

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Australian Leisure and Hospitality Group Pty Ltd
(represented by Ms Isabella Mosole of Squire Patton Boggs)

First Intervener and Objector: Commissioner of Police
(represented by Mr Toby Bishop of the State Solicitor's Office)

Second Intervener: Chief Health Officer
(represented by Mr Francis Cardell-Oliver of the State Solicitor's Office)

Other Objectors: Mr Jeffrey Michael Caddy
Mr Timothy Matthews
Mr Laurie E Smith

Commission: Ms Emma Power (Acting Chairperson)
Ms Pamela Hass (Member)
Ms Alya Barnes (Member)

Matter: Application for alteration and redefinition of licensed premises referred under section 24 of the *Liquor Control Act 1988*.

Premises: Leisure Inn, Rockingham
Lot 2, 1 Chalgrove Avenue,
Rockingham, Western Australia

Date of Hearing: 20 August 2021

Date of Determination: 17 January 2022

Determination The Application is granted

Authorities referred to in Determination:

- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police & Ors (LC 26/2017)*
- *Commissioner of Police v Australian Hospitality Group Pty Ltd [2019] WASC 114*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police [2020] WASCA 157*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*
- *O'Sullivan v Farrer [1989] HCA 61*
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WASCA 258*
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*

Background

- 1 This matter concerns an application for alteration and redefinition of licensed premises (“Application”) by Australian Leisure and Hospitality Group Pty Ltd (ACN 067 391 511) (“the Applicant”) referred under section 24 of the *Liquor Control Act 1988* (“the Act”) for premises known as Leisure Inn located at Lot 2, 1 Chalgrove Avenue, Rockingham Western Australia.
- 2 On 8 April 2014, the Australian Leisure and Hospitality Group Pty Ltd (ALH) applied, pursuant to sections 68 and 77 of the Act, for the conditional approval for the alteration and redefinition of existing licensed premises known as the Leisure Inn and which trades under licence number 601002384.
- 3 On 21 August 2015, the Director of Liquor Licensing (“Director”), referred the Application to the Liquor Commission (“the Commission”), pursuant to section 24 of the Act, for determination.
- 4 On 11 October 2017, the Commission granted the Application [*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police & Ors* (LC 26/2017) (“Original Commission Decision”).
- 5 Following an appeal to the Supreme Court in 2018 (*Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd [2019] WASC 114*) and a further appeal to the Court of Appeal in 2020 (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police [2020] WASCA 157*) the Original Commission Decision was quashed.
- 6 The matter has now been remitted for the reconsideration of the Commission afresh and according to law.
- 7 Also to note is that a previous application was made by the Applicant in 2011 pursuant to section 77 of the Act to develop a new building to provide retail packaged liquor under the Dan Murphy’s brand at the same location. This application was refused by the Commission as the proposed building, at that time, was not contiguous to the existing licensed premises as required under the Act.

SUBMISSIONS

Applicant’s Primary Submissions Dated 6 July 2016

- 8 The Applicant lodged a Public Interest Assessment (“PIA”) in support of the Application.
- 9 The Applicant acquired the Premises in 2007 and has increased the venue’s appeal and customer base since that time. The improvements implemented by the Applicant have resulted in the Premises becoming a well-run hotel catering to around 5,000 people per week, largely attributable to popular live music and food promotions.

- 10 However, the Applicant submitted that the Premises remain dated, are configured in a style that suited the 1980's and suffers from a reputation that is not consistent with the current management of the Premises.
- 11 The proposed upgrade will increase the current approved licensed area from 3,220m² to 4,990m², the majority of which is attributable to the proposed new Dan Murphy's liquor outlet. The proposed upgrade is a major undertaking costing in the vicinity of \$6.5 million.
- 12 The Application states, *"[Q]uite simply, all the applicant wants to do is to upgrade, replace and modernise the existing services and facilities (accommodation, various bars, entertainment facility, bistro dining facility, packaged liquor outlet and the two TAB facilities) so they are far better"*.
- 13 It was submitted that the upgrade and redevelopment is supported by:
- a an expansion of the target market from its immediate neighbourhood to the greater Rockingham region and in particular the locality, which has a population of around 75,000 people;
 - b overwhelming support from members of the local community;
 - c the strategic location of the Premises on a major arterial road adjacent to the Rockingham Regional Shopping Centre;
 - d the scarcity of "Full Service Hotels" in the locality and the fact there are no hotels in the Rockingham CBD;
 - e the fact none of the competing licensed premises provide a comprehensive range of hotel facilities to be provided in the proposed upgraded format of the Premises;
 - f developed in 1981, the Premises are not in a style or format preferred by contemporary customers, which is having a detrimental effect on the business of the hotel; and
 - g the lack of connectivity of the various facilities in the hotel also results in operational inefficiencies.
- 14 The Applicant points to previous examples of hotel upgrades it has undertaken in Western Australia as evidence of the successful application of its business model which involves the preserving of existing hotels and adding to the services and facilities resulting in increased patronage and sales.
- 15 In this case, the Applicant submits that the new and improved facilities will increase the focus on food service both in terms of the type of food offering and the décor and configuration of the eating areas, with an upgrade to the kitchen and the food preparation and service areas to improve efficiency and functionality.

- 16 The current entertainment facility will be also remodelled to improve flexibility to host functions when the designated entertainment area is not in use. Further, the type of entertainment and music will be “customer friendly” and more mainstream, consistent with the current theme to cater for a wider trade catchment area.
- 17 Replacing the current BWS drive through liquor outlet, the proposed Dan Murphy’s will be “*a full scale purpose built liquor store, which will offer comprehensive, distinctive and unique retail packaged liquor services and facilities*”.
- 18 A range of factors have been addressed in the PIA in support of the submission that the grant of the Application is in the public interest and includes several reports from various consultants, including:
 - a an analysis and report on health and crime statistics comparing data for the City (“City of Rockingham”) (as data for the locality is not publicly available) with data for the South West Metropolitan Region and WA (“Health and Crime Statistics Report”);
 - b a traffic impact assessment report (“Traffic Assessment Report”);
 - c a review and report on the health, environmental and amenity aspects of the existing licensed premises (“Other Licensed Premises Assessment”);
 - d trading activities of the premises (“Licensed Premises Assessment”);
 - e a report on the Public Interest Assessment Health and Environment by Caporn Services (“Caporn Report”); and
 - f a report on the regional and town planning aspects of the proposed redevelopment (“MGA Report”).
- 19 In addition, the PIA was accompanied by:
 - a a report on a community survey among residents of, and visitors to, the Rockingham locality (306 intercept interviews) designed to establish consumer attitudes towards the proposed development (“Community Survey”);
 - b a report on the geographical extent from which the upgraded Premises would be expected to draw custom and related matters (“Trading Area Report”); and
 - c a range of statements from the Applicant’s solicitors and industry professionals working for, or engaged by, the Applicant including the architect engaged to prepare the plans for the upgrade and redevelopment, as well as a number of witness statements (“Architect’s Statement”; “Applicant’s Statements and Witness Statements”).
- 20 Various reports and a number of witness statements also support the common theme of the proposed upgrade of the facilities.

- 21 The Applicant further submitted that:
- a the expanded facility is estimated to create about 30 new employment opportunities due to the improvements and the anticipated increase in patronage;
 - b the facility will also include the new State training facility for training staff to be employed in other outlets throughout the South West corridor;
 - c the Premises are within the area zoned “Central City Area” under the Metropolitan Region Scheme and the redevelopment conforms to the City’s town planning scheme, commercial strategy and structure plan; and
 - d the capital expenditure of approximately \$6.5 million will create an integrated hospitality destination which will be identifiably different from the current competing leisure, hospitality and liquor industry outlets throughout the Rockingham region, more in keeping with the regional role of the Rockingham CBD now and into the future.
- 22 The Applicant has examined the socio-demographic and socio-economic profile of the various suburbs within that locality and contends:
- a the overall demographic profile for the locality is of a mature age, predominantly Anglo-Saxon, English speaking with a Christian faith and “mixed” socio-economic standing;
 - b whilst income levels are lower than the WA average, housing costs are low, and although unemployment is higher in the locality than the WA average, it is comparable to the greater Perth average;
 - c of the “at-risk” groups identified in the Director’s Policy on Public Interest Assessments, the only group that has a higher representation than the WA average is single parent families (17.6% vs 14.5%), but there is nothing to suggest this group has experienced any greater liquor related harm or ill-health from the operation of the Premises;
 - d although in 2013 the locality experienced a higher aggregate crime per capita than the WA average, the proportion of alcohol-related crime is unknown;
 - e for 2009-2010 and 2005-2009, the City recorded a lower proportion of alcohol-related assaults and alcohol-related hospitalisations respectively than the WA average;
 - f although the Premises are situated in “what was traditionally a lower socioeconomic area” and which historically had “some significant security issues”, since the acquisition of the Premises by the Applicant there has been, and continues to be, a “very low rate of incidents throughout the venue” particularly in the context of the patronage of around 20,000 per month;
 - g the absence of a liquor accord suggests that there is no need for a coordinated response to alcohol-related matters in the community;

- h the impact of the current Premises under the ownership of the Applicant has been minimal and the design of the upgraded and redeveloped facility with increased open planning and the new secure packaged liquor outlet will ensure that security and surveillance operates more effectively;
- i of the 15 commercial premises within the Rockingham area permitted to sell or supply liquor to the general public, two are hotels (the Applicant's Premises and the Rockingham Hotel, which also has a drive through bottle shop), two are small bars, three are taverns, one with a drive through liquor outlet, and five are liquor stores all of which are some distance away (2-3 km approximately) except for the BWS store in the Rockingham Shopping Centre across Chalgrove Road from the Premises;
- j outside the locality there is a Dan Murphy's and First Choice major retail packaged liquor outlet at a distance of 10.5 km and 11 km respectively from the Premises;
- k the Applicant's Premises is the only licensed premises in the CBD that is a full service hotel and "it is evident that the range and diversity of full service hotels in the locality is severely lacking";
- l the independent marketing survey which comprised face to face interviews with 306 respondents (considered by the Applicant to be a representative sample of residents) demonstrated, among other things:
 - i very strong support for the proposed renovations (90% of respondents) across age, gender and family characteristics;
 - ii 54% would use the Dan Murphy's store more than the current drive through;
 - iii 84% would more than likely use at least one of the refurbished facilities; and
 - iv 23% would more likely use all facilities,

an outcome, the Applicant contends, highlights strong demand for a range of integrated services and facilities at the one location; and

- m the consumer witness statements sought by the Applicant to ascertain specific and more detailed views from the local community establish a clear demand for the modern, new style of venue proposed rather than the existing Premises, descriptions of which ranged from run-down and needing updating to "scabby looking" and "bogan".

23 The Applicant addressed the public interest requirements of the Act in the PIA with reference to the decision of the Supreme Court in *Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227* which the Applicant contends is relevant to the current Application as:

- a there is an abundance of evidence which demonstrates the Applicant's business model is a success, an outcome that will be replicated in this case;

- b there is a consumer requirement having regard to matters of taste, convenience, shopping habits and shopping preferences for the range of liquor products and services which the Applicant proposes to provide; and
 - c the proposed development meets the modern and diverse demands of the Applicant's customers and caters for, and reflects the diversity of, requirements of consumers consistent with the proper development of the liquor industry.
- 24 In addition to the material lodged with the PIA and initial submissions, the Applicant lodged further reports and a number of witness statements including, but not limited to:
- a a number of reports prepared by Data Analysis Australia ("DAA"), two dated 2010, and the other a critique of the academic research relied upon by the Police and EDPH ("the Executive Director of Public") dated 2016 ("DAA Reports");
 - b a report prepared by Social Impact Strategies ("Social Impact Strategies Report");
 - c a supplementary report prepared by MGA ("MGA Supplementary Report"); and
 - d further statements from the Applicant's Barry Cloke, National Property Manager, and Tim Osborne, State Manager ("Applicant's Further Statements").

Intervention And Objection by Commissioner of Police Dated 1 July 2014

- 25 The CoP ("the Commissioner of Police") initially lodged a notice of intervention pursuant to section 69(6)(c)(ii) and (iv) of the Act to make representations on the basis that if the Application is granted and/or conditions not imposed, public disorder or disturbance is likely to result and on other matters related to the public interest.
- 26 The lodged Memorandum of Senior Constable Garbin in support of the intervention asserts that whilst the CoP does not take issue with the development of the tavern restaurant/drinking facilities, it does take issue with the proposed Dan Murphy's large format destination store proposed to be included in the development that the CoP submits will, due to its business operation as a large, cheap packaged liquor outlet store, cause harm in, what is submitted, a high-risk locality.
- 27 The CoP submits, given certain factual similarities between the City and Maylands as to harms, crime figures and 'at risk' groups, weight should be placed on concerns raised by service providers in the locality as was the case in the Liquorland (Australia) Pty Ltd Liquor Commission decision (LC18/2012).
- 28 The CoP state that whilst the IMS Incidents data tables "*do not necessarily reflect crime figures specific to any single licensed premises or the applications premises*" it may be inferred from them that alcohol related offences are attributable to the sale, supply and consumption of liquor which must have been purchased at a licensed premises.

- 29 There is an undesirable number of offences occurring in the Rockingham area including sexual assaults, domestic assaults and non-domestic assaults and that half of sexual assaults are attributable to alcohol.
- 30 The CoP considers that the Balga crime data proves that a Dan Murphy's store will exacerbate, to unacceptable levels, the already increasing crime figure as was the case, according to the CoP, in Balga following the introduction of a Dan Murphy's store there.
- 31 The Dan Murphy's store will likely result in consumption of liquor in a public place, as evidenced by rubbish and empty bottles at two other stores, and therefore adversely impact amenity.
- 32 Amenity will also be adversely impacted by advertising on the Dan Murphy's building.
- 33 The Commissioner submits the Applicant's intended manner of trade would:
- a facilitate opportunistic purchasing of liquor products; and
 - b may negatively impact the amenity.
- 34 The approval may contribute to harm caused to people living and frequenting the locality noting the object of the Act.
- 35 The CoP contends the need to protect the public from alcohol related harm far outweighs the want or perceived needs of the public and the interests of the Applicant and if granted, submits certain conditions should be imposed.

Commissioner of Police Notice of Objection Dated 15 July 2014

- 36 Subsequently, the CoP lodged a notice of objection pursuant to section 73(1) of the Act to make representations that the grant of the Application would not be in the public interest pursuant to section 74(1)(a) of the Act and would cause undue harm or ill-health to people, or any group of people, due to the use of liquor pursuant to section 74(1)(b) of the Act.
- 37 The CoP have minimal concerns regarding the proposed upgrade of the Applicant's hotel premises. The principal focus of the objection is the conversion of the existing BWS store at the premises to a large format Dan Murphy's store.
- 38 In the intervention, the CoP expressed concerns that there is already a degree of harm occurring in the locality and the approval of the Application will increase this harm, highlighting the statistics relating to alcohol and non-alcohol related offences specific to the suburb of Rockingham commenting that "*alcohol is quite prevalent in crimes such as recent sexual assaults, domestic assaults and nondomestic assaults*".
- 39 The CoP also provided a breakdown of alcohol-related offences for various individual suburbs in the Rockingham Police District concluding that there is "*a significantly high rate of alcohol*

related crime in Rockingham when compared to neighbouring suburbs” and that any further increase would be intolerable.

- 40 The CoP considers that aspects of the intended manner of trade and marketing principles specific to the proposed Dan Murphy’s store are not in the public interest, particularly having regard to the locality to which the Application relates.
- 41 By reference to research in the United Kingdom, the CoP contends that the availability of cheap discount liquor coincides with unacceptable levels of harm and that the Dan Murphy’s marketing strategy of “lowest price guarantee”, coupled with discounts for bulk purchases is not in the public interest (in terms of the protection of the public from harm) and that the grant of the Application will raise the level of harm in the locality.
- 42 The CoP objection:
- a outlines the serious nature of family and domestic violence;
 - b contends alcohol is a common contributing factor and submits, by reference to a report of the Australian Institute of Criminology, that a significant number of domestic violence incidents are not reported to police; and
 - c highlights that 85% of all family and domestic violence referred to the Lucy Saw Women’s Refuge Centre in Rockingham is alcohol related and that in the view of the Executive Officer of the Centre, *“another cheap alcohol outlet would impact greatly on victims of family and domestic violence, and especially the wellbeing of young vulnerable people within the community”*.
- 43 Police recordings show a high number of domestic related incidents in the suburb of Rockingham with a “distinctly higher rate” than similar neighbouring suburbs, such as Port Kennedy and Baldivis.
- 44 The CoP also point to a number of research findings to support the proposition that there is a causal relationship between alcohol consumption and domestic violence, and a relationship between outlet density, consumption and violence and crime.
- 45 In an endeavour to assess the impact on the community of the introduction of a Dan Murphy’s store, the CoP conducted an analysis of the crime data before and after the introduction in 2004 of a Dan Murphy’s store in Balga, a suburb of Perth the CoP contends has a similar demographic profile to that of Rockingham.
- 46 Based on this analysis, the CoP submit that there was “a significant spike” in offences in 2004 and 2005 (at a time when Balga experienced a decrease in population between 2001 and 2006) and “speculates that this spike was caused by the approval and operation of the Dan Murphy’s store”.

- 47 The concerns of the CoP about the manner of trade, marketing principles and liquor discounting of the proposed Dan Murphy's store arise because the CoP considers "at risk" people, who tend to be socially marginalised without support and supervisory networks and who have limited disposable income, will be able to purchase more liquor than they otherwise would, and, as a result, there is a greater chance they will consume liquor and become intoxicated more regularly, and be more likely to commit offences.
- 48 The CoP contends that the focus of the Applicant on the number of product lines and references to premium wines and liquor products to be stocked by the proposed Dan Murphy's store without revealing information relating to actual product sales or the proportion of low cost product products sold tends to suggest that Dan Murphy's stores do not sell a significant amount of low cost liquor when, in fact, as is evident from interventions by the CoP and EDPH in previous applications, the sale of low cost liquor is a matter of enormous significance to the issue of harm and ill-health that may result for the grant of an application.
- 49 The CoP analysed the median house price and incomes in areas in WA in which Dan Murphy's stores are located and concludes from that analysis that 7 of the 12 stores are in areas in which the median house price is lower than the median house price for Perth and that some of the suburbs are significantly disadvantaged in terms of income compared to the WA State average. It is contended that this analysis suggests that rather than catering for consumers seeking premium wines and a broad range of product, these stores predominantly cater to consumers in these areas by offering cheap liquor products.
- 50 In the view of the CoP, the discounting of liquor products, particularly the discounting of cheaper liquor products, means that "at risk" persons who previously chose to purchase the cheapest items available at the existing BWS store at the Premises would be able to purchase in excess of a third more liquor.
- 51 Further, a review of the "current offers" advertised by Dan Murphy's, for a specific day selected by the CoP, showed that 25 of the 48 products discounted were priced under \$10.
- 52 The CoP conclude from a review of the marketing and advertising strategies adopted by Dan Murphy's (as evident from its internet web page, print media and external and internal advertising at its stores) that in contrast to the focus in the PIA on offering a large range of high quality liquor products, the Dan Murphy's brand is designed to appeal to the public by providing a discount liquor outlet; by offering liquor cheaper than its competitors; by providing discounts on bulk purchases; and by offering price guarantees against its competitors.
- 53 The practice of selling cheap liquor and offering discounts for bulk purchases of cheap liquor products is an aspect of the Dan Murphy's business model that the CoP considers is not in the public interest as it will lead to a significantly higher rate of liquor consumption and higher rates of crime and domestic violence.

54 It is submitted that the Dan Murphy's stores do not promote the sale of liquor responsibly and in doing so contravene the Director's policy on the responsible service of liquor.

Intervention by the Executive Director of Public Health Dated 22 July 2014

55 The EDPH lodged an intervention pursuant to section 69(8a)(6) of the Act to make representations to establish that the characteristics of the proposed Dan Murphy's store (large format, cheap alcohol, high volume capacity, convenience) when combined with the vulnerabilities of the local community, are likely to cause harm or ill-health to people, or a group of people, if the Application is granted.

56 The focus of the intervention is the Dan Murphy's component of the upgraded and redeveloped Premises, noting that the area of the existing BWS store of approximately 120m² (59m² of browse area and 61m² cool room) will, if the Dan Murphy's store as proposed is granted, increase to 1,100m² (997m² browse area and 103m² cool room).

57 As a consequence, the Dan Murphy's store will significantly increase the physical availability of liquor, which, according to the EDPH, is a relevant consideration as past and recent research and reviews demonstrate a positive relationship between the availability of alcohol and associated harm, problems and ill-health, and the locality, which already contains multiple packaged liquor outlets is currently experiencing negative alcohol related health and social concerns.

58 Further, the characteristics of the proposed Dan Murphy's store distinguish it from other liquor outlets and all of these factors have the potential to impact on the amount of liquor purchased, the frequency of purchases and related consumption and the potential harm and alcohol-related problems.

59 Based on the analysis of price comparisons for various types of liquor at Dan Murphy's and a selection of other stores in the locality, the EDPH concludes:

- a the economic availability of alcohol in Rockingham is likely to increase significantly; and
- b lower priced products, for example in the \$0 - \$9.99 price range, are a key feature of Dan Murphy's.

60 By reference to relevant research and literature, the EDPH also highlights the following propositions:

- a there is a relationship between price, consumption and harm;
- b a reduction in price can result in an increase in consumption and vice versa;
- c low/competitive price positioning is particularly significant in low income areas where the vast majority of consumers will attempt to maximise the quantity of liquor purchased for a given amount;

- d low/competitive price positioning and greater exposure to stock ranges and layout can also result in customers purchasing more than planned and then consuming more overall than if they had not purchased in bulk;
- e the provision of alcohol at lower cost is known to increase consumption among various groups, especially those on limited incomes;
- f overall, lower prices impact the risk of harm, not just to “at risk” persons, but in the longer term, the broader community;
- g it is likely that many people will purchase alcohol when they would otherwise not be considering a purchase due to the high visibility and convenience of the Dan Murphy’s store (in conjunction with the lowest price guarantee and cheap liquor availability); and
- h packaged alcohol sales by liquor stores has been shown to be positively related to levels of assaults, road crashes, drink driving and alcohol related hospitalisations which is particularly relevant due to the level of domestic assaults in the Rockingham locality.

61 In addition, the EDPH has examined the demographic profile and community characteristics of the locality and submits:

- a the Applicant has “underplayed the disadvantage in the Rockingham area”;
- b using the Socio Economic Indexes for Areas (“SEIFA”) as a measure, and consistent with the comments of some local service providers, a number of suburbs in the locality, including Rockingham, are relatively disadvantaged in comparison to other suburbs in the State, which may contribute to the disproportionate morbidity and reduced life expectancy of those in disadvantaged socio-economic circumstances;
- c socio-economic circumstances can influence drinking behaviours and “at risk” groups are more sensitive to the price of alcohol which can influence the amount of alcohol consumed;
- d within the cycle of economic disadvantage, unemployment exacerbates alcohol related problems and unemployment rates for the City have been consistently above the State and Perth unemployment rates since 2012; and
- e the proposed Dan Murphy’s store is in close proximity to places popular with young people and where young people congregate, and based on comments from some service providers who treat young people with alcohol related and other problems, easier access to alcohol, because of price or range, has the potential to further contribute to the health and wellbeing problems of these young people.

- 62 The EDPH refers in some detail to the information provided by the following service providers:
- a the Multisystemic Therapy Team (five psychologists) for Child and Adolescent Mental Health, Southern Metropolitan region, who work with adolescents referred to them through schools, the Department of Child Protection and other community services; (“Multisystemic Therapy Team”);
 - b Headspace Rockingham, which provides mental health and wellbeing services for young people; (“Headspace Rockingham”);
 - c Palmerston Association which provides treatment services to individual whose lives are affected by alcohol and drugs (“Palmerston Inc”); and
 - d Perth South Coastal Medicare Local who provide primary health care within the community.
- 63 As in the objection lodged by the CoP, the EDPH highlights the period between 1 January 2011 and 31 May 2014 referencing the level of domestic and non-domestic assaults in the various suburbs within the locality, as well as drink driving offences, pointing out the number of alcohol related assaults for each suburb (for Rockingham about 1 in 3 domestic and non-domestic assaults involved alcohol) and drink driving offences involving packaged liquor (again for Rockingham, about half of the drink driving offences involved packaged liquor consumption).
- 64 Additionally, the EDPH provides statistics for alcohol treatment episodes from the Drug and Alcohol Office noting that residents of Rockingham represent the highest proportion of treatment episodes and that in almost 1 in 3 treatment episodes alcohol was the primary drug of concern.
- 65 Overall, the level of alcohol related hospitalisations for the Rockingham area was lower than the State, but higher for some specific alcohol related conditions, such as alcoholic liver cirrhosis (1.59 times).

Objections

- 66 In addition to the objection from the CoP, three further objections have been lodged pursuant to section 73(4) of the Act.

Rockingham Seventh-day Adventist Church, Rockingham

- 67 The members and Church Board object to the Application on the grounds the grant of the Application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor, citing the State Government’s warnings on the physical effects of over-indulgence of alcohol, the reputation of Western Australians as “big drinkers”, the cost to the

State of alcohol related harm and the reputation of the City as a place where people drink alcohol to excess as reasons for the objection.

Mr T Mathews

- 68 A long term resident and business owner, Mr Mathews objects on the grounds:
- a the proposed reduction in the overall space of the refurbished hotel in order to greatly increase the floor area of the packaged liquor outlet is not in the public interest particularly having regard to the increase in population;
 - b changing the drive through facility to a park and walk-in facility will, given the surrounding facilities, car parks and public open space, increase the incidence of public drinking;
 - c the close proximity of the Rockingham Senior High School and passing traffic from the school to the nearby Shopping Centre will increase the incidence of third party supply to school children; and
 - d the PIA is deficient as it does not identify two stores within the locality (Celebrations Safety Bay – 4 km away and Malibu IGA Liquor Outlet – 3 km away) both of which provide a wide range of products and product knowledge (Mr Mathews declares a pecuniary interest in the Celebrations store).

Mr L Smith

- 69 A resident of Rockingham since 1968, Mr Smith believes Rockingham already is “*very well catered for liquor outlets*” and submits a new Dan Murphy’s outlet would have a marked downturn on a number of existing liquor stores that can be accurately described as small businesses, with a “disproportionate loss of employees”.

Response On Behalf Of the Applicant Dated 13 July 2016

- 70 In respect of the evidence presented by the EDPH and CoP, the Applicant responds:
- a the analysis undertaken by DAA and Social Impact Strategies casts significant doubt on the utility of the evidence of the CoP and the EDPH and shows the level of harm within the locality appears to be no higher than appears to be commonly accepted elsewhere in the community;
 - b there is very little evidence presented to demonstrate that the existing BWS store contributes to the existing level of harm and ill-health in the community;
 - c the existing level of domestic violence has not been shown to be connected to the BWS store at the Premises;

- d the Applicant has demonstrated that the introduction of a Dan Murphy's store into the community results in minimal or no negative impacts;
- e the proposition of the EDPH and the CoP that the increase in products available at the proposed Dan Murphy's store will result in the increase in consumption of liquor is not sustainable as despite the increase in stores throughout Australia between 1998 and 2016 overall consumption in Australia has actually fallen;
- f whilst Dan Murphy's "sell many products at low price points, it also stocks a large range of products at high price points" and the experience and evidence gathered by the Applicant makes "it tolerably clear that the majority of Dan Murphy's customers are most unlikely to be vulnerable people, on limited incomes, purchasing small amounts of cheap alcohol";
- g the potential increase in harm from the introduction of the Dan Murphy's store over that already occurring in the community (which is not high or unacceptable) is extremely small, and the positive benefits of the Application greatly outweigh any perceived and alleged risks of harm; and
- h it is not in the public interest to leave the Premises in its current out-dated state, nor is it in the public interest "to deprive this significant metropolitan region of the significant development in retail that is available elsewhere".

71 In addition, the claim that the Applicant has not demonstrated a consumer requirement for the Dan Murphy's store contrasts with the contention that the Application should be refused because the Dan Murphy's store will attract considerable patronage. Furthermore, it is no answer to say that just because some items do not rank in the products sold that there is no consumer requirement for them.

72 The Applicant contends there is no evidence upon which the Commission can conclude that the grant of the Application will result in the domination of the industry in the locality to the extent it would be contrary to the proper development of the industry.

73 It was submitted that the relevance to the locality of the data relied upon by the EDPH to establish that per capita consumption of alcohol in WA has increased in comparison to Australia is questionable, as high rates in specific regions skew the rates, Rockingham is an entertainment precinct with a number of tourist venues and WA has been in boom conditions in recent years all of which are recognised as factors that may affect average rates.

74 Moreover, alcohol is already available in the locality and the refusal of the Application will not ameliorate this, and for "at risk" persons to be negatively affected their pattern or level of consumption will have to change due to the Application.

- 75 The grant of the Application will not eradicate harm and cannot eliminate the risk of harm, but it does present a significant improvement over the present circumstances.
- 76 In response to the claim by the CoP that Dan Murphy's predominantly sells cheap liquor, the Applicant submits that when analysing and interpreting data, different results can be achieved depending on how it is categorised, and contends:
- a the most important part of the data is that there is a proportion of cheap alcohol sold at Dan Murphy's, but it "tells us nothing about who is purchasing the alcohol and consuming it"; and
 - b evidence and modelling of purchasing patterns of Dan Murphy's customers demonstrates that Dan Murphy's customers:
 - i generally buy in bulk;
 - ii include restaurateurs, event organisers, clubs and business owners; and
 - iii irrespective of the locality of the store, about 25% will purchase premium products with at least 40% choosing "mid-range" products.

Further and Responsive Submissions on Behalf of the Police Dated 13 July 2016 and filed 14 July 2016

- 77 The CoP contend that:
- a given the significant improvements already made to the tavern, any further benefit would be marginal and "*it does not appear that the services to be offered by a refurbished tavern will significantly differ from those already provided by the Premises*";
 - b there is little or no direct evidence as to how the proposed Dan Murphy's store adds to the proposed development or explanation of why the Application could not be granted without the proposed Dan Murphy's store;
 - c the Applicant's survey was framed overwhelmingly in terms of the upgrade to the tavern with minimal reference to the proposed conversion of the BWS to a Dan Murphy's store;
 - d the Applicant has not established a consumer requirement for the proposed Dan Murphy's store and certainly not for a wider range of products or for a wide range of premium wines, which the CoP contend is not a product that would be sought by many people living in the locality;
 - e the evidence relating to sales at Dan Murphy's indicated the vast majority of Dan Murphy's sales are likely to be identical to the sales of the existing BWS, albeit in larger volumes at cheaper prices;

- f despite the 4,000 or so product lines that Dan Murphy's proposed to stock, based on the evidence of the sales of the Dan Murphy's Mandurah, 1380 top selling product lines amount to about 90% of the stores sales by number of stock unit sold, which equates to, for example, Liquorland Baldivis which carries approximately 1380 different product lines;
- g there is strong evidence that the proposed Dan Murphy's store would sell products comparable to the 10 existing liquor stores in the locality even if it stocks a wider variety; and
- h based on the analysis of the sales data for Dan Murphy's stores, Dan Murphy's stores sell vast quantities of cheap liquor.

78 While it is accepted by the CoP that there is no other Dan Murphy's or First Choice store within 10 km of the Premises, the CoP submit, with reference to the witness statements from liquor store owners/operators who have experienced the impact of the new Dan Murphy's stores on their business, granting of the Application will have a tendency of stifling or destroying diversity and promoting a duopoly in the liquor industry.

79 In relation to the potential for an increase in harm or ill-health if the Application is granted, the CoP re-iterate and further submit that a Dan Murphy's rebranding of the BWS store will, in all likelihood, result in:

- a a decrease in the prices of alcohol sold;
- b a significant increase in customer numbers and sales;
- c a substantial increase in liquor sales and consumption in the locality, even accepting some degree of outlet substitution; and
- d an increase in the level of alcohol related harm which is likely to be felt acutely by heavier and younger drinkers, who are more price sensitive than other drinkers.

80 The CoP contend that the locality is socio-economically disadvantaged with a higher rate of unemployment compared to the State average (11.0% vs 5.5% in March 2016) and that relatively disadvantaged people report higher alcohol consumption levels and also spend a larger proportion of their household income on alcohol.

81 Clients from "at-risk" groups are also likely to be attracted to the proposed Dan Murphy's store because of its reputation as a provider of alcohol at the cheapest price.

82 In assessing the public benefits likely to be derived from the grant of the Application, the CoP refer to the improvements made to the tavern to date and contend that it does not appear that the proposed services differ from those already provided. Rather, in many respects the services will be duplicative of those already available in the locality.

- 83 The claim by the Applicant that “the vast majority of Dan Murphy’s customers are most unlikely to be vulnerable people, on limited incomes, purchasing small amounts of cheap liquor” is flawed as no attempt has been made to quantify the number of customers who are vulnerable people, nor is there any basis for assuming vulnerable people only buy cheap liquor or only buy it in small amounts.
- 84 The CoP submit that in light of the current level of crime in the suburb of Rockingham and the fact the majority of alcohol related domestic violence offences result from pre-packaged liquor purchased in liquor stores, even a small increase in crime as a result of granting the Application cannot be tolerated.
- 85 In contrast to the Applicant’s claim that the declining average per capita consumption of liquor shows that the increasing availability of liquor does not increase consumption, the CoP contend, by reference to recent research of changes in alcohol related mortality and morbidity in Australia over the period 2001-2010, that:
- a while the number of abstainers has increased, the proportion of heavy alcohol consumers has increased; and
 - b alcohol related harm has increased while consumption has remained relatively stable.

Further And Responsive Submissions on Behalf of the EDPH Dated 13 July 2016

- 86 The EDPH largely reiterated its primary submissions in its responsive submissions. It rejects the Applicant’s reference to accepted studies and literature on availability, use and supply of alcohol as “a plethora of general studies”, but, rather, considers them to be a source from which reasonable inferences may be drawn when assessed with the locality specific evidence addressed by the EDPH.
- 87 The EDPH also points out that the DAA Rockingham Report upon which the Applicant has sought to rely has not been subject to the same level of review as the peer reviewed literature referred to by the EDPH, and does not enjoy the scientific credibility of the works the DAA report seeks to criticise.
- 88 It is not incumbent on the EDPH to adduce evidence that a large Dan Murphy’s store “will actually” result in harm, the burden is on the Applicant that it will not.
- 89 The West Ballina case study and data is of limited use because the data pertains to a short period of 10 months following the opening of the liquor store; there are methodological and analytical issues with it and no longitudinal analysis of the potential impact the Dan Murphy’s store may have had on the community there; similar problems are identified with respect to the Applicant’s study of Balga, Albany and Mandurah Dan Murphy’s stores and the fact the report has not been the subject of peer review.

Applicant's Submissions Dated 7 May 2021

- 90 The Applicant relies on its previous submissions and submits there is a need in the City for a regional-based modern hotel which development will:
- a fulfil an unmet need within the locality;
 - b result in a wide range of benefits in the locality including the liquor industry, tourism and hospitality; and
 - c not result in a significant increase in the level of alcohol related harm or ill-health in the locality.
- 91 The Applicant asserts that consideration of the merits of the Application must be carried out as a whole and not focus on the Dan Murphy's component of the Application.
- 92 The Commission's power must be exercised consistently with the objects and other provisions of the Act which provisions are recited in the submissions together with the applicable principles in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*, but says the object of minimising harm does not take precedence over the other primary objects of the Act, it is one of the factors to be considered.

Fulfilling an unmet need within the Locality

- 93 The Applicant contends catering for the requirements of consumers for liquor and related services is a public interest requirement central to the objects of the Act and that the updated survey evidence shows, together with the Applicant's successful management of the hotel, that the community supports it and that the development is necessary to cater to the requirements of consumers for liquor and related services in the locality.

Wide Range of Benefits to the Locality

- 94 To meet what the Applicant views as an imminent consumer requirement resulting from the transitioning of Rockingham to a regional hub that will service a wide catchment area, the Applicant repeats various specific attributes of the development noting tourism and entertainment industries will both be better serviced if the development were to proceed.
- 95 That there is no large format packaged liquor outlets within the locality with the closest one being noted as 10 kms away is submitted as an additional example of how the public will be benefited with focus being on the Dan Murphy's business model of selling "*premium and commercial wines, large range of stock and competitive price point executed by a well-experienced, responsible manager.*"

No significant Increase in Harm or Ill-Health

96 The Applicant holds, in relation to the CoP and CHO objections, that evidence of a general nature concerning a potential correlation between increases in harm or ill-health and the increased availability of alcohol through an increase in licensed premises area is of limited assistance in the determination of the Application when applying the Carnegies test.

Level of harm in the Locality

97 Relative to the number of patrons that attend the Premises per week, the Applicant says the total relevant incidents is inconsequential and that there is no significant level of alcohol-related harm occurring on or around the Premises.

98 Furthermore, as for the locality generally, the expert evidence presented by ALH shows the level of alcohol-related harm is comparable to, or below the level of harm suffered in the communities of this State.

Likely degree of harm to result from granting the Application

99 Relying on the Balga and Ballina Dan Murphy's store case studies and the testimony of its National Property manager, Barry Cloke, the Applicant says there is likely to be minimal or no negative impact from granting the Application.

100 The Applicant concedes there are two potentially "at-risk" groups in the locality being young people and people with low socioeconomic status but says neither group are in concentration above the state average and the mitigation measures will ameliorate any potential harm.

Weighing the potential increase in harm against the existing harm

101 The Applicant submits the baseline level of alcohol-related harm and ill-health is not high particularly when compared with other CBD/entertainment/dining areas in satellite cities of Perth and that the Commission should find that it is comparatively low such that the minimal risk of a potential increase in alcohol-related harm does not weigh heavily in the balance against the other public interest factors.

Weighing and Balancing

102 The Applicant submits that the benefits of the development outweighs the minimal risks of an increase in alcohol-related harm and ill-health in the locality where existing levels are unremarkable.

Commissioner of Police Outline of Submissions Dated 21 May 2021

103 The CoP continues to oppose the expansion and re-branding of the existing BWS to a Dan Murphy's store and seeks to rely on its original intervention dated 1 July 2014, original

objection dated 14 July 2014 (CoP Objection 2014), the CoP Primary Submissions 2016 and the responsive submissions lodged on 13 July 2016 (CoP Responsive Submissions 2016) and makes further submissions regarding the public interest to the extent it relates to the Dan Murphy's store at the Premises, having regard to the updated evidence lodged since the matter was remitted by the Supreme Court Appeal Court to the Commission for re-hearing.

104 The CoP submits that the original decision-maker (being the Commission) is obliged to determine all questions of fact and law arising in the matter afresh, but that the Commission may adopt the findings of its original decision 11 October 2017 (Original Reasons) to the extent they are unaffected by the errors of the law.

105 The CoP:

- a submits it first conducted an analysis of the purported benefits the grant of the Application would confer through catering to consumer requirements;
- b submits that it has lead evidence that an increase in alcohol related harm and ill-health caused by the Application would not be insignificant;
- c maintains that the Applicant's updated Patterson Research Group consumer survey pertaining to consumer demand contains the same deficiencies it identified in the earlier survey due to the design of the questionnaire and its focus on the upgrade to the tavern and not to the Dan Murphy's store; and
- d concludes that since the Applicant has not provided any evidence of consumer requirement in locality for the Dan Murphy's offering at the Premises, it has not shown the proposed Dan Murphy's store is responding to the preferences or requirements of consumers of liquor in the local community.

106 The CoP holds that consumers in the locality are already well catered for, noting the additional number of packaged liquor outlets since the Application was first made has increased from 9 to 14 which includes an ALDI Rockingham Liquor Store located 0.2 kilometres from the proposed Premises and the proposed size and purported diversity of the new store is not a benefit but rather a detriment as proliferation is contrary to the public interest.

107 The CoP accepts the Applicant is a well-experienced, responsible manager of licensed premises.

Harm or Ill-health arising from the Application

108 The Commission must follow the four steps articulated by Allanson J in *Carnegies Realty Pty Ltd v Director Liquor Licensing [2015] WASC 208 [42]-[43]*.

109 The CoP submits the Commission, on remittal should make the same findings of fact concerning harm and ill-health as the Commission found in its Original Decision save and

except those facts the law did not permit to be considered (“irrelevant facts”) and since those irrelevant facts tipped the “fine balance” identified by the Commission between harm and ill-health likely to arise from the grant of the Application and benefits to decide in favour of the Applicant, once taken away the Commission should then find the likely degree of harm assessed to arise from the grant of the Application weighed against the benefits of the Application do not count in favour of the grant.

110 At the Hearing, the Commission noted it would consider the matter afresh to make positive and negative findings, if any.

Existing levels of harm in the locality

111 The CoP analysed and made submissions on data held in its Incident Management System database to support the contention crime levels, including domestic violence, in Rockingham is higher than the State average and that the locality has experienced and continues to experience crime, including alcohol-related crime, at a rate higher than the corresponding State rate.

112 The CoP cautions reliance on or weight being given to the Applicant-commissioned Social Impact Assessment report prepared by Mr James Lette (“SIS Report”) that concludes the locality does not experience greater levels of alcohol-related harm than those “commonly accepted in the community” and that the levels of harm are “much lower” than other CBD/entertaining/dining areas in satellite cities of Perth.

113 The CoP says the Commission should find that the level of alcohol-related harm in the locality, including Rockingham, has been consistently higher than corresponding State rates across a 10 year period.

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

114 The CoP submits that:

- a the proposed Dan Murphy’s store will result in an increase in customer numbers at the premises, which in turn will result in an increase in consumer purchasing of alcohol which in turn lead to an increase in the consumption of liquor in the locality;
- b Dan Murphy’s sells cheap liquor in vast quantities and mostly sells that cheap liquor by comparison to other products;
- c the alcohol at Dan Murphy’s is significantly cheaper than the existing BWS, giving rise to the opportunity to buy twice the volume of wine for the same price;
- d increased consumption will lead to an increase in alcohol-related offending and antisocial behaviour outside the licensed premises and at home;

- e Rockingham remains socially disadvantaged being in the bottom 20% of areas in WA for social disadvantage;
- f in the locality there are several risk groups: children, young people; aboriginal people; families; tourists and at-risk service providers; and
- g increased availability of cheaper alcohol in a disadvantaged area with at risk groups and a demographic that spends more than the Perth metro or Australian average gives rise to an increased risk of alcohol related harm or ill health, including an increased risk in the commission of offences,

and therefore it is highly likely harm or ill-health will result from the grant of the Application.

115 The CoP asserts no weight should be given to either the case studies concerning the Ballina and Balga Dan Murphy's or Mr Cloke's evidence; that management harm minimisation strategies do not effectively mitigate harm arising from the consumption of liquor; and that the Applicant has not proved the potential increase in alcohol-related harm or ill-health as a result of the grant of the Application would be minimal.

The likely degree of harm assessed against the existing degree of harm.

116 The CoP submit the high level of alcohol related harm and ill-health in the locality means that any small increase in the level of risk is likely to be tolerated and that the Application will significantly increase the risk, which is a consideration in the assessment of where the public interest lies with respect to the Application.

Weighing the likely degree of harm against other factors relevant to the public interest

117 Minimal weight should be given to the benefits of Leisure Inn Hotel renovation when viewed as a whole.

118 The "benefits" of the Application in relation to the Dan Murphy's store are, at the same time, detriments that will increase harm (as to crime) and therefore should not be considered such that the Commission should find that the public interest does not weigh in favour of the grant.

Chief Health Officer's Outline of Responsive Submissions Dated 21 May 2021

119 The CHO ("Chief Health Officer") as Second Intervener in the proceedings continues to rely on his original intervention and on the primary and responsive submissions filed on behalf of the CHO (2016 Primary Submissions and 2016 Responsive Submissions respectively) and makes further submissions in relation to the public interest aspect of the Application concerning harm or ill-health to people due to the use of liquor if the Application is granted.

- 120 The CHO submits that the Commission should come to the same or similar conclusion on the topic of harm or ill-health as the Commission did in the 2017 Decision based on previous evidence submitted and updated evidence that supports its contention that:
- a there are levels of alcohol related harm and ill-health in the locality consistently higher than corresponding State rates across a number of objective measures between 2011 and 2020; and
 - b concerns about extant alcohol related harm and ill-health are acute amongst treatment and support service providers in relation to the 'at-risk' groups in the locality (particularly young people); and
 - c the Applicant has failed to lead any new evidence to militate the above two points.

Carnegies Step 2: Degree of Harm and Ill-Health Likely to Result from the Grant of the Application

- 121 The CHO refers to statements from, amongst others, Professor Robert John Donovan and service providers to support factual findings that:
- a increased availability of alcohol in close proximity to at-risk groups will cause harm or ill-health; and
 - b there are at-risk groups and service providers in the locality trying to manage alcohol related problems.
- 122 The CHO holds the Dan Murphy's business model of advertising and supplying cheap alcohol will exacerbate the problem and submits little or no weight should be given to the Case Studies; Mr Barry Cloke's evidence or the Applicant's "Secondary Supply Policy" (that is a legal requirement anyway).
- 123 The CHO notes there are now 14 packaged liquor outlets in the locality including an ALDI liquor store just 0.2 kms away from the Premises and approval of the development would further increase the density of low-price liquor retailers particularly given the greater size, stock range and price positioning of the proposed Dan Murphy's including its "lowest price guarantee".
- 124 The CHO says there is a correlation between outlet density and alcohol related violence in the community and in concluding step 2 of the Carnegie's test, says the Commission should find based on the following, the Application will likely increase the degree of harm and ill-health in the locality.
- 125 As to the physical characteristics of the Dan Murphy Store that:
- a will be several times larger retail floor area than the existing BWS;
 - b will sell liquor at substantially lower prices;

- c has/will have a direct street frontage and entrance on Chalgrove Avenue making it more visible to at-risk groups; and
 - d will open at a time of the day that may be harmful for recovering alcoholics.
- 126 As to low-socio economic and disadvantaged people living in the locality vulnerable to harms associated with low cost alcohol, the CHO says unplanned and opportunistic purchasing will result due to the size and design of the store and marketing of low and discounted prices, and therefore increase liquor consumption in the community.

Carnegies Step 3: Comparison of Existing and Likely Future Harm if Application is Granted

- 127 The CHO contends that based on previous and new evidence, the Commission may find that it is highly likely the development would significantly increase harm to clients of service providers in the locality and the harm and ill-health likely to be caused to “at risk” groups in the locality will be high being a significant factor to be weighed.

Applicant’s Submissions in Reply Dated 8 June 2021

- 128 In reply to the CoPs Submissions dated 21 May 2021 and the CHO’s Submissions dated 21 May 2021, the Applicant asserts that the Commission is to determine the Application afresh, rather than adopt earlier findings, and this submission was accepted by all parties and the Commission at the Hearing.

Locality

- 129 The relevant locality, according to the Applicant, is the Primary Trade Area being Rockingham, East Rockingham, Safety Bay, Shoalwater, Peron, Waikiki, Hillman, Coo롱gup, Warnbro and Port Kenny and this has not been contested by either of the CHO or the CoP despite both utilising data from different areas.

Evidence as to Consumer Requirement

- 130 Contrary to the CoP’s submissions, the Applicant contends the Commission should have regard to the survey results according to their terms in determining whether there is a consumer requirement in the locality.
- 131 Other evidence tendered by the Applicant supports the above consumer requirement contention.
- 132 The Applicant does not need to meet a variant of the “needs test” for the Application to be granted and the Commission can be satisfied that:
- a the evidence shows there is an unmet consumer requirement for the services and products that will be provided by the redevelopment including the Dan Murphy’s store;

- b there is evidence of trends in consumer requirements at a broader level within WA and Australia that is consistent with the above; and
- c the grant will cater to consumer requirements for the products and services that will be provided by the redevelopment proposed by the Application in its entirety and as well as the Dan Murphy's component¹.

Promotion of Diversity in the Liquor Industry

133 Contrary to the CoP's submissions regarding the anti-competitive nature of the Application, the Commission should find that the grant will result in an increased range and quality of liquor-related products and services being made available in the locality which will promote the proper development of the liquor industry in that area.

Existing Level of Harm - Crime Statistics

134 The Applicant submits that the CHO and CoP's emphasis on Rockingham crime statistics is misplaced as the relevant area is the locality as a whole.

135 The latest crime evidence includes crimes in Baldivis which is not part of the locality, but despite this, the Applicant submits that the crime data is either at, or significantly below the State average in all categories of crime and there is a downward trend between 2016 and 2020 of alcohol-related crime in Rockingham proper; crime in total in Rockingham proper; alcohol-related crime in the Rockingham Sub-District and total crime in that sub-district such that the locality suffers a level of crime (alcohol-related and in total) that is below the State rate and trending down since 2016.

Existing Level of Harm - Health evidence

136 A similar objection is asserted with respect to the health evidence i.e., data provided by the CHO does not correspond to the locality with the hospitalisation data drawing on the Rockingham Statistical Area 2 ("SA2") - an area that only comprises a small part of the locality.

137 In any event, the Applicant contends that the Rockingham SA2 data was like the corresponding State rate and that the number of hospitalisations for alcohol-related conditions is lower in the locality than the State generally such that there is not any significant risk in the locality relative to the State.

Likely increase in harm – Sales data

138 The Applicant says the CoP's reliance on sales data (and specifically wines that cost less than \$10 a bottle and liquor sold for less than \$1.50 per standard drink) is irrelevant in the

¹ Applicant's Submissions in Reply dated 8 June 2021 para 26

circumstances the Palmerston Association identified cask wine at \$0.34 per standard drink and cheap beer at \$0.87 as problematic, yet only a small proportion of Dan Murphy's sales fall within the cheapest liquor bracket of \$0 - 0.50c per standard drink, thus the sales data does not support the CoP's submission that *"Dan Murphy's sells cheap liquor, it sells cheap liquor in vast quantities and it predominantly sells cheap liquor compared to other products available"*.

- 139 The Applicant further submits that the Dan Murphy's business model is not operated in a way that there is a likelihood that alcohol-related harm will significantly increase in the locality if the Application is granted.
- 140 With regards to the relative advantage and disadvantage in the locality, the Applicant refers to the SIS report analysis of the SEIFA indices and the Vinson indicators and says the locality was relatively advantaged "overall" even though there were several relatively disadvantaged residents in the locality who do not comprise a significant proportion of the population.
- 141 The relative advantage or disadvantage of residents within the locality:
- a is not a factor which significantly increases the likelihood of harm resulting from the grant; and
 - b is not a compelling factor weighing against the grant.

Likely increase in harm - increase in patronage and sales

- 142 The Applicant explains the increase in patronage and sales will be due to:
- a taking over market share of existing premises with 20-30% being its target market share; and
 - b attracting customers beyond the locality,
- such that there will not be a significant increase in consumption over and above the existing levels.

General studies

- 143 Academic studies and literature reviews on the topic of alcohol and harm are unreliable. Whilst they demonstrate the complexity of the relationship between alcohol and harm, they also illuminate the difficulty in predicting how existing levels of harm might respond to change, as borne out, according to the Applicant, by the fact despite 5 new premises opening in the locality between the period 2014 and 2021 and a significant increase in population, the data relating to alcohol-related crime and total alcohol-related hospitalisations remained:
- a static or declined; and
 - b at or below State averages.

144 After iterating previous submissions in support of the Application as to its merits; the unremarkable level of harm and ill-health in the locality; and the minimal risk of increasing that level, the Applicant, in conclusion, submits the Application is in the public interest.

LEGAL AND STATUTORY FRAMEWORK

145 Section 16 of the Act prescribes that the Commission:

- a may make its determination on the balance of probabilities [subsection(1)]; and
- b is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
- c is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].

146 The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*).

147 For the purposes of the application for the alteration and redefinition of the licensed premises sought by the Applicant, the Applicant must satisfy the licensing authority that granting the Application is in the public interest [section 38(2)].

148 The evidential and persuasive onus falls upon the Applicant to satisfy the licensing authority as to the above.

149 The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).

150 When determining whether an Application is in the public interest the Commission **must** take into account:

- a the primary objects of the Act set out in section 5(1):
 - i to regulate the sale, supply and consumption of liquor; and
 - ii to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - iii 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; and
- b the secondary objects of the Act set out in section 5(2):

- i 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; and
- ii to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
- iii to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

151 Section 38(4) provides that the matters the licensing authority **may** have regard to in determining whether granting an Application is in the public interest include:

- a the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor (subsection (a));
- b the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated (subsection (b));
- c whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises (subsection (c)); and
- d any other prescribed matter (subsection (d)).

152 No 'other matter' has been prescribed pursuant to s 38(4)(d).

153 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:

- a the grant of the application would not be in the public interest; or
- b the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
- c that if the application were granted:
 - i undue offence, annoyance, disturbance or inconvenience to persons who reside or
 - ii work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
 - iii 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 other manner be lessened;
- d that the grant of the application would otherwise be contrary to the Act.

- 154 Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (*Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WASCA 258*).
- 155 The task before the Commission is to assess whether the Applicant has discharged its onus and demonstrated that the grant of the Application is in the public interest and in doing so to weigh and balance the competing objects of the Act, specifically, in this case, the primary objects (sections 5(1)(b) and 5(1)(c)), and the secondary object (section 5(2)(a)) and to have regard to section 38 of the Act.
- 156 Neither of the primary objects takes precedence over the other, but to the extent that the Commission considers there is any inconsistency between the primary objects and the secondary objects, the primary objects take precedence.

DETERMINATION

Nature of the Premises

- 157 The Application deals with the upgrade of the internal facilities of the Premises in respect to the provision of food and beverages as well as the construction of a new Dan Murphy's packaged liquor outlet. However, the Commission cannot consider this application in a piecemeal manner and must consider the redevelopment as a whole.
- 158 The CoP has stated that it has minimal concerns in respect of the upgrading of the tavern and its intended manner of trade, but opposes the expansion and re-branding of the existing BWS to a Dan Murphy's store.
- 159 The Commission, by way of confirmation, notes that the configuration of the Premises is suitably contiguous for the purposes of the Application.

Locality

- 160 In respect to the issue of "locality", the Applicant has asserted that the correct locality to use is the Primary Trade Area as defined in the Trade Area Analysis undertaken by MacroPlan Dimasi in March 2014 ("the Macro Report").
- 161 The Macro Report notes that the Primary Trade Area is shaped by a number of critical factors. In this case the Primary Trade Area is defined as set out in Map 3 in the Macro Report and is described as being comprised of:

“...the urban area of Rockingham and the surrounding suburbs of East Rockingham, Safety Bay, Shoalwater, Peron, Waikiki, Hillman, Cooalongup, Warnbro and Port Kennedy, the residents of which will all be able to access the Hotel relatively easily and quickly” (paragraph 3.10 Macro Report).

162 Since the Premises is intended to include a “destination” packaged liquor store, the Commission considers that the locality is comprised of the Primary Trade Area which includes some 10 suburbs.

Public Interest Test

163 The Applicant has asserted that the redevelopment proposed by the Application:

- a will cater to a requirement of consumers for liquor and related services within the Locality, that is, it will fulfil an unmet need within the Locality;
- b will result in a wide range of benefits in the Locality, including to the liquor industry, the tourism industry and hospitality industries; and
- c will not result in a significant increase in the level of alcohol-related harm or ill- health in the Locality.

Requirements of Consumers

164 The Applicant asserts that, based on the results of the Community Survey, there is a clear demand for the facilities, services and products that will be provided if the Application is successful.

165 The CoP asserts that whilst the recent consumer survey might demonstrate a level of support for the proposed upgrade to the tavern, it does not provide any evidence of a consumer requirement in the locality for a Dan Murphy's offering at the Premises.

166 The Commission is prepared to accept that the community survey originally undertaken with 306 respondents and the more recent Community Survey with 346 respondents contains a sufficiently representative sample of the consumers who would likely attend the Premises.

167 The Commission has considered the Application and evidence supplied and is satisfied that the renovations in general are widely supported by consumers.

168 It is not contentious that refurbishment and upgrade of the bars, TAB and eating facilities of the Premises would improve and modernise the Premises and would therefore meet the needs of consumers (both residents and visitors) seeking more sophisticated food, function and entertainment options.

169 In respect to the proposed Dan Murphy's it is generally accepted that the sale of packaged liquor by large format “destination” stores has a broad appeal to consumers.

- 170 The Community Survey indicates that 60% of respondents would be more likely to shop at the Dan Murphy's than the existing BWS.
- 171 The Commission does not, however, accept that the construction of a Dan Murphy's would be a "one stop" shopping experience. The same would be located over a busy road and be physically isolated from the Rockingham Shopping Centre. Although relatively close as the crow flies, the Commission does not view the same as being close enough, nor accessible enough, to be considered "co-located" with the shopping centre or constitute a "one stop" shopping experience.
- 172 Despite this, the Dan Murphy's will provide upgraded facilities and a liquor range not being provided by the existing BWS.
- 173 Given the above, the Commission is satisfied that the grant of the Application would cater to the requirements of consumers for liquor and related services.

Benefits to the Locality

- 174 The Applicant has asserted that the grant of the Application will result in:
- a a great improvement to the facilities that already exist at the Premises, particularly in respect to the range of services provided and dining facilities;
 - b stimulation of the tourist industry by provision of entertainment and accommodation;
 - c an increased range of liquor products in a large format packaged liquor store with competitive pricing.
- 175 The CoP has asserted that there is no public interest except insofar as it will result in increased availability and supply of liquor in the Locality, and also notes that since the hearing at first instance, the number of packaged liquor outlets in the Locality has increased from 9 to 14 outlets leading to a proliferation of outlets.
- 176 Clearly the existing Premises are out of date and unattractive. The Commission is satisfied that the internal facilities of the Premises would benefit from proposed upgrade and that the redevelopment "as a whole" would result in a number of benefits to the Locality as discussed below:

Liquor Industry

- a The construction of the Dan Murphy's (and replacement of the existing BWS) will provide a more modern and desirable shopping experience with a greater range designed to meet consumer demands.
- b The Premises will be the only large format destination packaged liquor store within an approximately 10 km radius.

- c As the Dan Murphy's will replace the existing BWS, the Commission is satisfied that, although the range and quantity of liquor available may increase in the Locality, such replacement falls short of creating a proliferation of liquor outlets in the Locality.
- d The development and upgrade of the existing tavern facilities will create a safer and more inviting facility.

Tourism Industry

- e The Commission does not find that the upgrade of the motel facilities (which appears fairly limited) will create any significant benefit for the tourism industry in respect to accommodation facilities. The same will, at best, provide some convenience.
- f Despite this the Application is likely to positively affect the proper development of the tourism industry in that:
 - i visitors to the Rockingham area will be provided with a more sophisticated and desirable venue for dining and entertainment options; and
 - ii the Premises will provide various live music and entertainment services which will draw visitors to the region.

Entertainment Industry

- g As noted above, the upgrade of the Premises will allow the provision of live music and entertainment services for patrons.
- h This will also align with the secondary object of the Act in respect to the performance of live original music (section 5(2)(a) of the Act).
- i Additionally, the venue will have upgraded facilities to provide function services.

177 There is no dispute that the Applicant is an experienced and responsible manager of licensed premises that has undertaken several similar redevelopments in Western Australia.

178 The Commission is satisfied that the granting of the Application therefore:

- a will result in various benefits to the locality;
- b would facilitate the use and development of licensed facilities; and
- c would be consistent with the primary and secondary object so the Act.

Harm and Ill Health

179 The Applicant asserts that:

- a there is not a significant number of incidents associated with the Premises, taking into account the large number of patrons, and there is no basis to conclude that a significant level of alcohol-related harm is occurring on or around the Premises;

- b it is open to the Commission to conclude that the level of alcohol-related harm is comparable to, or below, the level of harm suffered generally in the State; and
- c that the potential increase in alcohol-related harm or ill-health is minimal.

180 The CHO and CoP maintain that:

- a the increased availability of liquor (in terms of price, volume and accessibility) at the proposed Dan Murphy's will result in greater consumption of alcohol, which will in turn lead to increased alcohol-related harm and ill-health in the Locality;
- b the Locality already experiences a high level of alcohol-related harm and ill-health; and
- c "at risk" groups are present within the Locality and the introduction of a Dan Murphy's will result in increased harms and ill-health to these persons.

181 In assessing the harm and ill health that may result, the Commission must undertake the analysis set out in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208* being that the Commission must:

- a make findings that specifically identify the existing level of alcohol-related harm and ill-health in the Locality;
- b make findings about the likely degree of harm or ill-health 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, as assessed, together with any relevant factors, to determine whether the grant of the Application is in the public interest.

182 *Carnegies Test – Level of Harm and Ill Health*

- a Based on the statistics provided, the Commission finds that there is an existing level of harm and ill-health associated with the use of liquor in the Locality.
- b The statistics relate primarily to crime and alcohol related hospitalisations.
- c In some instances (relating to particular suburbs within the Locality) the levels of crime and alcohol related hospitalisations are significantly higher than the State average.
- d The Commission accepts that there is a relatively low number of significant or serious events involving disorderly or violent conduct related directly to the existing Premises.

183 *Carnegies Test – Likely Degree of Harm and Ill Health*

- a Much is made by the Intervenors and Objectors as to the availability of low cost alcohol if the Application were granted.

- b Reference is made to several studies that conclude low priced alcohol increases alcohol consumption.
- c The real issue in this Application is whether the availability of low cost alcohol will result in an unacceptable increase in harm and ill-health to those who fall within the at-risk category in the Locality.
- d It should be noted that there is already a BWS liquor store operating from the Premises the subject of this Application. There is already low cost alcohol available to persons who reside in or visit the locality as things currently stand. The issue for consideration is whether the operation of a much larger liquor store will increase the levels of harm and ill-health already experienced in the locality.
- e The submission of the Intervenors and Objectors is that if there is more alcohol for sale and at a lower cost, then there must be an increase in harm and ill-health that arises from this. Further, at-risk persons are highly vulnerable and susceptible to alcohol-related harm and are acutely affected by fluctuations in alcohol prices.
- f In respect to the harm occurring on or immediately around the Premises, the Commission finds that it is unlikely there will be an increase in harm and ill-health, in fact, it is anticipated that the upgrade of facilities and a focus on dining would likely reduce the occurrence of such serious incidents.
- g It is always difficult to predict what may occur if a particular application is granted. It involves a prediction as to the likelihood that something may occur.
- h Ultimately the Commission is satisfied that the granting of the Application would likely result in an increase in the harm and ill health due to the fact more alcohol will be available for sale due to the large increase in retail floor area that will result from the redevelopment.

184 *Carnegies Test – Assessment*

- a Whilst it is acknowledged that harm and ill-health exists within the locality, and that there is a possible degree of harm that may occur due to the granting of the Application, the Commission considers that in the context:
 - i there is already a liquor store on the site of the Premises;
 - ii there is not a high concentration of vulnerable or “at risk” parties in the Locality;
 - iii the Applicant is an experienced, well regarded and responsible operator of licensed premises;

that although the likelihood of harm and ill-health increasing exists, it would not be to a level as to make it inappropriate to grant the Application.

- b It should also be noted that the primary object of the Act is to minimise harm or ill-health, not eradicate it.

185 *Carnegies Test – Weighing*

- a In weighing the likelihood of alcohol related harm and ill-health against the benefits of the Application (as considered above in paragraph 176) the Commission finds that such likelihood is not so unacceptable that it outweighs the benefits of granting the Application.

Impact on Amenity of the Area

186 The Commission is satisfied on the basis of the evidence provided that the amenity, quiet or good order of the Locality will not be adversely affected by the grant of the Application.

Offence, annoyance, disturbance or inconvenience

187 The Commission is satisfied on the basis of the evidence provided that the grant of the Application will not create undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school.

Objections

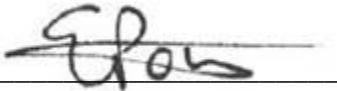
188 On balance, the Commission finds that none of the grounds of objection have been made out by the Objectors and as such, the burden of establishing the validity of the objections has not been discharged in accordance with the requirement of section 73(10) of the Act.

CONCLUSION

189 Having regard to the totality of the evidence in the context of the legislative architecture at the time, the Commission is satisfied on the balance of probabilities that the Applicant has established that the granting of the Application is in the public interest for the following reasons:

- a the granting of the Application will result in tired and outdated premises being redeveloped into a modern and appealing development, including additional food choices;
- b part of the development will include a large Dan Murphy's liquor store, offering a variety of diverse products and manner of trade that does not currently exist in the locality;
- c the Applicant is an experienced, well regarded and responsible operator of licensed premises; and
- d the current levels of harm and ill-health in the locality will not be adversely affected to a degree that the Application should be refused.

190 The Application is granted subject to standard conditions imposed by the Director of Liquor Licensing.



**EMMA POWER
(ACTING CHAIRPERSON)**



**PAMELA HASS
(MEMBER)**



**ALYA BARNES
(MEMBER)**