



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	ALDI Foods Pty Ltd v Independent Liquor & Gaming Authority [2019] NSWCATAD 43
Hearing dates:	5 and 6 November 2018
Date of orders:	21 March 2019
Decision date:	21 March 2019
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	R.L. Hamilton SC, Senior Member
Decision:	<p>(1) The decision under review is set aside.</p> <p>(2) The decision is made that the application to remove the packaged liquor licence from the ALDI supermarket in Gosford the ALDI Supermarket in Umina Beach is approved.</p> <p>(3) The parties are directed to file in the Tribunal within 21 days of publication of this decision (or such further time as may be granted) an agreed form of conditions to be attached to the removed licence which will permit the ALDI Umina Beach premises to operate as a packaged liquor outlet only.</p>
Catchwords:	LICENSING-liquor licence removal-overall social impact-balancing process- state of definite satisfaction of decision maker-role of licensing authority- s48(5) Liquor Act
Legislation Cited:	Liquor Act 2007 Gaming and Liquor Administration Act 2007 Gaming and Liquor Administration Regulation 2016 Administrative Decisions Review Act 1997 Civil and Administrative Tribunal Act 2013.
Cases Cited:	Auld v ILGA [2018] NSWCATAD 25 Dunpec Pty Limited v Department of Infrastructure and Transport [2012] AATA 132 Macedon Ranges Shire Council v Romsey Hotel (2008) 19 VR 422 Smith v ILGA [2018] NSWCATAD 224
Texts Cited:	Donnelly, Menendez and Mahoney "The effect of liquor licence concentrations in local areas on rates of assault in New South Wales" published in Contemporary issues in

Crime and Justice Number 181 in December 2014.

Livingston M. (2011) "Alcohol outlet density and harm: Comparing the impacts on violence and chronic harms". Drug and Alcohol Review vol.30 pp.515-523

Smith et al., (2014) Estimate of the costs of crime
Australian Institute of Criminology

Category:

Principal judgment

Parties:

ALDI Foods Pty Ltd (Applicant)
Independent Liquor & Gaming Authority

Representation:

Counsel:
M J Heath (Applicant)
S Robertson (Respondent)

Solicitors:
Hatzis Cusack (Applicant)
Crown Solicitor's Office (Respondent)

File Number(s):

2018/00191151

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Nil

REASONS FOR DECISION

- 1 This is an application for review of the decision by the Independent Liquor & Gaming Authority (ILGA or Authority) to refuse ALDI Foods Pty Ltd (ALDI) consent to remove its packaged liquor licence from its closed store in Gosford to its store at Umina Beach, NSW.
- 2 The reason for refusal was that ILGA was not satisfied on the material before it that the overall social impact of granting the application would not be detrimental to the wellbeing of the local and broader communities – s48(5) of the Liquor Act 2007.
- 3 Briefly, ALDI applied to ILGA in August 2017 to remove its existing packaged liquor licence from its Gosford store to its Umina store. ILGA refused the application. ALDI then applied for review of the decision to this Tribunal. On 30 June 2018 the Gosford store closed.
- 4 Was ILGA was correct in its refusal of the removal application? The Tribunal stands in the shoes of the respondent and must make the correct and preferable decision. The issue is whether the Tribunal can be satisfied on the material that it has before it that the overall social impact of granting this removal application will not be detrimental to the well-being of the local and broader communities. The Tribunal has more material before it than was before ILGA when it made the challenged decision.

The Tribunal obtains its review jurisdiction under s13A of the *Gaming and Liquor Administration Act 2007*, Reg 7(a)(iv) of the *Gaming and Liquor Administration Regulation 2016*, and ss 7,9 and 63 of the *Administrative Decisions Review Act 1997* (ADR Act) and s30 of the *Civil and Administrative Tribunal Act 2013*.

Legislation

- 6 The *Liquor Act* (LA) requires a removal application to be dealt with as if it were a new application for a licence (see s59(3) LA) which provides:
- (3) An application for approval to remove a licence to other premises is to be dealt with and determined by the Authority as if it were an application for the granting of a licence in respect of those other premises. Accordingly, the provisions of Division 1, in particular, extend to an application for the removal of a licence to other premises as if it were an application for a licence.
- 7 The objects of the *Liquor Act* are set out in s3 and state as follows:
- (1) The objects of this Act are as follows:
- (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
 - (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
 - (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.
- (2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:
- (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
 - (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
 - (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.
- 8 There are various other requirements of the *Liquor Act* which are not in contention as it is agreed that the applicant has satisfied them.
- 9 The dispute rests on the application of s48(5) LA.
- 10 In relevant part s48 LA provides as follows:

48 COMMUNITY IMPACT

- (1) The object of this section is to facilitate the consideration by the Authority of the impact that the granting of certain licences, authorisations or approvals will have on the local community, in particular by providing a process in which the Authority is made aware of:
- (a) the views of the local community, and
 - (b) the results of any discussions between the applicant and the local community about the issues and concerns that the local community may have in relation to the application.
- (2) In this section:
- "relevant application" means any of the following:
- (a) ...

(b) an application under section 59 for approval to remove a hotel licence, club licence, small bar licence or packaged liquor licence to other premises...

(3) A relevant application must be accompanied by a community impact statement....

(4) The community impact statement must:

(a) be prepared in accordance with the regulations and any requirements of the Authority, and

(b) be in the form approved by the Authority.

(5) The Authority must not grant a licence, authorisation or approval to which a relevant application relates unless the Authority is satisfied, after having regard to:

(a) the community impact statement provided with the application, and

(b) any other matter the Authority is made aware of during the application process (such as by way of reports or submissions),

that the overall social impact of the licence, authorisation or approval being granted will not be detrimental to the well-being of the local or broader community.

11 Standing in the shoes of the respondent, the Tribunal must not approve the removal of the packaged liquor licence to the Umina Beach ALDI store unless it is satisfied that the overall social impact of an approval will not be detrimental to the well-being of the local (Umina Beach) or broader (Central Coast Local Government Area) community. It is also relevant to have some regard to the impact on suburbs surrounding Umina Beach which are in the catchment area of the ALDI store there. The Tribunal must have regard to the community impact statement and other material before it. Determination of overall social impact requires a weighing up and balancing out of the various considerations for and against the removal, and of reaching a state of satisfaction that the overall social impact on the local and wider community will not be detrimental to their well-being.

12 The material that was before the ILGA in the making of its decision is contained in the s58 ADR Act documents which are before the Tribunal. These included:

- (1) A community impact statement (CIS) and submissions lodged by ALDI's solicitors, Hatzis Cusack Lawyers.
- (2) A report from Mr G Duane, an economist specialising in market analysis and strategic research for the property industry and retail operations in support of ALDI's application;
- (3) A report by Mr P Paroz former licensing officer with NSW Police Force concerning the inconvenience factors of using other liquor outlets by ALDI customers.
- (4) A report by a member of the local licensing branch of the Brisbane Water Local Area Command of the NSW Police Force, Senior Constable Tobin;
- (5) Crime statistics covering the local and broader community;
- (6) Other materials including submissions in support of and against the application, plus clarifying and information bearing documents; it is worth noting that four hundred and forty eight (448) ALDI Umina Beach supermarket customers signed a petition supporting the grant of the application. A further 19 customers signed individual letters of support, stating various reasons for their support. Only 2 emails from local residents expressed any concerns. A commercial competitor also lodged a submission which did not explicitly oppose the application, but provided certain clarifying information.

- 13 The additional evidence before the Tribunal (with leave) for the applicant was as follows:
- (1) Affidavits of Mr G Duane and a written commentary by him on the respondent's expert evidence;
 - (2) Affidavit of Ms J McClellan a social policy researcher at the University of Technology, Sydney and formerly a principal research officer at ILGA;
 - (3) Confidential affidavit of Ms L Rafidi property manager for ALDI setting out customer counts for the Umina store;
 - (4) Affidavit of Mr G Cusack, solicitor, attaching further and updating information concerning crime statistics, socio-economic indices, alcohol related health figures, recalculated comparative licence density statistics, and information on other licensed premises in Umina Beach. Mr Cusack also attached a copy of a study by Donnelly, Menendez and Mahoney ('Donnelly et al') titled "The effect of liquor licence concentrations in local areas on rates of assault in New South Wales" published in *Contemporary issues in Crime and Justice* Number 181 in December 2014. which was the subject of debate between the expert witnesses
 - (5) Oral evidence of Mr P Paroz;
- 14 The further evidence before the Tribunal (with leave) from the respondent consisted of:
- (1) an expert (revised) report and indicative cost/benefit analysis by Mr S Whetton, an economist from the University of Adelaide;
 - (2) an affidavit from Ms H Sims of the Crown Solicitor's office attaching some additional material, in particular an updated report from Senior Constable Tobin.
- 15 At the request of the Tribunal the applicant filed some material in reply consisting of a commentary by Mr Duane on the cost/benefit analysis of Mr Whetton.

The Expert Evidence

- 16 Mr G Duane of Location IQ, is an economist specialising in market analysis and strategic research for clients in the property industry as stated earlier. His previous assignments have included economic impact assessments, advice on market share, consumer behaviour and location sustainability.
- 17 Mr Duane originally provided a report for ILGA dated 2 February 2018. A copy was included in the s58 materials. After examining the ALDI application, the trade catchment area in which the Umina Beach store operates, the features of the ALDI Umina Beach customer base derived from Australian Bureau of Statistics figures and examination of socio-economic profile of the catchment area, Mr Duane developed a micro simulation of expected retail expenditure across the catchment and at the ALDI Umina store. There was an examination of the competitive environment and the competing outlets. Mr Duane considered the social impact of the licence removal application. He noted that most of the projected sales would come from a redirection of sales from other liquor outlets (including ALDI outlets at other places within the local government area). He considered that any growth in sales would be minimal.
- 18 Mr Duane concluded that it is expected that there will be limited change to the volume of alcohol consumed as a result of the proposed licence, that there was unlikely to be any appreciable increase in negative social impacts and that the ALDI store would be

unlikely to have any discernible impact on pricing.

19 Mr Duane made a second statement dated 21 August 2018 to supplement the report that he prepared for ILGA dated 2 February 2018.

20 In this second report Mr Duane concludes that the proposed outlet would not be really very competitive on pricing compared to existing outlets. His observation was that although the range of packaged liquor at ALDI stores differs from its competitors it is not materially different in terms of price.

21 Mr Duane noted that spending on alcoholic beverages from ABS household expenditure survey remains flat and that such spending has been falling as a proportion of total goods and services expenditure. He also notes a declining per capita alcohol consumption. Mr Duane confirmed his view that the provision of a new ALDI liquor outlet at Umina Beach would result in negligible supply induced growth to the packaged liquor market.

22 He said it follows logically that there is also unlikely to be any distinguishable increase in alcohol-related crime or other negative social implications.

23 Mr Duane further notes a change in shopping patterns so that consumers are often undertaking supermarket shopping two to three times per week and this would provide ALDI customers with greater convenience to have a liquor store within the Umina Beach operation.

24 Mr Duane submitted two further statements (dated 22 October and 16 November 2018) responding to expert evidence relied on by the respondent from Mr S Whetton to which it is convenient to now refer.

25 Mr S Whetton is an economist from the University of Adelaide who specialises in the social impact of substance use. He swore an affidavit filed on 18 September 2018 which was later revised. The revised version was admitted, but the applicant drew particular attention to the effect of the revisions. This effect was that Dr Whetton revised his figures leading to a considerable reduction (almost half) in his estimates of the negative social impact of alcohol related assaults of the granting of the removal application.

26 Mr Whetton placed particular reliance on two studies (Livingston M. *Alcohol outlet density and harm: Comparing the impacts on violence and chronic harms*. Drug and Alcohol Review vol.30 pp.515-523 -which I will call Livingston (2011); and Donnelly et al (2014)) for parameters to assess the potential impact of an increase in packaged liquor outlet density in Umina Beach. He concludes that the literature suggests an increase in density of liquor outlets would lead to an increase in domestic violence and non-domestic violence assaults and an increase in hospitalisations due to alcohol-related disease and injury. He also comments on Mr Duane's report and points out a number of matters which he regards as flaws in that report.

27

Mr Whetton also refers (par4.11) to estimates of the costs of crime compiled by researchers of the Australian Institute of Criminology (Smith et al., 2014) [no further citation] which is used to give an average cost of an assault (about \$3,000.00) and an average cost of hospitalisation (depending on the condition involved) between about \$6,000.00 and \$25,000.00. He also noted that there was under-reporting of assault cases which would increase the cost of such assaults.

28 Mr Whetton also provided a further analysis of the value of the costs and benefits of the grant of the removal application. He gave a value of the convenience factor for ALDI customers of having a liquor outlet in the ALDI store at Umina Beach. He derived a total value of between \$9,000.00 and \$31,000.00.

29 Using this analysis Mr Whetton concluded that there were negative benefits (i.e. costs outweighing benefits) on the assumptions and costs used in his analysis.

30 Mr Duane swore a further affidavit on 22 October 2018 to respond to the original (unrevised) report of Mr Whetton filed on 18 September 2018.

31 In my view Mr Duane gave convincing answers to the misgivings expressed by Mr Whetton in relation his opinion on the extent of the trade catchment area, estimates of packaged liquor expenditure, estimates of sales from the proposed ALDI outlet, and concerning liquor pricing and consumption in the Umina Beach vicinity and Local Government Area.

32 Mr Duane also addresses the question of whether local consumption would be increased. He notes that alcohol consumption patterns have clearly changed, and that overall the consumption of alcohol has declined in the past 10 years even though outlet density has increased.

33 Mr Duane refers to the lack of change in the incidence of alcohol-related assaults and disorderly conduct in regional areas of NSW where ALDI has opened and so too has "Dan Murphy's" in large format (nearly simultaneously in two cases). He also points to stable hospitalisation rates for alcohol-related harms.

34 At the request of the Tribunal Mr Duane prepared a written commentary dated 16 November 2018 on Mr Whetton's cost/benefit analysis of 4 November 2018.

35 Mr Duane comments that Mr Whetton has not identified or attributed a value of a number of benefits which would flow from the grant of the removal application including employment benefits, the maintenance of customer loyalty to ALDI and the reduction in traffic from having a one stop shop. In his view Mr Whetton has understated the potential benefits by not taking into account these factors.

36 Mr Duane comments on the opinions of Mr Whetton concerning the costs involved. He notes that the sources relied on are open to some question. He states that the alcohol outlet density measure used in Livingston (2011) is somewhat "crude" and not readily applicable to ALDI's small scale operations with limited opening hours and no chilled product. He also notes that the figures are derived from years generally prior to the commencement of liquor operations in Australia by ALDI. He also notes that there is no

suitable adjustment for the decline in alcohol consumption in Australia. Finally he makes the point that the cost benefit analysis can be very different for specific retailers (small format v large format for example).

- 37 The applicant read an affidavit by Ms Joanna McLellan dated 23 October 2018. It may be recalled that Ms McLellan is an expert social planner based at the University of Technology Sydney who gave evidence concerning the social impact of a removal to the Umina Beach store. Ms McLellan was formerly a principal research officer at ILGA before moving to consulting. Her evidence consisted of a detailed study of the issues of socio-economic disadvantage in the Umina Beach area; the relationship of packaged licence density to alcohol-related assaults; and impacts of alcohol-related health impact. She provided a detailed commentary on the expert report of Mr Whetton.
- 38 Her report involved an in-depth examination of demographic risks; the number of liquor licences by type and location; outlet density research; research on alcohol-related crime and the links between alcohol and violence and other anti-social behaviour; hospitalisations due to alcohol abuse; and she refers to certain case studies.
- 39 As to socio-economic disadvantage Ms McLellan noted that Umina Beach was in the third decile from the bottom of ABS figures (SEIFA – Socio-Economic Index For Areas). While noting some relative disadvantage in the area Ms McLellan said there was no single socio-economic factor which could be said to be causative of alcohol-related harms. Although SEIFA data is a pointer of socio-economic disadvantage and potential social harm this relationship is not clear.
- 40 Ms McLellan then examined the density of licenced premises in Umina Beach, the primary trade area which covers surrounding suburbs, the Central Coast local government area and NSW as a whole.
- 41 She provided statistics showing that Umina Beach and the primary trade area has a liquor premises density well below the NSW average of 0.33 outlets per 1,000 people. Umina Beach has 0.18 packaged liquor outlets per 1,000 people which would increase 0.24 outlets if the removal is approved.
- 42 Ms McLellan also points out that the relationship between harm and licence density is not linear. She and the two previous experts (Mr Duane and Mr Whetton) referred to Figure 2 (a graph) contained in the research report Donnelly et al (2014).
- 43 This was tendered to the Tribunal and graphs domestic violence (DV) assault rates per 1,000 of population against packaged liquor concentration per 1,000 population. It shows an increasing rate of domestic violence assault (from an underlying rate of approximately 0.75 DV assaults per 1,000 population with 0.0 packaged liquor concentration) to about 1.3 per 1,000 as packaged liquor concentration reaches about 0.24 outlets per 1,000 population then declining back to the starting point until concentration reaches a turning point at about 0.75 packaged liquor concentration per 1,000 population, where there is a marked increase in adverse social impacts. While this raw information could be a cause for concern, Ms McLellan concludes that the

harm caused by an additional alcohol outlet depends on various factors and it seems to me that this small scale in store outlet, with limited hours, and no cold liquor is unlikely to have any material impact on the domestic violence assault rate where the other evidence is that consumption in the local area is unlikely to increase.

- 44 As to alcohol related health impacts Ms McLellan points out that as this is a removal application from Gosford to Umina this does not result in an increased outlet density in the local government area so there is going to be negligible increase in alcohol related hospital admissions to the area hospital. Ms McLellan referred to a study which examined the outcome of the opening of a “Dan Murphy” store in Ballina NSW. She reports that the study shows that the domestic violence assault rate remained stable. The non-domestic violence assault rate reduced and there was no apparent change to drinking habits of the local population.
- 45 Ms McLellan goes on to make useful commentary on the police report from Senior Constable Tobin of the Brisbane Water Local Area Command licensing branch which was provided to ILGA. Ms McLellan makes the point that a view that the community does not need “*another liquor outlet*” is not of itself a basis for refusing the application. She points to some differences as to liquor licensing density figures and also points to effective policing in the Umina Beach area having an effect on crime rates.
- 46 She also provides some very useful commentary on Mr Whetton’s report which the Tribunal found helpful and is discussed below.
- 47 In reaching its decision ILGA took into account (and found ‘persuasive’ par 38 Statement of reasons) the report received from Senior Constable S Tobin one of the licensing officers at Brisbane Water Local Area Command. Senior Constable Tobin recommended that the removal application should be refused on the basis that the overall social impact would be detrimental to the local and broader community. He included within the local community the surrounding suburbs. After noting the other licensed premises in Umina Beach which can sell packaged liquor already existing he expressed the view that if the ALDI store at Umina Beach had a licence it would be likely to lead to increased crime. Senior Constable Tobin referred to the link between crime, hospitalisations and liquor outlet density. He further noted that the suburbs surrounding Umina Beach have high levels of anti-social activity including higher domestic violence rates and higher malicious damage rates.
- 48 Ms Sims put on an affidavit annexing an updated report from Senior Constable Tobin dated 24 September 2018. This updated report also took into account the report which had been provided by the applicant to ILGA prepared by Mr P Paroz. The Paroz report is referred to later.
- 49 In his updating report Senior Constable Tobin says that it is the police stance that an increase in packaged liquor outlets will inevitably result in increases in certain crimes. He notes that Mr Paroz disagrees. He notes that the needs of the Umina Beach community are “*more than adequately met*” currently. He further says that he is disturbed by the rate of alcohol-related domestic violence in the area. He attributes

lower than average rates of crime in the area to good policing and the existence of a Liquor Accord in the Local Area Command region meaning that if offenders are banned from one outlet they are banned from all.

- 50 Senior Constable Tobin states that crime rates in the area surrounding Umina Beach are well above the state average and that a high rate of alcohol-related domestic violence and other assaults are a direct result of the over-supply of alcohol.
- 51 Senior Constable Tobin concedes that the rates of domestic violence generally are significantly lower in Umina Beach than in the local government area itself. However he does note that the Umina Beach rates are above the state average. Senior Constable Tobin refers to the effect that another packaged liquor outlet could have on the Woy Woy area where domestic violence rates are well above the local government area average rates.
- 52 Senior Constable Tobin refers to the highly regrettable rate of domestic violence and other assaults and the connection of some of these unfortunate incidents with alcohol.
- 53 However he does not refer to the point identified by Mr Duane that there is unlikely to be a material increase in the consumption of alcohol as a result of the grant of this removal application.
- 54 The applicant's solicitor Mr Cusack put on an affidavit attaching copies of further information concerning statistics and published studies relevant to this matter.
- 55 The s58 materials contained the materials that were before ILGA in the making of its decision. The s58 materials contained a report from Mr P Paroz dated 31 January 2018 which was submitted to ILGA but which is not referred to in its decision. It is not clear then how much weight it was accorded.
- 56 Mr Paroz, a former licensing officer in the NSW Police, is now a consultant who specialises in liquor licensing matters.
- 57 Mr Paroz reported that he attended the premises of ALDI in Umina Beach on a Friday night in December 2017. He inspected and photographed premises of competing packaged liquor outlets and estimated the distances between them and the ALDI store. In particular he noted that a BWS outlet across the road from the ALDI store required a not insignificant walk to a pedestrian crossing and then a return down the other side of the street to get to the BWS outlet. There would then be a return journey for customers if they left their vehicle in the ALDI car park.
- 58 Mr Paroz noted the high volume of vehicular and pedestrian traffic in Umina which would be exacerbated by ALDI customers travelling to other liquor outlets to buy liquor.
- 59 Mr Paroz noted crime rates in the local government area were steady or declining.
- 60 He investigated whether there was any significant price differential between the ALDI products and those offered in other packaged liquor outlets and came to the view that there was not much between them.
- 61 Mr Paroz noted that underage drinking offences in the Umina area were falling and were at a rate well below the NSW average.

62 As to the risk of secondary supply (buying alcohol for minors) Mr Paroz considered that this was unlikely to be a problem given that most of this took place after dark and the ALDI store closed at 8.00pm. Mr Paroz regarded ALDI as a low risk of contributing to underage drinking compared with larger format operations. Mr Paroz further reported that he had patrolled the area for some time on the Friday evening of his visit and did not observe any anti-social activity. He was also of the view that persons were unlikely to loiter in the ALDI car park to drink.

63 Mr Paroz concluded that there was very little risk that additional packaged liquor outlet would lead to further negative outcomes and that there would be a positive impact regarding the movement of vehicles and pedestrians and considerable convenience to ALDI customers from being able to purchase liquor in store rather than walk or drive to alternative outlets.

The Submissions

64 The submissions of the applicant were to the following effect.

65 There is very considerable public support for the removal by reference to the number of petitioners and supporters who favour the application, set against the very limited opposition.

66 It is well recognised and accepted (and has been accepted for many years) that it is reasonable for local community members to demand and expect a conveniently placed liquor outlet in a location where they otherwise regularly attend to do their grocery shopping: see *Dunpec Pty Limited v Department of Infrastructure and Transport* [2012] AATA 132 and cases there cited. The fact that there are other liquor outlets nearby does not obviate such demands and expectations: *Dunpec supra at para. [42]*.

67 Reference was made to the evidence of Mr Paroz concerning the inconveniences, hazards and traffic congestion being faced by ALDI customers in accessing those other facilities, which would be obviously alleviated if ALDI were to provide a small packaged liquor department within its own supermarket. Packaged liquor can be heavy, bulky and breakable, and will often be most conveniently transported in customers' vehicles.

68 Mr Paroz corroborates the claims of many ALDI petitioners, finding that "*due to the high volumes of pedestrian and vehicle traffic, there would currently be substantial inconvenience experienced by ALDI shoppers who are required to visit other outlets to undertake their packaged liquor shopping.*" The applicant noted the lack of reference to Mr Paroz' report in the reasons for decision of the respondent.

69 The very substantial monthly customer count for the ALDI Umina Beach Supermarket set out in the confidential Affidavit of Lisa Rafidi filed in the proceedings supports the proposition that many members of the local and wider community will have the benefits of one stop shopping convenience available.

70

There were further benefits, in addition to the convenience of customers, which ALDI identified in its submission to ILGA which appear to have merit (section 58 materials, Tab 20, paras. [12.29] -[12.40]):

- (a) Provision of additional choice of liquor products/new product lines into Umina Beach - as ALDI principally sells a range of its own branded products, this would expand the range of product lines available to local community members, which furthers the balanced development of the liquor industry in the local community: see 3(1)(b) LA.
- (b) I infer that this would provide a competitive benefit to the community by providing an alternative to the offerings of competing outlets.
- (c) Increase in employment (though this is likely to be small)
- (d) Increasing the attraction of the ALDI Umina Beach store can assist in developing support/custom for other businesses in Umina CBD.

- 71 On the question of potential negative social aspects, ALDI submitted that none of the local Council, the Department of Health, Family and Community Services, indigenous representatives, 9 community/special interest groups served with the application and only 3 of the approximately 145 neighbouring occupiers served with the application expressed concern about the application.
- 72 Only the local Police and 3 named neighbours opposed the application.
- 73 In submissions ALDI contested a number of the opinions expressed by Mr Whetton. It was notable that in correcting his evidence (as it was right for him to do) Mr Whetton substantially reduced (by about half) the predicted level of social harm caused by assaults that grant of the removal application might create.
- 74 ALDI also put Mr Whetton's suggestions for not insignificant increases to the number of hospitalisations for Umina Beach for chronic alcohol-related conditions and assaults under scrutiny.
- 75 They submitted that the latter result is, on its face, quite surprising. The 2016 census population for the LGA/broader community was 327,736 (Annexure C to Mr Cusack's affidavit 2016 Census Quickstats). The LGA experienced a total of 1386 alcohol-attributable hospitalisations in 2013-15 (Table 10 p26 of Ms McClellan's report) with a total of 497 licences (100 of which were packaged liquor licences). I agree it would appear to be a surprising result that the relocation of a packaged liquor licence within that broader LGA area would result in an additional 84 hospitalisations for alcohol-related conditions and 21 for assaults. It is no real answer to say that as ALDI Gosford has closed that the removal of the licence to Umina Beach "increases" the number of packaged liquor licences in the LGA by one. ALDI commenced the removal process before the closure of its Gosford store, and has had to await the outcome of the process.
- 76 The applicant then referred to Ms McClellan's examination of Mr Whetton's report, particularly as it related to the Donnelly et al paper. Ms McClellan analysed the propositions put forward by Mr Whetton. In doing so, Ms McClellan referred to the same research literature as was referred to by Mr Whetton, as well as to additional studies.

ALDI noted that in Smith v ILGA [2018] NSWCATAD 224, Magistrate Hennessy refused to apply the Donnelly et al findings to a smaller spatial area than the local government area: at [55]. Here, if one also applies the Donnelly findings only to the LGA/broader community area, they say there can be no scope for any increase in assaults as there will be no increase in licence densities within the LGA. There will merely be a relocation of an existing licence within the LGA.

- 77 In this case, Ms McClellan appears to be willing to assume that the research findings might be applicable to the smaller spatial area of Umina Beach. However, the outlet densities in Umina Beach are so far below the risk threshold identified in Donnelly et al her view was that the increase in density is not a material risk factor for increased rates of assault, whether DV or non-DV.
- 78 Ms McClellan then examines Mr Whetton's proposition that the relocation of the ALDI licence to Umina Beach would result in a significant increase of alcohol attributable hospitalisations.
- 79 Ms McClellan's review of the literature shows that there is a link between the amount of alcohol consumed and the level of harm that may result therefrom. However, there is no empirical link established between density of liquor outlets and alcohol attributable hospitalisations in NSW (p. 27).
- 80 At pp. 33 - 34 Ms McClellan takes issue with Mr Whetton in his analysis. Livingston reported that as the rate of packaged liquor licences increases by one unit (per 1,000 of population) the rate of chronic alcohol-related hospitalisations increases by 0.874 per 1,000. Being a longitudinal study, this occurred over a 14-year period. Ms McClellan says that in order to appropriately calculate the influence of one additional packaged liquor licence on assault and chronic alcohol-related hospitalisations, calculations should be based on the rate of packaged liquor licences per 1,000 of population and not the raw number of packaged liquor licences. Based on calculations using the rate of packaged liquor licences, if the ALDI Umina Beach removal were approved, the packaged liquor density in Umina Beach would increase by 0.06 per 1,000 of population. Using the parameters from Livingston, a 0.06 increase in the rate of packaged liquor licences in Umina Beach would be associated with an increase of 0.052 chronic alcohol-related hospitalisations over a 14-year period. Such an increase, if any, would be negligible.
- 81 Further, Ms McClellan's findings are supported by the analysis of Mr Duane. Mr Duane's conclusion is that the turnover to be derived from the operation of the ALDI liquor department will mostly be drawn from other incumbent operators. There will only be a negligible increase in the amount of liquor purchased by, and consumed in, the local community of Umina Beach.
- 82 That evidence is particularly significant in the context of whether the grant of the application is likely to cause alcohol-related health harms. As noted by Ms McClellan (at p. 27) it is the amount of alcohol consumed in a particular community that has the strongest relationship to alcohol-related harm. It was submitted that where there is

credible evidence that the grant of the application is unlikely to result in any appreciable increase in liquor purchased and consumed in the local community, there is little or no reason to infer that any appreciable increase in alcohol-related hospitalisations is likely to occur.

83 The submissions of the respondent were to the following effect.

84 ILGA's role in these proceedings is not to defend its decision as an adversarial party with a personal interest in the subject matter. Rather, the Authority's role is to assist the Tribunal in reaching the correct and preferable decision on the material before the Tribunal. It can assist the Tribunal to reach its decision by testing the strength of that material by cross examination, evidence of its own and submissions. ILGA submitted it has a "*unique contribution*" to make in this regard. Unlike the Applicant, the Authority has no commercial interest in the subject matter. As the Victorian Court of Appeal observed in *Macedon Ranges Shire Council v Romsey Hotel* (2008) 19 VR 422 at 431 [28]-[33], the Authority:

has experience, knowledge and expertise possessed neither by the tribunal nor by any adversary party appearing in the review proceeding The [Authority] is the only party to the review proceeding whose participating is governed exclusively by the aims and objectives of the statutory scheme

85 The Authority properly raises for the Tribunal's consideration:

- (a) the extent of and weight to be attributed to the negative and positive social impacts which would be caused by approving the Application,
- (b) whether the Tribunal should be satisfied that the positive social impacts of approving the Application outweigh or are equivalent to the negative social impacts such that the Tribunal should be satisfied that the "*overall*" social impact of the removal being approved will not be detrimental to the well-being of the local or broader community.

86 The respondent drew the Tribunal's attention to a number of aspects of s48(5) LA.

87 The Authority, and thus the Tribunal on review "must not" grant the removal application unless the decision-maker is actually "satisfied" that the overall social impact of the grant will not be detrimental to the well-being of the local and broader community.

88 That formulation of that statutory test has the effect of imposing a practical though not a legal onus on an applicant to provide the material necessary to ensure the Tribunal has an actual state of satisfaction that the overall social impact of approving the application for removal "*will not be*" detrimental to the well-being of the local or broader community.

89 That approach, it was submitted, reflects a precautionary principle which can be discerned from the text and context of the Liquor Act. That Act recognises that access to liquor can have detrimental consequences to the well-being of the community. The Liquor Act therefore prohibits the grant of a licence, authorisation, approval or removal application unless the relevant decision-maker is positively satisfied that the overall social impact of such a grant will not be detrimental. That approach will mean that some applications will be required to be refused where the adverse social impacts of granting

an application may be uncertain or where positive and negative social impacts of granting an application are so finely balanced such that the decision-maker is not satisfied as to what the *"overall social impact"* will be.

- 90 The phrase *"overall social impact"* recognises that the grant of a licence, authorisation, approval or removal application may have both positive and negative social impacts. The decision-maker must make an assessment of the positive and negative impacts 'overall' (i.e. taking proper account of all relevant factors for and against) of a particular grant and decide whether he or she is satisfied that the social impact will not be negative (detrimental) to the well-being of the community when all relevant things are considered.
- 91 The Authority submitted that as the sub-section uses the definitive phrase *"will not be"* as opposed to a more qualified phrase such as *"is not likely to be"*, that this is consistent with and fortifies the precautionary principle referred to above and suggests that the decision-maker must reach a definite state of satisfaction that the relevant grant will not be detrimental to the well-being of the community.
- 92 The parties agreed that the relevant suburb (Umina Beach) and the relevant local government area (Central Coast Local Government Area) are appropriate proxies for the *"local"* and *"broader"* community. This is also consistent with the Authority's Guideline 6 to which the Tribunal can and should have regard in these proceedings (see *Auld v ILGA* [2018 NSWCATAD 25 at [42]-[45]).
- 93 The use of the word *"will"* confirms that the test prescribed by s 48(5) LA is forward-looking and definite, and requires the decision-maker to assess what will, in the future, occur if the application is approved.
- 94 The respondent submitted that ALDI was wrong to impliedly suggest approving the application would have no impact on the *"broader"* community because it merely involves the *"removal of a packaged liquor licence from one place to another within the same Local Government Area (broader community)"*.
- 95 The licensed premises to which the licence presently relates is ALDI Gosford which is now closed. The respondent says the present application is appropriately assessed by treating it as an application which, if approved, will lead to an additional packaged liquor outlet being opened in the Central Coast Local Government Area. The respondent refers to *Auld v ILGA* [2018] NSWCATAD 25 at [111].
- 96 This is in the circumstances an unduly technical approach. ALDI submitted its removal application well before the closure of its Gosford store. To adopt the respondent's approach could have the effect of penalizing the diligent, and placing an unwarranted obstacle where there is delay for which an applicant is not responsible. In *Auld* the packaged liquor licence sought to be removed was from a hotel to an ALDI store in Young NSW and had been dormant since late 2015. Here the Gosford licence became dormant due to store closure just after the Authority's decision was given and this application for review was filed.

Consideration

- 97 I have read the community impact statement prepared by the applicant and the other s58 ADR Act documents. I have read the statements/affidavits and heard the evidence of the various witnesses, and heard and read the submissions of the parties.
- 98 I bear in mind that the proposed ALDI Umina Beach packaged liquor outlet is to be located in-store, with limited hours, a small floor area, with a limited product range usually specially produced for ALDI, comparably priced with competing products in other outlets, and only available unchilled. It is important to ensure the decision takes account of the facts particular to the application, and this application on its face appears to be low impact.
- 99 The evidence of the applicant's expert witnesses is compelling, both as to the positive and negative aspects of granting approval of this application
- 100 Mr Paroz's evidence amply demonstrates the convenience benefits to ALDI customers.
- 101 The submissions identify a number of other, probably less important, benefits.
- 102 Mr Duane's evidence establishes that the grant of the removal application is unlikely to lead to any material increase in consumption of liquor in the community. ALDI customers will largely switch their liquor purchases from other outlets to the more convenient one-stop shop. Mr Duane's evidence of a general decline in consumption of alcohol in Australia reinforces this conclusion.
- 103 Ms McClelland's evidence recognised the statistical potential for social harm. However, she says that the relationship between harm and outlet concentration is not linear; and in any event the additional concentration which an ALDI outlet would create is a long way below (0.24 packaged liquor outlets per 1,000 residents) what is regarded as the 'danger level' (more than 0.75 outlets per 1,000 residents). She referred to recent studies of harm rates where new packaged liquor outlets have opened which show such rates to be stable. She also was of the opinion, by reference to studies, that the grant of this application would be associated with only a negligible increase in alcohol related hospitalisations.
- 104 Mr Whetton's evidence appeared to me, in the light of the commentary from Mr Duane and Ms McClelland to overstate the potential social harms which could result from the grant of this application.
- 105 His estimates of additional alcohol related hospitalisations did not stand up to scrutiny, and this also undermined his position on the costs which would follow. Mr Duane's comments on the gaps in Mr Whetton's cost/benefit analysis cast further doubt.
- 106 Mr Whetton's estimates of alcohol related assaults associated with an increase in concentration of packaged liquor outlets were significantly (and properly) revised down by him. Ms McClelland adopted a more nuanced and detailed approach. Her expertise in this field is apparent. She did not deny the risk of an increase in alcohol related

assaults, but concludes that the grant of the application will not exacerbate the risks of social harm. Her evidence also provided a useful commentary on the scale of risk of increased crime which Senior Constable Tobin was concerned about.

- 107 It is a serious responsibility for a Tribunal to make a decision which may lead to social harm. I am acutely aware of the scourge of domestic violence. The Liquor Act provides a process for balancing the harms and benefits and requires the decision maker to come to a state of definite satisfaction that the benefits of granting the application outweigh the harms to the local and wider community.
- 108 Taking into account all of the material before the Tribunal I am of the view that the benefits of approving the removal application outweigh the negative aspects by a significant margin. I determine that I am fully satisfied that the overall social impact of the grant of this removal application will not be detrimental to the well-being of the local or broader community.
- 109 The decision under review will be set aside.

Orders

- (1) The decision under review is set aside.
- (2) The decision is made that the application to remove the packaged liquor licence from the ALDI supermarket in Gosford the ALDI Supermarket in Umina Beach is approved.
- (3) The parties are directed to file in the Tribunal within 21 days of publication of this decision (or such further time as may be granted) an agreed form of conditions to be attached to the removed licence which will permit the ALDI Umina Beach premises to operate as a packaged liquor outlet only.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Amendments

28 March 2019 - Coversheet representation corrected. "T Hatziz" replaced with "M J Heath".

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 28 March 2019