

## **DECISION OF DIRECTOR OF LIQUOR LICENSING**

**APPLICANT:** LIQUORLAND (AUSTRALIA) PTY LTD

**PREMISES:** LIQUORLAND SCARBOROUGH

**PREMISES ADDRESS:** 91 SCARBOROUGH BEACH ROAD, SCARBOROUGH

**APPLICATION ID:** A000190270

**NATURE OF APPLICATION:** CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

**DATE OF DETERMINATION:** 1 JUNE 2016

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### **Introduction**

- 1 Liquorland (Australia) Pty Ltd (the applicant) seeks the conditional grant of a liquor store licence for premises to be known as Liquorland Scarborough and located at 91 Scarborough Beach Road, Scarborough. The application is made pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (the Act).
- 2 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. In accordance with ss 73 and 74 of the Act, objections to the grant of the application were lodged by:
  - Mary Bizzaca, Principal of St John's Primary School;
  - Michelle Innes, President of the P & C Association, Scarborough Primary School;
  - Trisha Lee, Board Chair, Scarborough Primary School;
  - Jason Crofts, Principal, Scarborough Primary School
  - David Kennedy;
  - Lukey Nominees Pty Ltd, licensee of Scarborough Cellars;
  - Dr Ronald Naylor;
  - June Pennington;
  - Marie and Bryce McGreevy;
  - Toni Bishop; and
  - William Corry
- 3 Pursuant to s 69 of the Act, Notices of Intervention were lodged by the Executive Director Public Health (EDPH) and the Commissioner of Police (the Commissioner).
- 4 The application will be determined on the written material lodged by the parties as permitted under ss 13 and 16 of the Act.

### **Statutory framework**

- 5 An applicant for the grant of a liquor store licence must satisfy the licensing authority that the grant of the application is in the public interest (refer s 38(2) of the Act). An applicant must therefore adduce sufficient evidence to discharge this burden.

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- 6 In determining whether the grant of an application is 'in the public interest' I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
- 7 The burden of establishing the validity of any objection lies on the objector (s 73(10)), however, an intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321);
- 8 The factual matters which I am bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5 (refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227).
- 9 The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;
  - to minimise harm caused to people, or any group of people, due to the use of liquor; and
  - to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 10 The secondary objects of the Act are:
- to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
  - to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
  - to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
- 11 The licensing authority is also entitled (but not bound) to take into account the factual matters set out in s 38(4) of the Act as part of the public interest considerations.
- 12 Section 16 provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case. The licensing authority should also act without undue formality and is not bound by the rules of evidence.
- 13 Section 33(1) provides that licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority

considers in the public interest. Further, s 33(2)(a) provides that an application may be refused, even if the applicant meets all the requirements of the Act. In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, EM Heenan J described the 'absolute discretion' provided for under s 33(1) in the following terms:

*The 'absolute discretion' to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA356 [6] - [7] (Wallwork J) and Palace Securities v Liquor Licensing(1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231; (2002) 25 WAR 511, [52] - [55]; O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 and Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380, 400.*

## **Overview of the evidence and submissions of the parties**

### The applicant

- 14 The proposed liquor store is to be located at 91 Scarborough Beach Road, Scarborough on the south western corner of Scarborough Beach Road and Hinderwell Street, being approximately 900m inland from West Coast Highway. The premises:
- borders residential housing in the west and south sides;
  - is located across the road from the Scarborough Police Station and St John's Primary School;
  - is diagonally across from the Immaculate Heart of Mary Parish Church; and
  - is part of a commercial and retail strip on both sides of Scarborough Beach Road.
- 15 According to the applicant, the subject site is zoned mixed use under the provisions of the Interim Scarborough Redevelopment Scheme (ISRS). The Scarborough Master Plan (SMP) provides for this area to be:
- "... a flexible mixed use environment for a diversity of commercial, tourism and high density residential development. Commercial uses may include district level retail and services, and other commercial development not

directly dependent on the beachfront. Commercial development should initially be located along Scarborough Beach Road and West Coast Highway, with the potential for commercial enterprises to establish on consolidated blocks back from these routes in the longer term.”

- 16 The premises is currently occupied by Video Ezy, which will be relocating to new premises nearby. The existing building is on land which will be modified and upgraded. There will 17 car bays providing off-street parking for customers. It was submitted by the applicant that the proposed liquor store will service the expanding population of local residents of the area and the increasing number of visitors to the iconic Scarborough Beach area. According to the applicant, with the implementation of the SMP, the residential population in the Scarborough Redevelopment Area (SRA) will increase significantly over the next 3-10 years.
- 17 The applicant currently operates a liquor store called Liquorland Express at the Luna Maxi site, located on the corner of Scarborough Beach Road and West Coast Highway. According to the applicant, Liquorland Express overtrades for its size; is too small to service the needs of local residents; cannot service its customers effectively and efficiently particularly during the peak summer season; and cannot cater for any further demand. The applicant intends for Liquorland Scarborough to service some of the usual customers of Liquorland Express. However, the lease for Liquorland Express expires on 30 November 2016 and there is no further option to renew. The entire Luna Maxi site has been sold to a developer with the intention to redevelop the site to maximise its residential use. Having regards to industry timeframes, it is likely, in the applicant's view, that the redevelopment of the site could take four to five years. Coles is keen to negotiate with the new owner of the Luna Maxi site with a view to building a new supermarket and liquor store.
- 18 The applicant also advised that the Thirsty Camel Drive Thru, which operates at the White Sands Hotel site on West Coast Highway, is located within the central foreshore core of the SRA. The current owner of the site was granted development approval in or about 2011 and that development did not contain a drive-through liquor store, however that development approval has now lapsed. According to the applicant, it is widely understood that the owner of the White Sands Hotel site was waiting for the finalisation of the Scarborough Master Plan before proceeding with any new development application and if the site is redeveloped, it could take three to five years during which time the Thirsty Camel Drive Thru will be closed.
- 19 The applicant submitted a Public Interest Assessment to support its application, which included:
  - a Planning and Amenity Analysis Report by Planning Solutions;
  - a Social Impact and Amenity Audit Report by Bodhi Alliance; and

- the results of telephone and intercept surveys conducted by Data Analysis Australia (DAA report).

20 Some of the key findings from the Planning Solutions report are:

- the locality can be described as having an established urban character, with core activity areas along Scarborough Beach Road and at Scarborough Beach, surrounded by low and medium density neighbourhoods;
- the locality exhibits lower than average numbers of families and children, with higher than average lone person households, group households and couples with no children. The locality can be described as affluent, with higher than average household incomes and lower than average unemployment;
- the existing character and demographic/socio-economic profile of the area is in a state of transition, and likely to undergo further change as Scarborough is revitalised and Scarborough Beach Road emerges as a mixed use activity and public transport corridor;
- further infill residential development in the locality will see a progressive increase in local population catchment for the proposed premises as the intensification of the residential area proceeds (which the Luna Maxi and White Sands' sites are examples as they are redeveloped into multi-storey higher density residential towers);
- the proposed liquor store will have a total floor area of 278m<sup>2</sup> and access will be provided directly from the existing 17 bay car park;
- the subject premises is to be located within an existing retail/commercial building fronting an activity corridor and in close proximity to other complementary land uses;
- the existing Video Ezy premises already trades with similar hours and peak periods to the proposed liquor store;
- negative impacts on the current and future amenity of the locality, such as anti-social behaviour, noise, vandalism, litter and criminal acts are considered unlikely;
- there are six existing packaged liquor outlets in the locality, with five liquor stores and one unrestricted tavern licence, of which three are in the local catchment area for Liquorland Scarborough and three are located in neighbouring suburbs offering a local resident/visitor catchment;
- the proposed liquor store will provide for the retail sale of packaged liquor in a mixed use commercial/retail/residential location that is not well served at present. There are no comparable liquor stores within a walking catchment area, and the

variety of existing and likely future land uses in the area will be well served by Liquorland Scarborough; and

- the two closest takeaway liquor stores in the locality (Liquorland Express and Thirsty Camel Drive Thru) have been earmarked for development.

21 Bodhi Alliance provided information on the profile of the local community, including at-risk persons and sensitive premises within the area. This report identified that there are eight schools within the locality, which are all achieving above average results in the Naplan tests. According to the Bodhi report, the student population within the locality would not be considered vulnerable or a risk. The Bodhi report identified the two schools in closest proximity to the proposed liquor store being St John's Primary School and Scarborough Primary School. In respect of St John's Primary School, the school is sensitive about the potential visual impacts from Scarborough Beach Road and contact with pedestrians and persons waiting at the bus stop that is outside the school gate. Students from the Scarborough Primary School may need to pass the proposed liquor store in their way to and from school. The Bodhi report concluded that the key risk to students will be visual impacts from any street advertising of alcoholic products as there is some evidence that suggests inappropriate advertising of alcohol can encourage alcohol consumption by children and young adults.

22 In order to address any concerns about the proximity of the two schools to the proposed liquor store, the applicant advised that it will not have any external advertising of liquor products at the proposed premises (and this can be a condition of the licence) and has offered to provide landscaping on the St John's Primary School boundary with Scarborough Beach Road with appropriate bushy plants.

23 DAA conducted an intercept survey and telephone survey to gauge support for the application. The DAA report concluded that there is a significant level of support for the proposed liquor store and a reasonable high likely usage of the store if it is opened. This usage would be particularly significant if the most popular existing stores, Liquorland Express and the Thirsty Camel Bottleshop at the White Sands Tavern, were no longer available.

24 According to the applicant, the primary purpose for seeking the grant of the liquor store licence is to provide:

- a) local residents;
- b) passing motorists and tourists commuting along Scarborough Beach Road; and
- c) the government's forecast increased residential population and tourist visitation as a result of the implementation of the Scarborough Master Plan,

with a well managed, modern design and fitted out store, staffed with trained and knowledgeable employees, offering a range of quality takeaway, packaged alcohol for consumption off-premise.

The objectors

- 25 The issues raised by the objectors generally fall within the following broad areas:
- proximity to the existing primary schools and impact on students;
  - traffic/parking;
  - impact on the surrounding neighbourhood; and
  - commercial impact.
- 26 According to Ms Bizzaca, the principal of St John's Primary School, the close proximity and high visibility factor of the proposed liquor store immediately across the road from the school is not in the best interest of her students. It was submitted by Ms Bizzaca that the 2009 National Health and Medical Research Council's guideline states that for children and those under the age of 18, not drinking alcohol is the safest option. The research explored in this guideline related to evidence which suggests that earlier initiation of drinking is related to more frequent and higher consumption in adolescence, and these patterns are in turn related to the development of alcohol-related harms in adolescence and adulthood. The 'earlier initiation' refers to the influence from within the child's environment, the adult modelling they are exposed to and the characteristics associated with the consumption of alcohol. According to Ms Bizzaca this would mean the steady and constant visibility over the road from the school's playground of such things as alcohol store signs, delivery trucks unloading alcohol and a steady stream of adults carrying alcohol in and out of the store.
- 27 Ms Bizzaca also referenced a publication produced by the British Medical Association in 2009 called "Under the Influence – the damaging effect of alcohol marketing on young people." This publication states that:
- "The fact that promotion is allowed, ubiquitous and heavily linked to mainstream cultural phenomena, communicates a legitimacy and status to alcohol that belies the harms associated with its use."*
- "Alcohol promotion therefore influences social norms, and there is substantial evidence that these in turn influence young people's relationship with alcohol. "The more common and acceptable young people think drinking is, both in society as a whole.... the more likely they are to be a drinker and the greater quantities of alcohol they are likely to consume. "*
- 28 On this basis, Ms Bizzaca submitted that a liquor store in full view of students in the school yard of a primary school, on a daily basis, for the eight years of their primary schooling, may contribute to influencing students to be consumers of alcohol and also to consume it in greater quantities.

- 29 In respect of the applicant's offer to landscape the southern boundary of the school, Ms Bizzaca stated would not resolve the problem at all, as plants take many years to grow and the playground equipment height will always allow visibility to be there and the school has a policy which encourages exploratory play which allows students to climb the trees in the school yard.
- 30 Ms Bizzaca also submitted that the school currently experiences problems with 'visitors' on weekends, who access the schools grounds to play basketball or cricket, using a range of beverages. The school also has a problem with people who come onto the school grounds at night to find a spot to 'party' or rest, resulting in greater damage to property and more debris to clean up. The school also currently experiences a pollution problem from both Scarborough Beach Road pedestrian traffic and people waiting at the bus stop where cigarette butts, bottles and take away food wrappers are tossed or blown onto the school property. Ms Bizzaca expects that the amount of people accessing the school property of an evening to consume alcohol and the amount of damage to school property and accompanying pollution will increase should the application be approved.
- 31 The objectors associated with the Scarborough Primary School and some of the other objectors, also raised concerns about the proximity of the proposed liquor store to the school and the negative impact on students. It was submitted that many students attending the school walk or ride to school and will have to pass the proposed liquor store on a daily basis. The children's crossing on Scarborough Beach Road is directly in front of the proposed liquor store. Although the applicant has agreed not to have any external advertising or promotion of liquor products on the facade of the premises, it was submitted that children attending the school will still be exposed to excessive alcohol advertising including:
- the Liquorland name and branding present on the building fascia and elsewhere on the premises – this brand wording and imagery is inherently alcohol advertising, and will be associated with Liquorland television and other alcohol advertising;
  - alcohol advertising visible through external windows;
  - delivery and sales vehicles arriving with alcohol branded livery; and
  - store patrons carrying labelled boxes and bottles of alcohol from the venue and loading it into their cars.
- 32 These objectors also submitted that the likely increase in customer traffic flow to the area will increase the opportunity for injury to children and increase the potential for car crashes in the location. Large delivery trucks attending the premises will need to use the access and egress point, which will require them to cross directly through the children's crossing on Scarborough Beach Road. The children would also have to cross over the Liquorland driveway in order to reach the children's crossing point,

- increasing the risk of a pedestrian being hit by a patron entering or leaving the premises.
- 33 It was further submitted that the school grounds are accessed by the public after school hours and on weekends resulting in a level of vandalism in the form of damage and graffiti and the school is required to check the school grounds daily and often pick up bottles, syringes and other forms of rubbish left behind. The objectors are concerned that if the application is successful, these current problems would significantly escalate due to the association between anti-social behaviour and alcohol.
- 34 A further concern is the likely increase in traffic flow on Hinderwell Street, where the school is located. It was submitted that whilst the applicant claims that most customers of the proposed liquor store will arrive via Scarborough Beach Road; this reflects a lack of understanding of the traffic movement in the local area as many road users tend to use local streets to avoid using Scarborough Beach Road and West Coast Highway. The majority of patrons coming from south of Scarborough Beach Road will no doubt access the venue via Hinderwell Street and other local parallel roads. According to the objectors, the City of Stirling has recently undertaken extensive road works in many of the local roads immediately south of Hinderwell Street, partially aimed at traffic calming, road safety and reducing the volume of traffic using these roads. It was submitted that the proposed Liquorland development would significantly increase the volume of vehicles using Hinderwell Street to access the liquor store. Existing short term parking on Hinderwell Street adjacent to the premises would also attract patrons to approach from Hinderwell Street resulting in increased traffic travelling past the school. Consequently, it was submitted that increased traffic flows which would result from the grant of the application would cause undue noise, disturbance and inconvenience to the school.
- 35 Mr Kennedy also raised similar concerns about the proximity of the proposed liquor store to the two schools and the negative impact of increased traffic to the welfare and safety of students. Mr Kennedy further raised the impact of the proposed store on those attending church services at the nearby Church and then crossing Scarborough Beach Road at the crosswalk. It was submitted by Mr Kennedy that the 6 p.m. church service coincides with high trading times in a liquor store.
- 36 In respect of the school crosswalk, Mr Kennedy advised that throughout 2015 the crosswalk attendant was not regularly attending the crosswalk resulting in considerable increased risk to those crossing the road. Mr Kennedy therefore submitted that approving a liquor store with associated traffic and distraction to existing traffic inside a school zone and next to a frequently unattended crosswalk leads to an unacceptable risk of injury or death to students attempting to cross Scarborough Beach Road to attend either of the two nearby schools.
- 37 Mr Kevin Lukey, on behalf of Lukey Nominees Pty Ltd raised concerns about the potential negative impact on the amenity of the locality and the potential negative impact that the grant of the application may have on his business.

38 Ms Bishop pointed out that there are eight packaged liquor outlets within a three kilometre radius of the applicant's proposed premises, which excludes the current Thirsty Camel drive-thru and Liquorland Express, which may cease trading. Ms Bishop also raised concerns about the proximity to the proposed store to the existing schools and the likely negative impact on the amenity of the area through increased traffic. Ms Bishop submitted a petition signed by local residents opposed to the application.

### The interveners

#### *The Executive Director Public Health*

39 The EDPH intervened in the application to make representations regarding the close proximity of the proposed premises to St John's Primary School and Scarborough Primary School. The intervention was predicated on the following grounds:

- the proposed liquor store will be located in close proximity to two schools;
- the location of the proposed liquor store is a main route for primary school students walking, and catching public transport, to and from school;
- if the application is granted, there is likely to be an increase in regular exposure of primary school students to alcohol in their way to and from school;
- concerns have been raised by local stakeholders in regards to the increased visibility and exposure to external alcohol product advertising by primary school students that attend school near the proposed premises;
- children and young people are a recognised 'at-risk' group, with vulnerability to the influences of their environments;
- research shows regular exposure to alcohol product advertising on the way to and from school can have a negative health impact on children and young people; and
- if the application is granted, limiting the exposure of students going to and from school to the venue's alcohol advertising would be an important harm minimisation approach.

40 It was submitted by the EDPH that there are eight schools within a 2km radius of the proposed premises, with the closest schools being St John's Primary School and Scarborough Primary School.

41 In respect of these two schools, it was submitted that:

- St John's Primary School is located at 21 Lalor Street with part of its boundaries bordering Scarborough Beach Road, approximately 100 metres from the proposed liquor store;
- in 2015, there were 231 student enrolments at St John's, ranging from 3 year olds, kindergarten and pre-primary, up to year 6;

- there is direct visibility from St John's playground to the building where Liquorland Scarborough is to be located; and
- the crosswalk used by school students from St John's and other nearby schools is located at the entrance to the proposed liquor store;
- Scarborough Primary School is located on Hinderwell Street, approximately 270 from the proposed liquor store; and
- Scarborough Primary School has approximately 127 students enrolled, ranging from kindergarten to year 6.

42 It was submitted by the EDPH that there is an established link between exposure to alcohol advertising and the initiation, amount and continuance of drinking by young people. Research shows children attending schools in neighbourhoods where alcohol advertisements were common, tended to want to drink more and, compared with other children had more positive views of alcohol and early initiation to drinking is related to harmful patterns in adolescence but also the development of problems in adulthood.

43 According to the EDPH, children are a specific at-risk group for harm and the impact of alcohol advertising on children is an important alcohol-related harm and ill-health consideration given children are vulnerable to both actual consumption and related harm, and the influence of environments on current and future drinking attitudes and behaviours.

#### *The Commissioner of Police*

44 The Commissioner intervened for the purposes of having conditions imposed on the licence, if the application is approved. Conditions relating to CCTV, lockable glass cabinets, dress standards and no external advertising of liquor products were sought.

45 According to the Commissioner, it is well documented that licensed premises, including liquor stores, have the capacity to cause harm or ill-health and directly or indirectly influence undue offence, annoyance, disturbance or inconvenience to members of the community or places in close proximity.

46 The Commissioner identified that whilst the representation of 'at-risk' groups in the locality are less than Greater Perth, they do exist, and consideration needs to be afforded these groups in order to address anti-social issues and an increase in theft observed in recent times. The risk of harm becomes greater with each additional liquor outlet permitted to operate within a locality.

47 Consequently, it was submitted by the Commissioner that if the application is approved, the conditions sought by the Commissioner would assist in minimising any negative impact the premises may have on the local community.

**Reasons for determination**

- 48 For the reasons that follow, I am of the view that the grant of this application is not in the public interest.
- 49 There is no presumption in favour of the grant of an application. Rather, the opposite applies where the burden falls upon the applicant to satisfy the licensing authority that the grant of the application is in the public interest (s 38(2)). I am required to consider the application in the context of the objects of the Act and may also take into consideration the matters referred to in s 38(4), which include:
- a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
  - b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
  - c) whether offence, annoyance disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or the proposed licensed premises.
- 50 The proposed liquor store is to be located in premises currently occupied by Video Ezy at the corner of Scarborough Beach Road and Hinderwell Street, Scarborough. There are a number of schools within the locality, which is not necessarily unusual; however, there are two primary schools in very close proximity to the applicant's proposed premises, St John's Primary School and Scarborough Primary School.
- 51 The applicant submits that the site of the proposed liquor store is a flexible mixed use environment suitable for commercial activities as proposed in the application. According to the applicant, the population in the locality will increase significantly over the next 3-10 years and the proposed liquor store will cater to this increased population and service some of the overflow customers from the Liquorland Express liquor store, which is located about 900 metres away in the Luna Maxi site on the corner of Scarborough Beach Road and West Coast Highway. The applicant also submitted that the Luna Maxi site and the White Sands Hotel site, which has a Thirsty Camel Drive-thru, are likely to be redeveloped for residential purposes and one or both of these packaged liquor outlets may cease to operate permanently, or at least suspend operations for a considerable period of time pending the redevelopment. The applicant has stated that Coles is keen to re-establish a liquor store at the Luna Maxi site. The applicant also stated that the lease for Liquorland Express expires on 30 November 2016 and there are no further options to renew.
- 52 The applicant conducted a survey to gauge the likely use of its proposed liquor store if the Liquorland Express and Thirsty Camel premises were closed for redevelopment. Respondents surveyed at the Coles location indicated 52.5% are likely to only use the proposed liquor store once a month or less (table 37) while 80% of respondents surveyed at the Video Ezy store indicated they would only use the proposed store

once a month or less (table 38). When questioned about the likely use of the proposed premises prior to the redevelopment of the two sites, 74.8% of respondents indicated once a month or less, with 41.1% saying they would never use the proposed store (table 31).

- 53 The survey data does not reflect strong support for the grant of the application.
- 54 Catering to the requirements of consumers under object 5(1)(c) of the Act must be viewed in the context of the proper development of the liquor industry. In this regard, EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, said:

*“Whether any particular licence application will or will not contribute to the proper development of the liquor industry or whether it will facilitate the use and development of premises in a manner which reflects the diversity of the requirements of consumers in this State are questions of fact, degree and value judgement.... I have previously concluded that the primary objects of the act set out in s 5(1)(c) are not the only or the exclusive objects of the Act and, except to the extent of any inconsistency, do not restrict considerations of the public interest required by s 33(1) or s 38(2).*

*Because the appellant has emphasised the potential significance of the primary objects of the Act set out in s 5(1)(c), it is necessary to observe that another primary object specified by s 5(1)(a) is to regulate the sale, supply and consumption of liquor and that this statutory policy of regulation is entirely consistent with the measured approach to what may be regarded as contributing to the proper development of the liquor industry and to the facilitation of the use and development of licensed premises to reflect the diversity of requirements in this State. These considerations are inextricably linked with the public interest and cannot be properly addressed or applied without regard to it.”*

- 55 Although the Planning Solutions report stated there are no comparable liquor stores within a walkable catchment area, I note there is an existing liquor store (Scarborough Cellars), on Scarborough Beach Road, approximately 800 metres from the applicant's proposed business, which provides a wide range of liquor products. The applicant's proposed liquor store will be essentially duplicating the existing services in the area and therefore the supposed benefits to the community are, in my view, diminished. In total, there are eight packaged liquor outlets within a three kilometre radius of the proposed store.
- 56 The applicant's evidence concerning the redevelopment of the Luna Maxi site and the White Sands Tavern site appears somewhat inconclusive. There is nothing definitive for the redevelopment of either site at this point in time and I note that the previous development approval for the White Sands Hotel site, granted in 2011, has lapsed.

Further, whether the sites are redeveloped at the same time, or years apart is unknown, therefore the future operation of the existing packaged liquor outlets at these sites is unknown. It is also unknown whether any future development will include any packaged liquor outlets. Although there is no option to renew the lease for the Liquorland Express premises, this of course does not mean that a new lease for the Liquorland Express site could not be negotiated pending any redevelopment and that those premises continue to trade for a number of years. Also, if the applicant successfully negotiates with the developer of the Luna Maxi site, as indicated, the Liquorland Express premises could re-open following redevelopment of the site and could be larger than the existing premises.

- 57 The location of the proposed liquor store in such close proximity to two primary schools is also a main point of contention concerning the grant of this application. The objectors from each school expressed concerns about the likely negative impact on students and the amenity of the area if the application was approved.
- 58 Children are an identified at-risk group in the *Drug and Alcohol Interagency Framework for Western Australia* and the objectors and the EDPH have submitted evidence linking the adverse impact of exposing children to alcohol advertising and promotion. Although the applicant has undertaken not to advertise alcohol products on the external facade of the premises, I accept, to some degree, the submission from the Scarborough Primary School objectors that the Liquorland name and branding present on the building facia is a form of advertising and will be associated with Liquorland television and other alcohol advertising.
- 59 Concerns were also expressed about increased traffic in Hinderwell Street and traffic accessing the site of the premises. In response, it was submitted by the applicant that Scarborough Beach Road is a busy distributor road carrying around 18,000 vehicles per day, and traffic volumes are likely to increase. The site contains one crossover, with all access to the site being from Scarborough Beach Road. The site also contains 17 car bays which have been assessed to be sufficient for the proposed use. Therefore, it was submitted by the applicant that it is highly unlikely that the operation of the premises would negatively impact on Hinderwell Street or the other surrounding roads.
- 60 According to the applicant, the main catchment area for the proposed premises is bounded to the north by Sackville Terrace and Pearl Parade, to the west by Scarborough Beach Road, to the south by Ventnor Avenue and Sonia Street and to the east by Duke Street and its extension Weaponess Road.
- 61 In my view, it is quite possible, as submitted by the objectors, that persons in the southern catchment area (Ventnor Avenue and Sonia Street and to the east Duke Street and its extension Weaponess Road) will use the convenience of the surrounding backstreets and Hinderwell Street to access the applicant's premises in order to avoid Scarborough Beach Road, which by the applicant's own admission, is a very busy distributor road. It is likely that customers will park in Hinderwell Street, to

avoid exiting on to Scarborough Beach Road, and leave the area using Hinderwell Street. This will increase traffic flow past the Scarborough Primary School and cause inconvenience to children and parents of the school.

- 62 I note that the crossing used by students from both nearby schools is immediately in front of the applicant's proposed premises. This raises two issues: first, the on-going exposure to the proposed liquor store and its activities; and secondly, the potential traffic hazard caused by customers entering and leaving the proposed premises. The applicant submitted that given the number of vehicles using Scarborough Beach Road, the patronage associated with the proposed liquor store would be negligible in the context of overall traffic volumes. However, the applicant has provided no evidence of the likely increase or decrease in current traffic accessing the site. It is quite likely there will be an increase in traffic accessing the site of the liquor store, which is within a school traffic zone and with a children's crossing in front of the store. Students will also have to cross over the Liquorland driveway. It is possible, in my view, that this has the potential to create an increased hazard for students.
- 63 Although the applicant submitted that the busy times for the liquor store would be outside core school hours, I note that the schools also conduct activities after school. For example, Ms Bazzaca stated that St John's students have regular after school training sessions for basketball, netball and soccer throughout the year.
- 64 There is also evidence that the schools already experience some anti-social activity by people, who may be consuming liquor, accessing school grounds out of hours and this could be exacerbated by the location of the liquor store and the convenient availability of packaged liquor.
- 65 I am of the view that there is sufficient evidence to conclude that the grant of the application is likely to cause annoyance and inconvenience to students and parents of the two nearby primary schools and the amenity of the area would be lessened which are relevant matters for consideration under ss 38(4)(a) and (b) of the Act. Section 37(3) of the Act provides that the licensing authority shall not grant an application where the licensing authority is satisfied that an undue degree of offence, annoyance disturbance or inconvenience to –
- a) persons who reside or work in the vicinity of the place or premises to which an application relates; or
  - b) persons in, or travelling to or from, an existing place of worship, hospital or school would be likely to occur.
- 66 Whilst the applicant was critical of some of the research relied upon by the objectors and the EDPH, I do not believe this invalidates the overall value of this material. Bell J in *Director of Liquor Licensing v Kordister Pty Ltd & Anor [2011] VSC 207*, stated:

*“..... by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the ‘particular local, social, demographic and geographic circumstances’ of the given case.”*

67 In the context of the proximity of the proposed liquor store to the two schools, the research evidence should not be totally disregarded. This is not a situation where there are other licensed premises which currently exist in the immediate proximity of the schools. The applicant is seeking to introduce a packaged liquor outlet near two primary schools, one of which is across the road.

68 In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:

*“The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”*

69 Although children, in their everyday activities, are likely to be exposed to licensed premises, nonetheless, in my view, locating a liquor store in such close proximity to two existing primary schools, in the circumstances of this case, is not in the best interests of the local community and I give greater weight to the advancement of the welfare of the local community, and in particular the interests of the children attending the two primary schools, over the marginal benefits that some members of the community may gain by being able to purchase packaged liquor from the applicant's liquor store at this particular location.

70 I arrive at this conclusion mindful of the applicant's concessions not to advertise liquor products on the external facade of the premises and to undertake some landscaping at St John's Primary School. Notwithstanding, the premises will still be clearly identifiable as a liquor store (i.e. by its trading name and other attributes) and have all of the associated activity of the packaged liquor outlet. The principal of St John's Primary School does not believe the proposed landscaping will adequately address her concerns.

71 Object 5(1)(a) of the Act is to regulate the sale, supply and consumption of liquor and this statutory policy of regulation is consistent with the measured approach to be adopted by the licensing authority.

72 Further, in discharging its functions under the Act, “*the mere possibility of harm or ill-health*” is a relevant matter for the licensing authority to consider. In *Executive Director of Health v Lily Creek International Pty Ltd & Ors (2000) WASCA 258* Ipp J stated:

*“The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on the balance of probabilities, would be a powerful public interest consideration.”*

73 Therefore, in summary, I conclude that the grant of this application is not in the public interest and the applicant has failed to discharge its onus under s 38(2) because;

- the majority of respondents to the applicant’s surveys would use the proposed premises infrequently; and catering to the requirements of consumers for liquor and related services must be considered in the context of the proper development of the liquor industry;
- the proposed liquor store will be duplicating existing services in the locality which diminishes the likely benefit to consumers. There are eight packaged liquor outlets within a three kilometre radius, and there is an existing liquor store about 800 metres away on Scarborough Beach Road. Although the Planning Solutions report indicated there are no comparable liquor stores within a walkable catchment area, this is hardly justification for the grant of the licence;
- there is a lack of clarity over the redevelopment of the Luna Maxi site and the White Sands Hotel site and the operation of the existing packaged liquor outlets at those respective sites;
- there is a possibility that the Liquorland Express store might continue to exist after any redevelopment of the Luna Maxi site;
- the location of the proposed liquor store, in such close proximity to two primary schools, would not be in the best interests of the students, or the schools in general, when compared to the marginal benefits to the public in obtaining packaged liquor at the applicant’s proposed liquor store; and
- the potential negative impact on the amenity of the area and the increased hazards to students.

74 Accordingly, the exercise of my discretion under s 33(1) of the Act, the application is refused.

75 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.

76 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin  
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING