

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: ALDI FOODS PTY LIMITED

OTHER PARTIES: CHIEF HEALTH OFFICER
CITY OF BUNBURY
BURT COOPER PTY LTD
CATHOLIC DIOCESE OF BUNBURY

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

APPLICATION REF: A000242591

PREMISES: ALDI BUNBURY
9 EDWARDS STREET, BUNBURY

DECISION OF: BRETT SNELL
DEPUTY DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 20 AUGUST 2018

1. On 18 July 2017, an application was made to the Director of Liquor Licensing (the Director) by ALDI Foods Pty Limited (the Applicant) for the conditional grant of a liquor store licence for premises to be known as ALDI Bunbury and situated at 9 Edwards Street, Bunbury.
2. The application was made pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (the Act) and was advertised in accordance with instructions issued by the Director, which resulted in:
 - (a) a notice of intervention being lodged by the Chief Health Officer (the Intervenor); and
 - (b) notices of objection by:
 - (i) the City of Bunbury (the First Objector);
 - (ii) Burt Cooper Pty Ltd (the Second Objector); and
 - (iii) the Catholic Diocese of Bunbury (the Third Objector).
3. On 29 November 2017, the parties were advised that:
 - (a) pursuant to ss 13 and 16 of the Act, a document exchange would take place so that each party would be given a reasonable opportunity to present its case; and
 - (b) the application would then be determined on their written submissions.
4. As this is an administrative decision, rather than referring in detail to the entirety of the evidence before me, I will set out what I consider to be the relevant material facts. I will also outline the process of my reasoning from consideration of those material facts to conclusion, setting out the differing positions advanced by the parties.

The Application

5. The Applicant proposes to operate a small liquor store as part of the ALDI supermarket in Bunbury. The proposed liquor store will be typical of the ALDI liquor store model and will have the following features:
 - (a) a small browse area of about 21m², together with a single licensed checkout;
 - (b) about 95 non-refrigerated liquor products on offer, including 64 different wines (including 4 different ciders), 16 different beers, 15 different spirits; and
 - (c) some liquor products that are unique to the Applicant.
6. The application was supported by a Public Interest Assessment (PIA) and other submissions to demonstrate that the grant of the application would be in the public interest. The PIA provided information on ALDI's business model and proposed manner of trade, the likely impact on the amenity of the neighbourhood and the low risk features of the proposal. The Applicant also submitted a report by Patterson Research Group, who conducted a survey of consumers within the locality, which the Applicant submitted indicated strong support for the grant of the application.
7. A separate report, prepared by Deep End Services¹, considered the demographic profile of the locality surrounding the proposed liquor store and submitted that:
 - (a) ALDI Bunbury is located on the southern edge of the City centre, just east of Bunbury Centrepoint;
 - (b) there would be no refrigerated products and no external advertising or signage indicating the presence of liquor in-store²; and
 - (c) the Socio-Economic Indexes for Areas (SEIFA Index) compiled by the Australian Bureau of Statistics records a decile rating for Bunbury of 987, which sits between the Regional WA average (979) and the national average (1,000).
8. The report further found that:

“SEIFA scores are also mapped at the small area (SA1) level to show any localised areas of advantage or disadvantage. The suburbs of Withers, College Grove and Carey Park in the secondary south sector are the only areas where the SEIFA score is below 900. A small area of Withers (4km south of the ALDI site) has a SEIFA score below 800 however this area has less than 2,000 people or about 4% of the catchment population.

The highest SEIFA scores are in the city centre, coastal areas, acreage areas on the city edge and new housing areas at Dalyellup.

¹ An economic research and property consulting firm, which provides a range of services including market assessments

² This claim was repeated in the Applicant's PIA, which noted at page 26, that the liquor area would have no presence outside of the ALDI Supermarket; there would be no external access, façade or signage and the liquor area would not be visible from outside the ALDI supermarket

The average SEIFA score and the spatial patterns across the city suggests the area rates positively in terms of its socio-economic status. The catchment could not be characterised as overwhelmingly disadvantaged.”

9. Accordingly, the report concluded that except for very small variations, the locality largely mirrors the average regional and national SEIFA scores. Further, in its consideration of at-risk groups for alcohol-related harm, as identified in the Director’s *Public Interest Assessment* policy, the Applicant analysed the categories of at-risk groups in each of the suburbs comprising the locality, together with the corresponding State average, before it submitted that the locality should not be considered as a a low or troubled socio-economic area, particularly given the SEIFA ranking for the suburb of Bunbury:

“...suggests that residents within the suburb experience a higher than average standard of living by Australian standards. Furthermore, the City of Bunbury scores a decile of 5 out of 10 when assessed on a national basis. This indicates that the City represents an average Australian city.”

10. In its consideration of alcohol-related hospitalisations in Bunbury, the Applicant noted that according to a report published by the Drug and Alcohol Office in 2014, the area experienced “significantly higher” rates of alcohol-related hospitalisations, but considered that “*the modest ALDI Bunbury Liquor Store will be most unlikely to lead to incidents that contribute to those statistics...*” Further, while acknowledging some level of crime occurring in the locality and “*logically some of that crime may possibly be linked to liquor*”, the Applicant submitted that “*it does not appear to be at such a level as to warrant any special concern consideration [sic].*”
11. The PIA also outlined several strategies advanced by the Applicant to minimise alcohol-related harm or ill-health, including the fact that it is a “*highly experienced and sophisticated operator when it comes to retailing liquor products*”, together with the low risk ALDI liquor model (i.e. small floor area, exclusive products, no chilled products and no external signage).
12. While the Deep End Services report noted various licences within the locality, including a number of liquor stores, hotel licences and taverns that are already capable of selling packaged liquor, the Applicant submitted that:
- (a) the impact of the additional licence would be small, given the unique size and characteristics of ALDI’s liquor offering; and
 - (b) it would be offering some liquor items that are unique to the Applicant and which are therefore not available from the existing packaged liquor suppliers.
13. In conclusion, the Applicant submitted that:
- (a) the operation of its proposed premises in Bunbury “*will add enormous choice and diversity and the addition of the liquor store component will fit perfectly into the mix of services within the City*” and generally advance shopping facilities; and

- (b) it has identified the positive and negative points associated with the locality and the application generally and, given the *“few small risks that exist in this case, several valuable risk minimising features have been proposed. Further, the many positive factors have greater weight.”*

The Intervention

- 14. The Intervenor made representations regarding the risks of alcohol-related harm specific to the application and on how those risks could be minimised, including concerns that:
 - (a) ALDI Bunbury intends to provide the public with consistently low-priced alcohol products from within its supermarket and there is a relationship between low cost liquor, consumption and increased alcohol-related harm;
 - (b) there is alcohol-related harm occurring in the locality;
 - (c) existing risk factors for harm and ill-health in the locality will be exacerbated by the Applicant’s intended manner of trade;
 - (d) local alcohol and other drug treatment providers raise concerns over ALDI’s proposal and the potential impact on clients accessing treatment for their alcohol use; and
 - (e) if the licence is granted, the imposition of conditions that seek to separate the sale and display of alcohol from the sale and display of general grocery items would be an important harm minimisation approach.
- 15. In terms of the alcohol-related harm occurring in the locality, the Intervenor submitted that:
 - (a) between the period of 2014/15 and 2016/17, there were 1,189 treatment episodes for people residing in the locality at treatment services funded by the Mental Health Commission (MHC) for prevention and treatment programs for alcohol and other drug related issues. Of those treatment issues, alcohol was identified as:
 - (i) the primary drug of concern in almost one in four (24%, n=290); and
 - (ii) a drug of concern in over two in five treatment episodes (41%, n=493).
 - (b) Western Australian Police (WAPOL) offence statistics for the locality show there are existing levels of harm occurring, with the Incident Management System showing, for the period of 1 January 2014 to 31 December 2016 (inclusive):
 - (i) there were a total of 480 reported domestic assault offences in the locality; and
 - (ii) of the 480 reported domestic assault offences, over one in four (27.1%, n = 130) were recorded as alcohol-related; and
 - (c) between 1 January 2014 and 31 December 2016, there were 271 drink-driving charges recorded in the locality using the Breath Test Form, which allows the collection of Place of Last Drink information, of which over half (53.8%, n=146) were

recorded as having their last drink at a private residence or public place, which corresponded to people who would likely have been drinking packaged liquor.

16. The Intervenor also submitted that because of convenience and ‘visual reminders’, there is potential for supermarket patrons of ALDI Bunbury to purchase alcohol when they would otherwise not have been going doing to do so, thus increasing consumption. This concern was also supported by “*the extensive clinical experience of the South West Community Alcohol and Drug Service (SWCADS)³ Manager.*” Accordingly, the Intervenor submitted that:

“The SWCADS Manager is aware of the ALDI Bunbury Liquor Store application and has an understanding of the applicant’s proposed manner of trade. The author of this Statement is in a unique position to provide evidence about harm or ill-health in the locality, given their position within the SWCADS and their work in providing alcohol treatment services to people within the locality who have experienced, or are at-risk of experiencing, harm or ill-health as a result of their alcohol use.

The SWCADS Manager has identified there are at-risk people in the locality, and it is his personal opinion that the ALDI Bunbury proposal may encourage impulse or unplanned purchasing...”

17. The Intervenor also noted that the visibility and ease of access of the liquor browse/display area presents a number of harm and ill-health considerations and the Applicant’s intention to restrict the presence of alcohol external to the store would form an important harm minimisation approach for ALDI Bunbury.
18. Accordingly, the Intervenor recommended that a number of trading conditions be considered for imposition on the licence to reduce some of the potential risks of harm or ill-health presented by the application, primarily to separate the sale of liquor from grocery items in ALDI Bunbury.

The Objections

19. The First Objector objected to the application to recommend several trading conditions to ensure consistency with the Applicant’s stated manner of trade.
20. The Second Objector, declared a pecuniary interest in the refusal of the application, as the licensee of the *Rose Hotel* and objected on every ground permissible under s 74(1) of the Act, although it seemed mainly concerned that:
- (a) the grant of the application would increase the availability of cheap takeaway liquor, which would exacerbate existing alcohol-related issues in Bunbury;
 - (b) while the Applicant’s retail format may prevent the immediate consumption of products designed to be consumed cold:

³ SWCADS is an integrated service based in Bunbury, servicing Bunbury and the broader South West Region and offering a range of services to assist people with drug and alcohol issues

- (i) it will not prevent the immediate consumption of some wine products and spirits; and
 - (ii) will result in increased incidents of street drinking, with its attendant anti-social activities; and
- (c) there is no need for another liquor store in Bunbury, given the existing variety of outlets.
21. The objection by the Third Objector progressed on the ground that if the application were granted undue offence, annoyance, disturbance or inconvenience would be likely to occur, given that the proposed premises is adjacent to the Saint Patrick's Cathedral Precinct.

Legislative and legal framework

22. Section 30A(1) of the Act provides that applications under the Act are determined by the licensing authority.
23. Further, there is no presumption in favour of the grant of the application, rather the opposite applies, and the Applicant must adduce sufficient evidence to satisfy the licensing authority that the grant of the application is in the public interest⁴. In this regard, the Courts have found that applications under the Act cannot proceed on the expectation that the commercial interests of an application will coincide with the public interest. To this end, Tamberlin J observed⁵ that:
- “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.”
24. Further, the Act places the burden of establishing the validity of any objection on the objector. Conversely, in proceedings such as these, the Intervenor carries no onus to establish their assertions of fact or opinion.⁶
25. In determining this application, I must therefore consider both the positive and negative social, economic and health impacts on the community in order to be satisfied that the grant of the liquor licence is in the public interest. This responsibility requires the exercise of a discretionary value judgment that is confined only by the scope and purpose of the Act.⁷
26. Accordingly, the factual matters that I am bound to take into account when undertaking such a value judgment are those relevant to the primary and secondary objects of the Act, as set out in s 5.⁸ The primary objects of the Act are:

⁴ *Liquor Control Act 1988*: s 38(2)

⁵ Refer *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142

⁶ Refer *Re Gull Liquor* (1999) 20 SR (WA) 321

⁷ Refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175

- (a) to regulate the sale, supply and consumption of liquor;
 - (b) to minimise harm caused to people, or any group of people, due to the use of liquor; and
 - (c) 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.
27. The secondary objects of the Act are:
- (a) 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;
 - (b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
28. As stated by Banks-Smith J⁹, consideration of the matters under object 5(1)(c) does not diminish the role of the other objects of the Act, to which regard must be had.
29. Where conflict arises in promoting the objects of the Act, I must weigh and balance the competing interests in each case.¹⁰
30. I am also entitled (but not bound) to take into account the factual matters set out in s 38(4) of the Act as part of the public interest considerations.
31. Section 16 of the Act provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case; should act without undue formality and is not bound by the rules of evidence.
32. Finally, s 33(1) of the Act provides that the licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that it considers in the public interest.

Determination

33. The Applicant contends that the grant of the licence will principally cater for the “reasonable liquor shopping needs of ALDI supermarket customers” in Bunbury and will:
- (a) provide a premium shopping convenience; and
 - (b) cater to the growth and development occurring in the local community and advance shopping facilities generally.

⁸ Refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227

⁹ Refer *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police & Ors* [2017] WASC 88

¹⁰ Refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

34. In my view, these contentions are supported by the results of the Patterson Market Research, which indicated that consumers found the prospect of having a packaged liquor section within the ALDI Bunbury supermarket as an attractive prospect, with the survey results establishing that:
- (a) 90% of respondents indicated they would try out the ALDI Bunbury Supermarket;
 - (b) 64% of respondents indicated that the provision of a packaged liquor section within a grocery supermarket would be more convenient for the purchase of their packaged liquor requirements; and
 - (c) 67% of respondents (who actually purchase alcohol) indicated they would be likely to purchase their packaged liquor requirements when shopping for groceries, if Bunbury ALDI had a packaged liquor section.
35. Accordingly, I find that there is good public support for the grant of the application and that the grant of the application would cater to the requirements of consumers and therefore promote objects 5(1)(c) and 5(2)(a) of the Act.
36. While the Applicant acknowledged the “at-risk” groups and sub-communities within the locality, it contended that they are not likely to be put further at-risk due to the various harm minimisation factors forming part of the application. Accordingly, the Applicant submitted that the “*small prospect of harm or ill-health occurring is far outweighed by the significant benefits to the public, particularly ALDI Bunbury supermarket customers, of which there are many.*”
37. The Intervenor made representations that some suburbs within the area experience a greater level of disadvantage and a lack of advantage in general, noting particularly that Carey Park ranks in the bottom 20 percent of disadvantaged suburbs in WA, according to the SEIFA index. Therefore, the Intervenor submitted that in consideration of the socio-economic profile and existing harm being experienced in the locality, the conditions suggested in the intervention should be imposed on the licence, to support the minimisation of harm and ill-health.
38. I have also observed that the Applicant’s PIA and supporting report by Deep End Services, include Carey Park and Withers as either falling within the locality or the proposed store’s secondary catchment area. In regard to these suburbs, I note that in *Liquorland (Australia) Pty Ltd v Commissioner of Police & Others*¹¹, the Liquor Commission was satisfied that Carey Park and Withers experience a relative high level of socio-economic disadvantage.
39. Therefore, notwithstanding my finding that the grant of the application would promote the object of the Act expressed at s 5(1)(c), the application must also be considered with regard to the other objects of the Act and one of the Act’s other primary objects is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.¹²

¹¹ 29 July 2015 (LC18/2015)

¹² Object 5(1)(b)

40. Where conflict arises in promoting the Act's primary objects, the licensing authority is required to weigh and balance the competing interests¹³ and assign weight to those competing interests and other relevant considerations.¹⁴ Further, given that alcohol-related harm is a factor in these proceedings, I must also adopt the approach outlined by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*¹⁵ and:
- (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 to result from the grant of the application;
 - (c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - (d) weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant has satisfied the licensing authority that it is in the public interest to grant the licence.
41. Therefore, in the context of this application, I find that there is an existing level of alcohol-related harm and ill-health in the locality, based on a consideration of the following evidence:
- (a) the number of treatment episodes funded by the MHC for prevention and treatment programs for alcohol and other drug related issues in the locality for the period of 2014/15 and 2016/17, where alcohol was identified as the primary drug of concern in almost one in four (24%, n=290) treatment episodes;
 - (b) WAPOL offence statistics for the locality, which showed that:
 - (i) over one in four (27.1%, n = 130) of the 480 reported domestic assault offences were recorded as alcohol-related for the period of 1 January 2014 to 31 December 2016 (inclusive); and
 - (ii) (53.8%, n=146) of the 271 persons charged with drink-driving in the locality between 1 January 2014 and 31 December 2016 were recorded as having their last drink at a private residence or public place, which corresponds to people who would likely have been drinking packaged liquor.
42. In respect of the likely degree of harm to result from the grant of the application, I have observed that:
- (a) the evidence of the parties makes it clear that there are suburbs within the locality that experience a level of socio-economic disadvantage, together with the findings of the Liquor Commission in *Liquorland (Australia) Pty Ltd v Commissioner of Police & Others*, supra;

¹³ Refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

¹⁴ Refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASC 356

¹⁵ [2015] WASC 208

- (b) there is evidence to show a link between socio-economic disadvantage (i.e. unemployment) and poor health and other psychological effects, which are often associated with alcohol and drug use; and
 - (c) the evidence of the South West Community Alcohol and Drug Service (SWCADS) Manager indicates that “*clients report that problematic alcohol use is more often associated with takeaway alcohol because of its lower price in comparison to drinking at a hotel or tavern...*”
43. However, after consideration of all the information before me, I find that there is a likelihood of a low degree of harm likely to result from the grant of the application, given that the suburbs that experience the greater levels of socio-economic disadvantage, i.e. Withers and Carey Park, could not be considered to be in close proximity to the proposed store. In this regard, I note that neither Carey Park nor Withers fall within the primary catchment area for ALDI Bunbury and were only identified by Deep End Services as forming part of the store’s identified secondary catchment area.
44. Accordingly, it is my view that:
- (a) the risk of increased harm is not significant when regard is given to the circumstances of the locality; and
 - (b) the likely degree of harm to result from the grant of the application is no greater than that which appears to be commonly accepted in the community.
45. I further consider that the likely degree of harm, when assessed together with the trading conditions laid down by the Liquor Commission in *ALDI Foods Pty Ltd v Director of Liquor Licensing*¹⁶ (and further explained in LC 12/2018), favour the conditional grant of the licence. These conditions require *inter alia* the separation of the liquor area from the food/grocery area by a barricading of non-see-through material over two metres in height, to provide a degree of separation between the licensed area and the remainder of the supermarket.
46. In relation to the objections, I note that the:
- (a) concerns of the First Objector can be adequately addressed through the imposition of trading conditions as outlined in paragraph 45 (above);
 - (b) Second Objector declared a pecuniary interest in the refusal of the application and did not introduce any evidence to substantiate the claims made in its objection; and
 - (c) Third Objector also failed to lodge particulars or evidence to substantiate its grounds of objection. Further, given the scope of the liquor store proposed and the fact that it will be wholly enclosed within the ALDI Supermarket, I find it difficult to envision how the grant of the application would cause undue inconvenience, annoyance, disturbance or offence to any member attending St Patrick’s Church.

¹⁶ LC 09/2017

47. Therefore, after weighing and balancing the competing interests in these proceedings, I am satisfied that the Applicant has discharged its onus under s 38(2) of the Act and the grant of the application is in the public interest. It therefore follows that the Objectors have failed to make out their grounds of objection, as required under s 73(10).
48. Accordingly, a liquor store licence is conditionally granted to the Applicant, subject to the following:
- (a) a Certificate under s 39 of the Act being lodged before the operation of the licence;
 - (b) compliance with the *Local Government Act 1995, Health (Miscellaneous Provisions) 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 14 July 2017;
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements dated 2 August 2017 being satisfactorily completed and the Director being notified in writing at least 21 days prior to applicant wishing to trade under the licence;
 - (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the Applicant seeking confirmation of the grant on or before 19 August 2019, pursuant to s 62(4)(c) of the Act.
49. On confirmation of the conditional grant, the following conditions will be imposed on the issue of the licence:
- (a) Trading hours:
 - (i) The permitted trading hours are those prescribed in s 98D of the Act. In this respect, only liquor stores located in the metropolitan area are permitted to trade on Sundays.
 - (b) Trading conditions:
 - (i) The licensee is authorised to sell and supply packaged liquor in accordance with the provisions of s 47 of the Act.
 - (ii) The licensee is prohibited from selling refrigerated liquor products.
 - (iii) There is to be no external advertising of liquor products on the façade of the licensed premises.
 - (iv) The browse/display area is to be closed off when not open for trade.

- (v) 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.
 - (vi) The licensed checkout can only be used by people purchasing liquor (without or in conjunction with non-liquor products).
 - (vii) The entry/exit point to the licensed area must have a gate.
 - (viii) The licensee is to have and maintain a CCTV system in accordance with the policies of the Director.
- (c) Modification to Approved Manager Requirement:
- (i) 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.
- (d) Compliance with Harm Minimisation Policy:
- (i) The licensee is to have a 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.
50. Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
51. The applicant is reminded that trading **may not** commence without the prior written approval of the licensing authority.
52. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
53. This matter has been determined by me under delegation pursuant to s 15 of the Act.



DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING