

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: ALDI Foods Pty Ltd
(represented by Ms Jessica Patterson of Lavan)

Intervener: Chief Health Officer
(represented by Mr Daniel Harrop of State Solicitor's Office)

Commission: Mr Eddie Watling (Deputy Chairman)
Mr Michael Egan (Member)
Ms Elanor Rowe (Member)

Matter: Application for variation of trading conditions referred to the Liquor Commission pursuant to section 24 of the Liquor Control Act 1988.

Premises: ALDI Harrisdale Liquor Store, Harrisdale Shopping Centre, Lot 3002 Yellowwood Avenue, Harrisdale

Date of Hearing: 10 April 2018

Date of Determination: 8 May 2018

Determination: The application is refused

Authorities referred to in Determination

- *Woolworths v Director of Liquor Licensing* [2012] WASC 384 at [32]
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Australian Leisure & Hospitality Group Pty Limited v Commissioner of Police* [2017] WASC 88

Application

- 1 On 18 August 2017, ALDI Foods Pty Ltd (“the applicant”) lodged an application to vary the conditions imposed by the Liquor Commission (“the Commission”) on the liquor store licence in respect of the ALDI Harrisdale Liquor Store at lot 3002, Yellowwood Avenue, Harrisdale. (“the Premises”)
- 2 The Chief Health Officer (“the CHO”) lodged an Intervention in respect of the application on 10 October 2017 pursuant to section 69(8a)(b) of the *Liquor Control Act 1988* (“the Act”).
- 3 Evidence, and primary and responsive submissions were lodged by the applicant and the CHO in advance of the hearing of the application by the Commission on 10 April 2018.

Background to Application

- 4 On 22 February 2017, the Commission conducted a review of the decision of the Delegate of the Director of Liquor Licensing (“the Director”) to refuse the grant of a licence in respect of the ALDI Harrisdale Liquor Store (“Review Hearing”).
- 5 At the conclusion of the Review Hearing, the Commission conditionally granted a liquor store licence subject to a number of conditions.
- 6 The Commission published its decision, with reasons, on 21 April 2017 (LC 09/2017).
- 7 The licence conditions articulated by the Commission at the Review Hearing and detailed in the Commission’s published decision are:
 - a. the licensee is prohibited from selling refrigerated liquor products;
 - b. there is to be no external advertising of liquor products on the façade of the licensed premises;
 - c. the browse/display area is to be closed off when not open for trade;
 - d. the licensee is to have and maintain a CCTV system in accordance with the policies of the Director;
 - e. 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; and
 - f. the entry/exit point of the licensed area must have a gate.
- 8 On 17 August 2017, the Director’s office advised the applicant that conditions (e) and (f) respectively require that the sales counter, as well as the liquor display area, must be enclosed and that a gate must be erected at the entrance to, and the exit from, the licensed area.
- 9 The applicant disputed this interpretation of the two conditions and, by letter dated 18 August 2017, contended that the reference to “display and sale area” was intended to be a reference

to an area where products are displayed for sale and that the checkout/register was not required to be barricaded. The applicant further contended that the reference to “entry/exit point” is singular and that the entry/exit gate related to one gate at the end of the checkout.

- 10 The applicant enclosed an application to vary the licence conditions with this correspondence in the event the Director considered the two conditions required formal variation to accommodate the applicant’s interpretation. The application seeks to vary the conditions to read:

e) the liquor display and sale area, excluding the licensed checkout/register and the entrance, must be separated from the food/grocery display and sale area by barricading of non-see-through material over two (2) metres in height; and

f) the entry/exit point to the licensed area must have one gate at the end of the checkout/register.

- 11 On 21 August 2017, the ALDI Harrisdale Licence was issued with an additional “special condition”:

The licensee is required to submit within 28 days of the grant of the licence, evidence of the completion of:

- a. permanent barricading of non-see-through material over two (2) metres height (sic) along the checkout (sale area); and*
- b. a permanent gate across the entry to the licensed premises.*

- 12 On 1 September 2017, following discussions with the Director, when it was apparently suggested or agreed there be a reduced form of barricading around the checkout and that a pull out strap be installed as the equivalent of an entry gate, the applicant requested that the application to vary the conditions be placed on hold pending clarification of the conditions by the Commission.

- 13 On 4 September 2017, the applicant sought “clarification” of the two conditions.

- 14 On 6 September 2017, the Chairman of the Commission advised the applicant:

“I refer to your correspondence dated 4 September 2017 seeking clarification of condition (e) imposed by the Liquor Commission (“the Commission”) in its determinations LC 09/2017 and LC19/2017 to grant approval to the applications by ALDI Foods Pty Ltd for its liquor stores in Harrisdale and Joondalup.

The intent of the Commission when imposing the condition on the licence was to clearly delineate the alcohol display and sales area from other grocery items. In the Commission’s view, this could be achieved effectively by barricading of non-see-through material over two (2) metres in height around the display area and also at the checkout point”.

- 15 On 19 September 2017, the Director's office confirmed to the applicant that the requirements of the special condition had been met – that is, the completion of a permanent barricade around the checkout sale area and a permanent gate across the entry - and that the ALDI Harrisdale Licence had been updated removing the special condition.
- 16 On 22 September 2017, the applicant requested that the variation application be reactivated and proceed to determination.

Applicant's Submissions

- 17 In support of the application to vary the licence conditions, the applicant contends that the barricading of the licensed checkout/register significantly reduces the surveillance and monitoring capacity to all but one staff member (i.e., the staff member at the checkout/register facing and looking into the liquor display area), as a consequence of which the safety of the staff member on the checkout and the applicant's ability to control and manage the store is compromised.
- 18 The applicant engaged Patterson Research to conduct a face-to-face intercept survey of ALDI customers at three stores (152 respondents) to "assess the level of consumer support for, or opposition to, a proposed change to the barricades that screen the separate liquor section from view at the checkouts in ALDI stores".
- 19 The applicant submits that this "expert survey evidence" establishes:
 - a. a relevant section of the public is strongly in favour of the barricading being removed from around the checkout/register;
 - b. in the opinion of actual ALDI shoppers who use the store, the liquor will remain sufficiently separated from other products even if the barricading is removed, which is what the original condition was intended to achieve; and
 - c. consumers do not believe children would be at greater risk if the barricading were removed as proposed.
- 20 A staff survey was also conducted at five different stores (42 respondents) in respect of which all, or most, staff responded in the affirmative to the questions:
 - a. Does the barricading restrict your in-store surveillance?
 - b. Does the barricading restrict how safe you feel operating the checkout register?
 - c. Does the barricading affect your comfort or convenience in operating the checkout?
- 21 The applicant submits that the outcome of this survey which, according to the applicant indicates the staff have real concern and issue when operating the barricaded checkout/registers, provides a "powerful public interest" consideration for the Commission in determining the application.

- 22 The applicant also contends, with reference to supportive photographic evidence of a number of other licensed premises, that liquor stores have operated within supermarkets and grocery stores across Western Australia for decades without any separate barricading of the licensed checkout/register.
- 23 In addition, a 2016 report of the Chief Health Officer of NSW on Trends in Alcohol Use and Health Related Harms in NSW (“the NSW report”) was tendered in evidence and referred to at the hearing with particular reference to statistics relating to young people. This was submitted in support of the proposition that ALDI stores have been operating in that jurisdiction over many years with limited, or no, adverse impact on harm or ill-health in the community.

Intervention and Evidence

- 24 The CHO has intervened to make representations on the proposal to dismantle the barricading behind the licensed checkout/register, but not on the proposal for a single gate.
- 25 In addition to the intervention, the CHO tendered in evidence a copy of the transcript of the Review Hearing and an expert statement from Professor Simone Pettigrew, a well recognised expert in alcohol research and consumption behaviour.
- 26 The intervention refers to the CHO’s representations (and supporting research material) in the original ALDI Harrisdale Licence application regarding:
- a. the potential impacts associated with the proposal to sell alcohol with grocery products including the potential impact of the association of groceries purchased with alcohol on children and young people;
 - b. the potential for impulse and unplanned purchasing; and
 - c. the suggestion by the CHO to impose a condition on the licence to the effect “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 2 metres in height”.
- 27 The expert statement from Professor Pettigrew responds to a number of questions posed about the likely impact of the integration (and visibility) of alcohol products with grocery items. Professor Pettigrew contends, among other things:
- a. there is consistent evidence that exposure to alcohol promotion and display influences young peoples’ alcohol-related beliefs and behaviours;
 - b. studies have shown increases in youth alcohol consumption resulting from exposure to in-store displays of alcohol;
 - c. presenting alcohol products among life’s necessities in supermarkets creates a process of normalisation of alcohol products, leading to an increase in consumption;

- d. the visibility of alcohol products located in close proximity to the checkouts where customers queue to purchase alcohol and grocery products is likely to impact on the purchase and consumption of alcohol. This is of particular concern in terms of children's exposure, given that children also spend periods of time waiting at checkouts and will be exposed to any product displays and signage within eyesight; and
 - e. making clear demarcations between areas in which individuals purchase life necessities and where they purchase a social drug such as alcohol is a critical aspect of ensuring the general public understands that alcohol is no ordinary commodity.
- 28 The CHO submits that the intent of the Commission in imposing the conditions on the ALDI Harrisdale Licence is clear, as:
- a. it is, and always was, clear the Commission intended the condition for barricading to apply to the dedicated licensed checkout area;
 - b. the Commission's reasons make it abundantly clear the Commission accepted the concerns of the CHO and the other intervener and objector regarding the impact of alcohol visibility on drinking attitudes and behaviours; and
 - c. to alleviate those concerns, the Commission determined that the alcohol display and sales area be clearly delineated from the grocery display and sales area and that this could be achieved by a barricade around the display areas and checkout point.
- 29 The CHO views the conditions as an important harm minimisation measure.

Applicant's Responsive Submissions

- 30 In response to the CHO's interpretation of the conditions and the Commission's intention in imposing the conditions, the applicant submits:
- a. as is envisaged by the definition of "sell, in relation to liquor" in section 3 of the Act, the display/browse area itself is a "sales area" because there is liquor in that area being offered for the purposes of selling and supplying liquor;
 - b. the display/browse area alone could easily "be separated from the food/grocery display and sale area" without any reference to the separate checkout/register; and
 - c. the condition relating to barricading only intended that barricading be erected around the area where liquor is displayed and available for sale.
- 31 By reference to the transcript of the Review Hearing, the applicant challenges the contention of the CHO that the Commission accepted the CHO's propositions regarding the affect alcohol visibility may have on drinking attitudes.
- 32 The applicant also submits that the reference by the Chairman of the Commission, in his letter of 6 September 2017, to a clear delineation of the licensed area by barricading was not

directed at reducing the visibility of liquor to avoid affecting peoples' attitudes towards drinking.

- 33 According to the applicant, no reference was made to enclosing and barricading the checkout/register at the Review Hearing, and the applicant did not make any submissions on the appropriateness of barricading the licensed checkout, as a consequence of which it is entirely appropriate to seek a variation to the condition.
- 34 Further, the applicant contends the Commission found that the "generic material" produced by the CHO as to the effect of "normalisation", including the so-called effect of increasing the visibility of liquor was unhelpful.
- 35 Additionally, the applicant submits that the CHO has not presented any evidence about what harm or ill-health may result from the removal of a small section of barricading as proposed, but rather that the removal of the barricading will increase visibility for staff, thereby reducing the likelihood of theft as well as improving staff safety.
- 36 Both of these outcomes are, the applicant submits, in the public interest and will not, based on the consumer survey, adversely affect the public's perception of the integration of liquor into the supermarket.
- 37 The applicant submits the evidence of Professor Pettigrew is of little, or no, value to the determination of this specific application and should be given little, or no, weight on the basis of:
 - a. members of the public of any age, including young people, can potentially see liquor in any number of situations, as well as witness alcohol promotion in a wide range of different environments and mediums in society;
 - b. the so-called "youth exposure to alcohol promotion" from within the supermarket would, if the application is granted, be minor or virtually non-existent;
 - c. ALDI supermarkets do not present a risk of "normalisation" in the sense of liquor "being presented among life necessities" as ALDI liquor is completely segregated, separated and screened off;
 - d. no new or different marketing or promotion of liquor is proposed;
 - e. liquor will be clearly visible from within the licensed area, but will be much less discernible at other checkouts/registers and is hardly likely to result in impulse purchasing; and
 - f. as to the comparison with cigarettes, such references are irrelevant and unhelpful.
- 38 In contrast to the CHO, the applicant contends the views of consumers and staff members are very relevant to a proper determination of the application.

Determination

Legislative Provisions

- 39 Section 64(1) of the Act provides that the licensing authority may vary any condition imposed by the licensing authority, having regard to the tenor of the licence and the circumstances in relation to which the licensing authority intends that it should operate.
- 40 Under section 33(1) of the Act, the licensing authority has absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest. This discretion is only confined by the scope and purpose of the Act, read as a whole (*Woolworths v Director of Liquor Licensing* [2012] WASC 384 at [32]).
- 41 Moreover, an application may be refused, even if it meets all the statutory requirements; however, the application must be dealt with on its merits (section 33(2)(a)).
- 42 Although the Commission accepts that the Director has determined section 38(2) of the Act does not apply to this application, the Commission has informed itself of the guidance provided by the Supreme Court of WA in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 and *Australian Leisure & Hospitality Group Pty Limited v Commissioner of Police* [2017] WASC 88.
- 43 Further, in considering the application, the Commission has had regard to the primary and secondary objects, and scope, of the Act.

Nature and Extent of Conditions

- 44 Prior to considering the merits of the application to vary the conditions attached to the ALDI Harrisdale Licence, it is necessary to understand the nature and extent of the conditions imposed by the Commission on the licence and the application of the conditions by the Director (and the Director's office).
- 45 The CHO, initially, and the applicant in response to the CHO's submissions, have each sought to rely on extracts from the transcript of the Review Hearing to support their interpretation of the conditions sought to be varied.
- 46 However, in the Commission's view, the decision of the Commission in granting the ALDI Harrisdale Licence is clear and is not open to doubt or misinterpretation.
- 47 At paragraph 34 of the Commission's decision (LC 09/2017), the Commission found that the application related to a small operation within a supermarket facility, which would involve a discrete location within the supermarket in which alcohol will be available for sale. Further, the Commission found that there would be a gate erected to prevent people from simply walking into the licensed area. There is no doubt this finding related to an entry gate into the licensed area from within the supermarket.
- 48 At paragraph 36 of the decision, the Commission notes the concerns of the objector, the McCusker Centre for Action on Alcohol and Youth ("MCAAY"), which were summarised at

paragraph 32 of the Commission's decision and at paragraph 25 of the Director's decision at first instance.

- 49 Among other concerns, MCAAY expressed concerns about the risk of the normalisation of alcohol by selling alcohol with everyday grocery items in a supermarket environment and submitted that the current situation in Western Australia where liquor stores are separate from supermarkets, with their own registers and entry points should be maintained.
- 50 Whilst not satisfied the MCAAY objection was made out so as to warrant the rejection of the application, the Commission responded to the concerns of MCAAY at paragraph 36 as well as the concerns of the interveners at paragraph 39 indicating that conditions could be imposed to mitigate and alleviate their concerns.
- 51 At paragraph 43(j), the Commission states that the location of the licensed area (which of necessity under the Act must include the checkout/register at which alcohol is purchased) is such that it will be separated from the rest of the supermarket thus avoiding concerns of normalising liquor.
- 52 Finally, consistent with these findings and comments, the Commission imposed the conditions, which the applicant now seeks to vary.
- 53 At the hearing of the application, the Commission sought to understand from the applicant the manner in which the various ALDI stores, including the ALDI Harrisdale store, are operating to better appreciate the application of the conditions imposed by the Commission.
- 54 The applicant acknowledged that members of the Commission had been exposed to, and witnessed, aspects of the ALDI store operation at various locations and supported members informing themselves and asking questions based on their experience.
- 55 A number of characteristics of the current ALDI store operations became apparent at the hearing, which appear to the Commission to be either not in accord with the conditions imposed by the Commission or capable of undermining the objective of the conditions, namely:
- a. there is no gate into the licensed area from the supermarket;
 - b. in place of the entry gate is a retractable strap that is released leaving the entrance into the licensed area open at all times apart from a screen behind the checkout. This has the practical effect of leaving open one complete side of what the Commission clearly expected to be a four sided barricaded licensed area;
 - c. at the end of the dedicated liquor checkout, the exit gate is generally open when the checkout is in use;
 - d. at various times during the day, the dedicated checkout (typically checkout 5), which is immediately adjacent to the liquor display area, is the only checkout open;
 - e. when checkout 5 is the only checkout open, customers are required to use that checkout irrespective of whether or not they are purchasing alcohol;

- f. if a juvenile, who is not accompanied by, or under the supervision of a responsible adult, endeavours to purchase and pay for groceries or other non-alcoholic items at checkout 5, apparently, a separate checkout, which is unlicensed, will be opened to conduct the transaction;
 - g. whilst the barricade behind the dedicated liquor checkout screens and prevents customers at other checkouts from seeing into the liquor display area, the liquor on display is readily visible from the approaches to the checkouts and that general vicinity of the supermarket;
 - h. the distance between the queue of customers at the dedicated checkout and the liquor display area is approximately one metre; and
 - i. although not directly relevant to the present application, the licence conditions for the Butler and Wattle Grove stores have been amended, but do not reflect, as they should, the conditions applying to other ALDI stores.
- 56 The barricading of the licensed liquor store is clearly intended to separate visually, as well as operationally, the liquor store component of the operation from the remainder of the supermarket, such that customers who seek to purchase liquor are required to do so by entering the licensed area through an entrance gate to browse and select their liquor requirements, and to then go to the licensed checkout to purchase their liquor with or without any grocery items.
- 57 In the Commission's view, neither the reduced barricading around the checkout to what is now essentially a screen directly behind the checkout (resulting in expansive visibility into the liquor display area from the licensed queuing line and checkout), nor the conversion of an entry gate into a retractable or pull out strap, is consistent with the licence conditions which, as stated above, was clearly intended to comprise barricading around the entire licensed area.
- 58 The use of the dedicated checkout (checkout 5) for grocery purchases only is also at odds with the condition imposed by the Commission. It is clear that the purpose of the dedicated licensed checkout/register was to process purchases of liquor, whether the liquor was purchased separately or in conjunction with groceries, and that there would always be another or other checkouts open and available to process purchases of groceries and non-alcoholic items.
- 59 Whilst the close proximity of the dedicated checkout operator to the liquor on display facilitates and enhances the effectiveness of observation and surveillance of that area, the fact that, on occasions, customers have no choice but to use the dedicated licensed checkout, with alcohol products nearby or virtually within reach, is not conducive to mitigating the risk of unplanned or opportunistic purchasing of alcohol and is not consistent with the purpose of the conditions.

Variation of Licence Conditions

- 60 In addition to the reasons advanced in the applicant's written submissions in support of the variation of the conditions (detailed above), the applicant further submitted at the hearing of the variation application that:
- a. the removal of the screen behind the dedicated checkout will facilitate observation of the licensed area from an office on the opposite side of the supermarket overlooking, and with a line of sight across, the various checkouts towards the liquor display area; and
 - b. a recent theft of liquor from one of the ALDI supermarket liquor stores had highlighted the potential benefit of improving visibility of the licensed area as a security, safety and deterrence measure.
- 61 The Commission notes that the checkout operators have access to an alarm button, which may be activated in response to an incident or circumstance of concern, alerting another staff member or other staff members that immediate assistance is required.
- 62 Nevertheless, the Commission acknowledges the perceptions of staff about their safety, although the Commission understands there are multiple levels of supervision and the circumstances would appear not to be markedly dissimilar to the circumstances of staff working in other liquor outlets.
- 63 Further, if the Commission were minded to amend the conditions as requested, the Commission questions the effectiveness of other checkout operators undertaking surveillance of the licensed area when at least two operators face in the opposite direction and presumably all operators at open checkouts would be active serving customers.
- 64 The Commission does not accept that surveillance from the office, as proposed at the hearing, would be particularly effective or act as a deterrent.
- 65 The Commission places little weight on the intercept survey of consumers given the manner in which the questions are framed and the limited information and knowledge respondents have of the matters under consideration.
- 66 Having regard to the different operating and legislative environment in NSW, the Commission also places little weight on the references to the NSW report.

Deliberations

- 67 It is evident from the Commission's decision to grant the ALDI Harrisdale Licence that the Commission:
- a. acknowledged the unique nature of the ALDI model which comprises a small licensed area, ALDI branded products, limited range of non-refrigerated products and limited or no advertising and promotion; and

- b. consistent with section 5(1)(c) of the Act, had regard to public interest considerations such as improving diversity and choice, and the proper development of the liquor industry in the context of the existing Western Australian framework where the predominant model, in a supermarket environment, is for liquor stores to operate outside of, and adjacent to, supermarkets.
- 68 In the Commission's view, the present application is based on a misunderstanding of the nature and extent, and purpose, of the conditions imposed by the Commission on the ALDI Harrisdale Licence.
- 69 The ALDI Harrisdale liquor store was approved on the basis it would be a separate and clearly delineated component of the supermarket, enclosed with barricading around not only the display area, but also the sales area. The checkout in the enclosed licensed area was to be dedicated to the sale of liquor, and liquor and groceries, not a general checkout for the sale of groceries and non-alcoholic items. This meant that customers of all ages who frequent the supermarket would be able to transact their purchases of groceries and non-alcoholic items at the other non-licensed checkouts.
- 70 In granting the ALDI Harrisdale Licence, the Commission weighed and balanced all the competing considerations and determined to prescribe a range of conditions, in particular conditions regarding the separation of the licensed liquor store, both visually and operationally, from the remainder of the supermarket.
- 71 Whilst the concerns of the objector and the interveners in the ALDI Harrisdale Licence application were not so significant as to cause the Commission to reject the application, the concerns were, nevertheless, sufficiently serious to necessitate the imposition of the conditions on the licence to mitigate the concerns.
- 72 Those concerns remain and, in the present application, the Commission would need to be satisfied there are sound reasons to interfere with, and to vary, the conditions.
- 73 The Commission has not been persuaded that sufficient reasons, or any reasons of substance for that matter, have been advanced to satisfy the Commission the conditions should be varied.
- 74 Accordingly, the application is refused.



EDDIE WATLING
DEPUTY CHAIRPERSON