

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: ALDI FOODS PTY LIMITED

PREMISES: ALDI BYFORD

PREMISES ADDRESS: 845 SOUTH WESTERN HIGHWAY BYFORD

APPLICATION ID: A000256989

NATURE OF APPLICATION: APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 05 JUNE 2018

Introduction

1. On 16 February 2018, ALDI Foods Pty Limited (the applicant) lodged an application for the conditional grant of a liquor store licence in respect of premises situated at 845 South Western Highway, Byford and to be known as Aldi Byford.
2. The application is made pursuant to ss 47, 62 and 68 of the *Liquor Control Act 1988* (the Act).
3. Pursuant to s 67 of the Act, the application was advertised in accordance with instructions issued by the Director of Liquor Licensing (the Director).
4. An objection to the grant of the application was lodged by Steven Johnson (the objector), pursuant to ss 73 and 74 of the Act. Also, pursuant to s 69 of the Act, the Chief Health Officer (CHO) lodged a notice of intervention.
5. By letter dated 13 April 2018, a document exchange process was initiated between the parties. Each party was afforded the opportunity to lodge any further evidence and submissions to be taken into consideration in the determination of the application.
6. Pursuant to ss 13 and 16 of the Act, the application will be determined on the papers.

Determination

7. In accordance with s 38 of the Act, the onus is on the applicant to satisfy the licensing authority that the grant of the application is in the public interest. In this regard, the licensing authority, however constituted, makes its determination on the balance of probabilities.
8. In considering the public interest, the licensing authority needs to consider both the positive and negative social, economic and health impacts, and exercise a discretionary value judgement as to whether the application should be granted (*Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241).

9. In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:

The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.

10. In determining whether an application should be granted “in the public interest” consideration must be given to the objects of the Act as specified in s 5 of the Act.

11. The primary objects of the Act are:

- to regulate the sale, supply and consumption of liquor;
- to minimise harm caused to people, or any group of people, due to the use of liquor; and
- to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

12. The secondary objects of the Act are:

- to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
- to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
- to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

13. The licensing authority may also take into consideration the matters set out in s 38(4) of the Act.

14. Pursuant to s 33 of the Act, the licensing authority has an absolute discretion to grant or refuse an application for any reason that the licensing authority considers in the public interest, but must deal with an application on its own merits within the scope of the Act (refer *Woolworths Ltd v Director of liquor Licensing* [2012] WASC; *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).

15. The applicant seeks the grant of a relatively small browse style liquor store within its new ALDI supermarket to be built at 845 South Western Highway, Byford. The proposed licensed premises are consistent and typical of the ALDI’s business model as it relates to the sale and supply of packaged liquor, by the applicant, within its supermarkets.

16. In accordance with its business model the applicant's proposed premises will comprise a browse/retail area of approximately 37m² to be located in close proximity to the entrance/exit of the supermarket and the checkout counters. The closest checkout counter to be included as part of the licensed premises for the purpose of carrying out liquor transactions.
17. The applicant submitted that it proposes to provide consumers with products including liquor with "*incredibly high quality at impossibly low prices*" through its highly sophisticated business model involving advanced levels of systemisation and organisation designed for optimum efficiency and product control. The liquor store will carry about 95 non-refrigerated liquor products including the applicant's own unique liquor product lines.
18. In support of its application the applicant lodged a comprehensive Public Interest Assessment (PIA) in which it outlined its intended manner of trade; a description of the facilities; its intended customer base; and addressed the matters contained in s 38(4) of the Act. The PIA was supported by legal submissions, numerous publications, reports and articles including the report by Patterson Research Group "*Survey Of The Consumer Requirements For Liquor Retailing Within The Locality Of The Proposed ALDI Byford Store* (Patterson's survey) and the appropriate planning approval from the local authority.
19. The Patterson's survey found a sense of anticipation about the prospect of an ALDI store being introduced in the locality with 94% of the respondents indicating that they were aware of the ALDI stores being established in WA, 90% indicating that they at least were "quite likely" to shop at ALDI with 6% indicating that they would at least try the ALDI store. In respect of liquor, 82% of the respondents indicated that if shopping in the ALDI supermarket they would purchase their packaged liquor requirements in the store.
20. The objector opposed the grant of the application on the following grounds:
 - the grant of the application would not be in the public interest (s 74(1)(a) of the Act); and
 - if the application were granted – the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be situated would in some manner be lessened (s 74(1)(g)(ii) of the Act).
21. In support of his grounds objection, the objector included:

Byford already has too many liquor outlets. I can count 6 others within 800 meters of the ALDI store. Anti-social behaviour is anticipated.

It is likely that another liquor outlet would lead to breaches of the peace within the centre of Byford.
22. In respect of the objection lodged, s 73(10) of the Act, provides that the burden of establishing the validity of any objection lies with the objector.
23. In this regard, while I acknowledge the concerns of the objector, as no evidence was lodged, I find that the objector has not discharged his burden of establishing the validity of the objection.

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24. The CHO intervened in the application and made representations relating to the risks associated with the grant of the application for a liquor store licence. In this regard, the CHO, as intervenor to the application, carries no burden of proof (per Greaves J. *Gull Petroleum (WA) Pty Ltd (1998) LLC No. 13/9*).
25. The CHO's representations were based on the following:
- ALDI Byford intends to provide the public consistently low-priced alcohol products from within its supermarket;
 - the association of alcohol products with everyday grocery items can lead to increased consumption and harm;
 - there is a relationship between low cost liquor, consumption and increased alcohol-related harm; and
 - if the licence is granted, the imposition of conditions that separate the sale and display of alcohol from the sale and display of general grocery items would be an important harm minimisation approach.
26. The CHO submitted that there are concerns regarding ALDI's proposal to integrate liquor into the supermarket setting, the intended use of the licensed checkout for both liquor and non-liquor items and the visibility of alcohol products from the unlicensed area. It was also submitted that these features can impact on community attitudes towards alcohol as a normal, everyday grocery item, and subsequently impact on purchasing and drinking behaviours.
27. The CHO further submitted that if the licence is granted, trading conditions largely consistent with the conditions imposed by the Liquor Commission of Western Australian (the Commission) in respect of ALDI Harrisdale, should be imposed for the purpose of minimising the potential risks of harm and ill-health the application presents.
28. In considering the information presented, I find that the applicant has discharged its onus under s 38(2) of the Act and that the grant of the application would be in keeping with the object contained in s 5(1)(c) of the Act and in the public interest.
29. Regarding the harm minimisation object of the Act, there is no evidence before me, in respect of the locality in which the proposed premises is to be situated to consider whether the grant of the application would result in an unacceptable increase in the levels of alcohol-related harm in the locality.
30. In respect of trading conditions which may be imposed, I acknowledge that s 33(2) of the Act requires that each application must be considered on its own merits and I am therefore not bound to adhere to and impose the same trading conditions as those imposed on the applicant in respect of its other liquor stores, particularly the trading conditions imposed by the Commission in respect of ALDI Harrisdale.

31. I also acknowledge the issues surrounding the interpretation and the implementation of the applicant's current trading conditions at its Harrisdale store. Therefore, I am of the view that it would not be prudent, in this matter, to depart to far from the conditions and intention of the Commission as set out in its ALDI Harrisdale decision LC 12/2018, because to do so would result in an inconsistent approach, but moreover may cause further confusion within the applicant's business model in WA, the public and to the regulatory authorities.
32. However, the intention of the Commission is very clear regarding the use of the licensed check-out counter to be used only for the sale and supply of liquor or the sale and supply of liquor with other non-liquor products, and not for the sale of non-liquor products only. Accordingly, a condition will be imposed to ensure that the licensed check out counter is used primarily for the sale and supply of liquor.
33. Therefore, as I am satisfied that the applicant has complied with all the necessary statutory criteria requirements and conditions precedent to the application being granted, the application for a liquor store licence is conditionally granted subject to the following conditions:

CONDITIONAL GRANT

- (a) a Certificate under s 39 of the Act being lodged before the operation of the licence;
- (b) compliance with the Local Government Act 1960, Health Act 1911 and any written law relating to the sewerage and drainage of these premise;
- (c) all work being completed within 12 months in accordance with the plans and specifications dated 16 February 2018;
- (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements dated 22 February 2018 being satisfactorily completed and the Director of Liquor Licensing being notified in writing at least 21 days prior to applicant wishing to trade under the licence;
- (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed;
- (f) the applicant seeking confirmation of the grant on or before **4 June 2019** pursuant to s 62(4)(c) of the Act;

WHEN THE LICENCE COMMENCES OPERATION IT WILL BE SUBJECT TO THE FOLLOWING CONDITIONS: -

TRADING HOURS

The permitted trading hours are those prescribed in s 98D of the Act.

TRADING CONDITIONS

1. The licensee is authorised to sell and supply packaged liquor in accordance with the provisions of s 47 of the Act.
2. The licensee is prohibited from selling refrigerated liquor products.
3. There is to be no external advertising of liquor products on the façade of the licensed premises.
4. The browse/display area is to be closed off when not open for trade.
5. The liquor display and sale area must be separated from the food/grocery display and sale area by barricading of non-see-through material over two (2) metres in height.
6. The entry/exit point to the licensed area must have a gate.
7. The licensed checkout can only be used by people purchasing liquor (without or in conjunction with non-liquor products).
8. The licensee is to have and maintain a closed-circuit television video (CCTV) surveillance system, in accordance with the policies of the Director.

MODIFICATION TO APPROVED MANAGER REQUIREMENT

Pursuant to s 100(2a) of the Act, s 100 of the Act is modified so that an approved manager must be present within the ALDI supermarket store whenever business is conducted under the licence.

COMPLIANCE WITH HARM MINIMISATION POLICY

The licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

LICENCE FEES

Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the issue of the licence.

34. Pursuant to s 116(3) of the Act, the premises' name "ALDI Byford" is approved. The licensee, on confirmation of this conditional grant, shall not subsequently conduct business at the licensed premises under any other name, without the prior approval of the Director of Liquor Licensing.
35. 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.

36. This matter has been determined by me under delegation pursuant to s 15 of the Act.

**TRADING MAY NOT COMMENCE UNDER THIS LICENCE
WITHOUT THE PRIOR WRITTEN APPROVAL OF THIS OFFICE.**



Eric Romato
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING