



Civil and Administrative Tribunal
New South Wales

Case Name: Auld v Independent Liquor and Gaming Authority

Medium Neutral Citation: [2018] NSWCATAD 25

Hearing Date(s): 1 and 2 August 2017

Date of Orders: 30 January 2018

Decision Date: 30 January 2018

Jurisdiction: Administrative and Equal Opportunity Division

Before: K Ransome, Senior Member

Decision: (1) The decision under review is set aside.

(2) The decision is made that the application to remove the hotel licence from the Mill Tavern in Young to the ALDI Supermarket in Young is approved.

(3) The conditions attached to the removed licence will be those agreed between the parties which permit the licenced premises to operate as a packaged liquor outlet only.

Catchwords: LIQUOR LICENCE – removal of licence to other premises – can hotel licence be used to sell packaged liquor only – requirement for development consent – conditions form part of licence – social impact test – matters to be considered when determining social impact

ROLE OF TRIBUNAL – powers on review – rehearing rather than new hearing – new evidence – correct or preferable decision

STATUTORY CONSTRUCTION – meaning of “the business or activity to which the proposed licence

relates” – actual business or activity to be carried out

STATUTORY CONSTRUCTION – social impact test – matters to be considered – role of general academic research

Legislation Cited: Administrative Decisions Review Act 1997
Environmental Planning and Assessment Act 1979
Gaming and Liquor Administration Act 2007
Liquor Act 2007
Liquor Regulation 2008

Cases Cited: Auld v Independent Liquor and Gaming Authority (No. 2) [2017] NSWCATAD 339
Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 634
Nevistic v Minister for Immigration (1981) 34 ALR 639
Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] 258 CLR 173

Texts Cited: DC Pearce & RS Geddes, Statutory Interpretation in Australia, 8th edition

Category: Principal judgment

Parties: Trent Auld (Applicant)
Independent Liquor and Gaming Authority (Respondent)

Representation: Counsel:
T Howard SC (Applicant)
J Emmett (Respondent)

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

File Number(s): 2017/00020211

Publication Restriction: Section 64 of the Civil and Administrative Tribunal Act 2013 applies to the material filed by the respondent on a confidential basis, to the evidence given in private before the Tribunal and to the record of that part of the proceedings conducted in private pursuant to s 49. That material is not to be released to either the applicant or to the public.

REASONS FOR DECISION

- 1 This matter involves an application to “remove” (transfer) a hotel licence from the Mill Tavern in Young to the ALDI Supermarket, about 400 meters away by road. ALDI wishes to use the licence to sell packaged liquor from its supermarket during opening hours.
- 2 On 14 December 2016 the Independent Liquor and Gaming Authority (the Authority) decided to refuse the application by Mr Trent Auld, the licensee of the Mill Tavern, to remove the licence to the ALDI supermarket. The Authority issued reasons for its decision on 23 December 2016.
- 3 Section 59 of the *Liquor Act 2007* (‘the Act’) and the Liquor Regulation 2008 set out the requirements for removing a liquor licence to another premise. In accordance with s 48 of the Act, an application to remove a licence must be accompanied by a community impact statement. Sub-section 48(5) requires that the Authority must not grant the application unless satisfied 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”.
- 4 Any person who exercises functions under the Act must have regard to the objects and considerations set out in s 3:

3 Objects of Act

(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.

- 5 In relation to Mr Auld's application, the Authority, after considering the evidence before it, was not satisfied that the overall social impact of removing the licence would not be detrimental to the well-being of the Young community as it would likely contribute to a problematic rate of alcohol related domestic violence in the local community.
- 6 The Authority in its decision also raised an issue about whether the applicant had satisfied s 45(3)(c) of the Act which requires that any relevant development consent must be in force before a licence is granted. The Authority held there was insufficient information before it to enable it to determine that s 45(3)(c) was satisfied.

Role of the Tribunal

- 7 Mr Auld has applied to the Tribunal for a review of the Authority's decision pursuant to s 13A of the *Gaming and Liquor Administration Act 2007*. That section provides for review of the Authority's decision under the *Administrative Decisions Review Act 1997*. However, the Tribunal's powers on review are qualified by s 13(2) of the *Gaming and Liquor Administration Act* which states that the review is by way of rehearing rather than a new hearing.
- 8 In *Auld v Independent Liquor and Gaming Authority (No. 2)* [2017] NSWCATAD 339 Senior Member Montgomery held that, as a result of the provision in s 13A(2), the Tribunal is required to determine the matter on the basis of the material which was before the Authority when it made its decision. However, he further held that the Tribunal retains a discretionary power to grant leave for fresh evidence to be adduced. Where leave would properly be granted, the Tribunal can exercise its function under s 63 of the *Administrative Decisions Review Act*.
- 9 Senior Member Montgomery gave the parties leave to adduce some further relevant evidence. I gave leave for some further evidence, as agreed between the parties, to be adduced at the hearing and contained in a "tender bundle". In

addition, Mr Jon Harris, Property Director, ALDI, NSW gave confidential evidence to the Tribunal.

- 10 There was some discussion by the parties during the course of the hearing about the nature of the proceedings and the role of the Tribunal in proceedings under the Act. In these, as in other proceedings under the *Administrative Decisions Review Act*, the Tribunal is tasked with making the correct or preferable decision on the material before it. In particular, in relation to this application, the Tribunal must be satisfied, after considering all of the evidence before it, that the overall social impact of granting the licence will not be detrimental to the well-being of the local or broader community. What is meant by the local or broader community is discussed below.

The current licence

- 11 In October 2015, Gemstone Hotel Pty Ltd, of which Mr Auld is a Director, purchased the premises from which the Mill Tavern was trading. The Mill Tavern ceased to trade in late 2015 and is now closed. Mr Auld is the licensee of the hotel licence attached to the premises. The licence is currently held by him in a dormant capacity.
- 12 The rights attaching to the hotel licence include:
- (a) sale of alcohol on the premises (which cover an area of about 840m²);
 - (b) sale of packaged liquor for off premises consumption;
 - (c) permission to trade for 132 hours each week with extended trading until 1:00 am on Thursday nights, 3:00 am on Friday nights and 2:00 am on Saturday nights; and
 - (d) live entertainment.
- 13 Take-away packaged liquor sales are permitted from 10:00 am to 10:00 pm each day. The Mill Tavern also had a gaming room with poker machines.

What ALDI proposes

- 14 ALDI proposes to open a packaged liquor department within its existing supermarket in Young within a defined area of about 33m². It proposes to use the hotel licence currently attached to the Mill Tavern premises but to use the licence subject to a number of conditions. Those conditions include:

- (a) that the sale of liquor will be limited to packaged liquor only;
- (b) that no consumption of liquor will be permitted on the premises;
- (c) that no refrigerated liquor will be sold from the premises;
- (d) that entertainment will not be provided on the premises; and
- (e) that there would be no gaming machines kept, used or operated at the premises.

15 Furthermore, trading hours for the packaged liquor would be reduced to be the same as the general supermarket hours (8:30 am to 8:00 pm Monday to Friday, 8:30 am to 7:00 pm Saturday and 10:00 am to 7:00 pm Sundays).

Application to remove a licence to new premises

16 Sub-section 59(3) of the of the Act provides that 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 new licence in respect of those premises. When granting a licence, the Authority must be satisfied in accordance with s 45(3) of the Act that:

- (a) the applicant is a fit and proper person;
- (b) appropriate practices are in place to prevent intoxication on the premises; and
- (c) any required development consent or approval is in force to use the premises for the purposes of the business or activity to which the proposed licence relates.

17 Matters (a) and (b) are not in contention. There is, however, an issue about what is required concerning development consent or approval in s 45(3)(c) which is discussed below.

Is the relevant development consent in force?

18 Sub-section 45(3)(c) provides:

- (c) if development consent is required under the *Environmental Planning and Assessment Act 1979* (or approval under Part 3A or Part 5.1 of that Act is required) to use the premises for the purposes of the business or activity to which the proposed licence relates - that development consent or approval is in force.

19 A development consent is in force for the operation of the ALDI supermarket and a development consent (complying development) is in force for the fit out of the relevant part of the supermarket for the purposes of the sale of packaged

liquor. The issue about whether s 45(3)(c) has been complied with arises because the licence sought to be removed to the ALDI store is a hotel licence.

- 20 The Act provides that a person must not sell liquor unless the person is authorised to do so by a licence. Section 10 of the Act sets out the types of licence which can be granted and held under the Act. They include a hotel licence, a club licence, a small bar licence, an on-premises licence and a packaged liquor licence. Importantly, s 10(2) states that a licence authorises the licensee to sell or supply liquor in accordance with the Act and the conditions of the licence.
- 21 Sub-section 14(2) of the Act provides that a hotel licence authorises the licensee to sell liquor by retail on the licenced premises for consumption on or away from the licensed premises. A "hotel" is defined as being the premises to which a hotel licence relates (s 4). The primary purpose of the business carried out at the licenced premises must at all times be the sale of liquor by retail (s 15). There does not appear to be any dispute between the parties that the proposed licensed premises would comprise that part of the ALDI supermarket designated as the packaged liquor section with display shelving and a checkout area.
- 22 The respondent's position is that, as the licence in question is a hotel licence, notwithstanding that the applicant is proposing to create a packaged liquor business only within its supermarket, it is incumbent upon the applicant to show whether a development consent is required and, if so, that such consent is in force which would permit the premises to be used as a hotel (that being the relevant business or activity to which the licence relates). ALDI does not have development consent to build a hotel on the site of its store in Young.
- 23 The applicant states that s 45(3)(c) is intended to have a practical effect by ensuring that a licence is only granted after any relevant development consent is in place. It thus prevents the granting of the licence, which attaches to particular premises, in circumstances where the land in question does not benefit from the requisite development consent. The applicant submits that the phrase "the business or activity to which the proposed licence relates" refers to the business or activity the person is actually proposing to carry out, not a

business the person is not proposing to carry out and which will not be permitted by the licence itself.

- 24 In that regard, the applicant states that the licence cannot be read devoid of its conditions. The licence in question in these proceedings will be subject to conditions which have the effect that the licence can only operate to permit ALDI to sell packaged liquor as part of its grocery store. ALDI will not be permitted to carry on what is commonly known as the “business” of a hotel.
- 25 The position of the respondent appears to be that businesses should seek licences appropriate to their business type, such as a packaged liquor licence, instead of acquiring an existing licence with a view to re-purposing it as a different kind of licence. That may well be the ideal position as it is one that allows for clarity and is particularly relevant to the grant of new licences. The issue here, however, is whether an existing hotel licence can be transferred to other premises which do not have planning approval for use as a hotel but are approved to sell packaged liquor.
- 26 The applicant referred to instances in the past where a hotel licence was removed to other premises used to sell packaged liquor only. It appears, however, that those cases were decided under previous legislation which is different to that in place today and are thus of marginal relevance.
- 27 I agree with the submissions made by the applicant concerning the purpose and scope of s 45(3)(c). The *Environmental Planning and Assessment Act 1979* is primarily concerned with the use of land in NSW and, among other things, requires approvals be given for certain uses of land. The purpose of s 45(3)(c) is to prevent a licence being granted (or in this case removed) by the Authority in relation to particular premises unless development consent (if required under the relevant environmental planning instrument) has been granted for the use of the premises (or land) for a particular business or activity proposed to be carried on at those premises. That is, the provision is concerned to ensure that prior approval, if required, for the use of the premises for a particular business or activity is in place before a liquor licence is granted. The provision thus ensures the integrity of both the planning and liquor licencing regimes.

- 28 I agree with the submissions of the applicant that a licence cannot be divorced from the conditions which attach to it. This is reflected in s 10(2) of the *Liquor Act*. In this case the licence, if removal is granted, will be circumscribed by a number of conditions which will have the effect of only permitting the sale of non-refrigerated packaged liquor on the premises. While the licence is a hotel licence, it is limited in its operation by the conditions attached to it. That does not mean the licence does not continue to be a hotel licence, but the business or activity to which that licence relates is a business selling packaged liquor only.
- 29 The phrase “the business or activity to which the proposed licence relates” concerns the nature of the actual activity or business to be carried out at the premises. In this case, the business proposed to be carried out is a packaged liquor business within the ALDI store. Development consent is in place for that proposed business.
- 30 The respondent notes that the licence conditions may be changed from time to time, for example, by removing the condition that ALDI will not sell liquor for consumption on the premises. That may be correct, but is a matter for the Authority to consider at the relevant time. The Authority would no doubt take into account the reasons for the imposition of the relevant condition before making any decision to change or remove that condition. Furthermore, were the nature of the business to change, prior development consent may be required to ensure that the relevant consent is in place for the new business or activity.

The social impact test

- 31 As noted above, an application to remove a licence must be accompanied by a community impact statement. Under s 48(5) the Authority, and therefore this Tribunal, must not grant a licence unless it is satisfied that the overall social impact of the licence will not be detrimental to the well-being of the local or broader community. This is generally known as the social impact test. The requisite level of satisfaction is to be reached after having regard to:
- (a) the community impact statement and

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

Construction of s 48(5) of the Act

- 32 The Applicant states that the respondent has misconstrued how s 48(5) is to be applied in considering whether to grant an application and puts forward a different view. Before proceeding to the arguments of the parties on this issue, it is necessary to set out some further detail of the provisions in the Act relating to the assessment of a licence application by the Authority.
- 33 When the Authority receives an application, it may, under s 42, carry out such investigations and inquiries in relation to the application as it considers necessary for a proper consideration of the application. In relation to a licence of the type under consideration in this application, the Authority is also to refer the application to the Secretary of the Department of Justice who is authorised to carry out investigations and inquiries. In turn, the Secretary may refer the application to the Commissioner of Police who may inquire into and report on any matters concerning the application as the secretary may request. The Secretary is to provide a report to the Authority.
- 34 Sub-section 48(1) states that the object of s 48 of the Act is to facilitate the consideration by the Authority of the impact that the granting of certain licences will have on the local community by providing a process whereby 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.
- 35 To this end, s 48(3) provides that an application (save with some exceptions) must be accompanied by a community impact statement. The applicant states that s 48(1) makes clear that the primary focus in assessing whether the overall social impact will be detrimental to the well-being of the local or broader community must be the views expressed by the local community itself during the process established under s 48.

- 36 The Act and Regulations set out the processes to be followed in preparing a community impact statement and in making submissions to the Authority about an application for a licence.
- 37 It is clear that the Authority must have regard to the community impact statement (s 48(5)(a)). The applicant argues that in relation to s 48(5)(b), there is a distinction between matters the Authority is made aware of during the application process itself and matters it is generally aware of. The applicant submits that the phrase in s 48(5)(b) “any other matter the Authority is made aware of during the application process (such as by way of reports or submissions)” is to be interpreted by reference to the principle of *ejusdem generis*. That principle requires that where legislation describes a class of things in general words and then gives specific examples, the examples will inform the meaning to be given to the general words (see DC Pearce & RS Geddes, *Statutory Interpretation in Australia* 8th edition).
- 38 The applicant submits that examples given of “reports or submissions” refer to matters which emerge during the course of the assessment of the application and the community impact statement. Further, “submissions” is a reference to submissions made in response to the application and the community impact statement which are provided for in the statutory process. Similarly, “reports” refer to those reports by the Secretary and the Commissioner provided for in s 42.
- 39 The applicant argues that the reference to “reports” is not a reference at large to general academic papers, the publication of which preceded the making of the application and the Authority’s decision. The applicant states that the Authority placed undue reliance on broad population based epidemiological studies in its assessment of Mr Auld’s application and, indeed, used such studies as a primary assessment tool.
- 40 The applicant submits that such studies do have a role to play in the assessment of an application by informing the Authority generally, for example, about the sorts of alcohol related outcomes that may correlate with the presence or density of alcohol outlets. However, such studies are not the specific focus of s 48(5)(b). The applicant submits that s 48(5) calls for an

assessment of matters that are particular to the application that emerge during the assessment process.

- 41 For these reasons, the applicant argues that the Authority has given disproportionate weight to broad based academic papers and failed to give sufficient weight to the views and expectations of the Young community.
- 42 For its part, the Authority relies on *Guideline 6* published on 6 November 2015 which sets out the Authority's policy on how it will go about considering the likely social impact of a licence when determining whether to grant an application. Under s 57 of the Act, the Authority is specifically empowered to establish policies. The Authority is also empowered under s 42 to carry out any investigations and inquiries it considers necessary for a proper consideration of the application.
- 43 The Authority submitted that the Tribunal should follow *Guideline 6* unless it is persuaded in the particular circumstances that there is good reason to depart from it (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634; see also *Nevistic v Minister for Immigration* (1981) 34 ALR 639 at 646).
- 44 In my view, *Guideline 6* is a comprehensive document which sets out the matters the Authority must or may consider when determining an application with reference to the requirements of the Act and the objects set out in s 3 and s 48(1). The Guideline is intended to provide information and guidance to applicants and other stakeholders on the matters that the Authority will likely take into account in considering an application.
- 45 The policy itself as set out in *Guideline 6* is unobjectionable. It is desirable that there is a consistent approach to decision-making in the development and regulation of the liquor industry in NSW. It is also desirable that the industry knows and understands the issues involved and the standards it has to meet. As was stated by the High Court in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] 258 CLR 173 at 194, policy guidelines can "promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike". I do not consider that there are particular circumstances in this case that indicate the policy as set out in Guideline 6 should not be applied.

- 46 The applicant's main objection appears to be that the Authority placed too much reliance on broad population based epidemiological studies in its assessment of Mr Auld's application. It does concede, however, that such studies have a role to play in informing the Authority (and therefore the Tribunal) of relevant research concerning the impact of alcohol.
- 47 It is not the role of the Tribunal to decide whether the Authority placed too much weight on academic studies in its assessment of the application. My role is to make the correct or preferable decision on the basis of the information that is now before me.
- 48 The applicant's submission that primacy should be given to the views of the community is misconceived. It is the totality of the relevant evidence that must be considered. There will be evidence before the Tribunal that demonstrates the benefits to the community if the licence is granted and evidence which demonstrates detrimental effects. The Tribunal is required to assess that evidence and, on balance, to determine whether it is satisfied that the overall social impact of removing the licence would not be detrimental to the well-being of the Young community. It is apparent from a reading of the Act that the assessment is a multi-factorial one taking into account the objects of the Act in s 3(1), those mandatory considerations in s 3(2) and the objects set out in s 48(1).
- 49 In this context I note that respondent submitted that it is incumbent upon the applicant to put forward material that enables the Tribunal (and the Authority) to actually be satisfied that the overall social impact will not be detrimental. The applicant, for its part, spoke of each party bearing a "persuasive onus" in relation to assertions made by the party.
- 50 Such characterisations are not necessarily helpful in the context of administrative review. As already stated, the Tribunal's role is to reach the correct or preferable decision after an assessment of the evidence before it. It is sometimes said that an applicant bears an "evidentiary burden" in administrative review proceedings to put sufficient evidence before a tribunal to enable it to reach the requisite level of satisfaction in the case before it. There is some force to this proposition but it does not change the tribunal's role in that

a decision must be made after considering all relevant evidence, irrespective of the party who adduces it.

Matters to be considered

- 51 Sub-section 48(5) refers to the local and broader community. Prior to the hearing there was some difference of opinion between the parties on what comprised these communities. Both parties it appears now accept that the local community is the community of the State suburb of Young and that the broader community is the community of the Hilltop Local Government Area. If there are still any points of difference between the parties, it is my view that this characterisation of the local and broader communities is correct for the purposes of this assessment.
- 52 *Guideline 6* usefully sets out a range of matters which will be considered when assessing an application. These are;
- (a) the type of proposed licensed premises;
 - (b) the proposed trading hours;
 - (c) the location of the premises – including the density of other licences in the local or broader community, recent crime statistics, demographic traits of the community and matters required to be addressed in a community impact statement; and
 - (d) any specific measures that will be implemented over and above those required by legislation to reduce any potential social detriment.
- 53 There is, of course, a requirement to consider the community impact statement, any report of the Secretary or the Commissioner and any submissions received by the Authority during the application process.
- 54 In addition, *Guideline 6* sets out a number of matters that may inform the decision-making process. These are:
- (a) domestic and international research about demographic indicia that are linked to a population's higher or lower vulnerability to alcohol related harm;
 - (b) domestic and international research on the association between high alcohol density and adverse social outcomes;
 - (c) recent crime statistics and analysis;

- (d) recent data from the Australian Bureau of Statistics for the local and broader community, including Socio Economic Index for Areas (SEIFA) data;
- (e) licence density in the local and broader communities;
- (f) information about alcohol-related road accidents; and
- (g) information about alcohol related deaths, hospitalisations and ambulance call outs.

Evidence before the Tribunal

- 55 Details concerning the proposed premises and trading hours are set out above, as are the conditions proposed to be attached to the licence.
- 56 Mr Auld gave evidence to the Tribunal that the premises formerly known as the Mill Tavern are presently listed for sale without any rights to the licence. He said that, if the sale to ALDI does not proceed, he and his co-directors of Gemstone Pty Ltd, intend to either offer the premises for sale with the licence or to re-open the hotel themselves. He states the hotel remains fitted out and equipped to operate as a hotel.
- 57 The applicant states that there is a significant public benefit in the licence being removed to ALDI, thus preventing the reactivation of the Mill Tavern premises as a hotel. This is due to the resultant significant reduction in the size of the licensed area and decreased hours of operation. In addition, the licence conditions will only permit the sale of packaged liquor and ALDI proposes to sell only a limited range of about 100 products.
- 58 The evidence is that in 2013 the Mill Tavern was a declared premises under the Declared Premises Scheme due to the number of alcohol-related assaults attributable to the hotel. The applicant argues that the resumption of a full hotel may again lead to increased incidents of alcohol-related harm. A well-managed liquor store within the supermarket is less likely to result in adverse social impacts. The applicant argues that the granting of the application will therefore considerably diminish the potential for adverse impacts resulting from the exercise of the licence.
- 59 The respondent states that, as the Mill Tavern licence is dormant, it is a matter of pure speculation that the licence for the Mill Tavern may start operating

again if the removal application is not granted. However, the opening of another packed liquor outlet in Young is a certainty if the application is granted.

Location of the premises

- 60 The ALDI supermarket in Young has been operating since 2008. It is located on a fairly large parcel of land some distance from the main commercial area of Young. Most people using the supermarket attend by car and park in the customer car park. The streets surrounding the supermarket comprise both commercial and residential premises.
- 61 The State suburb of Young has a population of 10,295 and the population of the Hilltops Shire is around 18,200 (which is higher than that of the former Young LGA). I note that some of the data referred to below is data relating to the Young LGA rather than the Hilltops LGA as that is the latest data available.
- 62 The applicant states that Young is a growth area in NSW and is a major tourist destination with a number of fairs and festivals being conducted each year. Other evidence is, however, that the population is relatively static. The applicant states that relocating the licence outside the Young central business area will provide more convenient access to more residents and will facilitate the balanced development of the liquor industry. Young also services the surrounding rural area.
- 63 Mr Adam Purcell, a former NSW Police officer who now acts in a consulting role for the liquor industry, prepared a report for the applicant in which he conducted a site assessment in the Young area. From his observations, Mr Purcell concluded that customers being able to purchase alcohol from ALDI when they do their grocery shopping would be likely to reduce traffic congestion in the business area of Young. ALDI customers now have to travel to or through the central business district to get from the supermarket to other alcohol outlets.
- 64 Mr Purcell also stated that the potential for increased public drinking, alcohol related crime or anti-social behaviour due to the introduction of packaged liquor at ALDI would be negligible. He noted the police station is close by and police traffic through the area is reasonably prevalent. Furthermore, ALDI will not sell refrigerated products thus lowering these risks. He stated there is no evidence

of public drinking or street level alcohol-related crime in the area either during or after trading hours.

- 65 Mr Purcell does not anticipate that the introduction of liquor at ALDI would change the current liquor market in Young to any degree as ALDI prices are commensurate with other liquor outlets in Young.

Density of licensed premises

- 66 The evidence is that there are currently six full hotel licensed premises (not including the Mill Tavern which is currently dormant) in the State suburb of Young. Five of those hotels are located in or close to the central business district of Young. The evidence of the Authority is that all of the hotels are authorised to sell takeaway liquor, although the applicant states that only one of these hotels has a separate dedicated packaged liquor facility. There are 10 hotel licences in what was the Young LGA (apparently including the Mill Tavern). The applicant states that another hotel in Young, the Empire Hotel, is also not currently trading.
- 67 There are currently four packaged liquor licences in the suburb of Young and the LGA – a BWS at the Woolworths supermarket, a liquor outlet at the IGA supermarket, a Liquorland and Bluestill. Bluestill is on the outskirts of Young and is licensed to sell only liquor distilled at and wine made at a property outside Young.
- 68 The information provided by the Authority indicates that the density of liquor licenses per 100,000 of population in NSW is 30.76 hotels, while in the Young State suburb it is 69.72 and in the LGA it is 81.72. In terms of packaged liquor licences the state density per 100,000 of population is 35.02, 39.84 for the Young suburb and 32.69 for the LGA. It appears the Mill Tavern, the Empire Hotel and Bluestill licences are included in these figures.
- 69 The applicant states the Mill Tavern, the Empire Hotel and Bluestill licences should be excluded from the density analysis which would mean that the hotel density for Young is 50 per 100,000 of population and for packaged liquor outlets the density is 30 per 100,000 of population.

Secretary's report

70 The Secretary provided a report to the Authority in the form of an Environment and Venue Assessment Tool (EVAT) Assessment Report in relation to the removal of the licence from the Mill Taverns premises to the ALDI supermarket. The EVAT report rates location risk and venue risk. Venue risk was generally rated low, except in relation to the licence type which is a hotel licence. Location risk for the State suburb of Young was rated as moderate. Risk factors for location include rate of alcohol related assaults and alcohol-related offensive behaviour. It appears data from 2015 was used as the basis for the ratings.

Community views and expectations

71 The applicant engaged in a process of community consultation as required by the Act – once before the application was lodged and once after. There were no expressions of concern received from the general community. There were no adverse comments received from the local council, NSW Health, Roads and Maritime Services, Community Services or aboriginal organisations.

72 1,948 patrons of the ALDI supermarket in Young signed a petition expressing their support for the application. Since the refusal of the application the Authority has received 16 letters from people aggrieved by the decision.

73 Prior to the lodgement of the application NSW Police stated they had a problem with transferring a hotel licence to a packaged liquor licence and also had concerns “as to the location of the premise being close to a housing commission area and the number of incidents”. The applicant states that these concerns were addressed in the community impact statement and NSW Police did not make any further submission or comment to the respondent after being provided with a copy of the application.

74 In relation to public housing premises, the applicant provided information that the premises in question are some 830 metres away by foot. In addition, rates of public housing in Young are below the state average.

75 The people who signed the petition stated that they would prefer to be able to purchase liquor at the ALDI supermarket at the time they did their grocery

shopping. Without having to travel elsewhere to do so. They also expressed a preference for ALDI's own branded products.

- 76 The applicant states that the provision of a small liquor department in the grocery store will offer the time saving benefits of a one-stop-shop to customers. The applicant states it is inconvenient for ALDI customers to have to travel to other outlets some distance from the ALDI store to purchase their liquor needs. The applicant states that the community expects the convenience of one stop shopping and customers of the other two supermarkets in Young – Woolworths and IGA – already enjoy this convenience.

Crime statistics

- 77 The Tribunal has before it updated recorded crime statistics for the March 2017 quarter prepared by the NSW Bureau of Crime Statistics and Research (BOCSAR). The respondent states that the State suburb of Young has a relatively high crime rate, particularly for domestic violence. The applicant refers to assault rates in the Young LGA and states that the BOCSAR figures do not support the respondent's conclusions.
- 78 The BOCSAR data shows that the rate of both domestic violence related assaults and non-domestic related assaults in the Young LGA is 1.2 times the State average. The data shows quite a number of LGAs have rates of domestic and non-domestic assault above the rates for Young. Quite a number also have less.
- 79 The data also shows that for the period April 2016 to March 2017 30% of domestic violence related assaults were flagged by police as alcohol related. Maps produced by BOCSAR indicate that the Young LGA falls within the median group of LGAs in respect of domestic violence rates.
- 80 The applicant stated that the BOCSAR data should be treated with a degree of caution as it is based on COPS events entries, not on offences. An analysis of COPS data for relevant incidents within the suburb of Young from 1 July 2016 to 30 June 2017 shows that no offences were identified or recorded in relation to several entries.

- 81 The parties also produced hotspot maps which aim to show the density of particular crimes such as domestic and non-domestic assault in particular locations within the Young area. The maps produced by both parties showed that hotspot densities can change over time. The most recent maps produced at the hearing do not show hotspots near the ALDI store in Young. The respondent contends, however, that there appears to be a hotspot covering the public housing estate the police stated was an area of concern.
- 82 In relation to rates and causes of domestic violence, the applicant referred to a number of studies which have concluded that there are a range of multi-factorial causes. The studies referred to showed little or no correlation between packaged outlet alcohol density and increased rates of domestic violence. On the other hand, the respondent drew attention to a study which identified a link between domestic violence and the availability of packaged liquor.
- 83 The applicant acknowledged that the rates of domestic violence in Young are higher than the State average but noted statements from police that this fact is attributable more to higher reporting of incidents rather than higher rates of actual incidents. In this context, the applicant also provided evidence that rates of domestic assault in Young have fallen over recent years.

Health data

- 84 Health data provided by the respondent from HealthStats NSW shows that alcohol attributable hospitalisations and alcohol attributable deaths are higher than the state average for the Young LGA.

Socio-economic disadvantage

- 85 The respondent states that Young is socio-economically disadvantaged as indicated by its ranking in the SEIFA index. The SEIFA for the State suburb of Young in 2011 was 928, below the NSW score of 997. The applicant states this approach to determining disadvantage is too simplistic.
- 86 The applicant relies upon an analysis by Mr George Smith (see below) who compared Young to other towns which he stated were similar to Young with comparable populations and found that the Young's SEIFA score is close to the median. The respondent criticises this approach for its lack of statistical

analysis and states that the fact other rural towns are in a similar position to Young does not make this any less a relevant factor to consider.

Evidence of Dr Morrison

- 87 Prior to the hearing the respondent engaged Dr Christopher Morrison to provide a report on:
- (1) his opinion as to whether there is a correlation between outlet type, local demographics and incidents of alcohol related harm;
 - (2) his opinion as to any risks presented by the factual scenario in this case; and
 - (3) whether, in his view, the transfer of the licence as proposed will, or is likely to, cause detriment to the local and surrounding community.
- 88 Dr Morrison is an epidemiologist based at the Penn Injury Science Centre, University of Pennsylvania, Philadelphia. His field of expertise concerns the spatial dynamics of alcohol markets and their relationships with alcohol consumption and alcohol-related injury.
- 89 Dr Morrison cited a number of publications and stated that current research demonstrates that:
- (1) off-premises alcohol outlets concentrate in disadvantaged areas;
 - (2) off-premises alcohol outlets in disadvantaged areas sell alcohol at lower prices;
 - (3) alcohol consumption is greater and alcohol-related harms are more common in areas with greater concentrations of off-premise outlets; and
 - (4) alcohol consumption is greater and alcohol-related harms are more common in areas where alcohol is available at a lower price.
- 90 Dr Morrison also stated that ALDI sells lower priced alcohol than independent and other chain outlets. He said the presence of additional outlets, particularly chain outlets, leads to lower priced alcohol in surrounding outlets. He also stated that the research shows traumatic injuries occur more frequently in areas with greater concentrations of chain outlets. He stated that the SEIFA data shows that the population in Young is disadvantaged.
- 91 In relation to this particular application, Dr Morrison is of the opinion that the convenience of being able to bundle grocery and liquor purchases will lead to increased alcohol consumption and therefore increased incidents of harm in Young. In addition, ALDI's pricing structure of cheaper alcohol will lead to other

outlets lowering their prices and, as a result, consumption is likely to increase (particularly among low income earners). This, in turn, is likely to contribute to an increased incidence of alcohol-related harms.

- 92 Dr Morrison was questioned extensively by the applicant at the hearing. The applicant states that many of the publications referred to by Dr Morrison do not support the propositions he put forward in his report and sets out the reasons why in the written submissions. These matters were also put to Dr Morrison at the hearing and he generally stood by his views as expressed in his report, although he made some concessions on particular points, such as that some of the studies were in relation to bars and other outlets, not packaged liquor outlets.
- 93 Dr Morrison acknowledged that his studies were not directed at the NSW or Young populations but said that his propositions would still hold for NSW.
- 94 Dr Morrison gave some confusing evidence in relation to appropriate spatial units upon which conclusions could be drawn about concentration of outlets and disadvantage. In his report he referred to State suburbs and LGAs, but when an analysis of data undertaken by Mr Smith showed that off premises outlets are not necessarily concentrated in disadvantaged areas was discussed with him, he stated that state suburbs and LGAs were too large a unit from which to derive meaningful results.
- 95 The applicant also challenged Dr Morrison's propositions concerning price and noted that ALDI prices are the same across all locations and that ALDI stores are located in all SEIFA deciles in NSW, from least to most disadvantaged.
- 96 I asked Dr Morrison whether there was a "tipping point" at which an increase in outlet density would be considered to have a significant effect. Dr Morrison expressed the view that the relationship was linear, although he had not carried out work in this area. The applicant questioned Dr Morrison about a study included with his own materials which found that the relationship was not linear and concluded that the so-called "tipping point" in the case of packaged liquor was reached the level passed 75 per 100,000 of population. The applicant notes this is far above the existing or proposed density in Young. Dr Morrison was dismissive of the study.

Evidence of Mr Smith

- 97 The applicant provided a report by Mr George Smith, a town planner and consultant on matters concerning licensed premises. The respondent submitted that, as Mr Smith, has a history of being an expert witness for several liquor merchants or hotel owners, he cannot be regarded as an independent expert. That submission fails to appreciate what is required of an expert. The mere fact that an expert has been engaged predominantly by, for example, an industry or employer sector as opposed to a government or community or worker sector, does not of itself indicate bias or a lack of independence. In this regard I note that Mr Smith has appeared as an expert in various jurisdictions. I also note that Mr Smith has been engaged as a consultant by ALDI in the past, but the respondent was unable to point to any current conflict.
- 98 Mr Smith undertook an analysis of towns he believes to be comparable to Young and concluded that Young is typical of inland towns in NSW and its SEIFA score compares favourably with other towns of similar size. He states there are a range of factors which mean that most regional towns in NSW have a lower SEIFA that in, for example, metropolitan areas.
- 99 Mr Smith also examined densities of packaged liquor outlets in NSW and reached the conclusion that, in NSW, the data does not show a concentration of packaged liquor premises in disadvantaged areas. He attributes this to licensing controls which have been in place in NSW for many years. Mr Smith was also sceptical of any claim that ALDI sells liquor at lower prices than its competitors. Mr Smith noted that there is no data available in NSW which enables the amount of liquor sold in any area to be assessed. This makes it difficult to assess any impact of the sale of packaged liquor on rates of violence etc.

Conclusions

- 100 The task of assessing the competing claims and interest in relation to this application is a difficult one. I have been presented with a large body of evidence in the form of statistical data, expert opinion and academic research. The material is complex and, in many respects, lacking in precision or

certainty. The parties acknowledge that much of the information presented comes with inherent limitations.

- 101 The decision I have to make is whether I am satisfied that the overall social impact of the licence will not be detrimental to the well-being of the local or broader community.
- 102 There is clear community support for the application to remove the licence to ALDI. A significant number of residents relative to the population signed a petition signifying that ALDI should be permitted to open a packaged liquor department in its store. There are obvious benefits in terms of convenience to shoppers. Other than a brief email from police, there were no objections to the application. Neither the local authority, health organisations, aboriginal organisations, community groups nor residents expressed opposition to the proposal. The police, when given the opportunity, did not follow up on their stated objection. The report of Secretary does not indicate any high risks associated with the removal of the licence.
- 103 The health data does show that here are elevated levels of alcohol related hospital admissions and deaths in Young compared to the NSW average. Health authorities have not, however, expressed a view that the addition of a packaged liquor outlet in ALDI will be of further detriment to the health of the community.
- 104 There is evidence that levels of domestic violence in Young are above the State average (at 1.2%) and that alcohol is involved in about 30% of cases. While these figures are of concern, they are not greatly above the average and I note that the available statistical data has some inherent limitations as identified by the applicant. There is information before the Tribunal that the rates and causes of domestic violence are multi-factorial. While alcohol may be a contributing factor, it is less clear the extent to which that is so. Indeed, other than broad police data, there was no information before the Tribunal concerning any analysis, even at an anecdotal level, of causes of domestic violence in the Young community.
- 105 I accept that Young is an area of disadvantage based on the SEIFA score. That, as shown by Mr Smith's analysis, many other comparable regional towns

record similar levels of disadvantage, does not change that fact in relation to Young. This brings into play the propositions put forward by Dr Morrison.

- 106 I accept that increased availability of alcohol can lead to an increase of alcohol related harm. I also accept that, in the Australian context, and as demonstrated through the BOCSAR statistics, there is more likely to be elevated levels of domestic and non-domestic assault and other crimes, such as malicious damage, in disadvantaged areas. There is also more likely to be increased levels of problematic alcohol consumption. That may be particularly the case if cheap alcohol is readily available.
- 107 The difficulty exists, however, in extrapolating broad propositions, to particular circumstances. Some information was presented about ALDI's pricing structure and this indicated that ALDI has the same price structure across all outlets in the State. There was also some evidence that other liquor outlets rely on "specials" to entice customers into their stores. While there were some submissions that price competition can be good for customers, there were other submissions that such competition can have detrimental effects by making liquor more cheaply available with resulting detrimental effects. There was a lack of empirical evidence, however, on the actual effect of the introduction of so called "chain" liquor outlets on pricing generally.
- 108 In a number of respects the evidence of Dr Morrison was unsatisfactory and he expressed some contradictory views. There is also other evidence available that does not support some of his propositions with respect to the sale of packaged liquor.
- 109 I also have some difficulty with the information provided by the Authority on existing density of licensed premises. The Authority contends that existing density is higher than the State average but includes premises no longer operating or with a particularly limited licence such as Bluestill. While the analysis may reflect the number of licences, it gives a somewhat unrealistic picture of the availability of alcohol. Furthermore, Dr Morrison could not state at what point outlet density becomes problematic. The applicant points to other research which puts that point much higher than the current State average.

- 110 There is therefore no reliable evidence before the Tribunal to indicate whether the addition of a packaged liquor outlet at the ALDI supermarket in Young will increase the density of such liquor outlets to the point where there is a detrimental effect upon the community. This is particularly the case where the proposed store is small and caters to people doing their grocery shopping at ALDI. Presumably ALDI shoppers presently buy their alcohol elsewhere, but in future may buy it at ALDI if this application is approved. There is no reliable information that overall sales or consumption of liquor in Young would change if the application was granted.
- 111 I should mention that I do not consider the applicant's argument that there is a significant public benefit in removing the licence to ALDI as this means that the Mill Tavern (or some other premises) will not re-open as a hotel with any attendant anti-social problems. I agree with the submissions of the respondent that, as the Mill Tavern licence is dormant, what is at issue is the opening of another packaged liquor outlet in Young if the application is granted. Whether or not the licence for the Mill Tavern may start operating again if the removal application is not granted, is a matter of pure speculation.
- 112 Having carefully considered all the information, I am satisfied that the overall social impact of the licence will not be detrimental to the well-being of the local or broader community. The decision under review will be set aside.

Order

- (1) The decision under review is set aside.
- (2) The decision is made that the application to remove the hotel licence from the Mill Tavern in Young to the ALDI Supermarket in Young is approved.
- (3) The conditions attached to the removed licence will be those agreed between the parties which permit the licenced 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

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.