38(2), one-stop shopping, convenience and shopping habits etc are relevant considerations, however, the definition of "local packaged liquor requirements" in s 36B is expressed differently to s 5(1)(c) in an important respect. The definition of "local packaged liquor requirements" in s 36B only refers to the "requirement of consumers for packaged liquor" unlike the broader requirement 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" in s 5(1)(c).
- 33 As noted by Bank-Smith J in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88, s 5(1)(c) requires regard be directed to the proper development of the relevant industries in considering the issue of catering to the requirement of consumers, and catering for consumer requirements is not to be considered in isolation. Adopting a narrow construction on s 36B gives some effect to the deliberate difference in the drafting provisions. This also reinforces the notion that the

⁹ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

¹⁰ Object 5(1)(c)

¹¹ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

tests under s 36B(4) and s 38(2) are two separate and distinct tests. If the test under s 36B(4) and s 38(2) were essentially the same test, s 36B(4) would be rendered meaningless and would not achieve its statutory purpose.

34 Secondly, such an approach is consistent with the clear policy objective of the provision, which is to prevent the proliferation of packaged liquor outlets, including small and medium size outlets, and enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality.¹²

35 In **SZTAL v Minister for Immigration and Border Protection** it was stated:¹³

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.....Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

36 The Court of Appeal in **Mohammadi v Bethune**¹⁴, having referenced **SZTAL**, observed that:

The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.

37 In order to achieve this statutory purpose, a narrow construction of the word “requirements” is necessary, otherwise, adopting a broader construction would allow applicants to mould their application to cater to the subjectiveness of convenience and shopping habits and thereby undermine the restriction in s 36B(4), when the intention of the proposed premises is to merely sell packaged liquor which is readily available within the locality.

38 Thirdly, the adoption of a narrow construction is supported by the approach of Anderson J in **Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd**¹⁵ (Austie) and King CJ in **Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)**¹⁶ (Lincoln Bottle Shop).

39 In **Austie**, Anderson J considered the meaning of the phrase “requirements of the public for liquor and related services” which was couched in the same terms in both s 38(1) and

¹² See the Explanatory Memorandum and Second Reading Speech referenced at [11] and [12]

¹³ [2017] HCA 34

¹⁴ **Mohammadi v Bethune** [2018] WASCA 98

¹⁵ (1999) 20 WAR 405

¹⁶ (1981) 28 SASR 458

s 38(2b) of the repealed provisions of s 38. Section 38(2b) was inserted into the then Act to create a specific restraint on the grant of new liquor store licences. Anderson J held that in order to give effect to parliament's intent, a narrower interpretation of the phrase "*requirements of the public for liquor and related services*" should be adopted for the purposes s 38(2b) than for the same words in s 38(1). In section 38(2b) "*requirements of the public for liquor and related services*" meant the requirements of the public for liquor itself, whereas the same phrase in s 38(1) was concerned with the requirement of the public as to matters of taste, convenience, shopping habits, shopper preferences and the like.

- 40 King CJ in ***Lincoln Bottle Shop*** took the same approach to similar provisions in the South Australian legislation.
- 41 Fourthly, section 18 of the *Interpretation Act* provides that an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object. Section 36B was introduced to restrain the licensing authority in the granting of licences for packaged liquor outlets in order to prevent the proliferation of packaged liquor outlets in the State.
- 42 Consequently, in my view, in order to give intent to the obvious legislative policy of restricting the grant of certain licences in order to prevent the proliferation of packaged liquor outlets in the community, s 36B(4) relates to the requirements of consumers for packaged liquor itself, but does not include questions of convenience, one-stop shopping and shopper preferences which are linked to object 5(1)(c) and form part of the public interest considerations under s 38(2).
- 43 In making a value judgment as to whether the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality, consideration of issues such as the existing packaged liquor services in the locality, distribution of premises in the locality and ease of access to the existing premises are relevant factors. This is not an exhaustive list as ultimately the value judgment will be guided by the facts and circumstances of each case and the evidence presented by the applicant when discharging its onus under s 36B(4).
- 44 The Act is essentially one of regulation, largely directed towards protecting the public.¹⁷ The purpose of s 36B is to prevent the proliferation of packaged liquor outlets across the State, including small and medium sized outlets, and to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality. This is because of the harm associated with the consumption of packaged liquor in the community. Section 36B is therefore very much consistent with the underlying regulatory scheme of the Act and the regulatory nature of each of the primary objects in s 5(1), including object 5(1)(c), whereby, in protecting the public, consideration must be given to the orderly and proper management and growth of the liquor industry.¹⁸

¹⁷ *Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd* [2019] WASC 114

¹⁸ *Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd* [2019] WASC 114

- 45 The applicant's evidence indicates that there is an existing liquor store (BWS store) in the same shopping centre and approximately 100-150 metres from the applicant's proposed premises. In this regard, the Deep End Services report states that the ALDI store would provide a convenient option for shoppers, and the small offering targets in-store grocery buyers with an emphasis on convenience, quality and value. However, there is no suggestion that ALDI customers cannot readily and easily access the existing liquor store, which provides a far greater range of table wines, beer and spirits.¹⁹
- 46 The applicant submitted that it provides some unique, award winning products, which supports the grant of the application. However, in this regard, I would make the following observations:
- although the applicant provides some unique products, it also provides many other mainstream liquor products (i.e. Crown Lager, Peroni, Victoria Bitter, Heineken, Canadian Club, Jack Daniels);
 - the proposed liquor offering is modest (approximately 95 products) and as noted in the Deep End Services report, the effect of the additional licence is small on the overall provision and availability of liquor in the locality. This statement indicates that the value in terms of the availability of liquor is insignificant;
 - it is not uncommon for retailers to create a point of difference in the marketplace and offer some unique products (i.e. from small or boutique wineries and craft breweries) or for larger retailers to provide "home brand" liquor products;
 - most packaged liquor retailers will sell products that have won an award at one of the many local, regional, State, National or International industry award shows;
 - the Patterson report indicates that only 56% of respondents who buy liquor at all, find the unique products extremely appealing or very appealing;
 - the Patterson report provided respondents with the opportunity to provide comments on the applicant's proposed liquor store, with the three most popular responses being: *I like the idea (47%); I hope it increases price competition (14%); and it would be convenient to buy groceries and alcohol together (10%)*. The desire for unique products does not appear amongst any of the comments from respondents; and
 - most respondents to the Patterson survey (94%) on at least half their shopping occasions visit a walk-in browse or drive-through facility.
- 47 Whilst some respondents to the Patterson survey may find the ALDI unique products "appealing" this does not in my view address the matters under s 36B(4) of the Act.
- 48 In my view, the Patterson report addresses matters relevant to the public interest test under s 38(2) of the Act, but does little to resolve the questions under s 36B(4). Inexplicably, the Patterson survey did not ask respondents the most basic question to which s 36B(4) is directed: *"Do the existing packaged liquor outlets in the locality meet your packaged liquor requirements?"*

¹⁹ The statement of Jessica Jarman indicates that the BWS store has a browse area of 110-120m², however the plans of the BWS store held by the Department indicate a retail area of about 176m² and a cool room of 36m², giving a total of 212m².

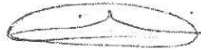
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- 49 The vast majority of liquor sold in Western Australia is packaged liquor for consumption in unregulated environments (i.e. the home). As observed in previous decisions of the licensing authority, ALDI specialises in low-priced liquor products, sold in a supermarket environment. The Liquor Commission has observed that research establishes that the sale of alcohol within a supermarket can lead to increased consumption and alcohol-related harm, as well as the normalisation of alcohol, which can impact on the patterns of alcohol use and lead to an increase in alcohol-related harm and ill-health.²⁰ Section 36B(4) reflects Parliament's concerns about the negative impact that packaged liquor can have on the community and could be considered a pre-emptive harm minimisation strategy, consistent with the primary objects of the Act, by minimising the likelihood of alcohol-related harm increasing in a particular community, by creating a restraint on the grant of new packaged liquor outlets where existing packaged liquor outlets can already cater to the local packaged liquor requirements.
- 50 In the context of this application and the surrounding locality, there is an existing liquor store nearby which provides one-stop shopping convenience for users of the Centre²¹ and in total, there are four liquor stores and one tavern within a 2km radius of the applicant's proposed liquor store. There was little or no evidence that ALDI customers experience any real degree of difficulty or inconvenience in obtaining packaged liquor.
- 51 The evidentiary burden falls upon the applicant to demonstrate that the existing packaged liquor outlets in the locality cannot meet the local packaged liquor requirements.
- 52 In my view, the applicant's evidence clearly supports the conclusion that the application is predicated on the desire to cater to the one-stop shopping requirements of ALDI supermarket customers. However, as explained earlier in these reasons, one-stop shopping, convenience and shopper preference are matters for consideration under s 38(2) of the Act, not s 36B(4). Section 36B(4) is confined to determining whether the public have reasonable access to packaged liquor itself. This approach is consistent with the context of the Act as a whole, the history of the legislation and the mischief to which the statute is directed.
- 53 Consequently, when I considered the applicant's evidence, I was of the view that the applicant had failed to adduce sufficient probative evidence to satisfy me that the local packaged liquor requirements cannot be reasonably met by existing packaged liquor premises in the locality in which the proposed licensed premises are to be situated. As stated in **Charlie Carter**²², "reasonable" means no more than sensible, not irrational or absurd.
- 54 The test in s 36B(4) is mandatory. Having concluded that the applicant failed to discharge its onus under s 36B(4), the application must be refused.

²⁰ See for example LC 13/2020

²¹ In **Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd**, unreported; FCt SCt of WA, 1994, it was held that in view of the presence of an existing outlet so close to the supermarket as to be almost part of the shopping centre, any subjective requirement of the relevant section of the public for a liquor store to be located within the supermarket was not objectively reasonable.

²² **Charlie Carter Pty Ltd v Streeter and Male Pty Ltd** (1991) 4 WAR 1

- 55 It was therefore not necessary for me to consider whether the applicant had demonstrated that the grant of the application was in the public interest, in accordance with s 38(2).
- 56 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.
- 57 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