

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE

MATTER: APPLICATION FOR SUBSTITUTION OF PREMISES AND
PERMANENT VARIATION OF THE CONDITIONS OF
LICENCE

LICENCE NUMBER: 81000242

LICENSEE: Woolworths Group Ltd

PREMISES: **BWS – Beer Wine Spirits (Stuart Park)**
Shop 1,
27 Stuart Highway
DARWIN NT 0800

APPLICANT: Woolworths Group Ltd

NOMINEES: Alastair McIntyre and Tova Bulbert

OBJECTORS: Danila Dilba Health Services
NT Council of Social Services
Association of Alcohol and Other Drug Agencies NT
Aboriginal Medical Services Alliance NT
Public Health Association of Australia – NT Chapter
Foundation for Alcohol Research and Education (“FARE”)
Amity Community Services Incorporated
RAAF Darwin Golf Club
Jennie Renfree
Guy Dunne
Marcelino San Jose
Gary Coleman
Kate Crawley
Darryl Thomas
Andrew Case
Dan Hartney
Robin Knox
Lesley Alford
Bagot Community
Gwala Daraniki Association (“GDA”)
Australian Hotels Association (NT Branch) (“AHA NT”)

LEGISLATION: Section 32A, 46A, Part IV and V of the *Liquor Act 1978*

HEARD BEFORE: Mr Richard Coates (Chairperson)
Ms Jodi Truman (Deputy Chairperson)
Mr Kenton Winsley (Health Member)
Ms Sandra Cannon (Community Member)

DATES OF HEARING: 4, 5, 6, 7 and 11 June 2019

DATE OF DECISION: 20 September 2019

Decision

1. For the reasons set out below and in accordance with section 46A(6) of the *Liquor Act 1978* the Commission has determined to refuse the application for substitution of the premises in the licence.
2. For the reasons set out below and in accordance with section 32A(7) of the *Liquor Act 1978* the Commission has determined to refuse to vary the conditions of the licence.

Reasons

Background

3. On 19 July 2018 Squire Patton Boggs acting on instructions from Woolworths Group Ltd (“the Applicant”) lodged two (2) applications with the Director-General of Licensing (“the Director-General”) in relation to its liquor licence held at the premises previously known as “BWS – Beer Wine Spirits (Stuart Park)” located at Shop 1, 27 Stuart Highway, Darwin (“the existing premises”).
4. The applications were as follows:
 - a. Substitution of the premises pursuant to section 46A of the *Liquor Act 1978* (“the Act”); and
 - b. Variation of the conditions of the licence pursuant to section 32A of the Act(“the applications”).
5. The application pursuant to section 46A of the Act was to substitute the existing premises to premises to be constructed and located at the corner of Bagot Road and Osgood Drive, Eaton (“the proposed premises”). During the course of the hearing, the proposed premises were referred to as the “Darwin Dan Murphy’s”, and this will be the reference during the course of these reasons.
6. The application pursuant to section 32A of the Act was for a permanent variation to the conditions of the licence to reduce the trading hours to be as follows:
 - a. Monday to Friday between the hours of 10:00 and 21:00;
 - b. Saturday and Public Holidays between the hours of 10:00 and 22:00.There was no application to vary the conditions preventing trade on Sunday, Good Friday or Christmas Day.
7. It was made clear during the course of the hearing, however, that the Applicant did not pursue its application for a permanent variation to its conditions of licence if it was not successful in its application for substitution.

8. Although the applications were lodged with the Director-General on 19 July 2018, there was a considerable period of time before the applications were finally referred to the Commission. Due to the publicity surrounding these applications, it is important that the relevant chronology of events be made clear:
- a. Following lodgement of this type of application with the Director-General of Licensing NT, the Act requires that the application must first be advertised. As a result on 4 August 2018 the application was advertised for the first time in the NT News and the public were notified in that advertised that they had 30 days to lodge an objection to the application.
 - b. Following that advertisement, seventeen (17) objections were received.
 - c. On 5 September 2018 the Applicant's solicitor was provided with details of the objections and pursuant to section 47G was given the opportunity to respond to the objections.
 - d. The Applicant's solicitor indicated that it intended to respond to the objections. However, despite several reminders from the licensing officer with carriage of the application, that response was not forthcoming.
 - e. Despite not having responded to the objections, and not having lodged a further crucial report that had been foreshadowed in the application, the Applicant sought, through the licensing officer an indication from the Commission of possible hearing dates.
 - f. As a result, an inquiry was made of the Commission and on or about 30 October 2018 the Applicant's solicitor was advised that if the Applicant's outstanding documentation was filed without further delay, it was possible to set the matter down for a three (3) day hearing in late January 2019.
 - g. Despite that indication, on 4 December 2018, the outstanding documentation had still not been provided by the Applicant. As a result, the Applicant was advised that it was no longer feasible to list the matter in January 2019 and that the next possible dates were for three (3) days commencing 4 March 2019.
 - h. On 11 December 2018, the Applicant's solicitor wrote to the Director-General asking that the incomplete application be referred to the Commission and declined the March 2019 dates that had been suggested because they were not convenient to the Applicant's legal advisors.
 - i. As a result of that request, on 17 January 2019, the application and a thousand pages of supporting documentation were formally referred to the Commission.

- j. Following receipt of that referral and after liaising with the Applicant's counsel and counsel for the Objectors the Commission settled on 26 February 2019 to deal with the significant number of pre-hearing issues which required directions.
 - k. A crucial document that had been outstanding and without which the application could not have proceeded, was not provided to the Commission until 21 February 2019.
 - l. Although previously indicating it would formally respond to the objections, the Applicant still did not file a formal response to the objections by the time of the first directions hearing before the Commission.
 - m. The hearing commenced on 4 June 2019 and concluded on 11 June 2019. At the request of the parties, the Commission allowed them until 6 August 2019 within which to file written submissions.
9. It should be apparent from the above that despite some media reports to the contrary, there was no delay on the part of the Commission or Director-General in progressing these applications.

Matters relating to rulings given at Directions Hearings

10. At the directions hearing on 26 February 2019 Mr Anderson, on behalf of Australian Hotels Association (NT Branch) ("AHA NT") sought leave to appear for that organisation pursuant to section 51(c) of the Act. That application was opposed by the Applicant on the basis that the provision only applied to persons, organisations or groups who could have objected to their application. It was also submitted by the Applicant that allowing an organisation like AHA NT to appear was contrary to competition policy principles.
11. Mr Anderson argued that AHA NT was uniquely positioned to offer the Commission assistance on the issues of volume of liquor sales.
12. The Commission indicated a preliminary view that section 51(c) had been included in the Act as a consequence of Recommendation 2.3.1 of the "Alcohol Policies and Legislation Review" ("the Riley Review") namely:
- "2.3.1
- The *Liquor Act* be amended to permit the Commission to grant leave to peak industry bodies, key government agencies and peak community and health bodies, to make submissions when it holds a hearing with respect to a licence application or an alcohol management plan."
13. It also having been noted at page 40 of that Review:
- "Although we are of the view that the current scope of objectors is sufficient, we recognise there may be instances where peak organisations may be able to provide information relevant to an application outside the formal objection process."

14. The Commission advised the Applicant's counsel, Mr Wyvill SC, that it was the Commission's view that section 51(c) of the Act clearly envisaged the granting of leave to appear to a peak industry body such as the AHA NT and that we believed that we would be assisted by its submissions on the issues of volume as well as on the employment benefits that were claimed to flow from the granting of the applications. As a result, leave was granted by the Commission to the AHA NT to appear. That ruling was affirmed at the further directions hearing on 26 March 2019.
15. Mr Crawley SC also sought leave pursuant to section 51(c) to appear for the Bagot Community and the Gwala Daraniki Association on the basis that these organisations which represented the Aboriginal residents of the Bagot, Kulaluk and Minmarama communities had a vital interest in this application. That application was not opposed and the Commission granted leave.
16. In relation to the conduct of the current licence, the Commission was informed by Licensing NT as part of its referral that there were no adverse reports recorded in relation to the conduct and operations of the current premises.

Disclosure of influential persons or potential beneficiaries

17. The Commission notes that section 32A(1A) and 46A(1A) of the Act requires Applicants to include within the application an affidavit "as mentioned in section 26A" disclosing whether certain persons may be able to influence the Applicant, or expect a benefit from the Applicant, if the variation or substitution is granted.
18. The Applicant filed an affidavit dated 2 July 2018 from Mr Shane Tremble, General Manager Corporate Services of Endeavour Drinks Group, which is an entity related to the Applicant addressing the matters required under section 26A. No issues have been raised concerning the matters addressed in that affidavit.
19. In relation to an application for substitution, the Act prescribes under section 46A(2) that the Applicant must "cause notice of the application to be published". In this matter, as set out in the chronology above, a notice of the application was published in the NT News on 1 and 4 August 2018.
20. The Act prescribes that upon the application being filed, together with the affidavit under section 32A(1A), there must be investigations conducted by the Director-General in relation to the application. The Commission has received no information to indicate there have been any adverse matters discovered as a result of the investigation by the Director-General.

Advertising and Objections

21. As outlined above; details of the application were advertised in the Northern Territory News on Wednesday 1 August and Saturday 4 August 2018 as well as having signage displayed at the premises for a period of 30 days.

22. During that period, and following, a number of objections were received in accordance with section 47F of the Act. During the course of numerous directions hearings in the lead up to the hearing of the application, the Commission determined that objections had been lodged in accordance with the Act on behalf of the following:
- a. Danila Dilba Health Services
 - b. NT Council of Social Services
 - c. Association of Alcohol and Other Drug Agencies NT
 - d. Aboriginal Medical Services Alliance NT
 - e. Public Health Association of Australia – NT Chapter
 - f. FARE
 - g. Amity Community Services Inc.
 - h. RAAF Darwin Golf Club
 - i. Jennie Renfree
 - j. Guy Dunne
 - k. Marcelino San Jose
 - l. Gary Coleman
 - m. Kate Crawley
 - n. Darryl Thomas
 - o. Andrew Case
 - p. Dan Hartney
 - q. Robin Knox
 - r. Lesley Alford
23. As previously outlined, the Commission also granted leave to the Bagot Community, Gwala Daraniki and Hospitality NT to appear pursuant to section 51(c) of the Act. Following that ruling, the legal representatives for the Applicant sought (and were granted) leave to uplift the brief as originally filed with Licensing NT to redact any commercially sensitive information. This was done and various rulings have been made throughout to protect the confidentiality of any commercially sensitive material. Those rulings continue to apply.

Notice to other persons

24. It is noted that section 32A(5) and 46A(4) of the Act requires that the Director-General must inform:
- a. the Chief Executive Officer (“CEO”) of the Department of Health (“DOH”);
 - b. the Commissioner of Police; and
 - c. if the application relates to premises within the area of a shire council or a regional council - the Chief Executive Officer (“CEO”) of the council.
25. Such notice was provided by the Director-General and the following responses were provided:
- a. The DOH provided what they termed to be a “general submission” to the application in the following terms:

“Application 1)

The Department of Health (DoH) has some concerns about potential future impacts on community safety and amenity outlined below.
 - a) *DoH is concerned that this License application is not merely a substitution of premises as the changes are substantial including modifying the license from a small takeaway outlet into the largest liquor takeaway outlet in the jurisdiction, hence in effect it is an application for a new takeaway premise and should be determined as such;*
 - b) *As the application is (in effect) a new takeaway premise application it should be subject to the current -5 year moratorium on new takeaway licenses;*
 - c) *DoH has some concerns about the risks related to the proximity of the nearby Aboriginal Alcohol Protected communities of Bagot, Minmarama and Kulaluk, and potential impacts on their residents and visitors from a possible ‘honeypot’ effect to those communities by Aboriginal drinkers keen to be in proximity to the NTs largest takeaway outlet which apart from existing specified product restrictions (such port/casks), will have unrestricted sales.*
 - d) *DoH requests ongoing monitoring of related alcohol harm statistics after trading commencement.*

Application 2)

DoH has no adverse comment and supports the application for a reduction in hours of sale for the new proposed premises 'Dan Murphy's' liquor licence referred to in Application 1".

- b. The City of Darwin provided a response following its 1st Ordinary Council meeting held on 11 September 2018 in the following terms:

"That Council has not identified any reason that would be grounds for objection under Section 47F(2) of the Liquor Act for the Application for the proposed Substitution of Premises and Variation of Licence Conditions for Woolworths Group Limited for 'Darwin Dan Murphy's'.

That Council requests the adoption of all of the risk management strategies and measures detailed in the Public Interest and Community Impact Analysis submitted as part of the application process".

26. In relation to the NT Police, a response was provided which detailed discussions held between representatives on behalf of the Applicant and representatives on behalf of the Commissioner of Police. It is apparent that the Commissioner of Police has taken a position of neither lodging an objection under the Act, nor making any supportive comment in relation to the applications. Evidence was provided however to the Commission on behalf of the Commissioner of Police and that will be discussed later in these reasons.

Public Hearing

27. Pursuant to section 50 of the Act, the Director-General must refer *inter alia* applications under section 32A and 46A of the Act to the Commission. Therefore these applications must be heard and determined by this Commission.
28. Pursuant to section 53 of the Act, the Chairperson of the Commission must fix the time and place for the hearing and give notice to the relevant parties not less than 7 days before the hearing date. As stated earlier, this application was referred to the Commission on 17 January 2019. A directions hearing was fixed shortly after that referral and attempts were made to fix the matter for hearing. Eventually, and in accordance with the convenience of the solicitors for the Applicant, the matter was fixed for a 5-day hearing commencing at 10.00am on 4 June 2019.
29. Pursuant to section 53 of the Act; the Commission is not bound by the rules of evidence and may inform itself in the manner it considers appropriate and conduct the hearing, or part of the hearing, by use of telephone or online facilities. A hearing must also be conducted in public unless the Commission considers that a public hearing is likely to cause undue hardship to a person. The majority of the hearing was conducted in open public. There were however occasions when the hearing was closed to allow for evidence to be taken "in

camera” (i.e. in private) to allow for the confidential and commercial nature of the evidence to be received without prejudice to the Applicant.

30. Mr Alistair Wyvill SC and Mr Ben O’Loughlin appeared on behalf of the Applicant. Mr Phil Timney appeared as counsel assisting the Commission. Mr Tom Anderson appeared on behalf of Hospitality NT. Ms Mary Chalmers appeared on behalf of Amity Community Services Incorporated.
31. Mr Myles Crawley SC appeared on behalf of the following Objectors and organisations which had been granted leave. (“the DSH Group”):
 - a. RAAF Darwin Golf Club;
 - b. Jennie Renfree;
 - c. Guy Dunne;
 - d. Marcelino San Jose;
 - e. Gary Coleman;
 - f. Kate Crawley;
 - g. Bagot Community;
 - h. GDA.
32. Mr Pat McIntyre appeared on behalf of the following Objectors (“the HWLE Group”):
 - a. Danila Dilba Health Services;
 - b. NT Council of Social Services;
 - c. Association of Alcohol and Other Drug Agencies NT;
 - d. Aboriginal Medical Services Alliance NT;
 - e. Public Health Association of Australia – NT Chapter;
 - f. FARE.

Legislative Framework for Assessment of the Application

33. Section 6B of the Act makes clear that it is the Applicant who bears the onus of satisfying the Commission that the approval of the application meets the public interest and community impact test.
34. As is clear from section 6(1) of the Act; when considering or determining an application under the Act in respect of a licence, the Commission **must** apply the public interest and community impact test as relevant to the application or conditions. Section 6(2) of the Act provides that:

“For subsection (1), the public interest and community impact test requires consideration of the following objectives:

- a. harm or ill-health caused to people, or a group of people, by the consumption of liquor is to be minimised;
- b. liquor is to be sold, or sold and consumed, on licensed premises in a responsible manner;
- c. public order and safety must not be jeopardised, particularly where circumstances or events are expected to attract large numbers of persons to licensed premises or an area adjacent to those premises;
- d. the safety, health and welfare of persons who use licensed premises must not be put at risk;
- e. noise emanations from licensed premises must not be excessive;
- f. business conducted at licensed premises must not cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the neighbourhood of the premises or who are making their way to or from, or using the services of, a place of public worship, hospital or school;
- g. a licensee must comply with provisions of this Act and any other law in force in the Territory which regulate in any manner the sale or consumption of liquor or the location, construction or facilities of licensed premises, including:
 - i. by-laws made under the Local Government Act; and
 - ii. provisions of or under the Planning Act;
- h. each person involved in the business conducted at licensed premises must receive suitable training relevant to the person's role in the conduct of the business;
- i. the use of credit in the sale of liquor must be controlled;
- j. practices which encourage irresponsible drinking must be prohibited;
- k. it may be necessary or desirable to limit any of the following:
 - i. the kinds of liquor that may be sold;
 - ii. the manner in which liquor may be sold;
 - iii. the containers, or number or types of containers, in which liquor may be sold;

- iv. the days on which and the times at which liquor may be sold;
 - l. it may be necessary or desirable to prohibit persons or limit the number of persons who may be on licensed premises, on any particular part of licensed premises or in an adjacent area subject to the control of the licensee;
 - m. it may be necessary or desirable to prohibit or limit the entertainment, or the kind of entertainment, which may be provided on licensed premises or in an adjacent area under the control of the licensee;
 - n. it may be necessary or desirable to prohibit or limit promotional activities in which drinks are offered free or at reduced prices;
 - o. any sale of additional liquor due to the grant of a licence or the relaxation of restrictive conditions will not increase anti-social behaviour.”
35. In addition, pursuant to section 6(3), the Commission must:
- a. consider the potential impact on the community in the area that would be affected by the outcome of the decision to grant or refuse an application or the changing of conditions of a licence and, in doing so, must have regard to:
 - i. the harm that might be caused (whether to the community as a whole or a group within the community) due to the excessive or inappropriate consumption of liquor; and
 - ii. the cultural, recreational, employment or tourism impacts; and
 - iii. the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
 - iv. the density of existing liquor licences within the community area; and
 - v. the volume of alcohol sales within the community area, and any increase in volume within the community area arising from the licence the subject of the application; and
 - vi. any other prescribed matter; and
 - b. apply the community impact assessment guidelines.”
36. On 6 March 2018, pursuant to section 6A of the Act, the Minister by *Gazette* notice published community impact assessment guidelines for determining whether or not an application being considered or determined under section 6(1) satisfies the public interest and community impact test. Relevantly those guidelines are stated to

“... set out those matters that will be considered by the Commission when assessing the community impact of the application against the criteria set out in section 6A(1) of the *Liquor Act*”.

37. Those matters are identified as follows:

Criteria	Matters to be considered
<p>The potential harm or health impact that may be caused to people, or any group of people within the local community area, due to the availability and accessibility of an additional liquor outlet.</p>	<p>Are there any ‘at-risk’ groups or sub-communities within the locality? This may include –</p> <ul style="list-style-type: none"> • children and young people; • Aboriginal people normally resident within the locality and those Aboriginal people that might be likely to travel to the locality from a dry community; • migrant groups from non-English speaking countries; • people in low socio-economic areas; and/or • communities that experience high tourist/visitor numbers. <p>Are there any communitybuilding, facilities and areas within the locality? Such facilities would include:</p> <ul style="list-style-type: none"> • schools and educational institutions; • hospitals, drug and alcohol treatment centres; • accommodation or refuges for young or disadvantaged people; • childcare centres; • recreational areas; • dry areas; and

	<ul style="list-style-type: none"> any other area where young people may congregate or be attracted to. <p>What policies and procedures will the Applicant implement to minimise any potential harm or health impacts to these 'at-risk' groups or sub-communities</p>
<p>Information about the location and area in which the premises is proposed to be so as to assess any social impact on the community. This includes information about the density of licensed premises within the community area.</p>	<p>This may include crimes statistics, social profile information and the location of existing licensed premises.</p> <p>This could also include traffic and pedestrian impact and any plans developed to address these potential issues.</p>
<p>Volume</p>	<p>This may include projected sales volumes and marketing analysis, liquor type and customer demographic (where applicable this should be provided for both on and offpremises sales).</p> <p>The Commission will consider information available to it about the current alcohol consumption rates for the community area.</p>
<p>Any cultural, recreational, employment or tourism benefits for the local community area.</p>	<p>Will the proposed licensed premises provide economic benefits, cultural, recreational or tourism benefits or any additional employment opportunities and to what level?</p>
<p>Why the grant of a relevant application is in the public interest and how the additional liquor outlet will benefit the local and broader community.</p>	<ul style="list-style-type: none"> What additional services will be provided other than simply an additional outlet for the sale of liquor – this may include accommodation or dining? Will the proposed licensed premises provide additional choices of service or products that are no available in the area?

	<ul style="list-style-type: none"> • Will the proposed premises provide liquor in a manner known to be safe and to minimise adverse impacts? • Will it use existing premises improve or add to existing premises or is it a new premises?
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38. As can be seen from the above, there are a large number of matters that the Commission must consider and that the Applicant must address (and satisfy the Commission of) under the new public interest and community impact test and guidelines. The guidelines do make clear however that:

“... the Commission has the authority to consider a broad range of issues specific to each application and flexibility exists to assess each individual application on its merits”.

Determination of the Applications

39. The Commission is required to exercise its discretion consistent with the objects and provisions of the Act to determine whether to grant or refuse the applications. In doing so the Commission is required to consider the objectives set out within the public interest and community impact test, and the community impact assessment guidelines.

The Objects of the Act

40. Section 3 of the Act sets out the Objects as follows:

“(1) The primary object of this Act is to regulate the sale, provision, promotion and consumption of liquor:

(a) so as to minimise the harm associated with the consumption of liquor; and

(b) in a way that takes into account the public interest in the sale, provision, promotion and consumption of liquor.

(1A) In subsection (1), sale, provision and promotion of liquor includes the sale, provision and promotion by retailers external to the Territory, who sell, provide and promote liquor:

(a) to purchasers who are in the Territory; or

(b) for delivery to a location within the Territory.

(2) The further objects of this Act are:

(a) to protect and enhance community amenity, social harmony and wellbeing through the responsible sale, provision, promotion and consumption of liquor;

(b) *to regulate the sale of liquor in a way that contributes to the responsible development of the liquor and associated industries in the Territory; and*

(c) *to facilitate a diversity of licensed premises and associated services for the benefit of the community.*

(3) *A person exercising a power or performing a function under this Act must have regard to the objects of this Act and must exercise the power and perform the function in a way that is consistent with those objects.”*

41. As set out in section 3(1) the “primary object” of the Act is to regulate the sale, provision, promotion and consumption of liquor so as to **minimise** the harm associated with the consumption of liquor **AND** in a way that takes into account the public interest in the sale, provision, promotion and consumption of liquor. A great deal of emphasis was placed by the Applicant upon the wording of this section that a primary object was in the “public interest” in the sale (etc) of liquor.
42. Whilst the Commission accepts that there is a public interest in the sale of liquor, which is a legal substance, it is also clear that there is a public interest that such sale, provision, promotion and consumption occur in a way that **minimises** the harm caused by liquor.
43. In addition, in April 2017 the Northern Territory Government (“NTG”) appointed an Independent Expert Advisory Panel chaired by the Northern Territory’s former Chief Justice Trevor Riley to undertake a review of the Northern Territory’s current alcohol policies and legislation with the overarching objective of developing an integrated Alcohol Harm Reduction Strategy. The panel delivered its report in October 2017.
44. The report (referred to earlier in this Decision Notice as “the Riley Review”) recommended a rewrite to the *Liquor Act* to provide a coherent framework for the operation of the liquor industry within harm minimisation principles. The Northern Territory Government committed to implementing almost all of the recommendations from the Riley Review, including establishing this Commission as the independent and primary decisionmaker under the Act.
45. The Riley Review observed at page 35 that the existing legislation including the primary object, had:

“... not served to ensure that harm minimisation has been at the forefront of decision making in the Northern Territory.
46. The Riley Review went on at page 37 to recommend that in the Northern Territory:

“The need for demonstrated public interest is greater because of the greater harm caused by alcohol in this jurisdiction.

“The *Liquor Act* should make it clear that the onus of establishing that the grant of a relevant application is in the public interest rests firmly upon the Applicant at all times. The sale of alcohol should be seen as a privilege not

a right and the supply and sale of it should be supported only if the community is protected from harm by sensible controls.”

47. The Legislature’s enactment of sections 6(3) and (4) and sections 6A and 6B are consistent with those recommendations.
48. The Commission accepts that there is a degree of public support within the community for the establishment of a “Dan Murphy’s Darwin”. Likewise however, it was made clear from the evidence received that there is also a degree of objection within the community to the establishment of such premises.
49. We also note the Riley Review’s criticism of the limited utility of section 6(2) of the Act in promoting the public interest where it said at page 35:

“This lengthy list of considerations has not served to ensure that harm minimisation has been at the forefront of decision making in the Northern Territory. It has not served to constrain the issue of licences almost as of right.”
50. Referring to the 1997 Anderson review of the South Australian Liquor Licensing Act which recommended a test based on the concepts of both community impact and public interest the Riley Review noted at on page 35: “ The Review concluded that this combined approach to the test required the decision maker to focus on the public interest and the potential impact on the community rather than ‘ simply what the public want and say they cannot get without difficulty’.Such a test should require the Applicant to satisfy the licensing authority that granting the application will not detract from the safety and well-being of the community and is in the public interest”.

The Commission’s Task

51. The Commission’s ultimate duty is, after having “considered” the application, to approve or refuse the application “having regard to the objects of the Act” pursuant to section 46A(6) of the Act.
52. Section 3(3) of the Act reinforces this duty by confirming that the Commission’s decision must be “consistent” with the objects of the Act. The objects of the Act are set out in sections 3(1) and 3(2).
53. For the purpose of having regard to the objects of the Act, in addition to the objects themselves in section 3, the Act requires at section 6(1) that the Commission apply the public interest and community impact test which requires consideration of 15 “objectives” set out at section 6(2).
54. Section 6(3) then requires the Commission to:
 - a. Consider “the potential impact on the community affected by the outcome” of the application and in doing so to have regard to the 5 matters specified in section 6(3)(a)(i) to (v).¹ The Commission agrees with the submission made on behalf of the Applicant that “potential

¹ The Commission notes there are no “prescribed matters” for the purposes of s.6(3)(a)(vi).

impact on the community” appears to be a reference to “community impact” as that term is used in the phrase “public interest and community impact test”.

- b. Apply the Community Impact Assessment Guidelines (“CIAG”) published by the Minister in the Gazette under section 6A. The Commission also accepts the submission made on behalf of the Applicant that by the use of the term “guidelines” in reference to “community impact” and noting the broad correspondence between the five matters in s.6(3)(a) and the five criteria in the guidelines², that this would appear to be the method which Parliament has specified for the Commission to undertake the consideration required by section 6(3)(a).

55. As submitted on behalf of the Applicant, these mandatory provisions create a complex statutory scheme requiring consideration of a large number of matters, many of which overlap:

- a. Firstly, the Commission must consider “the potential impact on the community affected by the outcome” of the Application and in doing so it must have regard to the five matters specified in section 6(3)(a)(i) to (v). It should have regard to those five matters by applying the CIAG.
- b. Secondly, the Commission must then “apply” the public interest and community impact test by considering and making findings about the impact of allowing the application on each of the objectives listed in section 6(2).
- c. In relation to “the public interest and community impact test”:
 - i. The “objectives” listed in section 6(2) are not an exhaustive statement of every relevant matter promoting the objects of the Act. The Commission agrees with the submission on behalf of the Applicant that so much is clear from the matters listed in section 6(3)(a); many of which are relevant to promoting such objects but do not appear to fall within any of the objectives in section 6(2).³
 - ii. Such objectives address the risks of the sale and consumption of alcohol and remind the Commission to take account of the potential detrimental effects of such sale and consumption to the community from the manner in which liquor is sold into the community.
- d. Thirdly, the “test” an Applicant must pass to satisfy the Commission that the application should be approved is whether, following:
 - i. the application of the CIAG and a consideration of the impact of the grant of the application on the matters in section 6(3)(a);

² Noting that s.6(3)(a)(i) appears to correlate with criteria 1, (ii) with 4, (iii) with 5, (iv) with 2, and (v) with 3.

³ As per the Exhibit amples given on behalf of the Applicant, being “cultural, recreational, employment and tourism impacts” in s.6(3)(a)(iii).

- ii. a consideration of the impact of the approval of the application on the objectives in section 6(2); and
- iii. a consideration of such other matters as the Commission considers relevant for assessing whether the approval of the application will promote the objects of the Act in sections 3(1) and (2),

the Commission is satisfied that the approval of the application will advance the public interest by advancing the objects in sections 3(1) and (2).

56. In addition to the matters outlined above, there are a number of other matters which the Commission is obliged to “consider” or “have regard to” by reason of s.46A(5A), which include the objections made under section 47F and the Applicant’s response to those objections under section 47G.
57. While the Commission has noted the above matters which must be considered when having regard to the objects of the Act, it is clear that the Act does not dictate the outcome. The Commission therefore has absolute discretion as to how it determines whether an application is in the public interest. While this is the case, it is equally clear that such discretion is not arbitrary or unlimited and must be exercised consistently with the objects of the Act in sections 3(1) and (2) and the objectives in section 6(2).
58. In this regard, in *Woolworths Ltd v Director of Liquor Licensing*⁴ Buss JA (with Martin CJ and Murphy JA agreeing) described the function of the Western Australian equivalent of the Commission in determining an application for a license in the following terms:

“... the Commission was obliged to determine the appellant’s application in accordance with the evidence (including notorious facts) before it and the criteria imposed by the Act. This statutory duty involves two aspects. First, the Commission must evaluate the evidence before it and make findings and draw conclusions from the evidence, including by inference. An inference is an affirmative conclusion which arises from facts that have been established. Of course, the Commission’s fact-finding task extends to the making of findings and the drawing of conclusions, wholly or partly, from notorious facts. Secondly, the Commission must apply the public interest criterion, as I have explained it, to the relevant circumstances, in particular, the findings it has made and the conclusions it has drawn. The Commission was required to undertake the statutory duty by reference to the issues which arose from the application in the context of the relevant provisions of the Act, the evidence (including notorious facts) before the Commission and any submissions made by the appellant, the Director and the Objectors.”

59. The above statement sets out the importance of a structured approach to the discharge of the Commission’s function. As a result, the Commission is satisfied that the approach to be taken is as follows:

⁴ [2013] WASCA 227; (2013) 45 WAR 446 at [55]

- a. Firstly, to “evaluate the evidence before it and make findings and draw conclusions from the evidence, including by inference” (and by) “making of findings and the drawing of conclusions, wholly or partly, from notorious facts” which are material to the discharge of its function. In undertaking these tasks, the Commission must have in mind – and assess relevance by reference to – how it must apply these findings and conclusions in order to discharge its function;
- b. This requires making findings and drawing conclusions about, generally speaking:
 - i. The relevant facts. This requires findings as to the current social and economic conditions in the relevant areas, including, for example, identifying the relevant demographics, present degree of harm from alcohol, the at-risk communities, and the present condition of the market for takeaway liquor in the relevant community and any identifiable trends. The Commission’s knowledge of notorious facts and expert evidence is relevant to assist with this factual inquiry, e.g., as to social and economic facts and statistics and as to trends.
 - ii. The likely position if the application is refused. This is a predictive assessment based on the facts as found, the Commission’s own experience and the expert evidence.
 - iii. The likely position if the application is granted. This too is a predictive assessment based on the facts as found in (a) above, evidence as to what Woolworths is proposing, the Commission’s own experience and the expert and other evidence about the likely impact if the application is allowed.
- c. Secondly, the Commission must then discharge the various mandatory obligations under section 6 and then, having regard to those outcomes and to the objects of the Act, decide whether it has been satisfied that the approval of the application will advance the public interest by advancing the objects in sections 3(1) and (2) of the Act.

Assessing the Risk of Harm

60. As submitted on behalf of the Applicant, assessing and having regard to the risk of harm is a particularly important aspect of the Commission’s function⁵. In *Carnegies Realty Pty Ltd v Director of Liquor Licensing*⁶ Allanson J said⁷:

[42] In the context of this application, counsel for the appellant submitted the real issues that arose concerned the facts relevant to the object in s 5(1)(b) (to minimise harm or ill-health caused to people due to the use of liquor), and the closely related factual matter in s 38(4)(a). In

⁵ See sections 3(1)(a) and 6(3)(a)(i) of the Act

⁶ [2015] WASC 208

⁷ This passage has been followed by Stirk AJ in *Sand Volley Australia Pty Ltd v Director of Liquor Licensing* [2019] WASC 209 at [92].

order to apply itself to the issues arising in the current application, the Commission was required to make finding about 'the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application'. Counsel submitted that to properly carry out this task the Commission was required to:

- (1) make findings that specifically identified the existing level of harm and ill-health in the relevant area (Fremantle) due to the use of liquor;
- (2) make findings about the likely degree of harm to result from the grant of the application;
- (3) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
- (4) weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the appellant had satisfied the commission that it was in the public interest to grant the application.”

61. The Commission agrees with the above.

62. Accordingly, the Commission accepts the submission on behalf of the Applicant that in assessing the risk of harm and taking into account the different statutory context here, once the Commission has considered the evidence and made the relevant findings of primary fact, it must then:

- a. make findings as to the existing degree of harm in the community;
- b. make findings about the likely degree of harm to result from the grant of the application; and
- c. assess the likely degree of harm to result from the grant of the application against the existing degree of harm,

as part of considering the potential impact on the community under section 6(3)(a)(i) and criteria one (1) of the CIAG and consideration of the objective in section 6(2)(a).

The Evidence

Woolworths' lay witnesses

Mr James Scott-McKenzie

63. Mr James Scott-Mackenzie (“Mr Scott-Mackenzie”) is the Woolworths' Business Development Manager. He provided affidavit evidence dealing with:

- a. Likely product range and prices and attempts at community consultation⁸. Although in cross-examination he conceded the limited nature of some of the consultation undertaken on behalf of the Applicant;
- b. The socio-economic demographics of Cairns and details of the Dan Murphy's there, changes to the design of the proposed store, the proposed use of a NT Police "smart pole", details of the two other large-format liquor stores in Darwin, updated information from NT Police concerning the non-availability of PALIs, Woolworths' plans for roaming security patrols, Woolworths' plans for a BWS Stuart Park if the application was refused and Woolworths' attempts to meet with the three at risk Indigenous communities.⁹
- c. BWS sales data for its Darwin stores, sales data for Dan Murphy's Launceston, the terms of the proposed price guarantee for the new store, updated plans showing the current design of the proposed store, further information about the Bottle-O Pit Lane, Yarrowonga and attempts to contact the 3 at risk communities, confirmation in relation to the Australian Standards and AustRoads Guides and "density maps" concerning outlets at various radii from BWS Stuart Park and Darwin Dan Murphy's at Eaton.¹⁰

Mr Shane Tremble

64. Mr Shane Tremble ("Mr Tremble") is the General Manager, Corporate Services, Endeavour Drinks Group, which is the entity that manages all of Woolworths' liquor retail businesses, including Dan Murphy's and BWS. He provided evidence dealing with:
 - a. The disclosure of influential persons required by s.26A of the Act and Woolworths' leasing agreement with Northern Territory Airports.¹¹
 - b. The risk report prepared by Mr Nevil Shah, Woolworths' Business Risk Manager, concerning alcohol related harm from his review of the proposed operation of Darwin Dan Murphy's, including a tour of Darwin.¹²
 - c. The adoption (with minor modification) of the contents of the Affidavit of Mr Campbell Stott.¹³
 - d. Examples of wine tastings undertaken at Dan Murphy's, information about the trends in liquor consumption in Tasmania, press reports about premiumisation and a spreadsheet showing premiumisation trends at BWS stores in Darwin¹⁴.

⁸ Affidavit of 20 September 2018; Exhibit .1/V/1065.

⁹ Affidavit of 9 April 2019; Exhibit .1/Z/2705.

¹⁰ Affidavit of 29 May 2019; Exhibit .1/DD/3289.

¹¹ Exhibit .1/C/18.

¹² Exhibit .1/X/2569.

¹³ Exhibit .1/R/770; Exhibit .1/HH

¹⁴ Exhibit .1/HH, Exhibit plained at TS77-78.

- e. Woolworths' Reconciliation Action Plan and its relevance for liquor stores in the Territory and confirmed willingness by Woolworths' to accept conditions on the licence to minimise the risk of harm.¹⁵
- f. Post-implementation internal reviews by Woolworths in relation to the connection between the number of licences and overall levels of domestic violence and similar offending.¹⁶
- g. His notation that the local BWS Stores have a "very high turnover" when compared nationally and his opinion that as a result they are "over-trading", which he attributed to the absence of a Dan Murphy's in Darwin.¹⁷

Ms Kay Attard

65. Ms Kay Attard ("Ms Attard") is Woolworths' National Manager of Responsible Service. She gave evidence of having worked in liquor regulation compliance for a large part of her career and provided evidence concerning:
- a. RSA training and other compliance training (e.g., BDR) and the strategies Woolworths' pursues to minimise harm including voluntary restrictions and participation in various forums relating to harm minimisation;¹⁸
 - b. The response by Woolworths in terms of what was purported to be "training" following a complaint by a local Aboriginal man, engagement with local Indigenous groups and action under the Reconciliation Action Plan;¹⁹ and
 - c. Woolworths' decision to continue to impose limits on the sale of cask wine.²⁰

Mr Ross Baynes

66. Mr Ross Baynes ("Mr Baynes") from Northern Territory Airports Pty Ltd ("NT Airports") provided evidence concerning:
- a. The plans for the development of the precinct, including the upgrade of the intersection of Osgood Drive and Bagot Rd, the appointment and role of Pritchard Francis and the other engineers and designers in the upgrade and traffic generally. Plans which show the latest design and confirmation of Government approvals were tendered.²¹

¹⁵ Transcript 75 – 80; 154-160; Exhibit . 1/JJ.

¹⁶ Exhibit .1/III.

¹⁷ Transcript 200.

¹⁸ Exhibit .1/S/837.

¹⁹ Transcript 82, 116, 118; Exhibit .1/HHH.

²⁰ Transcript 83 – 85, 116 – 117, 119; Exhibit .1/II.

²¹ Exhibit .1/AA, OO, CCC.

- b. He stated that Dan Murphy's is critical for the development proceeding and that NT Airports does not have a "Plan B" if the application is refused.²²

Ms Thelma Schwartz

67. Ms Thelma Schwartz ("Ms Schwartz") is a lawyer for an Aboriginal community/non-for-profit organisation in Cairns. She provided an affidavit about her opinion of the lack of any apparent connection between the misuse of alcohol from which her clients are suffering and the offending that it generates, and the opening and trading of two Dan Murphy's in Cairns.²³ Although Professor Ryan found her "on-ground experience" valuable information, she conceded that anecdotal accounts such as this are "not particularly weighty evidence" in her field of work²⁴.

Woolworths' expert witnesses

Mr Jeffrey Malcolm (Town Planner)

68. Mr Jeffrey Malcolm ("Mr Malcolm") provided evidence concerning:
 - a. Demographics and other features including potential "at-risk" communities and licensed premises in the locality within 800m, 2 km, 5 km and then 25 km.²⁵ Although the Commission notes he did not identify the Darwin Indigenous Men's Service in his report.²⁶
 - b. Predictions as to future population growth. The Commission notes it was accepted on behalf of the Applicant that this evidence, which predicted significant population growth in Darwin, must be discarded because of changes in conditions since his report in mid-2018 and mainly because Mr Malcolm was not even aware of the INPEX project. Mr Malcolm stated in re-examination that the difference in population growth would only affect the conclusion he reached contained in paragraph [11.3] of his report²⁷ and not his other opinions.²⁸

Dr Violet Lazarevic (Consumer Behaviour Analyst)

69. Dr Violet Lazarevic ("Dr Lazarevic") provided evidence concerning her opinion as to recent changes in the liquor market including its "fragmentation", premiumisation and the impact of Dan Murphy's entering the market in Tasmania.²⁹

²² Transcript 221.

²³ Exhibit .1/BB/3153.

²⁴ Transcript 239

²⁵ Exhibit .1/U; TS55 – 63.

²⁶ Transcript 60.2.

²⁷ Transcript 63.1 – TS63.3.

²⁸ Exhibit .1/U/1022, [11.3].

²⁹ Exhibit .1/W/2555, Exhibit .1A/TT

Mr Gavin Duane (Economist)

70. Mr Gavin Duane (“Mr Duane”) provided evidence concerning his opinion about:
- a. The market for packaged liquor in Darwin and the likely impact of Darwin Dan Murphy’s including the maximum likely turnover and the source of that turnover principally being sourced by cannibalising the turnover of existing outlets.³⁰
 - b. In a memorandum dated 4 June 2019 he responded to the statements of Ms Tisato and Mr Kelly in relation to Launceston, and Dr Rhonda Smith.
 - c. He modified his opinion in relation to employment impacts but opined the likelihood of some loss of employment in the liquor industry but overall a net increase in employment.³¹

Professor Roberta Ryan (Social Planner)

71. Professor Roberta Ryan (“Professor Ryan”) acknowledged within her evidence that she did not have sufficient information to express a “definitive view” about the risk of harm to the three at risk Indigenous communities.³² However she did express a provisional view as to why the risk may not be “significant”.³³
72. Professor Ryan referred to four factors in support of her opinion:
- a. the unattractiveness of Dan Murphy’s as an outlet to the relevant demographic,
 - b. two other large format stores having opened without any report of a resultant increase in harm,
 - c. the “highly protective regime” in the Territory; and
 - d. the Applicant’s stated intention to work with the at risk communities.

Objectors’ lay witnesses

73. The Commission notes there were numerous lay Objectors to this application. Every one of those objections was read and considered carefully along with all the other evidence by the Commission. Many of the lay witnesses were not required to give evidence and the Commission notes the concessions within the closing submissions on behalf of the Applicant as follows:

³⁰ Exhibit .1/Y/2590, Exhibit .1A/KK

³¹ Exhibit .1/KK.

³² Exhibit .1/CC/pg 3213.

³³ Exhibit .1/CC/pg 3213.

- a. “The concerns of the Objectors’ who were not called – Ms Crawley, Mr San Jose, Capt. Wilson and Ms Renfree³⁴ - concerning the risk of additional harm from the misuse of alcohol, increased nuisance behaviour and traffic can be accepted as genuine.
 - b. “The evidence of Dr Giles³⁵ and Ms Coalter³⁶ can be accepted as giving an accurate picture of the impact of alcohol on the clients who use their services.
 - c. “The evidence of Mrs Fejo-Frith and Ms Secretary can be accepted as giving an accurate picture of the impact of alcohol on their communities. This evidence is of considerable assistance in assessing the likely impact of Dan Murphy’s”³⁷.
74. Evidence was provided from Mr Reid (on behalf of Casuarina All Sports Club), Mr Dunne (on behalf of Beachfront Hotel), and Mr Thomas (on behalf of Thomas Chin Pty Ltd) as to the likely impact on their businesses if this application were successful. The Commission notes the submission within the Applicant’s closing submission that such evidence “as to the likely impact on their businesses can be accepted”, but that these consequences “are the intended consequences of implementing the National Competition Policy” (“NCP”).³⁸
75. While the NCP and its aims in relation to macroeconomic reform are relevant, so too is any evidence (as given by Mr Reid, Mr Dunne and Mr Thomas) of the impact on employment opportunities and volume. The Commission does not accept that the evidence of such witnesses can simply be ignored by referring to them, as the Applicant has, as “the evidence of competitors”³⁹.

Objectors’ expert witnesses

Mr Rick Basheer

76. Mr Rick Basheer (“Mr Basheer”) is a Partner and Senior Business Advisor with Bentleys SA/NT an accountant and business advisory firm. Mr Basheer provided evidence on behalf of AHA (NT) concerning his opinion about:
- a. The potential economic impact of the proposed Dan Murphy’s including upon:
 - i. profitability,
 - ii. market share,

³⁴ Exhibit .2/A2/A4/A5/A6.

³⁵ Exhibit .2/D20.

³⁶ Exhibit .2/E24.

³⁷ Applicant’s closing submission paragraph 9.16

³⁸ Applicant’s closing submission paragraph 9.18

³⁹ Applicant’s closing submission paragraph 9.18

- iii. employment,
- iv. other spending (i.e. sponsorship and local support and entertainment),
- v. consumer pricing,
- vi. valuations of business,
- vii. future investment in the industry.

77. The Commission notes the submission within the Applicant's closing submission that the report provided by Mr Basheer "may be accepted".⁴⁰

Dr Rhonda L. Smith

78. Mr Rhonda Smith ("Dr Smith") is a Senior Lecturer in the Economics Department and Senior Fellow in the Law School at the University of Melbourne. Dr Smith provided evidence on behalf of AHA (NT) concerning her opinion about the likely impact of allowing Dan Murphy's application addressing:

- a. The impact on liquor sales;
- b. The impact on average liquor prices;
- c. The shift on the demand curve for alcohol in Darwin; and
- d. The impact on volume of alcohol sold.

79. The Commission notes the submission within the Applicant's closing submission that the evidence given by Dr Smith concerning the impact on competitor and consumer behaviour in the market "may be accepted".⁴¹

80. The Applicant goes on to submit however that Dr Smith's evidence that "the entry of Dan Murphy's will reverse or slow" the current declining per capita consumption⁴² "relies on an analysis that fails to distinguish between consumption by volume and by expenditure (and hence takes no account of the effects of premiumisation), which means it is unhelpful. She has also had no regard to the detail of the market in Darwin, and her information from Mr Tisato has also been shown to be incorrect"⁴³.

81. The Commission notes that it is however relevant that the Applicant's own witness, Mr Gavin Duane, also conceded that the conclusions of Dr Smith are not inconsistent with his.⁴⁴

⁴⁰ Applicant's closing submission paragraph 9.18

⁴¹ Applicant's closing submission paragraph 9.18

⁴² Exhibit . 2, B14, p.81, [57]

⁴³ Applicant's closing submission paragraph 9.20

⁴⁴ Exhibit .1/KK [23].

Mr Paul Tisato

82. Mr Paul Tisato (“Mr Tisato”) is the General Manager for Australian Liquor Marketers Pty Ltd (“ALM”) in South Australia and the Northern Territory. ALM is a broad range liquor wholesaler with branches throughout Australia. Mr Tisato provided evidence on behalf of AHA (NT) concerning his opinion about the likely impact of allowing the Dan Murphy’s application addressing:
- a. The impact on volume;
 - b. The economic impact.
83. Mr Tisato also gave evidence addressing:
- a. The split of beer, wine and spirits in the Darwin market;
 - b. How to reconcile “range offerings” versus “volume of products” being sold;
 - c. The split of on premise versus off premise in the Darwin market;
 - d. The impact of Minimum Unit Pricing (“MUP”).
84. In providing his evidence, Mr Tisato also provided his opinion of the impact of Dan Murphy’s Launceston on the Tasmanian liquor market, based upon industry (IRI-Aztec) data and his own data estimates⁴⁵. At the time of preparing his report, Mr Tisato did not have the benefit of actual sales figures for the BWS stores in Launceston and Dan Murphy’s Launceston. The Commission will return to this factor later in these reasons.

Dr Christopher Morrison

85. Dr Christopher Morrison (“Dr Morrison”) is an Assistant Professor of Epidemiology at the Mailman School of Public Health at Columbia University, New York City. Dr Morrison provided evidence on behalf of AHA (NT) concerning his opinion about the likely impact of allowing the Dan Murphy’s application upon alcohol-related harm.
86. It is submitted on behalf of the Applicant that the evidence provided by Dr Morrison “is of no significant assistance”⁴⁶ to the Commission. This submission appears to be primarily based on the assertion that Dr Morrison’s opinions “were not formed by reference to the evidence ... and his reasons are summary and often mere assertion”⁴⁷.

⁴⁵ Exhibit .2/B8/pg 38 – 43.

⁴⁶ Applicant’s submissions, para 9.24

⁴⁷ Ibid

87. While the Commission accepts that numerous references were made by Dr Morrison to prior research and statements made by him as to the conclusions reached from that research, the Commission considers such research relevant to the task to be undertaken by the Commission and has considered such evidence in that context. The Commission does not accept the submission on behalf of the Applicant that Dr Morrison was “an unreliable witness”⁴⁸.

Dr Alison Ziller

88. Dr Alison Ziller (“Dr Ziller”) is a Lecturer in Social Impact Assessment in the Department of Geography and Planning at the Macquarie University. Dr Ziller provided evidence on behalf of FARE concerning her opinion about the likely social impact of allowing the Dan Murphy’s application and in direct response to the evidence provided by Professor Ryan.
89. In closing submissions, the Applicant objects to the receipt of the evidence of Dr Ziller on the basis that she was not produced for cross-examination. This was an issue raised during the course of the hearing, and the Commission made clear that if Dr Ziller were required for cross examination by the Applicant, the hearing would be adjourned to enable that evidence to be taken. The Applicant determined **NOT** to seek an adjournment for such evidence to be taken. It is inappropriate for the Applicant to now complain of the lack of availability of Dr Ziller for cross examination and seek that her evidence be excluded. The Commission will not permit its processes to be used in such a manner by this Applicant or any party in any proceeding.
90. Nor does the Commission accept the submission by the Applicant that should Dr Ziller’s report be admitted, it be given little or no weight because Dr Ziller was not made available for cross-examination. The opportunity to enable this to occur was provided to the Applicant, and the Applicant chose not to take that opportunity. That is a matter for the Applicant only, and the submission made on behalf of the Applicant concerning the impact on Dr Ziller’s credit by virtue of her not being cross-examined is not accepted in these circumstances.
91. Ultimately however the Commission notes that it was not assisted a great deal by the evidence of Dr Ziller in the circumstances of this application.

Dr Michael Livingstone

92. Dr Michael Livingstone (“Dr Livingstone”) is a Research Fellow/Senior Research Fellow with the Centre for Alcohol Policy Research at the La Trobe University. Dr Livingstone provided evidence on behalf of FARE concerning his opinion about the likely impact on the local community of allowing the Dan Murphy’s application by relating the best available current evidence on the links between alcohol-availability, socio-economic disadvantage and alcohol-related harm.

⁴⁸ Ibid

93. Dr Livingstone's evidence was significant in relation to these issues and will be referred to later in these reasons.

Professor Peter Miller

94. Professor Peter Miller ("Professor Peter Miller") is a Professor of Psychology and Director of the Violence Prevention Group, School of Psychology at Deakin University. Professor Miller provided evidence on behalf of FARE concerning his opinion about:

- a. The link between the presence of alcohol in the community and the prevalence of assault and injuries; and
- b. The nature of changed drinking habits in society and the link to increased harm.

95. This was another witness who, in closing submissions, the Applicant objects to the receipt of their evidence on the basis that Professor Miller was not produced for cross-examination. Again, for the reasons identified in the case of Dr Ziller, this was an issue raised during the course of the hearing and the Commission made clear that if Professor Miller were required for cross examination by the Applicant, the hearing would be adjourned to enable that evidence to be taken. The Applicant determined **NOT** to seek an adjournment for such evidence to be taken. As stated previously, it is inappropriate for the Applicant, in such circumstances, to now complain of the lack of availability of Professor Miller for cross examination and seek that his evidence be excluded.

96. The Commission also notes the submission by the Applicant that Professor Miller's report was not provided until 31 May 2019 "one working day" before the hearing. The unfortunate reality of this hearing is that the parties were all providing documents up to and during the course of, the hearing. In addition, the Objectors had argued against the June hearing dates and sought later dates to enable their witnesses to be available. Those applications were opposed by the Applicant, and the Commission determined for the hearing to proceed. It is inappropriate for the Applicant to now complain that it could not cross examine certain witnesses when it knew well at the time that it opposed an adjournment that it would mean those witnesses would not be available.

97. For these reasons the Commission does not accept the submission of the Applicant that it "would be unfair to entertain this report in any respect". The Commission has and will consider the evidence carefully as part of its analysis of the application. Ultimately the Commission has determined it was not assisted a great deal by the evidence of Professor Miller.

Professor Peter Phibbs

98. Professor Peter Phibbs ("Professor Phibbs") is a Professor of Planning, Head of Urban and Regional Planning and Director of the Henry Halloran Trust at Sydney University. Professor Phibbs provided evidence, by video-link from Greece, on behalf of FARE concerning his opinion about the likely economic

impact of allowing the Dan Murphy's application and in direct response to the evidence provided by Mr Duane.

99. The Commission notes the submissions on behalf of the Applicant that Professor Phibbs' accepted markets are complex and that matters like alternative product choices, in-elasticities and market saturation can affect theoretical relationships between price and demand.⁴⁹ Further that Professor Phibbs accepted that it is anomalous that, over the 21 years in which Dan Murphy's has opened 227 stores nationally, volumetric consumption has reduced.⁵⁰
100. His suggestion however that that the new store will generate a significant increase in sales⁵¹ did not distinguish between increase in consumption by volume and by expenditure.
101. Professor Phibbs was critical of Mr Duane's initial analysis of the likely employment outcome and in fact referred to Mr Duane's evidence in this regard as "a significant error and again disobeys a basic tenet of economic impact analysis, that a net direct employment change has to include the loss of jobs associated with the introduction of a new firm"⁵². The Commission notes that it is now accepted by the Applicant that there will be some job losses in the rest of the liquor industry following any job creation through the establishment of a Dan Murphy's outlet.

Professor James Smith

102. Professor James Smith ("Professor Smith") is Father Frank Flynn Fellow and Professor of Harm Minimisation including the Head of the Alcohol, Other Drugs and Gambling ("AODG") program at the Menzies School of Health Research. Professor Smith provided evidence on behalf of FARE and the Danila Dilba Health Service concerning his opinion about the social and health impacts of allowing the Dan Murphy's application and to provide contextual evidence in relation to the application. Professor Smith was critical of both the MGA town planner's report and the report of Professor Ryan because they failed to acknowledge that the Darwin Indigenous Men's service (DIMS), which delivers support services to Indigenous male clients, many of whom have substance abuse issues, was within 500 metres of the proposed site.
103. It was submitted on behalf of the Applicant that the evidence of Professor Smith "is of no significant assistance for each of the following reasons:
 - a. "... (the) report refers only in passing to – and does not otherwise address in any detail - the evidence provided by the Applicant or the other material provided by the Objectors.⁵³
 - b. "His report addresses a significantly higher threshold than required by the Act – "Woolworths has not sufficiently outlined how the introduction

⁴⁹ Transcript 318-9.

⁵⁰ Transcript 321.

⁵¹ Exhibit .2, p.336

⁵² Exhibit .2/D23/pg 336.

⁵³ Exhibit 2, p145 [58], [63], [67]

of a Dan Murphy's in the proposed location will reduce the alcohol-burden in Darwin."⁵⁴

- c. "His assertion that the "the proposed location of the Dan Murphy's store would directly compromise the goals of DIMS and their respective client outcomes" is an overstatement made, then and now, with an insufficient foundation."⁵⁵
- d. "When tested as to the basis for his assertion at [61] that "research shows that (close) proximity impacts behaviours associated with the harmful consumption of alcohol", he was unable to identify the "research" but instead deferred to the expertise of Dr Livingston and Prof. Miller."⁵⁶ That now abandoned opinion would appear to be at the foundation of his concern about DIMS, which is based on proximity.
- e. "His report appears to be based on a factual error, namely that "the three Aboriginal communities identified in his report"⁵⁷ are "certainly closer" to the new outlet than any existing outlet, which would appear to be wrong."⁵⁸

104. With respect to these submissions, the Commission does not agree. Like all witnesses, the Commission is entitled to accept all of their evidence, none of their evidence or only part of their evidence. There is no basis on the evidence before the Commission for the entirety of the significant evidence provided by Professor Smith to be ignored. It did not appear to the Commission that any of the witnesses were completely aware of "the evidence provided by the Applicant or the other material provided by the Objectors". That is the role of the Commission.

105. The Commission acknowledges that there is a higher threshold referred to by Professor Smith; however, the Commission is entirely cognisant of the threshold to be met. The Commission does not agree that the opinion provided by Professor Smith that "the proposed location of the Dan Murphy's store would directly compromise the goals of DIMS and their respective client outcomes" is an overstatement.

106. The Commission also does not agree with the Applicant's submission that⁵⁹:

"When tested as to the basis for his assertion at [61] that "research shows that (close) proximity impacts behaviours associated with the harmful consumption of alcohol", he was unable to identify the "research" but instead deferred to the expertise of Dr Livingston and Prof. Miller."⁶⁰ That now abandoned opinion would appear to be at the foundation of his concern about DIMS, which is based on proximity."

⁵⁴ Exhibit .2/155 [30]; see also the reference to benefiting "children and young people" at [55] and TS346.

⁵⁵ Transcript 349, 353.

⁵⁶ Transcript 349.

⁵⁷ Bagot, Minmarama and Kulaluk – see [63]

⁵⁸ Kulaluk is almost adjacent to shopping centre which contains BWS Nightcliff. Minmarama and the residential areas of Bagot would appear to be about midway between the Douglas Street shop and the proposed store.

⁵⁹ Applicant's Closing Submissions, paragraph 9.25(d)

⁶⁰ Transcript 349.

107. The Commission considers the Professor’s deferral to such experts, whose reports were already in evidence before the Commission, to be entirely appropriate in the circumstances.
108. Finally the Commission does not accept that “His report appears to be based on a factual error”⁶¹. It was obvious to the Commission that Professor Smith knew well the location of the proposed site and the locations of the at risk communities. The Commission considers Professor Smith’s concerns as identified with respect to the proximity of all three “at-risk” communities were reasonable.

Dr Sarah Giles

109. Dr Sarah Giles (“Dr Giles”) is the Clinical Director of the Danila Dilba Health Service and provided evidence on behalf of the Service concerning her opinion about the community impacts of allowing the Dan Murphy’s application. The Commission again notes the submission made on behalf of the Applicant that the evidence of Dr Giles “can be accepted as giving an accurate picture of the impact of alcohol on the clients who use (the) service”.

Ms Nicola Coalter

110. Ms Nicola Coalter (“Ms Coalter”) is a registered psychologist and Chief Executive Officer (“CEO”) of Amity Community Services Incorporated (“Amity”). Ms Coalter provided evidence on behalf of Amity concerning her opinion about the impact of allowing the Dan Murphy’s application. Again, the Commission notes the submission made on behalf of the Applicant that the evidence of Ms Coalter “can be accepted as giving an accurate picture of the impact of alcohol on the clients who use (the) service”.

Preliminary Issues for Determination

111. The following issues have arisen during the hearing and within the parties’ submissions which the Commission believes it expedient to determine prior to commencing our consideration of the Public Interest and Community Impact tests.

The Moratorium and whether this application should be treated as an application under section 46A

112. Pursuant to section 24(2) of the Act; there is at present a moratorium on the establishment of new takeaway liquor outlets for a period of 5 years as follows:

s.24(2) Despite subsection (1), no new takeaway liquor licences may be issued during the moratorium period of 5 years from the commencement of the Liquor Legislation Amendment (Licensing) Act 2018. (Emphasis added).

113. It is to be noted that the wording of the above subsection refers only to “new takeaway liquor licences”, not to applications relating to a transfer or

⁶¹ Applicant’s Closing Submissions, paragraph 9.25(e)

substitution of an already existing takeaway liquor licence. The Legislature also did not see fit, when it imposed such a moratorium into the Act, to restrict or prohibit the transfer and substitution of take-away liquor licences during the moratorium. The Commission considers this could have easily been done by the Legislature had that been its intention by the inclusion of words to that effect in section 24(2) of the Act.

114. The Commission accepts the submission on behalf of the Applicant that the moratorium seeks to minimise the risk of harm by fixing the maximum number of takeaway licences for the next five years. However, as submitted, although this moratorium was imposed, there was no limit imposed upon the scale and nature of the changes which may be made to existing takeaway licences.
115. Heavy emphasis was placed by some Objectors upon the decision of the then Northern Territory Licensing Commission in *Re Berry Springs Hotel*⁶². In that matter the then Licensing Commission considered an application under section 46A of the Act and stated as follows⁶³:

“Section 46A of the Act provides the means by which a licence may be substituted to a new location. This merely provides for a geographic shift of a like for like licence. Section 32A enables the Licensee to apply for a variation of the conditions of a licence. In this instance not only is the proposed Licensee seeking to significantly change the storage and display arrangements for the sale of the liquor, i.e. from a store to a drivethrough bottle shop, but in doing so is obviously anticipating a large increase in the volume of liquor sales, with a resultant potential impact on the amenity of the neighbourhood.”
116. In that application, the Licensing Commission made comment that what was being sought under the proposed section 46A application was a “paradigm shift”⁶⁴ from the nature of the licence sought to be substituted, rather than a “geographic shift of a like for like licence” which the Licensing Commission considered was the nature of applications contemplated by section 46A.
117. Whilst the Commission acknowledges the previous remarks made by the then Licensing Commission in relation to applications under section 46A, it is, with respect, apparent to this Commission that the references to a “geographic shift of a like for like licence” as discussed by the then Licensing Commission are not in fact found within the Act itself nor are they part of any conditions that must be considered when determining an application for substitution. This remains the case even after certain amendments were made to the Act following the Riley Review.
118. In relation to this application, the Commission finds that what is proposed is certainly not an application for substitution that could be described as “merely a geographic shift of a like for like licence”. As was submitted on behalf of several Objectors, if mere floor size were to be considered, this application is

⁶² Unreported, Northern Territory Licensing Commission 20 October 2011

⁶³ *Ibid*, para 25)

⁶⁴ *Ibid*, para 29)

effectively the equivalent of transposing one licence at a location and replacing it with nine (9) licences at another location that is geographically distant to its current location. If projected sales were to be considered, it is effectively replacing one licence with 48 licences.

119. The Commission finds that this application represents a paradigm shift in the nature of the business being conducted by the Applicant. So much was readily conceded on behalf of the Applicant by Mr Scott-McKenzie during questioning by the Deputy Commissioner⁶⁵:

“Why couldn't BWS do this disruption to the market and bring this amazing benefit to the Northern Territory?—That's a completely different operation to the way Dan Murphy's works. They're run independently of each other, so far as the directors and general managers of those businesses. And, the BWS model is very much a convenience your local bottle shop offer.”

120. It is clear from the evidence that Dan Murphy's operates an entirely different business model to the one operated by BWS.
121. Be that as it may, the Commission does not accept the submission that an application under section 46A must only be for applications resulting in a “geographic shift of a like for like licence”. Such a requirement simply does not exist within the Act and as a result the Commission finds that an application of this nature can properly be brought under section 46A and that the moratorium against new takeaway licence does not apply to this application for substitution.
122. Many of the Objectors argued in effect that it was inconceivable that the legislature could have intended that there be no limits on the extent of a substitution application whereas there was a strict moratorium on all new takeaway applications. However it is clear from our observations later in this decision in relation to the issue of density that the legislature did not leave “the gate wide open” for substitution applications. Any application which is not a “like for like” substitution will inevitably require the Commission to have close regard to density considerations in determining the community impact and public interest. So whilst a substitution application might not be barred by the moratorium, proportionality is still very much an issue we need to consider.

The Status of the Liquor Licence

123. It was submitted on behalf of the Objectors represented by the HWLE Group that the liquor licence held by the Applicant “no longer remains in force” as it is subject to a special condition in the following terms:

“Licence Concept

This licence shall remain in force only for so long as the licensed premises shall be operated as a bottleshop. Any variation to the conditions must be approved by the Director-General.”

⁶⁵ Transcript, p.72.6

124. The submission made on behalf of the HWLE Group was that because the licensed premises located at BWS Stuart Park have been closed, having ceased to trade on 24 October 2018 and subsequently vacated, that the licensed premises “are no longer operated as a bottleshop” and therefore the licence is no longer in force.
125. The Commission notes that this issue was part of the grounds of the originating motion before the Chief Justice of the Supreme Court on 31 May 2019 in *Foundation for Alcohol Research and Education Ltd v Northern Territory Liquor Commission & Ors*⁶⁶. On 29 May 2019, the Objectors being the “Foundation for Alcohol Research and Education Ltd” (“FARE”) filed an originating motion in the Supreme Court seeking declaratory, prerogative and injunctive relief.
126. As part of those proceedings FARE sought a declaration that section 126 of the Act did not authorise the Director-General to approve the substitution application in the manner undertaken and that an order in the nature of certiorari should be made quashing that decision by the Director-General.
127. The originating motion was dealt with on an urgent basis by the Chief Justice of the Supreme Court on 31 May 2019. The part of the proceedings relating to a declaration that section 126 did not authorise the Director-General to approve the substitution application was however not pursued by FARE and no orders were therefore made by the Chief Justice on this issue. However, during the course of the hearing before the Commission, it was confirmed on behalf of the Objectors that it was no longer sought to be argued that the substitution application should be dismissed on the basis that it was not on the proper “form”⁶⁷. As a result, the Commission intends to say nothing further on this point.
128. The HWLE Group of Objectors, however, confirmed they still pursued an objection before this Commission that the licence was no longer in force and had not been so since 24 October 2018. Therefore there was no proper application before the Commission⁶⁸.
129. In this regard, the Commission notes the findings of the Chief Justice that⁶⁹:

“[7] Section 30 of the *Liquor Act* provides that a licence remains in force until surrendered, suspended or cancelled under the Act. None of those events have transpired in the present case. [8] First, the licence condition is subordinate to the operation of the legislation and does not control that operation.

[9] Secondly, the licence is granted in respect of premises. The relevant condition, in this case, operates only so that the licence in respect of those premises is not in force during any period in which they

⁶⁶ [2019] NTSC 45

⁶⁷ Transcript p.429

⁶⁸ HWLE Closing Submissions, para 1.1 and 1.2

⁶⁹ FARE, para [7] to [10]

are not operated as a bottle shop. The operation of the condition does not extend beyond that effect.

[10] Thirdly, the breach of a licence condition may give rise to a disciplinary action. Section 67(3)(g) of the *Liquor Act* contemplates that such action may be taken in circumstances where the premises are no longer being used for the sale or supply of liquor or consistently with the business of the licence. That is the consequence of a breach of this condition. It is not that the licence is automatically surrendered or cancelled.”

130. Given that there has been no surrender, suspension or cancellation of the licence that is the subject of this application, we find that the licence remains in force and that an application for the substitution of that “in force” licence is validly before us.

Can the Commission approve a substitution application subject to conditions?

131. The Applicant has submitted⁷⁰ that the Commission has the power to make any approval of a substitution application conditional on an Applicant accepting a variation of the conditions in the Liquor Licence. It argued that given the express obligation on the Commission to consider objectives which contemplate conditions which limit how a licensee may conduct its business⁷¹ the power of approval in section 46A(6)(a) may be construed as including the power to grant approval to the substitution application conditional upon an Applicant’s agreement to specified amendments to the licence.
132. The Commission does not accept that submission. Whereas section 29(1)(a) of the Act allows us to issue a licence “subject to any conditions determined by the Commission under section 31”, section 46A(6) only allows us to approve or refuse the application to substitute premises. There is no reason why the section needs to be construed as providing a range of alternative dispositions for a substitution application because, leaving the moratorium aside, it is generally open to an Applicant to apply for a new licence. If the Commission was minded to vary the conditions of this licence it would have to embark upon the process envisaged by s.33 and in effect conduct a collateral inquiry and deliver a separate decision notice. In any event, for the reasons advanced later in this decision we do not consider the type of conditions that the Applicant was suggesting were realistic risk mitigation measures.
133. Although no issue was raised by any of the Objectors over the limitation of our powers under section 46A(6) we do now have concerns as to whether a substitution application is open to an Applicant when the proposed premises are yet to be built. Section 26(2) clearly empowers the Commission to grant an application for a (new) licence over premises which are yet to be constructed and we can then use our powers under s.31 to require that the premises be constructed in accordance with approved plans and that the licensee not commence selling liquor until the Commission is satisfied that all the necessary

⁷⁰ Applicant’s Closing Submission paragraph 2.14

⁷¹ See s.6(2)(k), (l), (m) and (n) of *Liquor Act 1978*.

building approvals have been obtained. These powers are not included within s.46A so it would seem to us that the only options available are for an Applicant to either construct the premises in the hope that the Commission will approve the substitution once it is ready for trade or apply for a new licence pursuant to s.26 at such time as the moratorium is no longer in force.

134. As the Commission has only given consideration to this issue during the formulation of these reasons for decision and did not raise it with the Applicant during the hearing, we have not had the benefit of the parties' submissions on this point. Therefore we have decided not to make a definitive ruling on this issue having regard to the adverse view we have formed on the merits of the application.

The Existing Stuart Park BWS Store

135. The Applicant submits that when the Commission is assessing whether or not the public interest would be advanced by allowing the application, the relevant comparison is with a BWS in Stuart Park which Woolworths could be conducting from premises substantially the same as the former licensed premises, not with the BWS Stuart Park as was trading in the period before it closed⁷².
136. There is no evidence before the Commission of any other type of BWS that the Applicant could be operating at Stuart Park. That store is somewhat of an anomaly within the BWS stable of outlets in Darwin. All the others are operated in conjunction with a supermarket or as a drive-through bottle shop attached to a hotel. The Stuart Park BWS is the only stand-alone liquor store operated by Woolworths in the Northern Territory.
137. As there is no evidence available as to the trading figures of any other stand-alone BWS store in Darwin, it is entirely speculative for the Applicant to contend that moving the store to another location in Stuart Park would necessarily increase its turnover.
138. The Applicant's primary submission that "the Commission could not lawfully refuse a substitution application with respect to premises for a new BWS in Stuart Park" is rejected. The Commission has a broad discretion to consider the public interest in all applications such as these. Furthermore, as was pointed out to the Applicant during the Directions Hearing, the Draft Bill for the reform of the *Liquor Act 1978* would require a substitution application (such as the one contemplated here) proceed as an application for a new licence. That application would then be subject to the moratorium on any new take away licences.
139. Accordingly as far as any comparison with the operation of the proposed Dan Murphy's outlet and operation of the original premises is relevant to our deliberations, we will be having regard to the actual volume of liquor sold at BWS, 27 Stuart Highway, Stuart Park.

⁷² Applicant's Closing Submissions paragraph 2.11.

The Community, Locality and Neighbourhood

140. The Act and Community Impact Assessment Guidelines use a number of descriptors for the persons and locations which must be considered for the purpose of determining an application.
141. In relation to “the community in the area that would be affected by the outcome of the decision to grant or refuse” the application: section 6(3)(a)”; the Applicant has submitted that this should be the area within a 25 km radius from the proposed new store⁷³, i.e. the predicted “trade area” for the new outlet.
142. The Applicant has further submitted⁷⁴:
- b) “Community” in s.3(2)(a) and (c) and s.47F(2)(b) would appear to have the same meaning.
 - c) The “whole” community and any relevant “group” within that community for the purpose of assessing harm under s.6(3)(a)(i) would appear again to be using “community” in the same sense.
 - d) “The community area” as referred to in s.6(3)(a)(iv) and (v) for the purpose of assessing volume and density would also appear to have the same meaning, on the wellsettled principles of statutory interpretation.
 - e) With respect to “the locality” of the premises which may be subject to “social impact” and “impact on the amenity” in s.6(3)(a)(iii), the locality will vary according to the kind of impact being considered. The social impact of any increased risk of harm to the community generally makes the “locality” the same as the “community area”. However, the impact of nuisance, for example, would probably be more localised and correspond with “neighbourhood” as referred to in s.6(2)(f) and s.47F(2)(a).
 - f) It is noted that the CIAG uses various different terms. “Locality”, “local community area”, “community” and “community area” appear to be references to the community affected by the application and its area as referred to in s.6(3)(a). “Broader community” would appear to be a more comprehensive reference and requires consideration of the impact of the application perhaps as wide as the Territory itself.
 - g) As the issues as to the “neighbourhood” to assess the status of Objectors under s.47F(3)(a) and (b) are no longer live, findings in this respect are not required.”

⁷³ Applicant’s Closing Submissions, paragraph 10.1(a)

⁷⁴ Applicant’s Closing Submissions, paragraph 10.1(b)-(g)

143. Counsel for the DSH Group of Objectors, which include the three indigenous communities within 2 kms distance from the proposed outlet, submitted⁷⁵:
- ”30. Woolworths submission on the topic of density/volume is a good example of attempting to water down the impact of a Dan Murphy’s by seeking to rely upon as large a consumer group as possible. Woolworths refers to the overall volume of alcohol supplied or sold into the community. In contrast, the Act talks of volume within the community area. The two terms are quite different.
31. Woolworths seeks to adopt as the community a radius of 25 km from the proposed site, as being the area from which consumers will come. As the only Dan Murphy’s in the NT, they might as well suggest the entire NT and well as parts of WA and Queensland.
32. In reality, the community area must be something far smaller than that – more akin to locality for the purposes of social harm. It is submitted that it is appropriate to utilise the 2 kms radius, as all of the at-risk groups considered below are within that radius.
33. At its largest, alternatively the community area would not exceed 5 kms.”
144. It is difficult to discern any logical framework for the myriad terms used by the legislature to describe the relevant areas and groups of people that we need to consider during our deliberations. At the first mention of this matter at the Directions Hearing on 24 February 2019, the problems associated with the different terms used in the Act, and within the CIAG, were acknowledged. It is to be hoped that during the impending “rewrite” of the Act that those responsible for drafting the new Bill will resolve some of the existing confusion which has arisen.
145. We consider that given the size of the operations of the proposed new outlet it was a reasonable concession on the part of the Applicant to extend the concept “neighbourhood” for the purposes of assessing the status of Objectors under section 47F(3)(a) and (b) to a 25 km radius from the site. This is because the proposed Dan Murphy’s will be marketed as a “destination site” and customers will be encouraged to travel there from all over Darwin because of both the broadest range of products and the lowest prices.
146. Although that same term “neighbourhood” is used in section 6(2)(f) the Applicant has also realistically submitted that it would be impractical to extend consideration of issues such as nuisance to such a broad area.
147. We are also not convinced that the term used in section 6(3)(a) “The community in the area” has the same meaning as “community area” used in section 6(3)(a) (iv) and (v) with regard to social impact and amenity.

⁷⁵ DSH Group Closing submissions, para 30-33

148. The Community Impact Assessment Guidelines refer to “The potential harm or health impact that may be caused to people or any group of people within the local community area” under the “Criteria” heading whilst under the “Matters to be Considered” head it refers to both “locality” and “community area” without any logical differentiation in the use of the terms. The Guidelines do make clear, however that:

“The Commission has the authority to consider a broad range of issues specific to each application and flexibility exists to assess each individual application on its merits”.

149. The Applicant has proposed that the Commission assess the impact of the application by reference to the areas and communities in the 800m, 5 km and 25 km radius as adopted by Professor Ryan and Mr Malcolm, the Town Planner. The Commission is prepared to accept the proposed Primary Trade area of 5 km from the proposed site and the proposed Total Trade area of 25 km radius from the proposed site but does not accept that an 800m radius of the proposed site provides a useful catchment of the immediate locality.
150. Professor Ryan stated in her report⁷⁶; “The measure of 800m for the immediate locality is commonly identified as the accessible walkable catchment in contemporary planning policy and equates to approximately 10 minutes walking distance”.
151. In his report, Professor James Smith stated⁷⁷:

“Whilst it is claimed in both of the aforementioned reports (i.e. Ryan and Malcolm) that 800m is commonly identified as a walkable catchment in contemporary planning policy (equating to a 10 minute walk), I would argue that longer walking distances would be common for these Aboriginal Communities, (i.e. Bagot, Minmarama and Kulaluk) where household income is lower. That is, the distance from all three Aboriginal communities is easily walkable if viewed from their social context. This claim is strongly supported by local Elder, Aunty Bilawara Lee”.

152. During cross-examination Mr Malcolm agreed with that proposition⁷⁸. He also conceded that he did not visit or have any first-hand knowledge of the Bagot Community⁷⁹.
153. Professor Ryan in her report stated that⁸⁰:

“The three communities (Bagot, Minmarama & Kulaluk) are clearly communities which could be considered “at risk” from the proposed Dan Murphy’s store. The likely impact on these communities of the proposed new store is a matter which requires careful consideration”.

⁷⁶ p.370

⁷⁷ Exhibit 2, p.145, para 42

⁷⁸ Transcript 59

⁷⁹ Transcript.62

⁸⁰ P.4.6.2(e) (p 3183)

154. During the course of the hearing, Professor Ryan acknowledged⁸¹ “that those bush communities (bush camps adjacent to the site) and those three communities are the most at risk communities”. Those three communities are within a radius of 1.45 km from the proposed outlet.
155. The Commission heard evidence from representatives of the three Aboriginal Communities about their concerns over the impact of liquor being sold from these proposed premises. Apart from the Darwin Indigenous Men’s Service and the “long grass campers” there are limited at risk groups or other residents within the 800 metre radius because the site is situated in a light industrial area. There are also no other existing active licenses within this area.
156. Accordingly, the Commission has determined on the basis of the evidence before us together with our own knowledge of this area and its resident community that we should extend the radius for the “immediate locality” to two kilometres from the proposed Dan Murphy’s outlet. This will enable us to properly consider the potential harm or health impacts that may be caused to a particular group of people, whom the Applicant’s social planning expert has identified “are clearly communities which could be considered at risk”⁸².

Findings in relation to the demographics of the local community and existing levels of harm

Demographics in 2 km radius

157. As previously indicated, the Commission did not find the proposed 800 metre radius from the proposed site as a useful catchment for those groups most likely to be at risk due to their close proximity to the outlet. Consequently we have decided to expand the primary zone to 2 kms from the site and have had to adjust the relevant demographical data accordingly.
158. The same suburbs that were included within the 800 metre radius, namely Coconut Grove, Millner and Ludmilla - The Narrows are the only Statistical Area Level 2 (SA2) areas within a 2 km radius of the site.
159. The MGA Town Planner report provides evidence of the Socio-Economic indices for Areas (“SEIFA”) scores for each of Coconut Grove, Millner and Ludmilla - The Narrows SEIFA scores are calculated by the ABS and are between 1 (the lowest SEIFA score) and 10 (the highest). The SEIFA scores for the relevant SA2 areas are as follows:

Coconut Grove – 5

Millner - 6

Ludmilla – The Narrows – 4

160. Although these SA2 areas SEIFA scores might be around the mid-range of the score band, they are lower than the majority of Darwin suburbs. It is also

⁸¹ Transcript 256

⁸² p.3183

apparent to those of us who have lived here for some time that these suburbs are not homogenous. There are pockets within each of these SA2 areas which would be considered relatively affluent and others where the residents are significantly disadvantaged.

161. The identifiable at-risk groups within 2 km that may be affected by the store are:
- a. Persons camping in bushland around the site close to Osgood Drive and separately in different camps in bushland east of Dick Ward Drive, south of Totem Rd, west/south west of Karu Park and north of Fitzer Drive⁸³.
 - b. The Darwin Indigenous Men's Service ("DIMS") situated at 2/4 Durand Court, Coconut Grove. Those premises provide support services for indigenous men, including those who have drug and alcohol abuse issues and are bussed there from their residential treatment facilities at CAAPS or FORWAARD⁸⁴. The Service is within 500 metres of the proposed outlet which would be clearly visible to those people attending DIMS⁸⁵.
 - c. RAAF Darwin Golf Club expressed concerns that aboriginal drinkers would camp on the golf course if the licence was granted. It is unclear on the evidence whether itinerants were in the habit of camping on the course in the past or whether the concerns raised are directed at the future possibility of this occurring. In any event, the risks associated with the potential golf course campers can be adequately assessed as part of the groups referred to in (a) above.
 - d. The Bagot Aboriginal Community is situated within 1.1 km of the site and is accessible by a 15 minute walk⁸⁶.
 - e. The Minmarama Park Community is 1.7km from the site accessible by a 20 minute walk⁸⁷ and Kulaluk Aboriginal Community (1.9 km from the site, accessible by 25 minute walk⁸⁸.

Bagot Community

162. The evidence of the demographics of the Bagot Community is in summary:
- a. The Bagot Community is within the area the subject of NT Crown Lease in Perpetuity 00840, being Lot 4806 Town of Darwin from Plan S88/331⁸⁹.
 - b. The lease of the area is held by Bagot Community Incorporated, which is currently under external administration;

⁸³ Helen Fejo Frith and Helen Secretary – transcript 263 and 265-266

⁸⁴ Professor Smith – transcript p 352

⁸⁵ Professor Smith – transcript p 353

⁸⁶ ZBT 1A/CC p 3183

⁸⁷ Exhibit 1A p 3183

⁸⁸ Ibid

⁸⁹ Exhibit t 1A Attachment PP

- c. There are 60 houses in the community, and between 180 to 250 permanent residents, although the numbers of persons staying in the community can increase up to around 500 persons at specific times of year for events (e.g. the Royal Darwin Show);
- d. There are 'nine (9) different [Aboriginal] language groups' which reside in the community, the conclusion being that Bagot Community is culturally heterogeneous and contains different kinship groups; and
- e. Alcohol is prohibited by law to brought into, possessed, consumed, or sold in the community area.

163. The evidence of the issues which members of the Bagot Community experience is:

- a. There are general problems with alcohol abuse in the community. This evidence was corroborated by Dr Giles;
- b. Alcohol consumption in a group setting occurs during card games in bushland near the Minmarama Park community;
- c. Alcohol abuse contributes to Ms Fejo-Frith's opinion to issues of violence, domestic violence, and child neglect in the community;
- d. The community suffers from issues of overcrowding, in that there are too many persons residing in the community especially during special events when kin travel to the Bagot Community from other locations;
- e. Members of the community being killed when walking across Bagot Road when inebriated; and
- f. A lack of employment prospects for community members, which Ms Fejo-Frith implicitly agreed in cross-examination was part of the cause of problems in the community (e.g. with alcohol).

164. In her evidence before the Commission, Ms Helen Fejo-Frith said she had lived at Bagot for 21 years and during that time "at least eight to ten people had passed away" on Bagot Rd and Dick Ward Drive⁹⁰. When asked whether her countrymen would use the proposed traffic lights to gain access to the Dan Murphy's site; she said⁹¹:

"A lot of them won't, because they – if they're in a hurry to get to a bottle shop, they will just cross the road anywhere. And I mean, the traffic along there is really hectic each day, every day of the week. So they're not going to be – they won't stand there waiting for the light to go green for you to walk across".

⁹⁰ Transcript 264

⁹¹ Transcript 265

165. When asked “What if anything, can you suggest to Dan Murphy’s they do to make it safer for your countrymen?”, Ms Fejo-Frith stated⁹²:

“Not to put it on Bagot Rd. And Yeah, it would be better I mean there are other places around that they could put it, but that would be a very – I think it would be a really, really bad story for them to be putting it where they’re going to put it”.

166. When asked to explain the issue of Alcohol in the Bagot Community, she said⁹³:

“We have a lot of domestic violence. We have people – parents who are not looking after their children because of alcohol and their children are then going hungry, and they’ve got family there – we all look after each other, but then the parents need to take responsibility and start learning that they have to give alcohol up – because it’s the children that are watching this – day to day, then as they get older, they’re just going to naturally think, oh this is what our parents did, so we can do the same”.

167. And⁹⁴:

“I know that you can’t stop anybody who’s a drinker, that’s their choice but the thing is we want the community to be safer for children and also tell community people that they have to have respect for the people on the community and for the ones who are working but they do also need to have respect for their wider Ludmilla community because there’s people that are our neighbours right next door that we have to be respectful to”.

168. In cross-examination, it was suggested to Ms Fejo-Frith that there are already fourteen (14) liquor outlets in that area “and having a fifteenth is not really going to increase the already terrible problem significantly?”; Ms Fejo-Frith responded⁹⁵:

“It’s going to get worse”.

Minmarama Park Community and Kulaluk Aboriginal Community

169. The evidence of the demographics of the Minmarama Park Community and Kulaluk Aboriginal Community is in summary:

- a. The communities are within the area the subject of NT Crown Lease in Perpetuity 00671, being Lot 5182 Town of Darwin from Plan S77/093B and Lot 8630 Town of Nightcliff from Plan S77/093A⁹⁶.
- b. The lease is held by Gwalwa Daraniki Association Incorporated;

⁹² Ibid

⁹³ Transcript 264

⁹⁴ Transcript 271

⁹⁵ Ibid

⁹⁶ Exhibit 1A Attachment QQ

- c. The Kulaluk community is located in Coconut Grove off Dick Ward Drive, and comprises 9 residences and 9 other buildings which house approximately 40 persons;
 - d. The Minmarama Park community is located south of Fitzer Drive, and comprises 24 residences which house approximately 100 persons;
 - e. The communities house predominantly the Secretary family (immediate and extended);
 - f. Alcohol is prohibited by law to be brought into, possessed, consumed, or sold in the community areas; and
 - g. According to 2016 ABS Census data, 14 'families' were residing within the confines of the Minmarama Park Community area.
170. The evidence of the issues which members of the Kulaluk and Minmarama Park communities experience is:
- a. Alcohol-related domestic violence and anti-social behaviour, although Ms Secretary considers that the incidence of this behaviour has decreased since 2015/2016 in the communities;
 - b. Persons in the communities who are on the BDR using persons (both Indigenous and non-Indigenous) who are not on the register to purchase alcohol;
 - c. The risk of harm when crossing Bagot Road to attend Dan Murphy's; and
 - d. A lack of employment prospects for community members, which Ms Secretary believes is part of the cause of problematic alcohol use by Aboriginal persons in Darwin.
171. In her evidence before the Commission, Ms Helen Secretary, the Chairperson of the Gwalwa Daraniki Association (which owns the land on which the Kulaluk and Minmarama Communities are located) spoke of the problems associated with alcohol abuse on those communities. Ms Secretary said⁹⁷:
- "It's getting worse. I'm a non-drinker but I grew up at Kulaluk since I was eight. I'm 50 years old now, and I've lived the life of seeing what alcohol does to family and extended family and its' getting worse".
172. Ms Secretary expressed concern that her countrymen would not use pedestrian crossings. She said they had lost two family members on Dick Ward Drive from the beginning of the year up until now and stated⁹⁸:
- "They don't go and use no pedestrian crossing. They will just get from A to B and that's why they're getting hit by a car. And that's all related to being intoxicated.

⁹⁷ Transcript.288

⁹⁸ Ibid

173. She also said⁹⁹:

“I see little indigenous kids, countrymen’s kids, come in from out of town, following their family members or their grandparents, crossing roads while they are intoxicated and it’s the traffic. Countrymen are not going to abide by any traffic rules while they are intoxicated and that’s why we are losing more and more of our people getting killed on the road, and it’s all because of alcohol”.

174. In relation to the impact of the proposed outlet on aboriginal people travelling to the area, Ms Secretary said¹⁰⁰:

“What my understanding of Dan Murphy’s and the prices and that, is it is right in the area where people are going to be coming in from bush on planes. They’re going to be coming in and living in the corners of our properties in the long grass and because of the dangers of those four cornered, five road sections, and people are getting killed”.

175. When asked how she saw the proposed Dan Murphy’s outlet as affecting the alcohol problems she had identified, she said¹⁰¹:

“To me, it will increase. My understanding, I’m not a drinker, but my understanding of people that do consume alcohol within our communities, including family members, I have heard that it’s cheaper prices. If Dan Murphy’s comes in and the prices are cheaper, that’s where everyone is going to go and purchase”.

Demographics in 5 km radius

176. The locality in a 5 km radius from the site ‘includes the area extending from the northern edge of the Darwin CBD, including the suburbs of Stuart Park and The Gardens, north along the coast to the suburbs of Brinkin and Tiwi, and terminating to the east before reaching the suburb of Malak’.

177. Professor Ryan’s report provides evidence in Tables 2 and 3 as to the relevant demographics of the SA2 areas within a 5 km radius of the site (both to the north and to the south of the site). The SA2 areas identified within the 5 km of the site by Professor Ryan are:

- a. As regards to those SA2 areas north of the site – Jingili, Moil, Marrara – Malak, Anula, Rapid Creek, Nightcliff, Wagaman, Wulagi, Brinkin – Nakara (including Casuarina), and also Coconut Grove and Millner (considered to be in the 800m locality).
- b. As regards to those SA2 areas south of the site – Woolner-Bayview-Winnellie, Parap and Fannie-Bay – The Gardens, and Darwin CBD (a separate area).

⁹⁹ Transcript.294

¹⁰⁰ Transcript.289

¹⁰¹ Transcript.289

- c. Maps depicting the locations within 5 km of the site are Figures 3A and 3B to the MGA Town Planners' report and contained in the Affidavit of Mr Scott-Mackenzie sworn 29 May 2019.

178. The general demographics within the 5 km area are:

- a. The suburbs in the 5 km area are primarily older long-established suburbs in Darwin;
- b. The proportion of persons aged 60 years or older is higher within 5 km of the site than throughout Greater Darwin, and the NT and the statistics demonstrate that the population is continuing to age;
- c. The area contains higher rates of homeownership (where the title of the property is not encumbered by mortgage or other security) when compared to Greater Darwin and the NT;
- d. A higher proportion of female population (49.2%) as opposed to the NT generally (48.2%); and
- e. Median weekly individual, household and family incomes were higher in the areas when compared to the rest of the NT, although it is noted that average weekly incomes have likely dropped since 2016 given economic conditions in Darwin and the NT in the intervening period.

179. Dr Sarah Giles provided an expert report¹⁰². Dr Giles is the clinical director of Danila Dilba Health Service, which manages the Bagot Community Clinic. In her report, Dr Giles defined a neighbourhood area within a 5 km radius of the proposed Dan Murphy's site and noted¹⁰³:

"18. It is well known that consumption of alcohol at levels that are considered hazardous, contributes to a range of individual, family and community harms to health and welfare. The data that we collect from our clinical services is recorded in the clinical Information system (CIS) and reveals that 98% of Danila Dilba clients are Aboriginal or Torres Strait Islander people. Our service level data, which can be reported by postcode locality, helps inform what we currently know about the alcohol-related harm that might be caused in the neighbourhood area.

19. The Bagot Community Clinic begun transitioning to Danila Dilba in July 2017. Our data shows that of the 1,258 people who visited Bagot clinic, most are visitors to Bagot Community. The largest group of clients using the Bagot clinic is from the 'neighbourhood area' as defined above (42%), followed by the northern suburbs (30%) and Palmerston (10%). Furthermore, people travel to the clinic from other parts of Greater Darwin (10%) and a small but not insignificant group who come from 43 different localities outside of Greater Darwin including East Arnhem, Katherine, the Barkly and Alice Springs.

¹⁰² Exhibit 2 p 199

¹⁰³ p.203-206

20. Alcohol screening has been part of the annual adult health check for some years. While many clients identify as “non-drinker” or “ex drinker” around 50% of people, drink “any amount” of alcohol. In 2018 we introduced the Audit-C (Alcohol Use Disorders Identification Test – Consumption) screening tool into the health check. This tool has three short questions that estimate alcohol consumption in a standard, meaningful and non-judgemental manner. A score of 4 for men or more (3 for women) is considered ‘positive’ and optimal for identifying hazardous drinking or active alcohol use disorders. AUDIT-C scores in the neighbourhood area revealed that while 47% of people do not drink, 41.21% have a positive score (above 4). There were 6.4% more people who screened across the whole of our service. This indicated a disproportionate number of people have a positive score, raising the possibility of hazardous drinking or active alcohol disorder.
21. As the Aboriginal Council for Drugs and Alcohol state in their 2011 guidelines; “A number of well-known terms are difficult to define or are pejorative in particular, levels of drinking are defined in many different ways and are hard to quantify”. Diagnoses in our CIS come from our clinical assessment, or from hospital or other records; consequently we do not always have diagnoses that are clinically accurate and guide patient recovery. CIS data on the main 5 ICD 9 diagnoses relating to active alcohol disorders indicate clients in the neighbourhood area are disproportionately represented by about 3%.

Social Context

22. Danila Dilba took over management of the Bagot Community Clinic in July 2018 after 12 months of hosting the service and a review that included a community consultation process. Almost 100% of people attending the Bagot clinic identify as Aboriginal or Torres Strait Islander. Although Bagot is a dry community, alcohol continues to impact on the community. The majority of the people who attend the Bagot clinic are women and children and an at risk group who are vulnerable to the effects of increased access to alcohol.
23. While our staff tell us that drinkers are an important group of clients, they also identify a significant group that are indirectly affected by high levels of alcohol consumption. These are usually women, grandmothers and carers of children, who do not drink alcohol. They are sometimes seen for routine medical care, which is when their stories are told. My staff report that they are often asked to write letters of support, for example, to change public housing because of community and domestic violence. They are the people who, despite not consuming themselves suffer some of the greatest harms through alcohol related violence.
24. Staff tell me that there are also people in the neighbourhood area who are on a good path to alcohol recovery but whose recovery would be put at risk if alcohol became easier to access and more readily available.

25. Clinic staff report that they have concerns for the safety of people who need to cross Bagot road to enter the community due to the inadequate pedestrian infrastructure on that section of the road. Those people who attend the clinic from the “Northern Suburbs would likely travel there by bus or car heading southwards along Bagot road and past the proposed site. Currently, the section of Bagot road outside the Bagot community is an 80km/h zone. Passengers travelling to the community on public transport from the northern suburbs would alight at the nearest bus stop to the community. This stop is south of the intersection of Fitzer Drive and Bagot Road on the far side of the road from the community. This section of Bagot Rd is a 6-lane high volume traffic road with a fenced traffic refuge on the central median.
26. From the Bagot clinic, we have observed that the community works hard to ‘keep the humbug out’, strengthen their sense of family and bring respect back into the community following the financial issues the community faced in 2015.
27. The homeless population in Darwin is another significant risk group when considering harm from alcohol consumption. Danila Dilba endeavours to provide services to this hard to reach group. In our total service population, there are over 800 people with “Darwin-long grass” denoted as their address (Palmerston long-grass is also used). We know from research by Larrakia Nation that close to 50 per cent of participants in this research reported drinking 6 or more days per week, and nearly three quarters of respondents were drinking at levels that posed a high risk to both their short and long term health. Furthermore, take away alcohol was found to be the primary source of alcohol for the ‘Long Grass’ population.”

Demographics in 25 km radius

180. The locality in a 25 km radius from the site on the evidence contained in the MGA Town Planners’ report ‘includes the local government areas of Darwin, ‘Unincorporated NT’ and Palmerston, along with the surrounding suburbs including Shoal Bay, Mickett Creek, Knuckey Lagoon, Holtze, Wickham, Coolalinga and portions of Howard Springs and Virginia.
181. A map depicting the locations within 25 km of the site is Figure 3C to the MGA Town Planners’ Report. The MGA Town Planners’ report provides evidence of the SEIFA scores for each SA2 areas within the 25 km locality.
182. Of all the suburbs between 5 and 25 km from the site, the only suburbs to fall below 5 on the SEIFA ranking, were Berrimah, Coolalinga, Gray, Lee Point, Moulden, Rosebery and Woodroffe¹⁰⁴ .

¹⁰⁴ Exhibit 1/U p970

Public Interest and Community Impact Test

183. In relation to the public interest and community impact test, the Commission considers that the following criteria under section 6(2) are particularly relevant:
- a. harm or ill-health caused to people, or a group of people, by the consumption of liquor is to be minimised;
 - b. liquor is to be sold, or sold and consumed, on licensed premises in a responsible manner;
 - c. public order and safety must not be jeopardised, particularly where circumstances or events are expected to attract large numbers of persons to licensed premises or an area adjacent to those premises;
 - f. business conducted at licensed premises must not cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the neighbourhood of the premises or who are making their way to or from, or using the services of, a place of public worship, hospital or school;
 - h. each person involved in the business conducted at licensed premises must receive suitable training relevant to the person's role in the conduct of the business;
 - i. the use of credit in the sale of liquor must be controlled;
 - j. practices which encourage irresponsible drinking must be prohibited;
 - k. it may be necessary or desirable to limit any of the following:
 - i. the kinds of liquor that may be sold;
 - ii. the manner in which liquor may be sold;
 - iii. the containers, or number or types of containers, in which liquor may be sold;
 - iv. the days on which and the times at which liquor may be sold;
 - n. it may be necessary or desirable to prohibit or limit promotional activities in which drinks are offered free or at reduced prices;
 - o. any sale of additional liquor due to the grant of a licence or the relaxation of restrictive conditions will not increase anti-social behaviour.”
184. In relation to the matters set out in section 6(2)(b), (c), (h), (i), (j) and (k) the Commission accepts that these criteria could be adequately addressed by the Applicant in relation to the various assurances it makes that it would ensure:

- b. that liquor would be sold on the premises in a responsible manner;
- c. that public order and safety would be addressed as far as reasonably practicable by the Applicant in relation to the premises or an area adjacent to the premises;
- h. that each person involved in the business conducted at licensed premises would receive suitable training relevant to the person's role in the conduct of the business;
- i. the use of credit in the sale of liquor would be controlled;
- j. that practices which encourage irresponsible drinking would be prohibited; and
- k. that it complied with any limits imposed by the Commission on the kinds of liquor that may be sold, the manner in which it may be sold and the days and times at which it may be sold.

185. That then leaves for consideration the criteria under section 6(2)(a), (f), (n) and (o) which we will address further within these reasons.

“Section 6(2)(a) - harm or ill-health caused to people, or a group of people, by the consumption of liquor is to be minimised.”

186. As earlier noted, the Commission accepts the Applicant’s submission that in assessing the risk of harm and taking into account the different statutory context here, once the Commission has considered the evidence and made the relevant findings of primary fact, it must then:

- a. make findings as to the existing degree of harm in the community;
- b. make findings about the likely degree of harm to result from the grant of the application; and
- c. assess the likely degree of harm to result from the grant of the application against the existing degree of harm,

as part of considering the potential impact on the community under section 6(3)(a)(i) and criteria one (1) of the CIAG and consideration of the objective in section 6(2)(a).

187. The Commission has addressed this criteria later during the course of these reasons.

“Section 6(2)(f) - business conducted at licensed premises must not cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the neighbourhood of the premises or who are making their way to or from, or using the services of, a place of public worship, hospital or school”

188. In relation to this issue, the Commission notes that it was submitted on behalf of the Applicant that¹⁰⁵:

“The concerns of the Objectors’ who were not called – Ms Crawley, Mr San Jose, Capt. Wilson and Ms Renfree - concerning the risk of additional harm from the misuse of alcohol, increased nuisance behaviour and traffic can be accepted as genuine. The evidence of Dr Giles and Ms Coalter can be accepted as giving an accurate picture of the impact of alcohol on the clients who use their services. The evidence of Mrs Fejo-Frith and Ms Secretary can be accepted as giving an accurate picture of the impact of alcohol on their communities. This evidence is of considerable assistance in assessing the likely impact of Dan Murphy’s and will be referred to below.”

189. The Commission accepts this submission and this is what we have done when considering the evidence as a whole.

“Section 6(2)(n) - it may be necessary or desirable to prohibit or limit promotional activities in which drinks are offered free or at reduced prices.”

190. The Commission has considered this factor throughout these reasons.

“Section 6(2)(o) - any sale of additional liquor due to the grant of a licence or the relaxation of restrictive conditions will not increase anti-social behaviour.”

191. The Commission has considered this factor throughout these reasons.

Community Impact Assessment Guidelines

192. In relation to the criteria under the community impact assessment guidelines, the Commission considers the following issues to be particularly relevant:

The potential harm or health impact that may be caused to people, or any group of people within the local community area, due to the availability and accessibility of an additional liquor outlet.

193. Within this criteria, the Commission is required to consider the following matters:

Are there any ‘at-risk’ groups or sub-communities within the locality? This may include –

- *children and young people;*
- *Aboriginal people normally resident within the locality and those Aboriginal people that might be likely to travel to the locality from a dry community;*
- *migrant groups from non-English speaking countries;*

¹⁰⁵ Applicant's Closing Submissions paragraph 9.16

- *people in low socio-economic areas; and/or*
 - *communities that experience high tourist/visitor numbers.*
- Children and young people
194. There was a slightly lower proportion of those aged between 0–14 throughout the 5 km locality area (18.7%) in comparison to Greater Darwin (20.1%) and the Territory (21.6%). There was also a slightly lower proportion of teenagers aged 15-19 in the 5 km locality area (5.4%) in comparison to Greater Darwin (5.6%)¹⁰⁶.
- Aboriginal people normally resident within the locality and those Aboriginal people that might be likely to travel to the locality from a dry community
195. The proportion of people identifying as Aboriginal or Torres Strait Islander (“ATSI”) within the 25 km trade area was 8.7% of the population compared to 25.5% for the whole of the NT¹⁰⁷.
196. Within the 5 km radius from the site, the proportion of ATSI residents was 7%. Within the 2 km radius, the proportion of ATSI residents was as follows¹⁰⁸:
- a. Ludmilla – 23.6%
 - b. The Narrows – 14.4%
 - c. Coconut Grove – 8.7%
 - d. Millner - 6.8%
 - e. Eaton - 1.4%
197. It is to be noted that the suburb of Ludmilla contains the highest proportion of ATSI persons of all suburbs within the greater Darwin area¹⁰⁹.
- Migrant groups from non-English speaking countries
198. There are a higher proportion of migrants from Non-English speaking countries within the 25 km zone (22.9%) in comparison to greater Darwin (18.6%). Although the proportion of migrants who do not speak English well (or at all) is only 2.8% for the 25 km zone and 2.0% for greater Darwin¹¹⁰.

¹⁰⁶ Exhibit t 1, U, p.974

¹⁰⁷ Exhibit 1, U, p.962

¹⁰⁸ Ibid

¹⁰⁹ Exhibit 1, U, p.975

¹¹⁰ Exhibit 1, U, p.980

- Communities that experience high tourist/visitor numbers

199. Not surprisingly, a higher proportion of visitors were recorded in greater Darwin (14.2%) than throughout the 5 km zone (8.9%)¹¹¹.

200. Further matters required to be considered under this criteria are the following:

*Are there any community building, facilities and areas within the locality?
Such facilities would include:*

- *schools and educational institutions;*
- *hospitals, drug and alcohol treatment centres;*
- *accommodation or refuges for young or disadvantaged people;*
- *childcare centres;*
- *recreational areas;*
- *dry areas; and*
- *any other area where young people may congregate or be attracted to.*

201. The range of community building facilities and sensitive areas within the 5 km and 800m radii of the site were identified in the map (figure 5) in the MGA planning report¹¹². The figure identifies 149 premises and of those:

- a. 15 are places of worship,
- b. 25 are childcare centres,
- c. 30 are educational facilities,
- d. 26 are recreation facilities/parks,
- e. 14 are premises involved in the provision of accommodation facilities, and
- f. 29 facilities are hospitals or involved in alcohol/drug treatment.

202. The MGA Town Planning Report provides the following useful summary of most of the relevant community buildings within approximately 1km of the site¹¹³:

¹¹¹ Exhibit 1, U, p.980

¹¹² Exhibit 1, U, p.976

¹¹³ Exhibit 1, U, p.982

“The Darwin Sobering Up Shelter

- 7.5 The Darwin Sobering Up Shelter is located at 2 Caryota Court, Coconut Grove, approximately 750m (10 minute walking time) through the local road network west from the subject land, and 550m measured as a straight line distance. Pedestrian footpaths are present on Caryota Court, Dick Ward Drive and Totem Road leading to the corner of Bagot Road. From this point, pedestrians must access Osgood Drive by crossing Bagot Road with its six lanes of traffic, which is the primary barrier to accessing Osgood Drive. No footpaths exist at the eastern side of Bagot Road, or along Osgood Drive leading to the subject land.
- 7.6 The shelter provides accommodation for up to 32 people under the influence of alcohol or other drugs who have been delivered to the shelter by the police or night patrol (no self-admission is allowed) The service operates between 4:00pm through to 8:00am, providing short-term, non-custodial and supervised accommodation as an alternative to prison for persons being intoxicated in a public place. Intoxicated people are cared for until acute intoxication has passed. The intent of the shelter is to provide relief to the police, assisting in the management of antisocial behaviour and provides a safe place for individuals of risk.
- 7.7 Discussion with staff at the Darwin sobering up shelter reveal that the occupants are present on a short-term basis overnight only and are supervised. Should a person placed in the shelter attempt to leave during their stay while becoming sober, they are restrained from leaving. Furthermore, if a person becomes unmanageable, the Police are called to take the individual away. If a person placed at the shelter manages to leave during their stay, the Police are notified. In the morning, once individuals staying at the shelter have become sober, a bus arrives to take each person to their place of residence.

The Juninga Centre (Aged Care Facility)

- 7.8 The Juninga Centre at 113 Dick Ward Drive, Coconut Grove is a 31 bed aged care service for elderly people experiencing health decline or requiring post-operative, respite or palliative care. The residents are elderly and ill, being managed by nurses and carers and are deemed a limited risk. The premises is approximately 730m north-west from the subject land measured as a straight line distance, and 1.0km by road (13 minute walking time).

The Bakhita Centre

- 7.9 The Bakhita Centre at 107 Dick Ward Drive, Coconut Grove provides short and medium-term accommodation for single men in Darwin aged 18 and above, and is located slightly over 800m west

from the subject land. Up to 30 people may be accommodated, and there is also a meal service for residents. Support staff and case managers are present to assist residents at the centre. Discussions with staff at the Bakhita Centre revealed that the consumption of alcohol and drugs is prohibited at the centre and that this prohibition is also included in the building lease arrangements. The premises is located 820m north-west from the subject land measured as a straight line distance, and 1.1km by road (15 minute walking time).

Ted Collins Village

7.10 The Ted Collins Village adjoins the Bakhita Centre at 107 Dick Ward Drive. The services feature a 20-unit housing complex that provides accommodation on 6 to 12 month leases for people in Darwin and was built in response to Darwin's extreme housing crisis. The service is available to single parent families, working couples, the disabled, young and old persons. The premises is located 820m north-west from the subject land measured as a straight line distance, and 1.1km by road (15 minute walking time).

Calvary Community Care

7.11 The Cavalry Community Care facility is located at 1/18 Totem Road, Coconut Grove, within 800m of the subject land. This facility provides services to assist people living independently in their home, including home help services such as assistance with shopping, gardening and other chores, and respite care (short – term care to relieve a primary caregiver). These services are provided off-site in the homes of individuals, away from the premises. The premises is approximately 550m west from the subject land measured as a straight line distance by road (7 minute walking time).

Mental Illness Fellowship of Australia

7.12 The Mental Illness Fellowship of Australia (NT) is located at 2/273 Bagot Road, Coconut Grove, approximately 500m north of the subject land by road (7 minute walking time) and 330m measured as a straight line. Discussions with the facility revealed that counsellors are available on site to assist individuals with a mental illness, or carer's and family members, to find appropriate support services.

NT Shelter

7.13 NT Shelter is a non-governmental body advocating for affordable housing and disadvantaged low income groups. It is not a provider of accommodation. The premises is located at 1/8 Caryota Court, Coconut Grove. The premises is approximately 690m west from the subject land measured as a straight line distance and 950m by road (12 minutes walking time).

NT Swim School

- 7.14 The NT Swim School is located at 12 Caryota Court, Coconut Grove. The premises offers swimming lessons for infants, children and adults. The premises is approximately 710m west from the subject land measured as a straight line distance and 1.0km by road (13 minutes walking time).

Kingpin Darwin, Flip-Out Darwin and Darwin Ice Skating Entertainment Facilities

- 7.15 The Flip-Out Darwin facility is located approximately 900m north-east from the subject land measured as a straight line distance, at the northern side of Osgood Drive, and 1.0km by road (13 minutes walking time). The facility caters predominantly to children and teenagers, while also hosting adult agility classes for those aged over 15. This premises does not have a liquor licence enabling the sale or consumption of liquor. The opening hours of the premises are as follows:

- Sunday-Thursday: 9am – 7pm.
- Friday-Saturday: 9am – 9pm.

- 7.16 The Kingpin Darwin indoor bowling facility is located approximately 806m northeast from the subject land measured as a straight line distance, at the northern side of Osgood Drive, and approximately 850m by road (11 minutes walking time). The facility attracts a wider range of age groups, but after 11pm, minors must be accompanied by a parent or legal guardian. Liquor is available for purchase and consumption on the premises only, with the 'house rules' prohibiting the consumption of alcohol on-site, other than those alcoholic beverages provided by Kingpin. The opening hours of the premises are as follows:

- Monday-Thursday 9.30am-7.30pm.
- Friday 9.30am-9.30pm.
- Saturday 9.30am-9.30pm.
- Sunday 9.30am-7.30pm.

- 7.17 The Darwin Ice Skating Centre is located approximately 860m northeast from the subject land measured as a straight line distance, at the southern side of Osgood Drive, and approximately 950m by road (12 minutes walking time). The premises is open 7 days a week and accommodates public ice skating, artistic skating, skating lessons, ice hockey and speed skating, in addition to birthday parties and group functions. This facility is open to persons within any age group. Staff at the centre advised that they have no liquor licence enabling the sale and/or consumption of liquor on site. The opening hours of the premises are as follows:

- Monday-Thursday 9.30am-7.30pm.
- Friday 9.30am-9.30pm.
- Saturday 9.30am-9.30pm.
- Sunday 9.30am-7.30pm.

7.18 Osgood Drive currently has no constructed footpaths from the corner of Bagot Road leading east to each of the abovementioned facilities.

The Darwin Velodrome and Bagot Park

7.19 The Darwin Velodrome is located approximately 630m north from the subject land measured as a straight line distance and approximately 750m by road (10 minute walking time). The premises is a community facility used for training and competitive cycling events. According to the City of Darwin, the Darwin Cycling Club is the primary user of the Velodrome, and on this basis, it is likely to be visited by a lower proportion of people in the community in comparison to the Kingpin Darwin and Flip-Out Darwin facilities.”

203. Using the 2 km radius adopted by the Commission would also capture Ludmilla and Millner Primary Schools, the Lutheran and Nightcliff Uniting Churches, a number of childcare centres and an Aboriginal Hostel¹¹⁴.
204. However, the Commission accepts that apart from the Darwin Indigenous Men’s Service¹¹⁵ the list of community facilities provided by the Applicant encapsulates a realistic description of those places that the Commission should have regard to under this guideline.
205. Finally, as part of this criteria, the Commission must consider the following matter:

What policies and procedures will the Applicant implement to minimise any potential harm or health impacts to these ‘at-risk’ groups or sub-communities.

The Applicant’s Proposed Risk Minimisation Strategies

206. The Applicant relied on a number of policy initiatives by government, together with its own existing policies, as well as some future strategies; which it said would reduce the risk of future harm. These included¹¹⁶:

“Responsible Service of Alcohol (RSA)

13.6 The key evidence on RSA was provided by Kay Attard, the Applicant’s National Manager for Responsible Service. Ms Attard gave evidence that she is responsible for providing advice and

¹¹⁴ See figure 5 of Exhibit 1, U, p976

¹¹⁵ P.161(b)

¹¹⁶ Applicant’s Closing Submissions paragraph 49-52

direction on all aspects of complying with local liquor laws and responsible service of alcohol procedures.

- 13.7 Ms Attard gave evidence that as part of the employee induction process to the Applicant's liquor business, each new employee is required to provide a copy of their RSA certification to prove that they have previously successfully undertaken RSA training.
- 13.8 She also gave evidence that if a new employee does not have RSA certification, RSA training is provided through the Applicant's national RSA training provider. The RSA training provided by the Applicant's RSA training provider is specific to the State or Territory in which the employee is working.
- 13.9 Ms Attard provided evidence that team members are required to complete RSA refresher courses yearly. Each store is required to complete a self-audit designed to ensure that compliance is being maintained with the refresher courses. Further, to assist compliance with this refresher schedule, RSA refresher reminders are sent to each Dan Murphy's and BWS store nationally every 6 months.
- 13.10 The Applicant's RSA policies include, among other things, policies addressing Secondary Supply, service to intoxicated persons, ID Checking Guides, and School Uniform Policy. Copies of these policies are annexed to the Affidavit of Kay Attard as KA-2.
- 13.11 Ms Attard confirmed that to her knowledge that all Wilson security personnel are formally trained in RSA.
- 13.12 Ms Attard gave evidence regarding 2 breaches that she was aware of in the last 10 years by staff of the Applicant of the liquor laws in the NT. The first was in 2008 in Alice Springs and involved a staff member deciding not to use the system that was the precursor to the current BDR. The second was in respect of a BWS Katherine team member who in December 2019 used the BDR incorrectly and scanned her own card when conducting a sale to a customer.
- 13.13 Ms Attard gave evidence that in response to the breach in December 2018, the team member in question was convicted and fined \$350 and that there was no finding that the Applicant was responsible in any way for the breach. Ms Attard gave evidence that after this incident in January 2019, the Applicant required all teams in the NT to undertake BDR training (even if it had been complicated before) to ensure team members were aware of the BDR requirements and what the Applicant's policies on the BDR were.

13.14 Ms Attard also gave evidence that, on a national scale, the Applicant reports that it experiences minimal (being 5 or less) breaches of liquor regulations yearly.

13.15 Ms Attard gave evidence that the Applicant will work with the local Indigenous communities to roll out Cultural Awareness Training for all Darwin Dan Murphy's team members.

13.16 Evidence was given by Ms Attard that the Applicant will launch a Reconciliation Action Plan (RAP) policy on 5 July 2019 during NAIDOC week. Mr Tremble gave evidence on the RAP policy 'in camera', and accordingly is not referred to in these submissions.

Banned Drinker Register

13.17 The Applicant has in place BDR policies which must be adhered to by staff. Copies of the BDR training materials are Annexure KA-1 to the Affidavit of Mr Attard.

Minimum Unit Price

13.18 Evidence has been given that Darwin Dan Murphy's will comply with all laws governing the sale of liquor in the Northern Territory, including the MUP.

13.19 Mr Scott-Mackenzie provided evidence that Dan Murphy's online sales to the Northern Territory have been compliant with the requirements of the MUP scheme since its implementation. This evidence is reflected in Dan Murphy's website Terms and Conditions.

13.20 Mr Scott-Mackenzie gave evidence that persons shopping at the Darwin Dan Murphy's store will be subject to similar terms and conditions in respect of the 'lowest liquor price guarantee'. That is that prices shown at Dan Murphy's (either in-store or on their website where a person is in the NT) are merely an invitation to treat, and not an offer to sell a product at a price specified.

13.21 Additional price checks will be conducted prior to selling any product in-store or online where the customer is based in the NT to ensure compliance with the MUP.

External design of store

13.22 A copy of the most recent plan for Dan Murphy's Darwin is annexed to the further supplementary Affidavit of Mr Scott-Mackenzie. The exterior of the store:

- a) it will be finished in the Dan Murphy's corporate colour scheme;

- b) the only exterior signage will be the Dan's Murphy's store branding; and
 - c) there will be no external product advertising.
- 13.23 Customers enter the store from the exterior through electronic sliding doors near the cashiers' area.
- 13.24 The customer then accesses the merchandised/sale area through one-way automatic electronic gates.
- 13.25 Security lighting will be installed and used in external areas during non-trade hours. The lighting fixtures will be:
- a) high mounted, vandal resistant and deflect light downwards;
 - b) positioned in a way that will not be blocked by mature vegetation; and
 - c) positioned to identify 'safe routes', such that pathways and potential entrapment spaces will be lit rather than windows and roads.
- 13.26 The CCTV system installed at the store will be located throughout the store, at the entrance to the store and facing the store's car park to achieve the best coverage of the store, provide personal safety and discourage anti-social behaviour.
- 13.27 A fence will be erected around the perimeter of the external plant area, and around the loading dock, and will:
- a) be constructed using 'Promax Security Mesh Fencing', with cut-proof features and topped with return angle 3-strand barbed wire; and
 - b) be designed to prevent persons from obtaining a foot or hand holds on the fence to frustrate attempts by persons to scale the fence.
- 13.28 Evidence was given that a 'smart pole' will be installed, which will:
- a) be connected to the NT Police service network and permit the NT Police to monitor the site on a 24 hours a day, 7 days a week basis;
 - b) have cameras installed on it that can pan and tilt, so as to provide a 360 degree overview of the area surrounding where the smart pole is located; and
 - c) have cameras installed on it capable of zooming in to a sufficient degree to identify any persons of interest, which

the NT Police consider will assist them in apprehending any persons so identified if they are of interest to the NT Police.

13.29 Evidence was given that a customer exits the store through the cashier laneways (i.e. staffed open checkouts).

13.30 There will be no external access to the roof.

13.31 The store will be fitted with a back to base security alarm system.”

207. The Applicant further submitted¹¹⁷:

“Specific measures to address issues relating to “at risk” communities.

13.42 It is submitted that the actions set out in Exhibit 3 Tab 6 will set a new standard for RSA takeaway licences in the Territory.

13.43 However, it is accepted that there are real limits on the effectiveness of those actions in reducing harm, e.g., without PALIs of the capacity to employ a person outside the police force with the same powers, the positive results from that innovation in Alice Springs, Katherine and Tennant Creek will not be available for the new store. These limits are limits which the new store would hold in common with all other existing outlets in Darwin.

13.44 Whilst Woolworths has accepted that, initially, its attempts at consultation with the 3 Indigenous Communities were inadequate, it has attempted to engage those communities over the last few months without success.

13.45 Whilst, as the Chair suggested, these communities may be free to decline those attempts that does make it difficult for Woolworths to investigate more effective ways of minimising harm.

13.46 It appears to be generally accepted that the most effective means of minimizing harm for such communities is by agreement reached between these communities and the relevant stakeholders. As it has shown by its actions in the past and consistent with the commitments it has made and will make in its RAP policy, Woolworths would welcome the opportunity to participate in any such process to ensure that, as far as possible, all steps which can be lawfully taken into minimise the risk of harm to the “at-risk” communities are taken.

Voluntary Measures

13.47 Ms Attard gave evidence that the Applicant is a signatory to the Northern Suburbs Liquor Accord.

¹¹⁷ Applicant's Closing Submissions paragraph 54-56

13.48 Mr Tremble gave evidence that the sale of 2 litre cask wine was less of an issue from the point of view of abuse when the price of them was increased from \$15 to \$32 due to the minimum pricing obligations.

Roaming Security Patrols

13.49 Evidence was given by Mr Scott-Mackenzie as to the roaming security patrols which the Applicant intends to have Wilson Security conduct near the store.

13.50 Evidence was given that the Applicant intends to engage Wilson to conduct vehicle patrols around the Darwin Dan Murphy's store, the area immediately surrounding the store and the greater area of Eaton, Darwin.

13.51 The Applicant has an existing on-going contract with Wilson Security (a division of the Wilson Group) in the Northern Territory (and throughout Australia).

13.52 Evidence was given that the Applicant contemplates there will be three patrols each day at the following times:

- i 10:00am – 12:00pm ACST;
- ii 1:00pm – 3:00pm ACST; and
- iii 4:00pm to 6:00pm ACST.

13.53 A map of the proposed route for the vehicle patrols has been included as JSM-24 to the Supplementary Affidavit of James Scott-Mackenzie.

13.54 Evidence was given that the Applicant will continue to evaluate the effectiveness of the route and the proposed times for the security patrols if and when the Darwin Dan Murphy's store is opened.

13.55 Evidence was also given that the Applicant will determine the effectiveness of an additional roaming security patrol occurring after 6:00pm ACST and extending/widening the areas the subject of the roaming patrol to include areas to the further North, South, and West of the store (being the broader Ludmilla, Coconut Grove, Nightcliff, and Millner suburbs).

13.56 The Applicant intends to liaise with NT Police and the management of the Larrakia Nation Outreach Program to determine the effectiveness of the patrols and appropriateness of the frequency and route.”

208. As part of its original application, it was proposed that the Applicant would voluntarily fund the operation of Police auxiliary liquor inspectors at its store. That proposal was not accepted by NT Police who wrote to the Applicant on 1 April 2019¹¹⁸:

“... there is no current appetite for the establishment of the PALI model in the greater Darwin area. This decision is based on many factors, including the large number of take-away outlets in the greater Darwin area and the challenge created by setting a new policy position outside of the current operating model for PALIs.”

209. It was also suggested that the Applicant would consider operating its own “private PALI scheme whereby security officers might impose BDR checks prior to persons gaining admittance to the store. Or interrogate potential customers about where they intended to consume the liquor”¹¹⁹. The Commission is aware of ongoing complaints about the fairness of the PALI system and the high cost to the community of stationing police auxiliaries at bottle shops. The success of the scheme seems to be mainly attributable to the PALI having a direct link with a police database which holds details of restricted areas, court orders including suspended sentences and outstanding warrants, none of which would be available to private security officers. It is to the credit of the Applicant's legal advisors that those measures have not been actively pursued in its final submissions. They could not have worked in Darwin and were bound to have been regarded as racially-based in their application.

210. We also do not believe that the proposed roaming security patrols are an appropriate risk minimization strategy. It would appear that the owner of the land, the Airport Corporation, has, to some extent, tolerated the presence of 'long grassers' on its property. Many of the residents of the nearby suburbs including Bagot would no doubt prefer they stayed there rather than bring their drinking and anti-social behaviour into a more residential environment.

211. The owner of this land is, of course, entitled to have trespassers removed from its property. However the idea of driving people, who have over many years established informal bush drinking camps, back into the suburbs so the land can be used for Darwin's most significant packaged liquor outlet just does not seem to be the sort of risk mitigation strategy that the Commission should be endorsing.

212. The Applicant still complains that the local indigenous communities refused to consult with it despite numerous entreaties to do so “over the last few months”¹²⁰. However, it is apparent on the evidence that contact was only made with those communities well after the matter had been referred to the Commission and the Applicant had obviously committed to this site for its proposed Dan Murphy's outlet. If the Applicant had been hoping for a

¹¹⁸ Exhibit EE, Affidavit of Commander Travis Wurst, AnnExhibit ure TW/01

¹¹⁹ Transcript, p.21

¹²⁰ Applicant's Closing Submissions paragraph 13.44

meaningful dialogue with those communities it should have sought their views prior to deciding to locate the site in such close proximity to their homes.

213. As part of its risk mitigation strategy, the Applicant relied heavily on both the MUP and BDR as measures that were already in place to restrict access to liquor by problem drinkers. However neither of those government initiatives can be regarded as the “silver bullet” in the battle to change our harmful drinking culture. Whilst there is cautious optimism that these schemes will make a positive contribution toward improving the current level of harm we are still bound to approach this application on the basis that the legislature has also embraced a number of other recommendations from the Riley Review aimed at reducing this harm. These include the moratorium on new takeaway outlets, the requirement that the Commission considers density and the new community impact and public interest guidelines.
214. We accept that this Applicant has a proven record in NT as a responsible licensee. We have no doubt that it will continue to comply with its obligations under the Act and the terms of any licence. However, as was conceded by Ms Attard, what these risk mitigation strategies (aimed at responsible service of alcohol) could achieve will for better or worse; be “no different” from what the Applicant is currently doing with its BWS stores¹²¹.

Information about the location and area in which the premises is proposed to be so as to assess any social impact on the community. This includes information about the density of licensed premises within the community area.

215. Within this criteria, the Commission is required to consider the following matters:

This may include crimes statistics, social profile information and the location of existing licensed premises.

This could also include traffic and pedestrian impact and any plans developed to address these potential issues.

216. The Commission has addressed these issues during the course of these reasons.

Volume

217. Within this criterion, the Commission is required to consider the following matters:

This may include projected sales volumes and marketing analysis, liquor type and customer demographic (where applicable this should be provided for both on and off premises sales).

218. Although some of the interstate expert reports referred to one takeaway license within the 800m radius of the site, that was the NT Oriental Emporium in Bagot Road, Whilst that store may have held a license to enable it to sell specialty

¹²¹ Transcript 90-91

Asian cooking wine, it has never been regarded as a packaged liquor outlet and as far as the Commission is aware is not currently operating as licensed premises.

219. Prior to the hearing commencing, the AHA sought the issue of a summons to obtain from the Director-General of Licensing the wholesale returns in relation to the volume of alcohol provided by wholesalers to retailers in the 25 km trade zone for the 2017 and 2018 years.
220. Much of the information contained in the reports, (Exhibits XX and YY) which were produced just prior to the hearing, had to be compiled manually and whilst we were only interested in packaged liquor sales, the exercise was more complex with Taverns and Clubs which had a mixture of on-premises and off-premises trade.
221. Given the short time frame that was available to licensing officers to create these reports, there were some obvious errors and duplication of entry which we have all had to work around. Furthermore, whereas the Commission and the parties' legal advisors have had access to the actual figures, we are cognisant of the fact that many liquor retailers would not appreciate their trade figures being put into the public domain and thereby released to their competitors. The Commission therefore determined that these actual figures should be treated as "commercial in confidence" so we will not generally refer to specific trade figures for particular outlets.
222. Within a 2 km radius of the proposed Dan Murphy's site, there are currently 4 takeaway premises, namely Sabine Supermarket, BWS Nightcliff, 5 Star Supermarket, Nightcliff and Happy Foodland. Although there was no data available for one of the smaller outlets, the total Pure Alcohol Concentration ("PAC") of liquor supplied was 85,593 litres in 2017 and 76,945 in 2018¹²².
223. Within a 5 km radius of the site, there are 22 take away premises. Although once again figures were not available for some of the smaller outlets, the available figures showed totals of 412,510 PAC litres for 2017 and 410,786 PAC litres for 2018¹²³.
224. Within a 25 km radius of the site, there already exist 55 takeaway premises. The best available data in relation to PAC sales for 2017 and 2018 respectively are 1,364,697.72 litres and 1,313,475.55 litres. This represents a 3.75% decline in consumption between the calendar years 2017 and 2018¹²⁴.
225. Using the average estimated total market size of \$245 million referred to in Mr Gavin Duane's expert report¹²⁵, the across market average cost price per litre of pure alcohol was \$179.53 for 2017 and \$186.53 for 2018¹²⁶.

¹²² Closing Submissions Miles Crawley S.C

¹²³ Ibid

¹²⁴ Applicants closing submissions – confidential schedule

¹²⁵ Exhibit 1A, Y, p 2630

¹²⁶ Applicants closing submissions

226. It is clear from the confidential data produced to the Commission that the Applicant; through its existing BWS stores and taverns, is the largest overall supplier of liquor in Darwin. In 2017 the BWS Darwin stores purchased 40.41% of all wholesale liquor supplied from NT Wholesalers. In 2018 that figure was 38.24%¹²⁷.
227. It is also clear from the evidence that BWS stores are selling alcohol at a significantly lower price than the majority of their competitors and that Dan Murphy's with its lower price guarantee is expected to be even cheaper.
228. Using a rough calculation based on existing BWS sales; Counsel for the DSH Group of Objectors has submitted that on the basis of the projected revenue in Mr Duane's report; the proposed Dan Murphy's outlet would sell over 328,000 litres of pure alcohol into the market each year¹²⁸.
229. On the evidence available, which includes the actual trade figures for the Applicant's BWS stores, the Commission considers this to be a conservative estimate. If the Commission was to apply a formula based on sales per square metres of floor space using BWS Central Darwin as the standard, then the expected volume of sales would be significantly greater than that estimated by Mr Duane. The Applicant would have access to more accurate data from which to challenge that projection by Mr Crawley SC but has not sought to do so. On that basis the Commission is prepared to find that figure *is* a reliable although conservative assessment of the projected volume of liquor that Dan Murphy's would sell into the Darwin market.
230. It is relevant to note that the original BWS store in Stuart Park in its last full calendar year of operation (i.e. in 2017) sold 6,701 litres (PAC). The proposed Dan Murphy's is projected to sell 48 times that quantity¹²⁹.
231. The projected volume of sales is also 4 times the current volume of sales within the 2 km locality and the equivalent of 80% of the current volume of sales within the 5 km radius of the site.
232. It would be by far the largest packaged liquor outlet within the 25 km zone and undoubtedly the largest liquor store that has ever operated in the Northern Territory. On current sales, this single store is projected to account for approximately 25% of all liquor sales within the 25 km trade zone.
233. Much of this hearing has centred around a contest on the evidence as to whether the increased availability of alcohol from a Dan Murphy's outlet will necessarily lead to an overall increase in consumption of alcohol within the community area. We will now turn to consider the evidence and make findings as to whether approving the application would be likely to increase the level of alcohol consumption within the local community.

¹²⁷ Applicants closing submissions ("ACS")

¹²⁸ Closing Submissions Miles Crawley S.C dated 15 July 2019

¹²⁹ Closing Submissions Miles Crawley S.C

234. The Applicant has submitted that the introduction of similar stores elsewhere including Launceston, Tasmania, has not lead to an increase in alcohol consumption. It relied on an ongoing trend of “*reducing consumption*” and submitted as follows¹³⁰:

“12.33 Trends

(a) *Reduction in consumption*

- (i) Professor Ryan referred to in her report statistics sourced from an Australian Institute of Health and Welfare report that indicated:
 - (A) consumption of alcohol per capita has been in consistent decline since the mid-2000s;
 - (B) the proportion of Australians who reported that they consume alcohol daily has decreased and those who exceed the two standard drinks per day limit for lifetime risky drinking behaviour has decreased; and
 - (C) the number of individuals reporting that they abstain from drinking has increased, and daily drinking rates have also fallen.
- (ii) Mr Duane noted in his report that in last decade (i.e. since roughly 2009), there has been an increase in the number of packaged liquor stores in Australia with the introduction of large format stores such as Dan Murphy’s (Applicant’s business) and First Choice Liquor (Westfarmers Group) into the Australian liquor market, along with increased access to packaged liquor due to the advent of online liquor sales.
- (iii) Mr Duane included in his report charts which show alcohol consumption on a per capita and age range basis.
- (iv) The accuracy of statements about the consistent long term trend of decline of alcohol consumption in Australia was not contradicted by other evidence, and for instance, was not contradicted when put to witnesses for the Objectors.

(b) *Fragmentation in liquor market*

- (i) Dr Lazarevic stated in her report that one of the trends that had been observed in the Australian liquor market, particularly based upon IRI Aztec data, was that the market was becoming more ‘fragmented’.
- (ii) Evidence was given by Dr Lazarevic of this market fragmentation with reference to IRI Aztec data, which showed that there was

¹³⁰ Applicant’s Closing Submissions paragraph 45-47

strong growth in artisan/craft products, local products, and niche products by liquor consumers.

- (iii) Dr Lazarevic, in her supplementary report, observed that IRI Aztec is considered to be one of the market leaders in liquor industry data, given that the figures are comprehensively sourced from retailers and suppliers. According to Dr Lazarevic, where figures cannot be sourced by IRI Aztec, approximations are made by the organisation. Dr Lazarevic stated that it was her opinion that IRI Aztec was the most generally reliable sources of data of the liquor industry.

(c) *Premiumisation*

- (i) Dr Lazarevic provided data in her report dated 24 September 2018 which showed that:
 - (A) customers are spending more per category, with spend per visit increasing across Australia for Dan Murphy's by 1.57% from 2017 – 2018; and
 - (B) customers are buying less in volume, with volume per visit decreasing across Australia for Dan Murphy's by 0.90% from 2017 – 2018.
- (ii) Dr Lazarevic also noted that there has been a decline in the volume of liquor sold in Tasmania by 0.3% in 2018 after the opening of Dan Murphy's Launceston in the week commencing 13 November 2016 and an increase in dollars spent on liquor sold in Tasmania by 3.45% over 'the last two years'.
- (iii) Dr Lazarevic stated in her report that the above statistics represented a trend in the liquor market known as 'premiumisation'.
- (iv) Premiumisation can be described as a behavioural phenomena observed in respect of consumers in the liquor market, whereby consumers are purchasing the same or less alcohol on a volumetric basis, but purchasing alcohol products which are of a more 'premium' quality for a higher price.
- (v) Mr Duane also referred to 'premiumisation' and stated it was a key term used throughout the liquor industry."

235. The Commission received extensive evidence on the impact of the opening of the first Dan Murphy's in Tasmania, in Launceston in November 2016. The AHA relied on projections by Mr Tisato, the General Manager of Australian Liquor Marketer, who estimated that there had been a significant increase in the volume of liquor sold in Launceston following the opening of the Dan Murphy's store. During the course of the hearing, the Applicant produced actual trade figures which impacted on the reliability of Mr Tisato's calculations. In response it was submitted by Mr Anderson for the AHA that in the year following

the introduction of Dan Murphy's, that the level of PAC consumption in Tasmania was flat despite a national declining trend.

236. However, as Mr O'Loughlin for the Applicant put to Mr Tisato in cross-examination, Tasmania had the highest increase in population for that year, so there would have been a decline in per capita consumption despite the total level remaining static¹³¹.
237. In relation to the experience elsewhere following the introduction of a Dan Murphy's outlet and the evidence before the Commission, the Applicant made the following submissions¹³²:
- “14.1 Mr Duane gave evidence of the impact of the opening of Dan Murphy's Launceston upon the Tasmanian liquor market.
 - 14.2 Mr Duane and Dr Lazarevic gave evidence that after Dan Murphy's opened in Launceston, Tasmania, the total liquor market contracted in overall sales and volume of alcohol sold.
 - 14.3 Mr Duane's supplementary statement dated 4 June 2019 contains his evidence in response to the statements of Mr Paul Tisato of Australian Liquor Marketers. Mr Duane's reply memorandum applied all of the assumptions made by Mr Tisato but differs to Mr Tisato's report in that it is based upon actual sales data for BWS stores in Launceston and Dan Murphy's Launceston.
 - 14.4 Mr Duane's opines in his supplementary statement that the opening of Dan Murphy's Launceston only increased the overall liquor market sales in Launceston by 1.8% (when adjustments are made to isolate other impacts upon the Tasmanian liquor market during the relevant period, which included the opening of a new BWS in Kings Meadows). However, because there was a 2.6% increase in the cost of alcohol per litre, the growth is in fact minimal if any.
 - 14.5 This 1.8% increase is in the dollar value of sales, not the volume of alcohol sold.
 - 14.6 Mr Duane noted that in the period following the opening of the Dan Murphy store in Launceston overall consumption of alcohol for Tasmania actually fell slightly and concluded that the Dan Murphy's had little or no effect on the volume of alcohol consumed in that region.
 - 14.7 Mr Duane provided evidence that the opening of Dan Murphy's Launceston had a negative impact on sales of other stores in the Launceston area.
 - 14.8 The impact upon sales attributable to the opening of Dan Murphy's Launceston was in Mr Duane's opinion was an approximate decline on sales of:

¹³¹ Transcript 326-327

¹³² Applicant's Closing Submissions paragraph 56-58

- (a) 25% in respect of BWS stores (excluding the new BWS store which opened in Kings Meadows in the same period); and
- (b) 20% in respect of independent stores.

- 14.9 Mr Duane said that in his opinion the impact of Dan Murphy's Launceston's impact upon other retailers in the Launceston liquor market was consistent with his analyses of the expected impacted of Darwin Dan Murphy's on other retailers in the Darwin liquor market.
- 14.10 Mr Duane notes that his analysis of the impact of Dan Murphy's Launceston on the Tasmanian liquor market was consistent with the analysis in his report.
- 14.11 Mr Tisato on behalf of the AHA (NT) provided evidence of his opinion of the impact of Dan Murphy's Launceston on the Tasmanian Liquor Market, based upon industry (IRI-Aztec) data and his own data estimates. Mr Tisato did not have the benefit of actual sales figures for the BWS stores in Launceston and Dan Murphy's Launceston.
- 14.12 Mr Tisato opined that Dan Murphy's Launceston caused a 17% increase in the overall liquor market in Launceston.
- 14.13 Mr Tisato's analysis is shown in a table at the rear of his report. The table has three parts were the top part shows the extent to which Dan Murphy's took sales from independent competitors in the first year of opening.
- 14.14 An outlet in Newstead had a fall in sales from \$5.6 M to \$2.5 M and another outlet had a large drop of 47.5%. The average drop in sales for competitors was 20.1%.
- 14.15 It is of note that Mr Duane was an independent expert, and is a qualified economist and demographer. Dr Lazarevic was also an independent expert and qualified in marketing and customer research. Mr Tisato did not disclose having any particular qualifications to give the opinion he did.
- 14.16 Mr Duane and Dr Lazarevic gave evidence which was their opinions of issues they identified with Mr Tisato's analyses. That evidence is contained in Dr Lazarevic's supplementary statement at paragraphs [11] – [29].
- 14.17 The second part of the table was Mr Tisato's estimate of how Dan Murphy's affected BWS sales in the Launceston region. Tisato did not have the actual figures and had to estimate the sales figures of BWS for that year, and his estimate was that Dan Murphy's took 6.2% of BWS sales.
- 14.18 Mr Tisato was also required to estimate the sales for the new Dan Murphy store. He acknowledged this that there were neighbouring towns to Launceston and that there could be sales outside of the notional market where people come from Burnie or Devonport to make

purchases. To account for this, he reduced 20% of the new Dan Murphy sales as these sales would be consumed consumption in a neighbouring market. This approach to estimating 20% of all sales being outside of the Launceston area was criticised by Dr Lazarevic in her supplementary report.

- 14.19 Mr Tisato conceded that his figures included a further new outlet and to properly calculate the effect caused by Dan Murphy's only his total was "adjusted downwards to remove the sales emanating from the opening of [the] additional outlet".
- 14.20 The result is shown at the bottom line of the table where, with the estimated sales of BWS and the new Dan Murphy's, Mr Tisato calculated that there was an increase in sales of \$11.6 million or 17%.
- 14.21 During cross-examination, Mr Tisato accepted that Mr Duane's calculation was the same as his except that he uses the actual figures:
- And so that's the major difference, or it's the only difference isn't it, between yourself and Gavin Duane, he had the advantage of actuals, you had to estimate?---Yes absolutely yes.
- 14.22 Mr Tisato stated that his estimate of 20% out of zone sales suggesting that it was a "big assumption" and that he had "no idea.
- 14.23 The above analysis by Mr Duane and Mr Tisato (respectively) was for the years 2016 and 2017. The further affidavit of Shane Tremble contained graphs showing Launceston Dan Murphy's taking an extra proportion of the sales, but that overall sales actually continued to fall."
238. The submission that Dr Lazarevic is "an independent expert" is an overstatement having regard to her status as a Woolworth's employee when she provided her original statement. However we accept the general thrust of the Applicant's submissions that the Launceston experience does not support the claim by some of the Objectors that alcohol consumption increased in that community following the establishment of Dan Murphy's. However while alcohol consumption in the Northern Territory has also been in decline over the past ten years, we are still consuming alcohol at a per capita rate 20% higher than the rest of Australia.
239. In referring to Exhibits XX and YY which contained the PAC wholesale data, Mr Duane rightly observed that the figures showed a 3.8% decline in the volume of sales within the Darwin Market between 2017 and 2018. Given the problems with the data entries behind the compilation of the exhibits, we have some doubts over the accuracy of that figure.
240. A declining population may also have played some part in that result. We do accept, however, that there was a continuing decline in per capita consumption of alcohol despite the establishment of at least three larger scale outlets during that period.

241. Despite the overall consumption rates declining within the Northern Territory, it is not so evident how far that trend extends to the “problem drinker” cohort. “Residents of the Northern Territory have the highest rate of lifetime risky drinkers across the nation than any other age group to drink at levels that place them at risk of lifetime harm (35% compared with the national average of 20%)”¹³³
242. It is also not clear on the evidence before us in relation to other jurisdictions whether the downward trend in alcohol consumption has abated to any extent in those areas where a large scale packaged liquor outlet opens.
243. The Applicant relied upon the evidence of Dr Lazarevic to the effect that customers are spending more per visit to Dan Murphy's whilst the volume of alcohol per visit is reducing. She said that from 2017 to 2018 there was an increase spend of .157% whereas the volume of alcohol declined by .9% for the same period¹³⁴ and referred to this as "premiumisation".
244. Both Dr Lazarevic and Mr Tremble relied on this national trend toward "premiumisation" as justification for their assertion that a Dan Murphy's outlet could still derive market share without increasing the overall level of alcohol in the community. Whether consumers' tastes in liquor are maturing or whether the retailers are just increasing prices to offset falling demand, or government taxes have increased, may not be particularly relevant in the Northern Territory.
245. An examination of consumer trends elsewhere in Australia discloses a movement toward wine rather than beer. According to Mr Duane in Dan Murphy's stores elsewhere in Australia wine sales account for the majority (34%) of an average sale-per-visit as compared with 26% in BWS nationally and 20.2% in BWS Northern Territory stores. Whereas in the Northern Territory beer (and this is overwhelmingly non-craft beer) accounts for the majority (44%) of BWS sales¹³⁵. Furthermore according to the affidavit of Mr Tremble¹³⁶ 94% of white wine and 74.5% of red wine sold by BWS in Darwin is sold at less than \$20 a bottle.
246. The Applicant declined to provide any information as to how much of that wine is sold in the lowest price categories¹³⁷. The Northern Territory is also bucking the national trend toward boutique and craft beer with the already low sales in these products declining over the last year¹³⁸.
247. The Applicant has submitted that the spreadsheet of data of BWS sales in Darwin attached to Mr Tremble's affidavit¹³⁹ points to growth in both the premium red and white wine categories. However, those increases are insignificant when compared to the volume of sales of the cheapest categories

¹³³ Duane Report, Exhibit 1A, p 2615

¹³⁴ Exhibit 1A, W, p.2560

¹³⁵ Exhibit 1, DDD

¹³⁶ Exhibit 1, p.44

¹³⁷ Evidence of Mr Scott-McKenzie, tp.63-66 and Mr Tremble, tp.162-163

¹³⁸ Evidence of Mr Tremble, tp.78

¹³⁹ Exhibit 1, HH, Annexure ST-7, pg.4126

248. Mr Tisato's evidence that approximately 50% of the volume of sales of bottled wine at Dan Murphy's is from the below \$10 wine category¹⁴⁰ was also not challenged or contradicted by the Applicant¹⁴¹.
249. It was also conceded by the Applicant that 93% of sales of bottled spirits would be in the "non-premium" category at a price point of between \$35 and \$61¹⁴².
250. It is apparent to the Commission that the MUP has effectively "premiumised" the Territory wine market into the above \$10 category whether it likes it or not. Accordingly, if the Applicant is committed to providing Northern Territory consumers with value for money, there is little point in it stocking that range of bottled wines which account for 50% of its wine sales elsewhere in Australia. Given that context and the continuing popularity of "non-boutique beer" with Territory drinkers, Mr Tremble's claim that the size of the new store was justified in order to provide "the very large number of product lines that are currently not available in the Territory¹⁴³" rings hollow.
251. Mr Tremble's other justification for a store which is more than twice the size of the average Dan Murphy's outlet and would therefore, be one of Australia's largest liquor stores was "delivery lead times"¹⁴⁴. However similar constraints would apply with the Applicant's BWS stores in Darwin which have much less space available. Mr Tremble confirmed that the Nightcliff BWS trade figures revealed it probably had the highest level of alcohol sales per square metre of any BWS store in Australia¹⁴⁵.
252. As a result of this evidence, if delivery issues were a significant driver of the outlet's size, then we would have expected that factor to have been identified as part of the initiating application rather than emerging for the first time in cross-examination. Furthermore if ensuring an adequate stockpile of product was a motivating factor in determining the size of the store it might have been achieved through a larger than usual storage area rather than increasing the overall trading area.
253. Although the Applicant has focused firmly on the fact that it will be bringing Territorians an opportunity to purchase a range of premium wines that have not been available in Darwin before¹⁴⁶, it is apparent that only 113 square metres of the store's total area will be devoted to premium wines. That is a mere 5.97% of the total area. Whereas 408 square metres, being 28.29% of the trading area, will be devoted to beer¹⁴⁷. When it was suggested to Mr Scott-Mackenzie that the area devoted to beer in the proposed Darwin store was greater than in other Dan Murphy's outlets he put it down to the¹⁴⁸:

¹⁴⁰ Exhibit 2, p.91

¹⁴¹ See evidence of Mr Tremble, tp.166

¹⁴² See evidence of Mr Tremble, tp.195

¹⁴³ Transcript 194

¹⁴⁴ Ibid

¹⁴⁵ Transcript 161

¹⁴⁶ See evidence of Mr Tremble, Transcript 162 & 194

¹⁴⁷ Exhibit 1, M, p.409

¹⁴⁸ Transcript.69

“... ever growing range of beers that are available through craft and that sort of stuff...” .

Given the evidence that the already minimal sales of craft beer are actually declining in the NT, we find this justification difficult to accept.

254. Much of the cross-examination of both Mr Tremble and Mr Scott Mackenzie by Mr Anderson for the AHA focused on the capacity of the Applicant to sell standard beer at close to the MUP. Mr Anderson compiled a comparative list of the prices at which bulk beer was being sold by various BWS outlets in Darwin compared to the price at which the same product was being sold by Dan Murphy's in Perth¹⁴⁹.
255. Unfortunately Mr Anderson neglected to factor in the additional costs borne by NT retailers due to the *Environmental (Beverage Containers and Plastic Bags) Act 2011 (NT)*. That additional cost amounts to between \$3 and \$4 per carton of beer sold in the Territory, whereas there is no similar impost on Western Australian retailers. However even when the container levy is factored into the comparison it was evident from exhibit 4 that Dan Murphy's in Perth was able to offer popular brands of beer at significantly lower prices than were available at BWS stores in Darwin.
256. Of particular note, on 4 June 2019, a 30 can block of Victoria Bitter was on sale at Dan Murphy's Hyde Park WA for \$49.90, whilst it was being sold at BWS Darwin City for \$73. Even allowing for the container levy; that represents a saving of almost \$20 on a popular brand of beer and would take the cost close to the MUP.
257. Whilst the Commission accepts that this is just one product in what is anticipated will be an extensive line of products likely to be provided by Dan Murphy's into the Darwin market, it provides a good example of the potential impact on price.
258. We accept that discounts will be offered from time to time by retailers for promotional and other reasons and that these will not necessarily be maintained. We do not accept the Applicant's submission that we should adopt the South Australian Book Price file as a more accurate price guide than what was publicly on offer in WA¹⁵⁰. Both Mr Scott Mackenzie and Mr Tremble were guarded in their responses to questions about the proposed price list for Darwin. This may be understandable; however it is not helpful for the Applicant to now assert that we should make findings from a price guide which was not adopted by any of its witnesses.

¹⁴⁹ Exhibit 4

¹⁵⁰ Applicant's Closing Submissions paragraph 14.58

259. Having regard to:

- a. the size of the area within the proposed store for the display of beer products,
- b. the existing higher proportion of beer sales in the Territory compared to the rest of Australia,
- c. the Applicant's undoubted ability to identify profitable market opportunities, and
- d. the demonstrated capacity of the Applicant to offer beer for sale at lower prices than is currently available,

we find that granting this application would lead to the price of beer coming down.

260. Whilst Dan Murphy's, with its promise of lower prices, would likely offer beer at the lowest cost, its competitors would probably also reduce prices to maintain market share. We acknowledge the benefits that would flow to responsible consumers from lower price through increased competition. However, those benefits need to be weighed against the harms that might be visited upon the community through the irresponsible consumption of liquor.

261. With the Commissioners' combined life experience in the Northern Territory of well over a century, we are far from persuaded that beer will not "become a product of choice for problem drinkers¹⁵¹". We, therefore, find that some of those problem drinkers with a preference for beer, who choose to spend as much as they can on liquor, will be able to obtain more beer for their money if the application is granted. Beer will increasingly become a product of choice for problem drinkers as its price approaches the MUP¹⁵².

262. Although the Applicant may be keen to promote its range of premium products to the more affluent sector of the Darwin market, it is clear that it will also have the greatest range of cheap wine around the MUP. Those products will be attractive to problem drinkers as well as those responsible consumers who will be looking for the best quality wine that can be purchased at or near the MUP. Once again it is a matter of weighing the potential risk of harm against the benefits that would flow through competition to responsible drinkers.

263. During the course of the hearing¹⁵³ and in its closing submissions¹⁵⁴ counsel for the Applicant submitted that the Commission could impose restrictive conditions in relation to the sale of cheaper liquor products if the Commission held ongoing concerns over the impact the store would have on the level of

¹⁵¹ Applicant's responsive submissions 2.7

¹⁵² Dr. Rhonda Smith, Exhibit 2, p 75

¹⁵³ Transcript.411

¹⁵⁴ Applicant's Closing Submissions paragraph 18.16

problem drinking in the community. As we have already indicated¹⁵⁵, we do not have the power to grant this application subject to conditions. In any event we are not sure how realistic that proposal was, because as was pointed out in Mr Anderson's submissions in response, if the Commission did impose conditions that accorded with the central thrust of this application and forbade the sale of standard beer products, bottled wine at less than \$20 a bottle and spirits at less than \$68 a bottle, then the existing Stuart Park store would be large enough to cater for the demand for that premium product range.

264. We have come to the view, on the evidence and on our individual experience of Dan Murphy's stores elsewhere, that the size and layout of this store has been influenced by the much higher demand for standard beer products in Darwin than elsewhere in Australia and that the Applicant is hoping to capture a significant proportion of that market with the lower prices it is able to offer. If the Applicant wanted to convince us that this was not its intention, then a smaller store or less space devoted to the sale of beer would have been more compelling.

265. A further difficulty we see with imposing any condition relating to a minimum price for beer is that it would be akin to the Commission setting a higher MUP for this particular licensee. It is relevant to note that the Riley Review originally recommended a MUP set at \$1.50. However the Legislature determined to lower it to \$1.30. In these circumstances, the Commission could be seen as attempting to usurp the clear intentions of the Parliament by imposing a higher threshold for this licensee as well as breaching competition policy principles.

266. Further matters required to be considered under this criterion are the following:

The Commission will consider information available to it about the current alcohol consumption rates for the community area.

267. The Commission has considered these matters during the course of these reasons.

Density

268. Apart from assessing the current volume of alcohol sales within the community area and any likely increase; the Commission is also required by sections 6(3)(a)(iv) to have regard to:

"the density of existing liquor licenses within the Community area."

269. The issue of density was considered by the Riley Review, where it was observed¹⁵⁶:

"Overall there is strong and consistent evidence of an association between outlet density and alcohol-related harm, both internationally and

¹⁵⁵ P.131

¹⁵⁶ Riley Review, p.58 @ 2.6, Exhibit t 2, p.446

in Australia” (W Gilmore, W Liang P Catalano etc. off-site outlets and alcohol related harm 2015).

“The literature supports the assertion that density contributes substantially to alcohol related harms, especially violence. The way the various studies determine density is restricted to measuring outlet density by counting numbers of outlets and then converting them to a rate (e.g.. per resident, per unit geographical area, per road miles) while excluding measures that quantify alcohol sales made by these outlets. A limitation inherent in count based modes (even in longitudinal studies) is that they cannot account for variation between outlets and their variable capacity to influence alcohol availability in the communities in which they operate”¹⁵⁷.

270. The Riley Review concluded¹⁵⁸:

“The evidence clearly shows density, as defined by the number of outlets and the volume of sales, for a particular geographical area or region, are essential considerations in assessing the public interest. In considering density, it is not sufficient to simply look at the number of outlets. A consideration of density must necessarily extend to the volume of alcohol sales of particular categories of licenses”.

271. Recommendation 2.6.1 of the Riley Review was that:

“The *Liquor Act* provide that density (however described) is a matter to be taken into account when considering the public interest and community impact.”¹⁵⁹

272. The Legislature adopted that recommendation through the enactment of section 6(3)(a)(iv), which mandates the consideration of density in the application of the community impact and public interest tests. That mandatory requirement to consider density is a factor which differentiates the Northern Territory *Liquor Act* from similar legislation in many other jurisdictions.

273. The Applicant made the following submissions in relation to Density¹⁶⁰:

“6.4 ‘Density’:

... is a noun and is defined as ‘the quality or condition of being dense’. ‘Dense’ (the adjectival form of the word) is defined as ‘having its constituent particles closely compacted together; thick; compact; of close molecular structure’.

6.5 Density is material principally in the context of the sale of liquor for consumption on premises. That, it is submitted, is the principal reason for its inclusion in s.6(3)(a). In Tab 15 of the Applicant’s closing

¹⁵⁷ Riley Review, p.59

¹⁵⁸ Ibid

¹⁵⁹ Riley Review, p.60

¹⁶⁰ Applicant’s Closing Submissions paragraph 16

submissions folder, a schedule is included which outlines the relevant academic literature cited in both the Applicant's and Objectors' written statements which examine "density". The schedule details how the academic literature deploys the term "density" in a highly variable way, using different combinations of factors listed in the table above according to the limits on the primary information which is available. The Riley Report acknowledges that density can be measured in various ways.

- 6.6 As was submitted by the Applicant's Senior Counsel to Commission on 11 June 2019, in the particular circumstances of this matter, considerations of density add nothing of substance to the consideration of volume. As Professor Ryan explains in her report, in relation to sale for consumption off premises, "outlet density has more significance where there is a direct relationship between density and volume of sales." In this instance, we have direct evidence of the market in Darwin which shows that, when new takeaway outlets open, there is significant "cannibalization" of the turnover of existing outlets but that overall the volume of sales remains static or reduces: see paragraph [14] below. Accordingly, where, as here, there is reliable evidence about volume, there is no point considering density.
- 6.7 During the course of this hearing, it has been suggested that 'density' in s.6(3)(a)(iv) may be an inquiry '[...] looking at the capacity of an outlet to put more liquor out into the community.' It is respectfully submitted that capacity is immaterial unless it translates into the actual supply of a volume of liquor into the community. Capacity is not productive of harm – at least in the context of takeaway licences – unless it results in increased consumption overall. The fact that the same volume of liquor is purchased from a different combination of outlets is, by itself, not an indicator of harm."
274. The schedule of literature concerning density at tab 15 of the Applicant's closing submissions, reveals that most research papers have measured density simply as a number of outlets. The Applicant realistically concedes that the different combination of factors used to measure density varies¹⁶¹:
- "... according, it appears to the limits on the primary information which is available."
275. In this matter, the Commission has had the benefit of extensive data on the actual volume of wholesale liquor that has been provided to particular retail outlets within various locations within Darwin¹⁶². An examination of that data reveals the obvious limitations of any simple outlet count measure of density.
276. Within the 2 km radius of the site, one of the existing outlets is selling more than ten times as much alcohol as each of its three competitors. In the 5 km zone, one outlet is selling more than 30 times the volume of alcohol sold by some of

¹⁶¹ Ibid

¹⁶² Exhibit WW & XX

its smaller competitors. The proposed Dan Murphy's store is projected to sell more than 200 times the amount of alcohol sold by some of the existing liquor stores within this zone. Therefore treating it as just one more outlet for the purposes of density would be misleading.

277. Professor Ryan in her evidence before the Commission was asked by counsel for the Applicant¹⁶³:

“And, in terms of making an assessment about the public interest in this matter and particularly, the risk of harm, which is the area you've been looking at, what would you be advising the Commission as the best approach or approaches to the issue of density in this application? – I would agree with the propositions in Riley that it's more important to link a range of issues, including sales volume and looking at particular populations who are at risk.”

278. Having regard to the matters referred to earlier from the Riley Review, Professor Ryan's evidence and the evidence before the Commission, it is our view that in considering “density” we must take into account the predictive quantity of alcohol sales by outlets and “their variable capacity to influence alcohol availability in the communities in which they operate”¹⁶⁴.

279. The Applicant argues that capacity is immaterial unless it translates into the actual supply of a volume of liquor into the community¹⁶⁵. However, the research papers referred to (and accepted by the Riley Review) link increased density and the exacerbation of harms associated with alcohol¹⁶⁶.

280. Dr Michael Livingston, one of the preeminent international researchers into the relationship between the availability of alcohol and alcohol-related harm, provided evidence to the Commission in the form of an affidavit. He referred to the research which had been accepted by the Riley Review in reaching its conclusion that increasing density of takeaway outlets leads to an increase in harm and said¹⁶⁷:

“5.3 Thus, while increasing availability has been shown to be linked to increases in harm, this association does not seem to be driven by changes in consumption across the whole population. Instead, it may be that expanding alcohol availability affects the consumption of only a small number of marginalised heavy drinkers, while the impact on the majority of the population is limited”.

281. A significant increase in density such as is proposed by this application is bound to drive prices for alcohol in the community area lower and this, in turn, will allow problem drinkers to access more alcohol for the money they have available, subject to the constraints of the MUP.

¹⁶³ Transcript 230

¹⁶⁴ Riley Review, p.59

¹⁶⁵ Applicant's Closing Submissions paragraph 16

¹⁶⁶ Riley Review, p.59

¹⁶⁷ Exhibit 2, p.136, para 5.3

282. We find that an increase in density is relevant as a predictor of an increase in the volume of liquor sales to risky drinkers and associated harms.
283. We do not think that it can be disputed that approving this application would lead to a massive increase in the density of packaged liquor outlets in both the 2 km and 5 km zones. The increase in capacity to influence alcohol availability in the 25 km trade zone would increase by approximately 25%. That is also a very significant increase in density.

Findings 25 km Trade Zone

284. As previously indicated ¹⁶⁸, granting this application would amount to a 25% increase in the density of liquor outlets in the trade area. The Applicant and its expert Mr Duane point to the experience elsewhere in Australia following the introduction of Dan Murphy's outlets over the past 10 years, where alcohol consumption has continued to decline. Although it was suggested by some of the Objectors' witnesses that there was evidence of increased consumption in both Ballina NSW and Launceston Tasmania following the introduction of a Dan Murphy's store, we are not satisfied on the evidence that this was the case¹⁶⁹.
285. The Applicant points to the introduction of the "2 large format outlets" of "The Bottle-O" and "Cellarbrations" at Pinelands as having had no impact on the declining trend of liquor consumption. We do not find that comparison helpful. Despite some controversy over the actual size of the trading areas of these outlets it is clear that neither of them is in the same league as the proposed Dan Murphy's store, nor for that matter the Applicant's existing BWS outlets, most of which sold much more liquor by PAC in 2018 despite their smaller floor space. As was pointed out in the Riley review:¹⁷⁰
- "The issue is not the floor space but the volume of alcohol sold into the community."
286. Woolworths, through its sophisticated marketing systems and purchasing power, has a proven record as a market leader in generating sales of all its products. It was evident to us that Dan Murphy's outlet will have a much more significant impact as far as its capacity to influence consumption than either of these so-called "large-format outlets".
287. Nevertheless, we find on the evidence before us, that any increase in alcohol consumption in a radius of between 5 km and 25 km from the site, following the establishment of a Dan Murphy's would be primarily confined to problem drinkers and would amount to a minimal reduction in the rate of the ongoing decline in consumption.

¹⁶⁸ P.232

¹⁶⁹ P.234-237

¹⁷⁰ Exhibit 2, p.447

Findings 5 km Zone

288. As indicated previously¹⁷¹, the establishment of a Dan Murphy's outlet would result in an 80% increase in the density of liquor outlets in this community area. It is reasonable to assume that most residents of this area who were intending to drive to an outlet to purchase their liquor would consider the possibility of a relatively short trip to Dan Murphy's for the broader range and lower prices. This would also place pressure on other liquor retailers within this area to reduce their prices in order to retain market share. We would expect a lowering of liquor prices across the zone.
289. Whilst this would have no impact on the level of consumption by responsible drinkers we find that there would be an increase in the amount of alcohol that problem drinkers would be able to access through the lower prices, both directly from Dan Murphy's and indirectly through the lower prices being offered by its competitors. We consider that such a massive increase in density as is proposed will lead to an increase in consumption by problem drinkers and subsequently to an increase in the level of alcohol-related harm.
290. We believe that the academic research papers accepted by the Riley Review (such as W Gilmore, W Liang, P Catalano, R Pascal, A Broyd, E Lensvelt, G Kirby and T Chikritzhs 2015 Off Site Outlets and alcohol related harm)¹⁷² establish that the link between increased density of takeaway outlets and an increase in alcohol related harms arises through both the better availability and lower liquor prices for the problem drinker through greater competition. We find that the increase in consumption by problem drinkers within 2 km and 5 km of the site will be moderate.

Findings 2 km Zone

291. The increase in density for this community area is 400%. On ordinary economic principles, this would be expected to result in even greater competitive forces driving prices down even further. However there are a limited number of other outlets in this area with the largest by far of the current liquor stores being the Applicant's own BWS, adjoining the Nightcliff Woolworths shopping complex. Given the size of the other few licensed stores it is difficult to envisage how they could retain their existing market share once Dan Murphy's opened. However we consider that there are other particular factors at play in this community area that are likely to lead to an increase in the harmful consequences of alcohol abuse if the application is granted.
292. Although Mr Duane in his original report¹⁷³ identified Aboriginal residents as a particular risk group, he surprisingly stated within that report¹⁷⁴:

¹⁷¹ P.231

¹⁷² Exhibit 2, p.447

¹⁷³ Exhibit 1A, Y, p.2590-2663

¹⁷⁴ Exhibit 1A, Y paragraph.6.4.3

“It would appear that the identified key at risk groups within the Darwin community are not in the immediate proximity of the site”.

293. As should be well known; the Bagot Community (with the highest concentration of Aboriginal residents in Darwin) is 1,000 metres from the site. As well as having permanent Aboriginal residents; many Aboriginal people from remote communities temporarily reside at Bagot. The proposed site is also the closest liquor outlet to the light aircraft terminals where most Aboriginal passengers from remote communities arrive on their visits to Darwin. Taxis collecting passengers from dry bush communities will invariably be ferrying them along Osgood Rd. and into Darwin right past the proposed Dan Murphy’s.
294. Taking into account the other vulnerable communities of Kulaluk and Minmarama, as well as the institutions referred to in paragraph 202, it is difficult to comprehend how Mr Duane failed to appreciate the significant risk factors associated with the proposed site.
295. Professor Roberta Ryan, in her social impact report, stated:¹⁷⁵
- “Whilst Indigenous Australians are more likely to report, they abstain from alcohol compared to non-Indigenous Australians, they are also more likely to drink at levels considered risky. Residents of remote and very remote areas are also two times more likely than those in major cities to drink alcohol in risky quantities. Whilst the proportion of lifetime and single occasion risky drinkers declined everywhere in Australia from 2010 to 2016, in comparison it increased in remote and very remote areas”.
296. Professor Ryan later observed that in light of that data¹⁷⁶:
- “... the three communities (i.e. Bagot, Kulaluk and Minmarama) are clearly communities which could be considered ‘at risk’ from the proposed Dan Murphy’s store. The likely impact of the proposed new store is a matter which requires careful consideration”
297. The proposed Dan Murphy’s store will be the closest liquor outlet to the residents of Bagot and their visitors. The evidence of Ms Fejo-Frith was unequivocal. People from her community would access the store because of cheaper prices, and it would also be attractive to people coming from other communities because of cheap liquor¹⁷⁷.
298. As noted earlier, the Applicant relies on the affidavit of Thelma Schwartz, a legal aid lawyer from Cairns who also worked in Darwin many years ago. She gave *anecdotal* evidence to the effect that her indigenous clients in Cairns did not buy their liquor from either of the Dan Murphy’s outlets. That may have been Ms Schwartz’s experience in Cairns, but the Commission has heard compelling

¹⁷⁵ Exhibit 1A, CC, p.3172, para 4.2.3

¹⁷⁶ p.3183, para 4.6.2(e)

¹⁷⁷ Transcript.264

evidence from both Ms Fejo-Frith and Ms Secretary who have no doubt that their community members will access this store if it is built.

299. We have not been provided with any evidence as to the location of the Cairns Dan Murphy's stores in relation to concentrated populations of indigenous people; however we would be surprised if either of them were the closest outlet to that city's largest indigenous community.

300. Relying on the evidence of Ms Schwartz and Professor Ryan the Applicant submits that¹⁷⁸:

“... outlets of this kind are unattractive to members of the demographic who engage in harmful consumption”.

301. Perhaps that may have been true to some extent in the past; however with the introduction of the BDR mandated in all takeaway outlets and the increasing use of CCTV by these retailers, we are not convinced that this is currently the case. It is also relevant to note that Woolworths, in its application for a liquor licence for BWS Central Darwin, also stressed in that application that it would be an upmarket prestige wine store that would not be attractive to the “risky drinker demographic”. It was not disputed by Mr.Tremble¹⁷⁹ that Woolworths agreed to the following licence condition:

“It is part of the concept of this licence that the premises and both fixtures and fittings will have the appearance of an upmarket or quality liquor store and shall be operated to standards consistent with this concept. The premises will stock a comprehensive range of product lines and the wine range of the business will have a premium wine emphasis.”

302. Anyone who has regularly visited that outlet can see that the concept of an “upmarket or quality liquor store” has certainly not appeared to deter the ‘risky drinker’ demographic from attending that store.

303. Although we accept that problem drinkers will not necessarily travel long distances to obtain cheap liquor, the short-sighted decision to establish the outlet so close to these vulnerable communities will provide harmful drinkers with easier access to the cheapest alcohol in Darwin. We find that there will be a significant increase in consumption by problem drinkers within the 2 km community area.

304. The Applicant submitted that¹⁸⁰:

“The facts that Dan Murphy's is unlikely to add to the existing problems with the misuse of alcohol including by itinerants is reinforced by the absence of objections from the Police, Darwin City Council, and any agency of the Northern Territory Government.”

¹⁷⁸ Applicant's Closing Submissions paragraph 16.7(c)(ii)

¹⁷⁹ Transcript.189

¹⁸⁰ Applicant's Closing Submissions paragraph 16.8

305. Although it is accepted that no Government agency lodged an objection; the response from Department of Health (“DOH”) included the following comments¹⁸¹:

“a) DOH is concerned that this License application is not merely a substitution of premises as the changes are substantial including modifying the license from a small takeaway liquor outlet into the largest liquor take away outlet in the jurisdictionand should be subject to the current 5 year moratorium on new takeaway licenses.”

306. The DOH official also said¹⁸²:

“c) DOH has some concerns about the risks related to the proximity of the nearby Aboriginal Alcohol Protected communities of Bagot, Minmarama and Kulaluk, and potential impacts on their residents and visitors from a possible “honeypot” effect to those communities by Aboriginal drinkers keen to be in proximity to the NT’s largest takeaway outlet...”.

307. Further, although NT Police did not lodge an objection, Commander Wurst provided an affidavit¹⁸³ in which he deposed as follows¹⁸⁴:

“The Northern Territory Police Force (“NTPF”) did not initially provide a formal objection to the proposed substitution of the Stuart Park BWS liquor license to the proposed Darwin Dan Murphy’s site in Eaton. The position of the NTPF on this application by Woolworths Group Ltd is neutral. The application is neither objected to formally, nor endorsed in any way.”

308. Commander Wurst also gave evidence at the hearing where he outlined what he regarded as the risks associated with the application which are dealt with elsewhere in this decision.

309. The Act requires the Director-General of Licensing to notify certain agencies including DOH, NTPF and the local council of applications such as these and the Commission welcomes their input when it is forthcoming. In this matter, we have been grateful for the information provided by both the DOH and the NTPF. It has assisted us in our deliberations. However the fact that none of the agencies that were consulted lodged a formal objection is certainly not determinative of the issues we need to decide and in this case, having regard to the comments which have been made, it is not a factor we have afforded significant weight.

¹⁸¹ Exhibit 1, p.252

¹⁸² Ibid

¹⁸³ Exhibit EE

¹⁸⁴ Ibid, para 6

Any cultural, recreational, employment or tourism benefits for the local community area

310. Within these criteria, the Commission is required to consider the following matter:

Will the proposed licensed premises provide economic benefits, cultural, recreational or tourism benefits or any additional employment opportunities and to what level?

311. In relation to the issue of economic benefits and any employment opportunities, the Applicant submitted as follows¹⁸⁵:

15.4 Dan Murphy's will stimulate further development in Darwin Airport Central and stimulate economic growth in Darwin because it will:

- a) stimulate further development of Darwin Airport Central;
- b) bring to Darwin Airport Central a unique retail offering and result in a diverse and complementary tenancy mix;
- c) punctuate the gateway to Darwin Airport Central;
- d) add and enhance the amenity of the precinct; and
- e) provide a retail offering that does not exist in Darwin.

15.5 In relation to the construction, the proposed store will cost approximately \$15M to build with between 129-140 jobs created.

15.6 Two additional tenancies proposed near the Dan Murphy's site have been made conditional on Darwin Dan Murphy's proceeding.

15.7 Without Dan Murphy's Darwin Airport Central will not proceed for the foreseeable future. Despite the NT Airports' daily efforts there are no alternative tenants the calibre of Dan Murphy's, and as such there is no alternative tenant, and the site will sit vacant if Dan Murphy's does not proceed."

312. Although it is accepted there would be an estimated 80 constructions jobs created during the building of the proposed store; the claimed additional 129 related jobs in the broader community are based on generalized assumptions and include both full and part-time workers for only one year¹⁸⁶. Given the estimated capital costs of the building will amount to \$11.5M of the estimated total cost of \$15M; it is likely that a substantial amount of these monies will be spent on sourcing material from outside the Northern Territory.

¹⁸⁵ Applicant's Closing Submissions paragraph 64-65

¹⁸⁶ Exhibit .1, Y, p.2659

313. In relation to the projected benefits of ongoing employment at the proposed Dan Murphy's store; Mr Duane resiled from his earlier prediction of a net gain of 36 positions,¹⁸⁷ but still maintained that there would be an increase in employment.
314. Mr Tisato from the Liquor Wholesaler ALM; provided a statement on behalf of the AHA in which he predicted local job losses would result from the introduction of Dan Murphy's. He said¹⁸⁸:
- "These local job losses will occur due to more of the logistics and supply chain being conducted interstate, with independent wholesalers further squeezed from the market and the viability at local warehouse's under further challenge. Further, the proportion of total sales going through a large big box format will increase, which provides significantly lower staff to sales ratio than smaller location stores".
315. Messrs. Kelly¹⁸⁹, Dunne¹⁹⁰ and Reid gave similar evidence on the likely negative employment and other impacts of the introduction of Dan Murphy's which was not challenged by the Applicant.
316. We have experienced ourselves Dan Murphy's stores in other parts of Australia. The supermarket style checkout is streamlined and is no doubt an efficient use of staff which helps to deliver the 'lowest price guarantee'. On all the evidence before us, we do not accept that granting the licence would result in an overall increase in ongoing employment within the liquor industry.

Why the grant of a relevant application is in the public interest and how the additional liquor outlet will benefit the local and broader community?

317. Within these criteria, the Commission is required to consider the following matters:
- *What additional services will be provided other than simply an additional outlet for the sale of liquor – this may include accommodation or dining?*
 - *Will the proposed licensed premises provide additional choices of service or products that are no available in the area?*
 - *Will the proposed premises provide liquor in a manner known to be safe and to minimise adverse impacts?*
 - *Will it use existing premises, improve or add to existing premises or is it a new premises?*
318. The Applicant relies on the fact that if the store opens in this location, there will be a "very significant upgrade to the intersection at Osgood Rd and Bagot Rd which will result in the significant improvement of the intersection"¹⁹¹.

¹⁸⁷ Exhibit 1, KK, p.25-28

¹⁸⁸ Exhibit 2, pp.41-42

¹⁸⁹ Exhibit 2, pp.44-46

¹⁹⁰ Exhibit 2, pp.47-54

¹⁹¹ Applicant's Closing Submissions paragraph 15.14

319. The Applicant also relies on the projected “aggregate savings in the range \$4M per annum” that Mr Duane estimates Darwin consumers will enjoy through increased competition in the liquor market¹⁹². Further, that consumers would also enjoy a wider range of liquor products than are currently available¹⁹³. The Commission accepts that these are all legitimate benefits which need to be taken into account.

320. On the evidence before the Commission, together with the notorious fact of the success of Dan Murphy’s elsewhere in Australia, the Commission is satisfied that the proposed store would deliver a range of benefits to the community by catering to the requirements of consumers for liquor and related services and would contribute to the proper development of the liquor industry. It would introduce a broader range of product at lower prices and would enhance the diversity of liquor products.

321. We also accept the observations of Kourakis CJ in *Liquorland (Australia) P/L v Woolworths Ltd*¹⁹⁴:

“Such superstores are the “heavy artillery” in the trade war between the operators which dominate the industry. It can also be accepted that such stores are being built because many members, and significant sections, of the public, shop there because those stores meet their needs”.

322. The Commission also accepts that, but for the significant points of distinction which exist between the social conditions in Darwin and elsewhere in Australia, National Competition Policy principles would provide significant support for the application. We acknowledge the importance of competition in delivering greater prosperity to the community. The Commission is also not unmindful of the fact that some of the individual Objectors in this matter have themselves significant holdings within the Northern Territory liquor industry. Whilst they may be entitled to object on loss of amenity grounds, the complaints from competitors of a potential increase in alcohol-related harm have been afforded no weight.

CONCLUSION

Existing Level of Harm

323. We have referred earlier¹⁹⁵ to the evidence of Dr Giles concerning the levels of alcohol related harm for those Aboriginal patients that access the services of the Bagot clinic. Dr Giles also noted¹⁹⁶:

“16. A recent study in Western Australia highlighted that the heaviest drinking 10% of the population consumed 54.4% of all alcohol consumed¹⁹⁷. This

¹⁹² Applicant’s Closing Submissions paragraph 15.23

¹⁹³ Applicant’s Closing Submissions paragraph 16.1

¹⁹⁴ (2018) 130 SASR 366

¹⁹⁵ P.179

¹⁹⁶ Exhibit 2, p.202-203

¹⁹⁷ M Livingston & S Callinan, ‘Exhibit amining Australia’s heaviest drinkers’ 2019 *Australian and New Zealand Journal of Public Health*

study was in line with other international studies which showed that the heaviest 10% of drinkers in the US consumed 55% of all alcohol and that in the UK, the heaviest drinking 4% of the population consumed 30% of all alcohol.¹⁹⁸

17. Without evidence to the contrary, it is my opinion that the same proportional rates of alcohol consumption in Western Australia can be assumed in the Darwin market. Aboriginal people are overrepresented in the top 10% of heaviest drinkers in the Northern Territory.¹⁹⁹ Any marginal increase in the consumption of alcohol is likely to disproportionately affect these 'at risk' people."
324. Doctor Giles also helpfully obtained police crime statistics from the police PROMIS database in relation to alcohol related offending within the 5 km radius of the proposed store.²⁰⁰ It is clear from the table that there has been a consistent increase in the level of alcohol related offending in that community area between 1 April 2016 and 31 March 2019. At para 30 of her affidavit she noted²⁰¹:
- "30. From 1 April 2018 to 30 March 2019, I make the following observations based on the data above and the further research I have done which can be found in **Annexure SG-4** from the 'neighbourhood area':
- 1) Alcohol related Domestic Violence offences account for 71% of all Domestic Violence offences in the neighbourhood area.
 - 2) The rate (per 100,000 people) of Domestic Violence offences is 29% higher in the neighbourhood area compared with the rest of Darwin.
 - 3) The rate of Alcohol involved Domestic Violence offences is 41% higher in the neighbourhood area compared with the rest of Darwin.
 - 4) In the 'neighbourhood area', alcohol is involved in:
 - a. 64% of all assaults,
 - b. 36% of sexual assaults,
 - c. 40% of robbery offences, and
 - d. 74% of all breach of violence order offences."
325. We also had the evidence from Ms Fejo-Frith and Ms Secretary regarding the significant social problems which currently exist in their communities as a result of alcohol abuse²⁰².

¹⁹⁸ Ibid, 1

¹⁹⁹ Australian Institute of Health and Welfare: National Drug Strategy Household Survey 2016, 78

²⁰⁰ Exhibit 2, p.215, Annexure SG 4

²⁰¹ Exhibit 2, p.207, para 30

²⁰² P.164-175

326. Lest it be thought that misuse of alcohol is confined to indigenous Territorians, 24.9% of the non-indigenous adult population is at risk of long term harm through excessive alcohol consumption²⁰³.
327. As earlier noted, Professor James Smith is the Father Frank Flynn, Fellow and Professor of Harm Minimisation at Menzies School of Health Research. He has lived and worked in the Northern Territory for over 10 years. In his affidavit, he observed that whilst the level of per capita consumption of alcohol in the NT had decreased by 14% over the past 7 years, it was still the highest in Australia²⁰⁴. He also noted that despite the declining level of consumption the social cost of alcohol had significantly increased²⁰⁵.
328. The basis for this conclusion and his assessment of the current costs to the community were as follows²⁰⁶:

“Understanding the social and economic costs and harms of alcohol consumption in the Northern Territory”

17. In 2009, Menzies School of Health Research (Menzies) and the South Australian Centre for Economic Studies (SACES) released a report estimating that the harms from and costs of alcohol consumption in the Northern Territory equate to \$642 million, with tangible costs of \$406 million and intangible costs of \$236 million. This indicated that the NT had the highest per capita alcohol consumption in Australia at that time. It provides a reliable baseline of the costs associated with alcohol in the NT.
18. A similar analysis of the social and economic costs and harms of alcohol consumption in the NT, again conducted in partnership between Menzies and SACES, was released in February 2019 (Smith et al. 2019a). This report indicates that the **total social costs of alcohol in 2015/16 was \$1.38 billion**, with tangible costs of \$701.3 million, and intangible costs of \$685.56 million (excluding the lost quality of life due to addiction amongst dependent drinkers and the family members of dependent drinkers – the magnitudes of which are very substantial) (Smith et al 2019a). These calculations include harms associated with:
- a) Alcohol attributable premature mortality;
 - b) Hospital morbidity;
 - c) Health care costs such as ambulance, primary health care, aged care and workforce costs;
 - d) Road crash costs;;

²⁰³ Transcript 248

²⁰⁴ Exhibit 2, p.149, para 12

²⁰⁵ Ibid, p.150, para 18

²⁰⁶ Exhibit 2, p.149, para 17-20

- e) Alcohol attributable crime such as police, court, correction system and victim of crime costs
- f) Child protection costs.

19. While comparisons between the 2009 and 2019 estimates are difficult, primarily due to a change in methodology to estimate costs, it is clear that the total social and economic costs of alcohol in the NT have risen over the past decade with a more nuanced understanding of additional impacts, such as those relating to child protection.

20. The following information has been drawn directly from the 2019 report about the social and economic costs and harms of alcohol consumption in the Northern Territory (Smith et al. 2019a):

- a) The costs and harms of alcohol consumption in Australia are well documented, significant and have impacts across society including premature deaths, heavy use of the health system, high rates of crime (particularly violent crime and antisocial behaviour), child abuse and neglect, and road crashes (AIHW 2018a).
- b) While alcohol consumption in the NT appears to have decreased slightly over the past decade, this report shows that the costs and harms associated with alcohol consumption have not. Indeed, the scale of the harm has continued to increase.
- c) At a population level, it is now estimated that the total social cost of alcohol in 2015/16 was \$1,386.8 million, with tangible costs of \$701.3 million, and intangible costs of \$685.5 million (excluding the lost quality of life due to addiction amongst dependent drinkers and the family members of dependent drinkers – the magnitudes of which are less certain but likely to be very substantial). A more detailed outline of total quantifiable costs of alcohol in the Northern Territory in 2015/16 by source of cost is included at Annexure JS3.
- d) At an individual level, the estimates total social cost of alcohol in 2015/16 was \$3,832.19 intangible costs per adult resident of the Northern Territory, with tangible costs imposing a further cost of \$3,745.75 per adult. This equates to a total estimated impact of \$7,577.94 per adult (excluding the cost of alcohol dependence to the dependent drinker and their family).
- e) At a population level, total costs of premature mortality equate to \$785,537,761 including both tangible and intangible costs.
- f) A summary of the tangible costs includes:
 - i Total health costs equate to \$100,177,195;

- ii Total road crash costs equate to \$57,626,900 (excluding mortality and hospital separations);
 - iii Total quantifiable costs of crime equate to \$272,577,240;
 - iv Total child protection costs equate to \$170,912,745;
- g) The most significant intangible costs are:
- i Intangible costs of premature death of \$652.5 million;
 - ii Intangible costs of permanent impairment from road crash injuries of \$17.1 million;
 - iii Intangible costs of crime (e.g. pain and suffering, reduced feeling of safety) of \$15.9 million.
- h) The following estimations have been made regarding the impact of alcohol on the Northern Territory in 2015/16:
- i There were an estimated 141.9 net premature deaths caused by alcohol;
 - ii Crime caused by alcohol accounted for \$75.9 million of police time while the total costs of alcohol attributable crime are just under \$142 million;
 - iii Alcohol is estimated to be responsible for between 4.5 per cent and 11 per cent of cases of child abuse and neglect, creating costs of \$8 million to \$20 million in increased child protection spending by the NT Government, and imposing lifetime costs of \$62 million to \$384 million on the victims of child abuse and neglect;
 - iv Almost fifty per cent of road crash deaths and twenty per cent of serious injury crashes are attributable to alcohol.
- i) The 2004/05 estimate of \$642 million, when adjusted for inflation over the intervening period using the Australian Bureau of Statistics (ABS) Consumer Price Index, is equivalent to \$844.4 million in 2015/16. The new estimate, therefore, represents an increase in real costs of 64.2 per cent.
- j) In addition to the total costs, it is also interesting to understand which groups in society are facing the costs, this is known as the incidence of the costs. The costs can initially fall on one or more of four broad community groups:
- i consumers of the substance (although as a social cost study many of these own costs have been excluded);

- ii other individuals;
 - iii businesses; and
 - iv government.
- k) For instance, in relation to alcohol consumption, the incidence of the costs may fall as follows:
- i Drinkers – the physical and psychological pain of premature death and alcohol-related illnesses or injury etc.;
 - ii Other individuals – impact of crime, impact of child abuse etc.;
 - iii Business – production losses resulting from smoking-related mortality and absenteeism and damage to or theft of property;
 - iv Government – funding of criminal justice system costs and healthcare.
- l) Public finance literature makes the distinction between the legal (or impact) incidence and the economic (or effective) incidence of a cost. Legal incidence refers to a legal requirement to pay the cost. Economic incidence refers to who ultimately bears the cost after all the economic responses to its initial imposition have been worked through. For example, business may be able to pass on the costs of productivity losses to consumers in the form of higher processor to workers in the form of lower wages. The same issue arises in regard to the incidence of social costs.
- m) The International Guidelines for Estimation the Cost of Substance Abuse (Single et al, 2001) note the inherent difficulty of estimating the economic incidence of a social cost, which involves following the various paths of possible cost shifting between community groups, and conclude that incidence analysis should be confined to examining the initial burden of consumption costs among the community groups. In line with this view, Collins and Lapsley restricted their analysis to estimation of the impact incidence on households, business and governments (Collins and Lapsley 2008, p. 12). This approach was followed in the recent NT report.
- n) Annexure JS4 illustrates the distribution of the estimated social costs of alcohol use between different groups of stakeholders in the community. In this analysis, households are treated as one group.

- o) The bulk of the impacts of alcohol falls on households due to the preponderance of intangible costs in the total, all of which fall on households.
- p) Looking at tangible costs, the greatest share fall on the NT Government which bore a tangible cost from alcohol of \$228.0 million in 2015/16, largely through increased expenses. Businesses also faced a substantial burden from alcohol, \$211 million, although the majority of this burden arises through reduced potential income due reductions in the workforce.
- q) In addition to these costs, it is estimated that there are very substantial costs arising from alcohol dependence. However, because of uncertainty about the number of dependent alcohol users in the NT, and on the extent to which some of the intangible costs of dependence are picked up in other cost items included in the abovementioned analysis, they have been excluded from the cost summaries in Annexure JS3 and JS4.”

329. Professor Smith referred to the same police PROMIS data as had been obtained by Dr Giles and noted²⁰⁷:

“23.This data reveals two important considerations.

- a) Prima facie total alcohol-related offences, including that relating to alcohol-related assault and sexual offense are higher in the suburbs in the closes proximity to the proposed location of Dan Murphy’s.
- b) Alcohol-related offences have continued to increase in the broader region, which implies that an increase in alcohol availability, accessibility or volume across the regions has significant potential to exacerbate rather than reduce the harms of alcohol consumption, and subsequent alcohol-related offences, across the region.”

330. In relation to alcohol-related emergency department presentations at Darwin Hospital, Professor Smith stated²⁰⁸:

“24.In addition to alcohol-related offences, alcohol-fuelled violence is known to lead to alcohol attributable emergency department presentations (Ramamoorthi et al. 2013). This is considered to be a significant public health issue in Darwin, with both sociological and epidemiological studies supporting this (Ramamoorthi et al. 2013; Ennis and Finlayson 2015).

25. Ramamoorthi et al. (2013) has described the disproportionate impact of the relationship between alcohol and violence among the Aboriginal and Torres Strait Islander population of the NT. A co-author of this paper, Dr Rama Jayaraj, a researcher at Charles Darwin University, has provided

²⁰⁷ Exhibit 2, p.154, para 23

²⁰⁸ Exhibit 2, p.154, para 24-29

a statement to describe and further validate these claims (Annexure FS6). This work has been used to inform the development of the *NT's Domestic, family and Sexual Violence Reduction Framework 2018-2028*.

26. Total alcohol attributable hospital presentations at Royal Darwin Hospital has reduced from 3785 presentations over 12 months in 2016 to 3270 presentations over 12 months in 2018 (NT Department of Health, 2019). This represents a 15.7% decrease in hospital presentations over a three-year period (see Annexure JS7).
27. Noteworthy is that this period mentioned above (25) includes the reintroduction of the Banned Drinker Register in September 2017; and the establishment of the Minimum Unit Price (MUP) in October 2018. While it is only the early stages of implementation of these population-wide legislative measures, they are showing promising outcomes in relation to the reduction of alcohol-related emergency department presentations in Darwin (Smith and Adamson 2018; Smith 2018; Smith et al. 2019a).
28. Any attempts to increase the availability, access or volume of alcohol in the NT (including Darwin) could seriously jeopardise this public health gain made in relation to alcohol-related emergency department presentations.
29. In my professional view, the proposed license substitution has significant potential to impact negatively on alcohol-related emergency department presentations and alcohol-related offences – potentially reversing the decrease noted in alcohol-related emergency department presentations; and further exacerbating the increase in alcohol-related offences.”
331. Professor Smith also referred in his report²⁰⁹ to the “boomtown” phenomena which he said exists in Darwin following the INPEX project. He said that in fast growing male populations, the research shows that violence is a major consequence of excessive alcohol consumption. When questioned at the hearing about the fact that the “boom” conditions no longer prevail in Darwin he said²¹⁰:

“But the research would show that the impacts of boom towns have a longer legacy affect”.
332. During the course of the hearing, the Commission received into evidence an updated report on domestic and family violence rates in Australia²¹¹. The report shows that while in all other jurisdictions, apart from Tasmania, there had been a decrease in the rate of domestic violence; the Northern Territory had experienced an increase of 12.5%.

²⁰⁹ Exhibit 2, p.155, para 31

²¹⁰ Transcript.347

²¹¹ Exhibit ZZ, Australian Institute of Health and Welfare Report, 2019 “Family, Domestic and Sexual Violence in Australia: continuing the national story”

Findings as to the existing degree of harm in the community

333. Despite the continuing decline in overall consumption of alcohol, the costs to the community of dealing with the harmful consequences of alcohol abuse is increasing. As was noted by the Riley Review²¹²:

“It is this alcohol related harm, both to the individual drinker and the broader community that continues to have a devastating effect throughout the Northern Territory.”

334. The 2019 Menzies report “The Social and Economic Costs and Harms of Alcohol Consumption in the Northern Territory” referred to above makes it clear that despite some recent improvements there is currently a high level of alcohol-related crime and ill-health across the Territory which includes the 25 km trade area. We also find, based on the evidence referred to above, that the level of existing harm is significantly higher within both the 5 km and 2 km community areas.

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

335. In relation to the 25 km trade area, we accept, based on the evidence of Mr Duane, that there will be no appreciable increase in the overall consumption of alcohol and that the consumption level will continue to decline if the application is granted. However for the reasons outlined in paragraph 287 we find that there would be a slight increase in the level of consumption by risky drinkers, particularly those attracted to cheaper beer.
336. The increase in density will, in accordance with the research studies referred to earlier²¹³, likely lead to an increase in alcohol related crime and anti-social behaviour, which we find would be minor. Although there would be consequential adverse effects on the health of some risky drinkers; we are unable to find that would be significant.
337. In relation to the 5 km community area, we have already found that there will be a moderate increase in the consumption of alcohol by risky drinkers²¹⁴. The levels of alcohol related crime in this area are already elevated above the average for the rest of Darwin and service providers such as Danila Dilba believe that any additional liquor consumed by risky drinkers in this community is likely to increase the already unacceptable level of alcohol related crime including domestic violence²¹⁵.
338. It is the community area or locality within 2 km of the proposed site that we have the most concerns about an increase in the harmful consequences of alcohol abuse. This area has the highest concentration of Aboriginal people living in Darwin. The Act clearly recognises the particular vulnerability of this sector of

²¹² Exhibit 2, p.396

²¹³ P.290

²¹⁴ P.289

²¹⁵ Exhibit 2, p.209

our community as have the expert witnesses of both the Objectors and the Applicant. The three permanent residential communities of Bagot, Minmarama and Kulaluk are also a destination for other Aboriginal people that are likely to travel to Darwin from dry communities. There is already a resident “long grass” community camping near the site and as we have previously observed it will be on the route to Darwin for most Aboriginal people arriving at the light plane hangars from dry communities.

339. We have earlier referred to the compelling evidence given by Ms Fejo-Frith and Ms Secretary about the devastating impact alcohol abuse is having on their communities. Of particular importance in our view, is the observation by Ms Fejo-Frith that not only are drinkers neglecting their children now in their pursuit of alcohol, but they are also providing a flawed role model for their children in the future. Ms Fejo-Frith said²¹⁶:

“... it’s the children that are watching this ... day to day, then as they get older, they’re just going to naturally think, oh this is what our parents did, so we can do the same”.

340. In his affidavit, Professor Smith recounted the view of another Aboriginal resident of the community area, Aunty Bilawara Lee, he said²¹⁷:

“I contacted Aunty Bilawara Lee on 27 May 2019. She identifies as an Elder of the Larrakia Nation and Traditional Custodian of Larrakia land. As a Ludmilla resident, she indicated strong verbal opposition to the Dan Murphy’s site, with deep concerns for the health and wellbeing of the local Aboriginal communities previously described in this affidavit. She also expressed concerns for long-grassing communities in areas adjacent to Dickward Drive, Rapid Creek and Jingili Water Gardens.”

341. Many of the Objectors have raised concerns over the risk to pedestrians wanting to access the new store. Those of us who have been here for more than 25 years may recall the tragic regularity of pedestrian deaths on Bagot Road associated with intoxicated people accessing or leaving the old Nightcliff Hotel which was then located on what is now the Homemaker Village complex.

342. The Applicant has fairly acknowledged that the site presents a risk for pedestrians and has, together with the owner of the land, commissioned extensive reports from appropriate experts on the best way to redesign the Bagot Road, Totem Road and Osgood Drive intersection so that both vehicular and pedestrian traffic can more safely access the proposed store. Although some of the Objectors complained that the expert traffic engineers were not available for cross-examination, the Commission takes the view that it is not for us to second guess the relevant authorities within Department of Infrastructure Planning and Logistics (“DIP”) who would be required to approve the remedial work on the intersection in accordance with Australian standards.

²¹⁶ Transcript 264

²¹⁷ Exhibit 2, p160, para 66

343. The Applicant has also invited us to make any approval of the application subject to a condition that the remedial traffic work be carried out. Despite our finding earlier that we do not have that power, as foreshadowed during the hearing²¹⁸, we find that the proposed controlled pedestrian crossing at the intersection would accord with the appropriate standards.

344. However, given the clear evidence from Ms Fejo-Frith and Ms Secretary that their community members will not necessarily use a pedestrian crossing; the risks will still remain. This is particularly so because of the complicated nature of the intersection. Pedestrians on the south-west corner of the intersection would be required to negotiate a “turn left” lane, then three sets of pedestrian activated crossing lights. Pedestrians from the north-west corner would be required to use four sets of pedestrian activated crossing lights. Pedestrians from the north-east corner would need to negotiate a “turn left” lane followed by two sets of pedestrian activated crossing lights.

345. Commander Wurst, in his affidavit, stated²¹⁹:

“Road crash data indicates that there is significant risk of pedestrians being struck by motor vehicles causing serious injury or death on the main roads in the area of the site location. Since 1 July 2016, there have been 5 pedestrian strikes where serious injury was caused to the pedestrian. The last recorded fatal crash occurred on Bagot Road on New Year’s Even 2016.”

346. And²²⁰:

“Historically, it is known that people who are already intoxicated or do not have the means to drive will walk to such takeaway liquor outlets in an effort to access alcohol. The risk is increased when pedestrians have to traverse a busy road like those in and around the current proposed site location”.

347. Some might argue that pedestrians have to take responsibility for their own safety, however that overlooks the cost to the community of the health care that may be required, the distress caused to the motorist who may be the “innocent agent” of the death of another and the families who are left to grieve the loss of a loved one.

348. It might also be suggested that there is no purpose in intoxicated pedestrians attending the Dan Murphy’s store because RSA practices would prevent them being served. However, that does not accord with our experience of what regularly occurs around packaged liquor outlets in Darwin, where intoxicated people congregate in the hope of ‘humbugging’ relatives or friends to buy or share alcohol. It is also relevant that the proposed development will include a fast food outlet which is another factor that is likely to attract people who have been drinking to the site.

²¹⁸ Transcript.224

²¹⁹ Exhibit EE, para 34

²²⁰ Exhibit EE, para 37

349. We find that despite the worthwhile proposed improvements to this intersection; allowing the application would increase the risk of death or severe injury to pedestrians wanting to access the store.
350. This locality or community area seems to have a higher concentration of supported accommodation centres and drug and alcohol treatment services than would be found in other areas of Darwin. Within close proximity to the site there are three supported accommodation centres, two drug and alcohol treatment centres, as well as the Mental Illness Fellowship of Australia and DIMs. Within the 5 km community area there are a further 9 supported accommodation centres and 25 drug and alcohol treatment centres²²¹.
351. As was stated by Professor Smith²²²:

“The sale and provision of alcohol through takeaway outlets is generally at odds with the aims of abstinence or minimising the harms of alcohol advocated within these centres. This could jeopardise client outcomes, thus increasing rather than minimising harms”.

The Commission agrees with those observations.

352. The Commission finds that approving the application would lead to a significant increase in the level of alcohol related harms which already exist in this community.

Is the grant of the application in the public interest?

353. The onus is on the Applicant to satisfy the Commission that the grant of the application is in the public interest. It is, therefore, our task, in light of our findings, to determine whether the Applicant has satisfied us that the approval of the application will advance the public interest by advancing the objects in section 3(1) and (2) of the Act.
354. The Commission is of the view that:
- a. The proposed development will cater to the requirements of consumers and will, harm considerations aside, contribute to the responsible development of the liquor industry;
 - b. There is significant support for the new store from some sections of the community who would welcome the opportunity to choose from a wider range of liquor products and take advantage of the lower prices that would be offered;
 - c. There would be an increase in competition and the benefits that such competition provides to responsible consumers;

²²¹ Professor Ryan, Exhibit 1A, p.3185

²²² Exhibit 2, p.157

- d. There would be some economic benefits from the construction of the store²²³ and the proposed improvements to the intersection adjacent to the store would be of wider benefit to the broader community;
- e. The harms associated with the proposed development would be significantly less for those living between a 5 km and 25 km radius from the site. Although there would be a minor increase in the level of drinking by risky drinkers, particularly beer drinkers, the benefits to that section of the community are more closely capable of being balanced with the expected increase in harm;
- f. Based on the significant increase in density of liquor outlets, 80%, which would arise through the grant of the application within the 5 km community area, we find that there would be a moderate increase in the consumption of liquor by risky drinkers with an attendant increase in alcohol-related crime and anti-social behaviour. This area already has elevated levels of alcohol-related crime so a moderate increase in alcohol-fuelled crime would be of great concern to the people living in this area and would weigh against the benefits they might expect from the proposed store being developed;
- g. It is that community area within 2 km of the site that stands to be most adversely impacted were the application to be approved. We find that the harmful consequences of easier access to cheaper alcohol for this community will be significant and greatly outweigh the benefits the store would provide. Having heard the evidence, and from our own experience with life in Darwin, we are left wondering why this site with all its attendant risks was chosen as the place to build the Territory's largest liquor store? We consider that Professor Smith's statement at the hearing is particularly apposite²²⁴:

“... what makes good business sense is different from what might be a good public health decision. And I think that's ... what is at play here. ... I know that as somebody who drives past that site as a resident of Darwin, that would be a pretty damn good site to get a lot of business. It is a store that I would probably go to myself as a middle-income person living in Darwin. I don't think it is a sensible place for – sensible location for an outlet of that nature in Darwin.”

- h. As previously indicated whilst the proposed Dan Murphy's store would be expected to provide a service to consumers outside the 2 km community area we find that the consequential harm and ill health to a large number of at-risk groups within the 2 km community area will be significant.

355. In balancing the:

²²³ P.310-316

²²⁴ Transcript 354

- a. competing objectives of sections 3(a) and (b),
- b. having regard to the other objects of the Act,
- c. together with the matters specified in sections 6 (2) and (3) and section 6A, and
- d. the Minister's Community Impact Assessment Guidelines,

the Commission is of the view, on the evidence presented, that the Applicant has not satisfied us on the balance of probabilities, that the benefits to be derived from the grant of the application outweigh the potential for a significant increase in harm due to the use of liquor, over and above that already occurring within the community areas. Accordingly, as outlined at the commencement of this Decision Notice, the Commission has determined in accordance with section 46A(6) of the Act to refuse the application for substitution of the premises in the licence.

356. Although we have focussed to some extent on the increase in liquor consumption by risky drinkers from within the 2 km locality the harmful consequences of their alcohol abuse will certainly not be confined to that zone. Alcohol fuelled crime and anti-social behaviour is already a major concern within the broader Darwin community. Punitive measures targeting problem drinkers have failed to improve the situation and have instead, imposed additional costs within our justice system for which we are all paying. The NT Government commissioned a major independent review of alcohol policy and the subsequent legislative and policy reforms have both defined the parameters of our independent inquiry and set out a pathway toward a future for our children which will be less blighted by the ravages of 'grog'. The Commission has concluded that if we are to "stay that course" then this application as currently formulated is not in the public interest.
357. That the Commission has arrived at this decision may not be surprising to some given the findings of the Riley Review which declared that there were already too many packaged liquor outlets in the Territory and recommended a moratorium on any new licences. However, as we have found that the moratorium does not apply to this application, we have dealt with it on its merits, in accordance with the law and on the evidence before us.
358. It is most unfortunate that the Applicant did not engage in consulting the local community prior to committing to this site because it would, in our view, have come to the realisation that this was not an appropriate position for any liquor store, let alone one the size of Dan Murphy's.
359. Having now heard all the evidence and considered the detailed and thoughtful submissions of the Applicant, the Commission wishes to make clear that it is not opposed to the **concept** of a Dan Murphy's store in Darwin. However, this is provided that the limitations associated with a substitution application, adverted to in paragraphs 131-133, can be addressed, an appropriate site can be identified and provided that the density impact can be reduced.

360. Finally, the Commission notes that during the hearing it was stated by counsel on behalf of the Applicant that if the application for substitution under section 46A was unsuccessful, the Applicant did not pursue its application for a variation. As a result of this indication and in light of the Commission's determination to refuse the application for substitution, the Commission has also determined in accordance with section 32A(7) of the Act to refuse to vary the conditions of the licence.

Notice of Rights

361. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to refuse to vary the conditions of a liquor licence pursuant to section 32A of the Act is specified in the Schedule and is a reviewable decision. A decision to refuse the application for substitution of premises is also specified in the Schedule and is a reviewable decision.
362. Section 120ZC of the Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision must be lodged within 28 days of the date of this decision.
363. For the purpose of this decision, and in accordance with section 120ZB(1)(b) and (c) of the Act, an affected person includes the following:
- a. the Applicant;
 - b. Danila Dilba Health Services;
 - c. NT Council of Social Services;
 - d. Association of Alcohol and Other Drug Agencies NT;
 - e. Aboriginal Medical Services Alliance NT;
 - f. Public Health Association of Australia – NT Chapter;
 - g. FARE;
 - h. Amity Community Services Inc;
 - i. RAAF Darwin Golf Club;
 - j. Jennie Renfree;
 - k. Guy Dunne;
 - l. Marcelino San Jose;
 - m. Gary Coleman;
 - n. Kate Crawley;

- o. Darryl Thomas;
- p. Andrew Case;
- q. Dan Hartney;
- r. Robin Knox;
- s. Lesley Alford;
- t. Bagot Community;
- u. GDA; and
- v. AHA NT.

A handwritten signature in black ink, appearing to read 'Richard Coates', with a large, stylized initial 'R'.

RICHARD COATES
Presiding Member
Chairperson