



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Aldi Foods Pty Ltd v Independent Liquor and Gaming Authority [2019] NSWCATAD 26
Hearing dates:	12 and 13 November 2018
Date of orders:	11 February 2019
Decision date:	11 February 2019
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	P H Molony, Senior Member
Decision:	The Tribunal affirms the decision of ILGA to refuse Aldi a packaged liquor licence at its Gunnedah store.
Catchwords:	ADMINISTRATIVE LAW – where respondent refused application for packaged liquor licence – assessment of overall social impact of granting the licence – whether that impact will not be will not be detrimental to the well-being of the local or broader community
Legislation Cited:	Administrative Decisions Review Act 1997 Civil and Administrative Tribunal Act 2013 Gaming and Liquor Administration Act 2007 Gaming and Liquor Administration Regulation 2016 Liquor Act 2007
Cases Cited:	Auld v Independent Liquor and Gaming Authority [2018] NSWCATAD 25 Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409 Smith v Independent Liquor and Gaming Authority [2018] NSWCATAD 224
Texts Cited:	Donnelly, Menendez and Mahoney, The effect of liquor licence concentrations in local areas on assault rates in NSW: Crime and Justice Bulletin No 181 Livingston (2011) A longitudinal analysis of alcohol outlet density and violence, Addiction vol 106 Livingston (2011) Alcohol outlet density and harm: comparing the impacts on violence and chronic harms, Drug and Alcohol Review, vol. 30
Category:	Principal judgment

Parties:	Aldi Foods Pty Ltd – applicant Independent Liquor and Gaming Authority - respondent
Representation:	Counsel: M J Heath (Applicant) H El Hage (Respondent) Solicitors: Hatzis Cusack Lawyers (Applicant) Crown Solicitor's Office (Respondent)
File Number(s):	2018/00202931
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REASONS FOR DECISION

Introduction

- 1 Aldi Foods Pty Ltd (Aldi) has applied to the Tribunal for administrative review of a decision of the Independent Liquor and Gaming Authority (ILGA) to refuse its application for a packaged liquor licence at Aldi's Gunnedah store.
- 2 Section 13A of the *Gaming and Liquor Administration Act 2007* (NSW) (the Administration Act) provides that a person who is aggrieved by a decision of the Authority, made under the liquor legislation and specified for the purposes of the section in the Regulation, may seek administrative review from NCAT.
- 3 Clause 7(a)(iv) of the *Gaming and Liquor Administration Regulation 2016* (NSW) then provides that a decision that an application for the granting or removal under the Liquor Act 2007 (NSW) of :
 - (iv) a packaged liquor licence (other than a packaged liquor licence that is limited to the sale of liquor only by means of taking orders over the telephone, by facsimile or mail order, or through an internet site),is one of the decisions prescribed for the purposes of s 13A.
- 4 Section 9(1) of the *Administrative Decisions Review Act 1997* (NSW) (the ADR Act) then provides that the Tribunal has administrative review jurisdiction over such decisions. The Tribunal in its administrative review jurisdiction therefore has jurisdiction to hear and determine an administrative review of a decision to refuse an application for a packaged liquor licence under the *Liquor Act 2007* (NSW): see s 30 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the CAT Act).
- 5 The decision to refuse Aldi a packaged liquor licence was made on the basis that ILGA was not satisfied that, "the overall social impact of the licence, ... being granted [would] not be detrimental to the well-being of the local or broader community."

The applicable law

The long title of the Liquor Act is an "Act to regulate and control the sale and supply of liquor and the use of premises on which liquor is sold or supplied".

7 The objects of the *Liquor Act* are found in s 3(1):

(1) The objects of this Act are as follows:

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,

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,

to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.

8 Section 3(2) instructs:

(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.

9 It is an offence to sell liquor to a person unless the seller is a person who is authorised by licence to do so: s. 7. Section 10 lists the types of licences that may be issued including a "hotel licence", "club licence", "on-premises licences" and a "packaged liquor licences". The nature and extent of authority conferred by each type of licence is set out in ss 14-39 of the Liquor Act.

10 A "packaged liquor licence" authorises a licensee to sell liquor from particular premises in sealed containers for consumption away from the licensed premises: s 29. It is the type of licence which Aldi sought to operate in a small portion of its Gunnedah supermarket in store opening hours.

11 Part 4 of the Liquor Act deals with the making of applications for liquor licences. Applications must be lodged with ILGA: s 40(1). Section 45 says that ILGA has a discretion to grant or refuse an application for a licence. The power conferred under s 45 is subject to number of requirements being satisfied, such as the applicant being fit and proper and the applicant taking all efforts to prevent intoxication: see s45(3).

12 Section 48 contains provisions aimed at ensuring that views of the local community, and the impact of any decision on the community, are ascertained and considered by ILGA. Section 48 relevantly provides:

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) an application for a hotel licence, club licence, small bar licence or packaged liquor licence,

(b) ...

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

(3A) ...

(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.

(6) The regulations may make provision for or with respect to the following:

(a) the requirements that must be satisfied in relation to the preparation of a community impact statement (including consultation requirements),

(b) the matters to be addressed by a community impact statement,

(c) the information to be provided in a community impact statement,

(d) the criteria for determining the local and broader community for the purposes of a relevant application,

(e) any other matter relating to the preparation and content of a community impact statement.

(7) ...

13 The requirement in s 48(5) has become known as the social impact test. In this case it requires that the decision-maker be satisfied that, having had regard to the community impact statement and the other information it is made aware of, that the overall social impact of granting the packaged liquor licence will not be detrimental to the well-being of the local or broader community. In order to do so, identifiable harms and benefits have to be ascertained and weighed, in assessing the overall social impact of granting a licence.

14 ILGA has published a document called *Guideline 6*, the most recent version of which was published on 3 September 2018, in which it sets out its policies and procedures for dealing with *considerations of social impact under s48(5) of the Liquor Act*. The establishment of such policies is specifically authorised by s 57 of the *Liquor Act* which provides:

57 Authority may establish administrative policies and procedures in relation to licensing matters

- (1) The Authority may approve policies and procedures for administering the licensing scheme under this Act.
- (2) Any such policies and procedures may be applied by the Authority:
 - (a) in dealing with applications for licences, authorisations or other matters that may be granted by the Authority under this Act, and
 - (b) in determining those applications

15 In *Auld v Independent Liquor and Gaming Authority* [2018] NSWCATAD 25 Senior Member Ransome reviewed *Guideline 6* and described it as “comprehensive”. She described the policy it sets out as “unobjectionable” and did not see any reason why the policy should not be applied. In *Smith v Independent Liquor and Gaming Authority* [2018] NSWCATAD 224 Hennessy DP considered that *Guideline 6* is a policy to which the Tribunal can have regard under s 64(4) of the ADR Act. Section 64 provides:

64 Application of Government policy

- (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the administratively reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.
- (2) The Premier or any other Minister may certify, in writing, that a particular policy was Government policy in relation to a particular matter.
- (3) The certificate is evidence of the Government policy concerned and the Tribunal is to take judicial notice of the contents of that certificate.
- (4) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal may have regard to any other policy applied by the administrator in relation to the matter concerned except to the extent that the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case.
- (5) In this section:
Government policy means a policy adopted by:
 - (a) the Cabinet, or
 - (b) the Premier or any other Minister,
 that is to be applied in the exercise of discretionary powers by administrators.

16 It is apparent that *Guideline 6*, which is a statement of policy and procedure adopted by ILGA and not by the Cabinet, the Premier or any other Minister, is not government policy for the purposes of s 64. It is, however, a policy applied by ILGA when considering the social impact test and therefore, as Hennessy DP found in *Smith*, is one to which the Tribunal may have regard, except to the extent that “the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case.”

17 It should be noted that Hennessy DP expressed the reservation that:

28 One of the views expressed in the Guideline is that the reference to the ‘local community’ in s 48(5) is a reference to the town of Kurri Kurri and that the reference to the broader community is a reference to the City of Cessnock local government area. Mr Smith agreed with that view. For the purpose of these proceedings, I accept that interpretation but I am not persuaded that the broader community always corresponds

with the relevant local government area. A local government area is an area which a council can govern in accordance with the Local Government Act 1993 (NSW). The size and population of local government areas varies significantly as does the location of a local community within a local government area. The identification of both the local and broader community is questions of fact to be determined in each case.

I agree with those reservations. In this case the parties are in agreement that the Gunnedah Shire should be treated as the relevant broader community when considering Aldi's application for a packaged liquor licence. Given that agreement, and in the absence of material to the contrary, I accept Gunnedah Shire is the broader community for the purposes of s 48(5) of the *Liquor Act*.

- 18 In considering this administrative review application I have had regard to *Guideline 6*.
- 19 Section 63 of the *Administrative Decisions Review Act* 1997 says that in determining an application for review the Tribunal is to make the correct and preferable decision having regard to the factual material before it, and any applicable written or unwritten law. It is well established that in considering an application for review the Tribunal is not constrained to have regard only to the material that was before the decision maker, but may have regard to any relevant material before it at the time of the review: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.
- 20 Parties before the Tribunal do not bear a legal burden of proof and matters of fact in dispute are determined on the balance of probabilities: see *Smith v Independent Liquor and Gaming Authority* [2018] NSWCATAD 224 at [25]. ILGA made a series of submissions going to the issue of whether or not Aldi, in the circumstances, bears a practical as opposed to legal onus of proof. I think this analysis unhelpful in the context of administrative review. As there is no legal onus of proof, I see little merit in discussions of the existence or otherwise of a practical onus. As already noted, s48(5) of the *Liquor Act* requires that the decision-maker be satisfied that, having had regard to the community impact statement and the other information it is made aware of, that the overall social impact of granting the packaged liquor licence will not be detrimental to the well-being of the local or broader community.

Material before the Tribunal

- 21 All the material before the Tribunal is conveniently listed in paragraph 6 of ILGA's submission.
- 22 In the present case the Tribunal did have some new material before it in addition to that considered by ILGA. This consisted of:
- (1) A new Police objection to the granting of a packaged liquor licence to Aldi in Gunnedah;
 - (2) an amended report from economist, Mr Steve Whetton, served by the ILGA;
 - (3) a reply report from social researcher, Ms Joanna McClellan, served by the Aldi.
 - (4) An affidavit of Mr Duane dated 12 November 2018.
 - (5) An affidavit from Mr Peroz dated 12 November 2018.

23

Since ILGA made its decision refusing Aldi's application for a packaged liquor licence the NSW Police Force has objected to the granting of a licence to Aldi. This was not the Police position when ILGA refused the application: there was no objection form Police but a request that specified conditions be included. Indeed, the only objection received was from a neighbour who was concerned about the potential for misbehaviour in the ALDI car park..

24 The Tribunal heard expert evidence from four witnesses. They are:

(1) Called by Aldi:

- (a) Ms McClellan, who is an expert social planner and holds a degree in Social Science and Policy from UNSW. She has undertaken a series of studies and qualifications since then. She is now Manager of Social Policy at the Institute of Public Policy and Governance at UTS. She was, from 2006 to 2011, the Principal Research officer for the then Office of Liquor Gaming and Racing, where she developed and managed the implementation of the Community Impact Statement (which she described as similar to the current process).
- (b) Mr Duane. He is an economist and demographer who has specialised in market analysis and strategic research for clients in a variety of industries, including for major retailers and the shopping centre industry.
- (c) Mr Peroz. He is a former superintendent of Police with 28 years of operational policing experience. From September 2010 to July 2015 he was the Commander, Drug and Alcohol Coordination for the NSW Police Force. This included roles as head of the Drug and Alcohol Enforcement Command and of the Drug and Alcohol Policy Unit. He was the principal Police spokesperson on alcohol related crime. In the years 2003 to 2011 he was the Local Area Commander of three separate local area commands.

(2) Called by ILGA

- (a) Mr Steve Whetton. He is an economist and is presently Deputy Director of the South Australian Centre for Economic Studies at the University of Adelaide. He has extensive experience in undertaking economic research and including current and past studies which require a consideration and interpretation of epidemiological studies related to the prevalence of substance abuse and harms arising from it.

There was no issue concerning the qualification of any of these experts to give the evidence they did.

25 Ms McClellan, Mr Duane and Mr Whetton gave their evidence concurrently and were able to reach agreement about some of their differences. Mr Peroz gave his evidence separately.

Matters agreed

26 The premises that Aldi seeks a packaged liquor licence for are within its existing supermarket in commercial Gunnedah. Those who have visited Aldi stores which sell packaged liquor will be familiar with the proposed configuration. The licenced area will consist of an area separated from the rest of the store by a wall on three sides, with the open side adjacent a cash register from which packaged liquor (as well as ordinary shopping) will be purchased. The total area proposed to be licenced is 34m². No

refrigerated alcohol will be sold from the store, with Aldi brands being principally on offer. Liquor will only be sold during store opening hours which are to 7pm each night, except on Thursdays, when the store stays open to 8pm. The Aldi store has its own car park.

27 The expert reports and the parties were in agreement about a large number of background matters. These form part of the factual context in which the social impact test is to be considered. It is convenient to quote ILGA's summary of agreed information and opinion derived from:

- (1) applicable data about Gunnedah and its broader community; and
- (2) from the expert reports from Ms McClellan and Mr Whetton.

28 This is found in ILGA's submissions at paragraph 44 (references removed).

A. Gunnedah is a small rural town with a population of 9,726 with a median age of 38. The Gunnedah LGA has a population of 12,215 with a median age of 40. There is growing evidence that regional and remote communities have higher prevalence of risky drinking and alcohol-related harms;

B. The Index of Socio-Economic Advantage and Disadvantage indicates Gunnedah is less advantaged and more disadvantaged in comparison to other Australian suburbs. As Ms McClellan states at p 13 of her report, the available evidence indicates that there is a correlation generally between social disadvantage and heightened risk of alcohol related problems;

C. Aboriginal and Torres Strait Island People make up 13.7% of the population in Gunnedah and 12.8% of the population of the Gunnedah LGA. Both figures are much higher than the State average of 2.9%. Aboriginal and Torres Strait Island People are a sub-group that tend to experience disproportionately high rates of alcohol-related problems. The evidence indicates that indigenous people are less likely to drink alcohol, but those that do drink are more likely to drink at high risk levels. These demographic characteristics indicate an elevated risk of social harm;

D. There are (i) 6 packaged liquor licences in the Gunnedah LGA (4 of those are in Gunnedah), (ii) 4 club licences (all of those are in Gunnedah) and 9 hotel licences (6 of those are in Gunnedah). In central Gunnedah, there are 9 premises authorised to sell packaged liquor, all within (approximately) three blocks of each other. The three blocks are a low/medium density hotspot for alcohol related assaults. The ALDI store is in located in the middle of the medium density hotspot for alcohol related assaults, amongst the 9 other premises. ...

E. Gunnedah has a total of 1.44 package, club and hotel liquor licences (per 1000 of population). The Gunnedah LGA has a total of 1.56 package, club and hotel liquor licences (per 1000 of population). The State average is 0.80 club and hotel liquor licences (per 1000 of population). As such, the density of package, club and hotel liquor licences in Gunnedah is approximately 80% greater than the State average. In the case of the Gunnedah LGA, the density is approximately is slightly less than 100% greater than the State average (i.e. almost double the State average);

F. The BOCSAR (NSW Bureau of Crime Statistics and Research) data reveals that the suburb of Gunnedah has (i) an alcohol-related domestic assault incident rate of 199.7 offences per 100,000, which is 1.5 times the State rate of 114.3 per 100,000 and (ii) an alcohol-related non-domestic assault incident rate of 399.5 offences per 100,000, which is approximately 3 times the State rate of 131.9 per 100,000. The incident rates for the broader Gunnedah LGA community (i.e. 175.3 for alcohol-related domestic assaults and 350.6 for alcohol-related non-domestic assaults) are also higher than the State rates. These rates derived from the Alcohol Related Crime Information Exchange database, referred to by Police in their report attached to Ms Sims' affidavit, are consistent with the BOSCAR data;

G. The rate of alcohol attributable hospitalisations for the Gunnedah LGA is lower than the State average and has generally decreased in recent years. The rate of alcohol attributable deaths within the Gunnedah LGA is higher than the NSW average

(however, Ms McClellan and Mr Whetton suggest that the difference is not significant);

H. Data provided by RMS reveals that the rate of alcohol-related casualty crashes in the Gunnedah LGA (9.1%) was more than double the State average (4.3%) and higher than the Northern average (7.8%).

29 In addition it was not in dispute that:

- (1) Gunnedah is one hour away from Tamworth. The Country Music Festival at Tamworth overflows to Gunnedah and that visitors for it are likely to impact on some of the data for Gunnedah and Gunnedah Shire.
- (2) Gunnedah is the venue for Gunnedah Field Days in August each year which attracts very large crowds, with a similar impact.
- (3) ILGA considered a petition supporting the application for a packaged liquor licence signed by 825 persons. They subscribed to the following proposition:

We expect to be able to purchase liquor at the ALDI Supermarket at the same time as we do our grocery shopping without having to 'travel elsewhere to do so. We would prefer to purchase ALDI's quality-owned branded liquor products.

In our view, the creation of a small liquor department in the ALDI Supermarket is not likely to lead to any increase in crime or anti-social behaviour.

We support the grant of this small liquor department for ALDI.

- (4) The Chair of ILGA received 104 signed letters from local community members stating their support for Aldi's application for a packaged liquor licence. In submissions Aldi summarised matters raised in those letters thus:
 - An expectation that they should be able to do one-stop shopping at their Supermarket,
 - The inconvenience of having to drive to another liquor outlet,
 - A desire to purchase ALDI's own branded product, without having to drive to Tamworth one hour away,
 - A belief that the grant of the licence will not contribute to anti-social behaviour,
 - An expectation that ALDI shoppers should enjoy the same level of convenience as is enjoyed by Woolworths Supermarket shoppers who have access to one-stop alcohol and grocery shopping.
- (5) It was agreed by the experts that should Aldi be granted a packaged liquor licence it is likely to generate new sales totalling between \$50,000 and \$300,000. This in a market that Mr Duane estimated is currently worth \$9.9million.

Consideration of evidence of likely impacts

30 In considering this matter I have had regard to the material before the Tribunal outlined above and to the expert evidence given at the hearing. While there was considerable agreement as to the factual background against which the social impact test is implemented, the expert's views as to what conclusions should be drawn from certain data or information, and the weight and import to be given to those conclusions differed.

31 A consideration of research literature was relevant to, but not determinative of the assessment of likely social harm. Inherent limitations in the research itself also needs to be identified and taken into account.

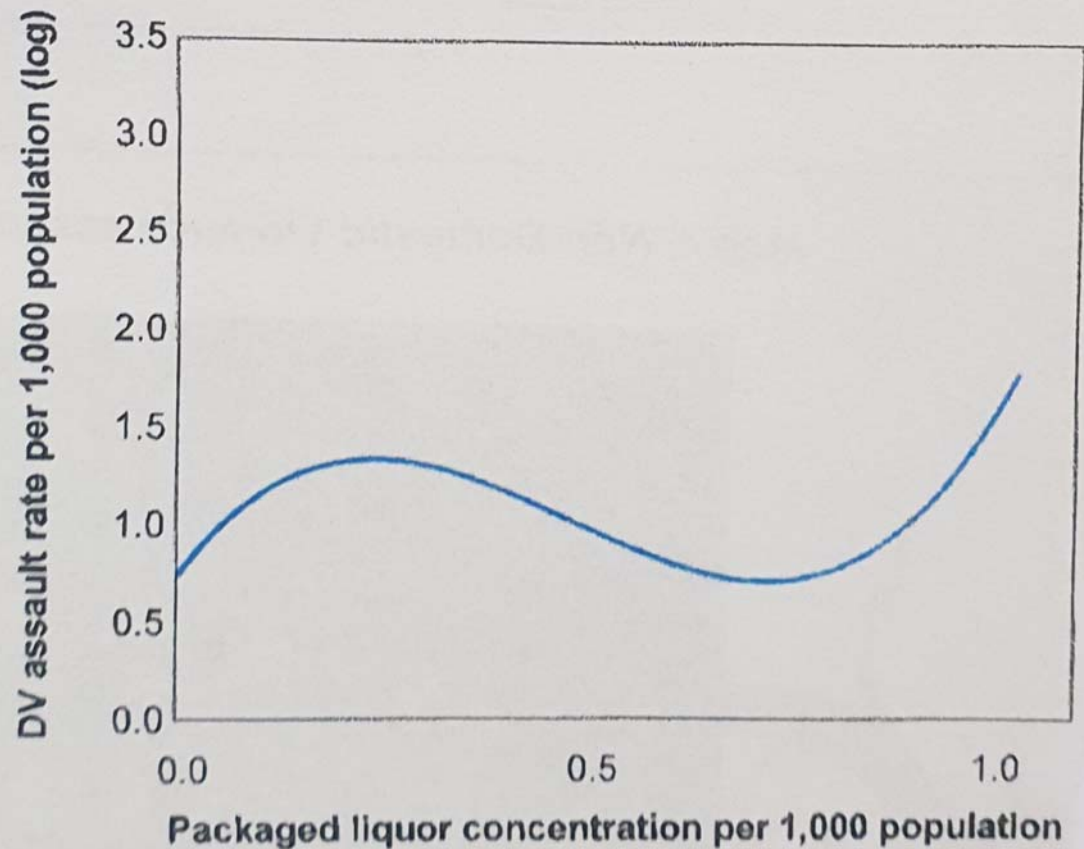
32

The potential benefits and detriments of granting Aldi a packaged liquor licence discussed below are these which were agitated by the parties before me. Also relevant to my consideration are the matters discussed above.

Outlet Density

- 33 The parties agreed that outlet density is a relevant consideration in assessing the probable social impact of granting Aldi a packaged liquor licence. The state average is 0.33 per 1000 persons.
- 34 The experts (Ms McClellan and Mr Whetton) were at odds concerning the application of a December 2014 study conducted by Donnelly, Menendez and Mahoney, *The effect of liquor licence concentrations in local areas on assault rates in NSW*: Crime and Justice Bulletin No 181 (Donnelly). Donnelly is one of the research papers which *Guideline 6* indicates ILGA may have regard to. The study investigated the relationship between liquor licence concentrations (by licence types) and assault rates in Local Government Areas in NSW. The experts agreed that research demonstrates that if the number of outlets selling liquor increases in a region (an increase in outlet density) then alcohol related harms in the region will likely increase (more with hotels than with packaged liquor licence), as will total levels of alcohol consumed in the area. The question then becomes how extensive those harms are likely to be.
- 35 Figure 2, at page 8, of Donnelly plots the relationship between package liquor outlets and DV assault rates found by the researchers: the plot is in the shape of a curve. It is non-linear. Donnelly noted that there is a sharp upturn in the curve when the packaged liquor licence density exceeds 0.75 per 1000 of population. Ms McClellan's evidence was that this (see her report of 30 October 2018 para 2.2),

Figure 2. Packaged liquor concentration and DV assault rate



... establishes a threshold of licence density above which increases in particular licence types will have a substantial impact on both domestic violence (DV) and non-DV assaults.

- 36 Mr Whetton did not agree that 0.75 packaged liquor licence per 1000 of population is the threshold of harm demonstrated by Donnelly. He argued that harms could arise from increases in outlet density below 0.75, and pointed out that the harms at an outlet density of 0.41 were greater than at 0.75, consistent with the curve in Figure 2. Ms McClellan clarified her position saying that an outlet density at or above the 0.75 threshold was likely to be a line above which severe harm might occur.
- 37 In applying the lessons from Donnelly, the parties differed over which licences should be treated as packaged liquor licences for the purpose of their calculations. Ms McClellan excluded from her calculation of outlet density an online sales business and hotels which are licenced to sell packaged liquor. She included the 4 existing local outlets. In his revised statement Mr Whetton calculated that this gives a density of 40.98 per 100,000 (0.4098 per 1000). He thought that one should follow the example

given by Donnelly and include the online licence, (making 5 packaged liquor licence for the purposes of calculation) which would result in an outlet density of 0.5122 per 1000. He noted that using the parameters from Donnelly that increase in density resulted in –

... a decrease of -1.9 reported non-domestic violence assaults (with a total expected impact of a reduction of -9.3). As there is no apparent mechanism whereby an increase in liquor licence density could itself result in a reduction of assaults this decline can reasonably be given low weight. However the results of Donnelly ... mean that it is not possible to discount the possibility that there would be a negligible increase in assaults over this range of packaged liquor licence density.

- 38 In cross-examination Ms McClellan agreed that she had not taken into account the hotel licences which authorised the sale of packaged liquor. She accepted that if she had been asked to prepare social impact statement she would have done so.
- 39 It should be noted that Mr Whetton did not include those licences in his calculations based on Donnelly. He was scrupulous in only factoring in the same type of data that Donnelly had. In my view he was correct to do so. I accept that granting a packaged liquor licence to Aldi's Gunnedah Store would increase the local packaged liquor licence outlet density to 0.5122 per 1000. It is accepted that this is well above the State average.

Alcohol related crime

- 40 Bureau of Crime Statistics (BOCSAR) data shows Gunnedah has an alcohol-related domestic assault incident rate of 199.7 offences per 100,000. This is 1.5 times the State rate of 114.3. The alcohol-related non-domestic assault rate for Gunnedah is 399.5 offences per 100,000, or slightly more than 3 times the State rate of 131.9. For Gunnedah LGA the incident rates are 175.3 for alcohol-related domestic assaults and 350.6 for alcohol-related non-domestic assaults, both higher the State rates.
- 41 Mr Peroz made the point that, in considering this data, one needed to factor in the high rate of visitors during two major annual events in January (Tamworth Country Music Festival running over 10 days) and August (Gunnedah Field Days) which are responsible for a very large increase in the towns population. According to Police Gunnedah Field Days increases the population to approximately 70,000 for a four-day period. Mr Peroz did not consider the BOSCAR data as a cause for concern.
- 42 While Police did not object to Aldi's application for a packaged liquor licence at the time of ILGA's refusal of the application, following inquiries made by the Crown Solicitors Office (CSO) in preparation for this hearing, the Police did object to the application. I should note that in submissions ALDI highlighted this and suggested that this represented prompting. The submission did not suggest what flowed from that suggestion. I am content to proceed on the basis that the Tribunal is bound to make an administrative review decision on the information before it; see s 63 of the *ADR Act*.
- 43 The letter from Gunnedah Police provided up to date Alcohol Related Crime Information Exchange (ARCHIE) data for the "Gunnedah Cluster" for the period April to September 2018. This showed, among other things, that:

- (1) 26% of the 182 domestic violence incidents involved alcohol and 53% of the 51 assaults involved alcohol. Police compared this with figures of the Oxley Police district of 23% of domestic violence incidents and 33% of assaults.
- (2) In 34% of crime the last place of alcohol consumption was at home or at a private residence, with 100% of underage persons involved in incidents (a total of 7) having last consumed alcohol at home or at a private residence.

44 The Police objection concluded –

Police support the decision by the authority to refuse the application. The crime statistics for the Gunnedah area indicate an elevated alcohol related crime rate with a large portion of consumption taking place in a home/private residence. This indicates the consumption can be directly attributable to alcohol being purchased from packaged liquor outlets. The number of packaged liquor outlets exceed the need of the Gunnedah Community by population numbers and would be sufficient for years to come even with continued steady growth of Gunnedah. An additional packaged liquor outlet would only increase consumption by persons in the home/private residence and subsequently [sic] increase the risk of additional alcohol related harms to the Gunnedah Community.

45 In Mr Peroz's view the ARCHIE statistics were not a cause for concern. He did question what was meant by the Gunnedah Cluster and how it related to Gunnedah and Gunnedah Shire. He said that it did not distinguish between domestic violence incidents and assaults, and was silent on the level of intoxication. The absence of comparative data from other areas also concerned him.

46 While I accept the validity of Mr Peroz's criticisms the ARCHIE data nonetheless clearly demonstrates that a significant proportion (although not a majority) of adult crime followed alcohol being consumed at home or in a private residence. In the case of underage crime this was 100%. Packaged liquor is the probable source of all that alcohol. Alcohol was also involved in a significant number of domestic violence incidents and the majority for the 6 months covered by the ARCHIE data. I accept the Police view that this is a cause for concern and points to a risk of harm should another packaged liquor licence be issued in Gunnedah, given that the volume of sales will increase, albeit marginally.

47 In his report Mr Whetton noted that, applying Donnelly, an increase in packaged liquor licence outlet density of 4 in Gunnedah would result in an increase of (para 2.7) –

... 12.7 additional cases of domestic violence assaults and 11.1 additional reported non-domestic violence assaults (with a total expected impact of 46.2 cases adjusting for underreporting of assault).

48 Mr Duane provided three reports. In the last dated, 30 October 2018, he compared the statistics for alcohol related assaults and disorderly conduct from 2007 to 2018, across three local government areas in which Dan Murphy Stores had commenced operating during that period. These were:

- (1) Tamworth – Dan Murphy store opened 1 October 2015.
- (2) Coffs Harbour – Dan Murphy store opened 18 May 2011
- (3) Port Macquarie – Dan Murphy store opened 12 July 2011.

In all three locations Aldi liquor commenced operations in 2011.

49

The general trend of alcohol related assaults and disorderly conduct in each of the LGA's has been downward since those stores opened. This points to the correlation between packaged liquor licence and domestic violence found in studies such as Donnelly not always applying or being readily apparent. It points to the need for caution when drawing parallels with the Donnelly study, and that the correlations found are not necessarily of universal application.

50 Having had the benefit of hearing from the experts called by the parties on this issue I conclude that, on balance, an increase in packaged liquor licence outlet density will result in some harm, in that an increase in domestic violence assaults is probable. While they differed as to the extent of the correlation between outlet density and alcohol related domestic violence assaults, both Mr Whetton and Ms McClellan accepted that the correlation demonstrated in Donnelly exists. Mr Duane's statistical analysis does not persuade me to the contrary. However, given the possibility of a decrease found by Mr Whetton I am not persuaded that any increase would be large or significant, and think it likely to be small. The variances and contradictions evident when one seeks to apply the lessons outlined in the Donnelly study, to the situation in Gunnedah, lead me to approach that study with considerable caution.

51 Further, the high rates of assaults, in both Gunnedah and the Gunnedah Shire, point to concerning levels of assaults (both alcohol related and not) which call for caution to be exercised when considering the introduction of a new factor that is likely increase the number of assaults, even if by a small amount.

Health impact

52 In submissions Aldi pointed out that there was no objection from the local health district. Aldi submitted that –

If [the local health district] had a concern about increased assaults one might have expected it to object and it did not.

53 I am not prepared to draw an inference that the local health district had no concerns because it did not make an objection. I accept that it did not oppose the granting of a packaged liquor licence to Aldi.

54 The rate of alcohol attributable hospitalisations for the Gunnedah LGA is lower than the State average and has generally decreased in recent years. The rate of alcohol attributable deaths within the Gunnedah LGA is higher than the NSW average (however, Ms McClellan and Mr Whetton agree that the difference is not significant). Rates of hospitalisation have been decreasing over recent years despite, as Aldi notes in its submission, the addition of a liquor licence for the rugby club.

55 Based on the model in Livingston, a Melbourne based study, Mr Whetton expressed the view that there would be a possible one-off increase in hospitalisations due to alcohol of 4.6 cases if Aldi is granted a packaged liquor licence (see Livingston (2011) *A longitudinal analysis of alcohol outlet density and violence*, Addiction vol 106 and (2011) *Alcohol outlet density and harm: comparing the impacts on violence and chronic*

harms, Drug and Alcohol Review, vol. 30). Mr Whetton explained that Livingston showed a correlation between outlet density and hospitalisation for chronic alcohol related conditions. Ms McClellan doubted the direct applicability of a Melbourne based study to a rural town in NSW. She thought that the likely increase in hospitalisations, if Aldi is granted a packaged liquor licence, would be 'negligible'. Some time was spent in cross-examination exploring why there was such a difference in opinion between the experts. This did not clarify the situation for me.

56 On this evidence, at worst, the granting of a packaged liquor licence to Aldi will result in a one-off increase in hospitalisation of 4.6 admissions. I am not satisfied that it would result in an increase in alcohol related deaths.

Alcohol related crash data

57 Roads and Maritime Services (RMS) provided crash data which was considered by ILGA in its decision and which 'troubled' it. RMS did not object to Aldi being granted a packaged liquor licence, but did draw ILGA's attention to the troubling data. ALDI submitted that the fact that RMS did not object is a relevant consideration. Given that RMS was not silent, but did respond and provide information for the community impact statement, I accept Aldi's contention that RMS made a conscious decision not to object.

58 The data provided revealed that in the 5-year period to 30 September 2016, there were 15 alcohol related casualty crashes. This meant that the rate of alcohol-related casualty crashes in the Gunnedah LGA (9.1%) was more than double the State average (4.3%) and higher than the Northern average (7.8%). ALDI argued that the Gunnedah LGA rate was only slightly above the northern average. I do not accept this. The Gunnedah LGA rate is more than 10% higher than the Northern average, and is more than twice the State average. I agree with ILGA that these figures are a cause for concern and point to the prospect of a real community detriment if Aldi's application for a packaged liquor licence is successful.

59 Aldi sought to address those concerns by pointing out that a further breakdown of the crash data revealed that:

- a. 33% of the casualty crashes were not residents of the Gunnedah Shire LGA and, therefore, it is unlikely to the availability (sic) [include] Aldi shoppers even if [it] then had a liquor licence; and
- b. 40% of the casualty crashes that did occur happened between 4.00pm and 8.00 pm and therefore they are more likely to be related to an hotel outlet than a packaged liquor outlet

60 As can be seen point (a) is unclear. While I see some merit in the argument that the rate would be less if drivers from the outside the LGA are excluded, I think it probable that the same criticism can be made of crash data for other local districts and observe that visitors are free to purchase packaged liquor. The submission that because the majority of alcohol related crashes happen outside Aldi's opening hours they are more likely to be related to 'an hotel rather than a packaged liquor licence' is not persuasive.

Packaged liquor can be consumed at any time. Without evidence of where the drivers involved in crashes actually obtained their liquor from, and where they consumed it, I am not able to draw a conclusion along the lines pressed by Aldi.

- 61 The fact that the proposed Aldi liquor outlet is small, and will sell only unrefrigerated liquor in limited trading hours, does not persuade me that, as submitted by Aldi, it is, “not likely to contribute to a drink and driving risk during the hours it is trading”. This is speculative. Not all people drink chilled alcohol, and those that do are likely to have access to a fridge.

Customer convenience

- 62 In addition to the petition from Aldi customers, and letters in support of Aldi’s application sent to ILGA, there are two reports from Mr Peroz which, in part, address this issue. Aldi did not read or rely on eight paragraphs from his report of 14 February 2018 numbered 27, 28, 42, 43, 46, 47, 48 and 49.

- 63 Mr Peroz visited Gunnedah on a Friday and Saturday in November 2017. He walked around the town a number of times, both at night and during the day, and found no signs of public drunkenness or of anti-social behaviour that might diminish the resident’s amenity. He attended all licenced venues. His report of that visit advised, among other things, that:

- (1) Five of the hotels he visited did not have a dedicated place for or advertise the sale of packaged liquor. Two had bottle shops that are closed.
- (2) Both licenced clubs did not have a dedicated place for or advertise the sale of packaged liquor.
- (3) The car park at Aldi is well lit and highly visible. He considered it unlikely to be a venue used for public drinking.
- (4) Traffic flow in the CBD is slow when it is busy, and the requirement for 45-degree reverse angle parking slows it further, as following traffic has to wait while vehicles park.
- (5) Shoppers at Aldi who wish to buy packaged alcohol face a walk varying between 160m to 600m depending on where they go to buy their alcohol. This he considered inconvenient, especially when carrying one’s purchases. To drive to an available liquor outlet would require traversing a block or more and then the difficulty of finding suitable parking, if possible.
- (6) The Oxley and Kamilori Highways both pass through the CBD explaining “the presence of significant heavy vehicle movements around the CBD.” This has resulted in the construction of pedestrian refuges and cut throughs.
- (7) There are 17 CCTV cameras operating in the CBD (which includes the Aldi store).

- 64 I accept that those customers of Aldi who wish to buy packaged liquor, who in numbers equal approximately 10% of the Gunnedah suburban population, would benefit from the convenience of being able to buy their liquor while doing their supermarket shopping. They would also be spared what I accept is a real inconvenience in having to drive elsewhere to buy their alcohol. I accept Mr Peroz’s opinion that they are unlikely to walk to other packaged liquor outlets.

Parking and Traffic

65 I agree that, if Aldi is granted a packaged liquor licence, it is likely that the small reduction in traffic might prove of some small benefit to the local community in terms of reduced traffic and reduced use of roadside parking. While I agree with ILGA that there is no data demonstrating this, it is a conclusion that I think Mr Peroz well qualified to reach. It is one which I accept.

Increase in economy

66 As already noted the parties agree that if Aldi is granted a packaged liquor licence there is likely to be an increase in alcohol sales of between \$50,000 and \$300,000. Mr Duane who has considerable experience in investigating and calculating such matters favours the higher figure. Whatever the figure, it represents a small percentage increase in the volume of total alcohol sales which Mr Duane estimates at \$9.9 million.

Conclusion

67 Section 48(5) of the Liquor Act requires that before granting Aldi a packaged liquor licence the decision-maker must be satisfied, on balance, that the overall social impact of the licence being granted will not be detrimental to the well-being of the local or broader community.

68 It can be seen from the discussion above that Gunnedah and Gunnedah LGA are areas where the population is more disadvantaged than average in the State and that they have a high indigenous population. The harm which is likely to flow from Aldi selling packaged liquor (albeit unrefrigerated and from a small store) while statistically small, nonetheless has the potential to be very real as it affects the community whether by means of the one-off increase in hospital admissions, an increase in alcohol related crashes or an increase in domestic violence. Those impacts represent a real harm to the broader and local community: one which already has too much alcohol related violence and too many alcohol related crashes.

69 I am not persuaded the overall social impact of Aldi being granted a packaged liquor licence will not be detrimental to the well-being of the local or broader community. I agree with the Police that Gunnedah and the Gunnedah LGA are already well provided for in terms of packaged liquor outlets.

70 The benefits which include:

- (1) convenience for that proportion of the population that shops at Aldi and those who wish to buy Aldi liquor;
- (2) greater market choice;
- (3) the impact on the economy; and
- (4) a small reduction on traffic volume and some small lessening in demand for kerbside parking;

do not in, my view outweigh, the harms.

Order

71 As a result

- (1) The Tribunal affirms the decision of ILGA to refuse Aldi a packaged liquor licence at its Gunnedah store.

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

11 February 2019 - Paragraph 29(5) duplicate word "liquor" deleted.

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Decision last updated: 11 February 2019