



Foundation for Alcohol Research & Education

27 March 2020

Board of Directors

Dear Director

DUTY OF CARE AND DILLIGENCE - DAN MURPHY'S DARWIN DEVELOPMENT

FARE is a shareholder of Woolworths Group Limited (**Woolworths**). It is writing to Woolworths and to each of you as a Director of Woolworths, in relation to the proposed development by Woolworths of a Dan Murphy's liquor outlet in Darwin (the **proposed development**). In short, it is FARE's position that in discharging your duty as a director to exercise due care and diligence, in the exercise of your powers as a board member, the Board of Woolworths should further consider its decision to pursue the proposed development in the light of:

- (a) the findings made by the Liquor Commission of the Northern Territory in its decision made on 20 September 2019 about the harm the proposed development will cause to local Aboriginal communities; and
- (b) as a consequence, the reputational risk to Woolworths' if it continues to proceed with the proposed development notwithstanding the harm the Liquor Commission has found will be caused to the local Aboriginal communities.

As you are aware, FARE was an objector in respect of Woolworths' application for substitution of the proposed development premises for an existing premises named in one of its liquor licences.

Following the refusal of that application by the Liquor Commission on 20 September 2019 (the **LC Decision**), FARE became a respondent in Woolworths' subsequent application to the Northern Territory Civil and Administrative Tribunal for review of the LC Decision. When that too was refused (the **Tribunal decision**) and Woolworths made an application to the Supreme Court for leave to appeal the Tribunal decision, FARE was named as the second respondent in the Supreme Court proceeding. FARE is not taking

an active role in the Supreme Court proceeding and has advised the Court and the parties that it will not be filing submissions in answer to the application.

FARE wishes to emphasise that this letter is directed to the members of the Board so that, given the matters set out above, they will further consider Woolworths' decision to pursue the proposed development. This letter in no way challenges or raises any issue about Woolworths' entitlement to challenge the Tribunal decision in the Court as it has. We add that in any event that challenge is likely to be overtaken by legislative change now that the Liquor Amendment Bill 2020 has passed by the NT Parliament.

The directors' duty of care and diligence

In order to provide the context in which this letter is sent, we set out our view on the duties of the directors of Woolworths under section 180 of the *Corporations Act 2001* (Cth) to exercise your powers and discharge your duties with reasonable care and diligence. This duty reflects, and to some extent, refines your obligations as a director at common law. Your duty of care and diligence requires that you put yourself in a position to guide and monitor the management of Woolworths. This has been described as a core, irreducible requirement of your role as director. You are required to inform yourself about material risks to the business of the company, when and how these risks might materialise, how they will impact the business, and how any expected adverse impacts may be mitigated.

In an assessment of whether your duty of care and diligence has been satisfied, a court will assess the foreseeability of risk by a consideration of the standard of a reasonable person, and will ask whether you should have known of the danger. The question of breach will be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.

Risk to reputation

Woolworths has accepted that risk to the reputation of Woolworths' is a material business risk. Its 2019 Annual Report lists "Socio-political and reputation" as a material risk to its business, explaining that "broader corporate reputation is driven by the perceptions of various stakeholders, including the public, non-government organisations and politicians" (p 33). In the highly competitive market in which Woolworths operates it is obvious that ensuring that Woolworths reputation with the public is maintained and not harmed is of prime importance to the company.

The disclosure of such risks is recommended by the ASX Corporate Governance Council (the **ASX Council**) in its *Corporate Governance Principles and Recommendations* (the **ASX Recommendations**). The February 2019 fourth edition of the ASX Recommendations states that a listed entity “should disclose whether it has any material exposure to environmental or social risks, and, if it does how it manages or intends to manage those risks”. “Material exposure” is described as “a real possibility that the risk in question could materially impact the listed entity’s ability to create or preserve value for security holders over the short, medium or longer term” (p 27, fn 63). Social risks are described to include the potential negative consequences to a listed entity if its activities adversely affect human society, such as risks associated with the entity “harming the local community” (p 36).

The commentary of the ASX Council for Recommendation 7.4 states that how an entity manages environmental and social risks can affect its ability to create long-term value for shareholders. The ASX Council, provides context for Recommendation 7.4 by referring to the *2015 ESG Reporting Guide for Australian Companies* (the **ACSI Guide**) published by the Australian Council of Superannuation Investors and noting that “investors are calling for greater transparency on the environment and social risks faced by listed entities, so they in turn can properly assess the risk of investing in those entities”.¹

The connection between reputation and the pursuit of long term gain for a company is usefully set out by the ASX Council’s paraphrasing of a statement of Commissioner Hayne in the *Interim Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*:²

As [a commercial enterprise], [a listed] entity... rightly pursues profit. Directors and other officers of the entities owe duties to shareholders to do that. But the duty to pursue profit is one that has a significant temporal dimension. The duty is to pursue the long term advantage of the enterprise. Pursuit of long term advantage (as distinct from short term gain) entails preserving and enhancing the reputation of the enterprise... And, lest there be any doubt, it also entails obeying the law. But to

¹ ASX Recommendations, 27 (Recommendation 7.4). See also, ACSI Guide, 14. The ACSI Guide states, in the context of social risk, the absence of a company’s accountability to its customers, suppliers, government and the broader community, is being recognised by investors as a source of risk. The ACSI Guide further explains that by ignoring landowners, occupiers and other community groups that can be directly impacted by company operations, reputational and brand damage can result.

² ASX Recommendations, 16, fn 41.

preserve and enhance a reputation... the enterprise must do more than not break the law. It must seek to do 'the right thing'.

The reputational risks of the proposed development

The risks of, and harm likely to be caused by, the proposed development are identified in the LC Decision. In order to determine Woolworths' application for the substitution of its premises the Commission was required to apply the public interest and community impact test set out in s 6 of the *Liquor Act 1978* (NT). In so doing, the Commission made findings as to the existing degree of harm in the community and findings about the likely degree of harm to result from the grant of the application.

As to the demographics of the local community, the Commission found that the identifiable at-risk groups within 2 km that may be affected by the store included the Bagot Aboriginal Community situated within 1.1 km of the site and accessible by a 15 minute walk, the Minmarama Park Community situated 1.7 km from the site and accessible by a 20 minute walk, and the Kulaluk Aboriginal Community situated 1.9 km from the site and accessible by a 25 minute walk: [161].

- The Commission referred to the evidence in relation to the Bagot Community that there are general problems with alcohol abuse in the community including violence, domestic violence, child neglect and the death of community members being killed when walking across Bagot Road when inebriated: [163].
- Similarly, the evidence in relation to the Minmarama Park Community and the Kulaluk Aboriginal Community, included that those communities experienced alcohol-related domestic violence and anti-social behaviour and that people in the community who are on the banned drinker register use others to buy their alcohol. And the risk of harm when crossing Bagot Road to the proposed Dan Murphy's was also identified: [170].

As to the existing degree of harm in the community, the Commission found 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". And also found, "that the level of existing harm is significantly higher within both the 5 km and 2 km community areas": [334].

The Commission's findings about the likely degree of harm to result from the grant of the application included that 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”: [338]. In considering whether the grant of the application was in the public interest the Commission’s findings included the following:

- “We find that despite the worthwhile proposed improvements to [the Bagot Road, Totem Road and Osgood Drive] intersection; allowing the application would increase the risk of death or severe injury to pedestrians wanting to access the store”: [349].
- “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”: [352].
- “We find that the harmful consequences of easier access to cheaper alcohol for [the community within 2 km of the site] will be significant and greatly outweigh the benefits the store would provide. ... [T]he consequential harm and ill health to a large number of at-risk groups within the 2 km community area will be significant”: [354(g) and (h)].
- “Although we have focussed to some extent on the increase in liquor consumption by risk drinkers from within the 2 km locality the harmful consequences of their alcohol abuse will certainly not be confined to that zone”: [356].

The risks identified by the Commission are risks of harm to the local community, being “social risks” as that term is described by the ASX Council. As noted above, Woolworths’ 2019 Annual Report identifies that socio-political and reputation risks are material risks to the business of Woolworths.

Duty to revisit the decision to proceed with the proposed development

The Board’s decision to pursue the proposed development was made before the LC Decision. Absent new facts or issues emerging it may be accepted that the Board would not normally revisit that decision. However, the new facts and issues revealed in the LC Decision in our view have the consequence that the Board should reassess its decision.

In light of the LC Decision, FARE’s position is that it is reasonably foreseeable that to continue to pursue the proposed development will carry with it significant reputational risk to Woolworths.

As such, FARE considers that your duty of care and diligence requires that you take steps to properly inform yourself about the nature of this risk, its significance, how it may emerge and how it may be mitigated if it does emerge. Once you are so informed, you will need to balance the risk against the potential benefits that could reasonably be expected to accrue to Woolworths from the proposed

development. A decision to pursue the proposed development should be one that you rationally believe is in the best interests of Woolworths, particularly if you intend to rely upon the business judgment rule set out in section 180(2) of the *Corporations Act 2001*. In other words, an issue for the directors to decide is whether Woolworths should continue with the proposed development, irrespective of the risk of harm to the local community identified in the LC Decision and the consequential reputational risk to Woolworths.

Accordingly, FARE requests that you provide written confirmation within 14 days that the Board members will further consider their decision to pursue the proposed development and that in doing so they will consider the matters set out in this letter. If that confirmation is provided, we would request that within a further period to be identified by the Directors we be informed of the outcome of that further consideration.

We reserve our rights in respect of all matters arising out of this letter.

Yours sincerely,



ANDREW FAIRLEY AM
CHAIR



CATERINA GIORGI
CHIEF EXECUTIVE OFFICER