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[LIQUOR LICENSING COURT OF WESTERN AUSTRALIA]

Re GULL LIQUOR, GINGERS' ROADHOUSE, UPPER SWAN

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Judge Greaves

17-21 August 1998, 15 January 1999

Liquor Law — Application for conditional grant of a liquor store licence — Liquor store proposed on major highway — Evidence establishes that the grant of the licence is necessary to provide for the reasonable requirements of the public — But evidence also establishes that the grant will cause undue harm to road users — Application of Re Woolworths Supermarket Derby (1997) 17 SR (WA) 128 under new Act — Liquor Licensing Act 1988 (WA), ss 5, 33, 38, 64, 69, 74.

Gull Petroleum (WA) Pty Ltd applied for the conditional grant of a liquor store licence for its roadhouse at 1381 Great Northern Highway, Upper Swan. The Licensed Stores Association and WA Hotels Association objected and the Director of Liquor Licensing and the Executive Director of Public Health intervened. Various representatives of the public interest at a government level opposed the application on the ground that liquor should not be sold in semi-rural areas on highways. A question arose as to the sale of liquor at service stations. An amendment to the *Liquor Licensing Act 1988 (WA)* now provides that a primary object of the Act is "to minimize harm or ill health caused to people, or any group of people, due to the use of liquor" (s 5(1)(b)).

Held: (1) The new s 38(2b)(a) requires the applicant to prove that the reasonable requirements of the public for liquor required the application to be granted, and then to prove that those reasonable requirements cannot be provided for by existing licensed premises in the area.

(2) Once the questions under s 38 are resolved, the Licensing Authority must decide how to exercise its discretion on the merits having regard to all of the objects of the Act including the primary objects in s 5(1).

(3) It is a primary object of the Act to regulate the consumption of liquor off licensed premises. Therefore a category "A" licence may be refused on the ground of minimizing harm or ill health to people due to the use of liquor off licensed premises.

(4) There is a tension between the primary objects in s 5(1)(a) and (b) and it is for the Licensing Authority to resolve the tension.

(5) The Court must also take into consideration whether harm or ill health will be caused to people other than the consumer due to the use of liquor, if a licence is granted.

(6) The Great Northern Highway is part of the national highway system and links Perth with north-west Australia.

(7) The applicant established a reasonable requirement of the public for the need of the proposed store licence. The applicant also proved that the existing licensed premises could not satisfy those reasonable requirements.

(8) Drivers between the ages of 18 and 24 are over-represented in alcohol related road crashes. These drivers also reflect a higher proportion of drivers who consume liquor before driving.

(9) There is a higher proportion of drink drivers who last drank in a vehicle in country road crashes than is the case in the metropolitan area.

(10) There is no recognised research in Australia about the sale of liquor from service stations, nor any about the extent of the impulse liquor purchasing from service stations.

(11) It is a moot point whether the grant of this application will detract from campaigns to educate the public against drink driving.

(12) There is no empirical basis for making a distinction between a service station selling liquor and a liquor store selling petrol.

(13) The location of the proposed premises is of paramount importance and the evidence is that this application if granted will cause undue harm to certain groups of people.

(14) Application refused.

ACTION

D Mossenson, for the applicant.

P D Evans, for the Liquor Stores Association and Liquorland (Australia) Pty Ltd.

P Laskaris, for the WA Hotels Association.

R Cock QC and *J F O'Sullivan*, for the Executive Director of Public Health and the Director of Liquor Licensing.

Cur adv vult

15 January 1999

GREAVES J.

Introduction

This is an application by Gull Petroleum (WA) Pty Ltd for the conditional grant of a liquor store licence for premises to be known as Gull Liquor Stop Gingers' Roadhouse situated at 1381 Great Northern Highway, Upper Swan. The Licensed Stores Association, Liquorland (Australia) Pty Ltd and the West Australian Hotels Association have lodged objections to the application while the Director of Liquor Licensing and the Executive Director Public Health have intervened in the proceedings.

At the outset, I observe that this is one of five applications for the conditional grant of liquor store licences in the metropolitan area of Perth lodged by this applicant. On the application of the applicant, I directed that this application be listed for hearing. The applicant did not seek to list the remaining four applications for hearing.

Exhibit 9 will reveal that the affected area for the purposes of this application is a 5 km radius from the proposed site. It is variously depicted in Ex 35.

Section 33(2) of the *Liquor Licensing Act 1988* (WA) (the Act) requires that an application is to be dealt with on its merits, after such enquiry as the licensing authority thinks fit. In this case the Director of Liquor Licensing has referred the application to the Court for determination pursuant to s 24 of the Act. It is, I think, trite to say that in dealing with the application on its merits, the Court must do so in accordance with the scheme of the Act. The *Liquor Licensing Amendment Act 1998* (WA) has recently amended the scheme of the Act. The interpretation of some of those amendments will require consideration

so that the Court can proceed to deal with the merits of this application in accordance with the scheme of the Act as amended.

The amended notice of objection of Liquorland (Australia) Pty Ltd as licensee of Liquorland Stratton is dated 17 August 1998. At the hearing, this objector pursued three grounds of objection under s 74(1)(a),(b) and (d) of the Act. Those grounds are, respectively, that the grant of the application would be contrary to the public interest, that the grant of the application would cause undue harm or ill health to people, or a group of people due to the use of liquor, and that the grant of the application is not necessary in order to provide for the requirements of the public.

The Liquor Stores Association of Western Australia (Inc) lodged a further amended notice of objection dated 29 July 1998. At the hearing, that body also pursued those three grounds of objection which I have just mentioned.

The amended notice of objection of the Western Australian Hotels Association (Inc) is dated 31 July 1998. At the hearing that body also pursued those three grounds of objection.

By its notice of objection dated 7 January 1998, the Alcohol Advisory Council of Western Australia Inc relied on the ground of objection under s 74(1)(a) of the Act.

By a notice of intervention dated 8 June 1998, the Executive Director of Public Health intervened in these proceedings pursuant to s 69(8)(a) of the Act for the purpose of adducing evidence and making representations on the question whether the sale of packaged liquor by metropolitan service stations will cause harm or ill health to people or any group of people. By notice dated 27 March 1998, the Director of Liquor Licensing intervened in the proceedings pursuant to s 69(11) of the Act for the purpose of adducing evidence and making representations in respect of several matters relating to the sale of liquor at metropolitan service stations. I shall refer in more detail to these objections and interventions later.

It will be observed that the onus is upon the objectors to establish their grounds of objection on the balance of probabilities, while the intervenors carry no burden of proof.

The relevant statutory provisions

I now set out the provisions of the Act which are relevant in the determination of this application. The long title to the Act now provides:

"An Act to regulate the sale, supply and consumption of liquor, the use of premises on which liquor is sold, and the services and facilities provided in conjunction with or ancillary to the sale of liquor, to minimise harm or ill health caused to people, or any group of people due to the use of liquor, to repeal the *Liquor Act 1970* (WA), and for related matters."

Prior to amendment by the *Liquor Licensing Amendment Act 1998* (WA), s 5 of the Act provided:

"5. The objects of this Act are

- (a) to regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;
- (b) to cater for the requirements of the tourism industry;
- (c) to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;
- (d) to provide adequate controls over, and over the persons directly

or indirectly involved in, the sale, disposal and consumption of liquor; and

- (e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act."

In its amended form s 5 of the Act now provides:

"5(1) The primary objects of this Act are —

- (a) to regulate the sale, supply and consumption of liquor; and
- (b) to minimize harm or ill health caused to people, or any group of people, due to the use of liquor.

(2) In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following objects —

- (a) to regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;
- (b) to cater for the requirements of the tourism industry;
- (c) to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;
- (d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
- (e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act."

Section 64(3) of the Act provides:

"(3) Without derogating from the generality of the discretion conferred on the licensing authority, the licensing authority may impose conditions which it considers to be in the public interest or which it considers desirable in order to —

- (a) ensure that the noise emanating from the licensed premises is not excessive;
- (b) minimize the offence, annoyance, disturbance or inconvenience that might be caused to those who reside or work in the vicinity of the licensed premises, or to persons in or making their way to or from a place of public worship, hospital or school, in consequence of activities on the licensed premises or the conduct of those making their way to or from the licensed premises;
- (ba) ensure that local laws of a local authority under the *Local Government Act 1995* (WA) or by-laws of an Aboriginal community under the *Aboriginal Communities Act 1979* (WA) are complied with;
- (c) ensure that the safety, health or welfare of persons who may resort to the licensed premises is not at risk;
- (ca) ensure that liquor is sold and consumed in a responsible manner;
- (cb) ensure that all persons involved in conducting business under the licence have suitable training for attaining the primary objects of this Act;

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- (cc) minimize harm or ill health caused to people, or any group of people, due to the use of liquor;
- (cd) limit or prohibit the sale of liquor on credit;
- (d) ensure public order and safety, particularly where circumstances or events are expected to attract large numbers of persons to the premises or to an area adjacent to the premises;
- (e) limit —
 - (i) the kinds of liquor that may be sold;
 - (ii) the manner in which or the containers in which liquor may be sold;
 - (iii) the times at which liquor may be sold;
- (f) prohibit persons being, or limit the number of persons who may be, present on, or on any particular part of, the licensed premises or any area which is subject to the control or management of the licensee and is adjacent to those premises;
- (g) prohibit the provision of entertainment, or limit the kind of entertainment that may be provided, on, or in an area under the control of the licensee adjacent to, the licensed premises;
- (ga) prohibit promotional activity in which drinks are offered free or at reduced prices, or limit the circumstances in which this may be done;
- (gb) prohibit any practices which encourage irresponsible drinking;
- (h) otherwise limit the authority conferred under a licence or permit; or
- (j) require action therein specified to be undertaken by the licensee —
 - (i) within a time or at times therein specified; or
 - (ii) on occasions or in circumstances therein specified, in relation to the licensed premises or any part of those premises, the conduct of the business carried on under the licence, or otherwise in the public interest;
- (k) prevent improper arrangements or practices calculated to reduce licence fees; or
- ...
- (m) ensure compliance with the requirements of, or with terms fixed or conditions imposed by or under, this Act."

Section 69(8a) of the Act provides:

"The Executive Director, Public Health within the meaning of the *Health Act 1911* (WA), or a person authorised in writing by the Executive Director to act on his or her behalf, may intervene in proceedings before the Licensing Authority for the purpose of introducing evidence or making representations in relation to the harm or ill health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill health."

Section 74(1)(b) of the Act provides that one of the grounds on which objection may be made to the grant of an application such as the present is:

"That the grant of the application would cause undue harm or ill health to people, or any group of people, due to the use of liquor."

In this context, I also refer to s 33(1),(2) of the Act, which provide:

"33(1) Subject to this Act, the licensing authority has an absolute

discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers in the public interest.

(2) An application —

- (a) may be refused, even if the applicant meets all the requirements of this Act; or
- (b) may be granted, even if a valid ground of objection is made out, but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit.”

Section 38 of the Act as amended now provides:

“38(1) An applicant for the grant or removal of a category A licence must satisfy the licensing authority that, having regard to —

- (a) the number and condition of the licensed premises already existing in the affected area;
- (b) the manner in which, and the extent to which, those premises are distributed throughout the area;
- (c) the extent and quality of the services provided on those premises; and
- (d) any other relevant factor, being a matter as to which the licensing authority seeks to be satisfied,

the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area.

(2) Taking into account the matters referred to in subsection (1), the licensing authority in considering what the requirements of the public may be shall have regard to —

- (a) the population of, and the interest of the community in, the affected area;
- (b) the number and kinds of persons residing in, resorting to or passing through the affected area, or likely in the foreseeable future to do so, and their respective expectations; and
- (c) the extent to which any requirement or expectation —
 - (i) varies during different times or periods; or
 - (ii) is lawfully met by other premises, licensed or unlicensed.

(2a) In considering what the reasonable requirements of the public may be for the purposes of an application under subsection (1) the licensing authority may have regard to —

- (a) the subjective requirements of the public, or a section of the public, in the affected area for liquor and related services, whether those requirements are objectively reasonable or not; and
- (b) whether the grant or removal of the licence will convenience the public or a section of the public in the affected area,

but the licensing authority may disregard either or both such considerations as it sees fit.

(2b) Notwithstanding anything else in this section —

- (a) a liquor store licence shall not, other than in accordance with paragraph (b), be granted in respect of, or removed to, premises unless the licensing authority is satisfied that the reasonable requirements of the public for liquor and related services in the

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- (b) where application is made for the removal of a liquor store licence to premises situated not more than 500 metres from the premises from which the licence is sought to be removed, the licensing authority need not have regard to the reasonable requirements of the public for liquor and related services in the affected area."

In *Re Big Bombers Liquors* (1998) 19 SR (WA) 315 at 322, I had occasion to examine the proper construction of s 38(2a) and (2b)(a) and its application in any one case.

For the sake of completeness I now repeat those observations:

"Section 38(2a) and (2b) are new provisions. This case raises for the first time the interpretation and application of s 38(2a) and (2b)(a) in the determination of an application for the grant of a liquor store licence.

Section 71(1)(b) of the *Liquor Act* 1970 (WA) (now repealed) provided:

'Subject to any valid objection, the licensing authority may grant a store licence if the licensing authority is satisfied that —

- (a) the population of the affected area or the number of persons resorting to or passing through the affected area is sufficient to warrant the granting of the licence; and
- (b) there are insufficient store licences or other licences in the area to meet the requirements of the public.'

Section 71(1) of the *Liquor Act* required the licensing authority to consider the two questions in subss (a) and (b). In *Costopolous v Petona Pty Ltd* (unreported, Supreme Court WA, Wallace J, Library No 7724, 23 June 1989), at p 5 of the judgment:

'I am unable to agree with counsel's argument. What Mr Meadows seems to be saying is that, one first of all looks to ascertain whether there is a sufficient population within the definition of the three categories. Then, pursuant to s 71(1)(b) one asks the question as to whether there are insufficient store licences or other licences in the area to meet the requirements of the public. The requirements of the public, as demonstrated by the evidence, was the desire to be able to obtain liquor purchases at the same location where they did their general shopping. It follows, that there is such a requirement and that could not be met by any of the existing store licences in the affected area. With great respect to counsel, that cannot be the construction which one would place upon ss 71 and 57 of the Act, nor does it accord with authority.'

Subsequently, in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (1991) 4 WAR 1 at 12 the learned Chief Justice referred to this passage from the judgment of Wallace J with approval when he said:

'The question under s 71(1)(b) of the former Act was whether there were insufficient store licences or other licences in the area to meet the requirements of the public. With respect that is a very different question from that posed by s 38(1): compare *Lovell v New World Supermarket Pty Ltd* (1990) 53 SASR 53 at 54-55 per King CJ. The question is not now whether there are insufficient stall licences or other licences to meet the requirements of the public. The question is

whether there is a reasonable requirement by the public for the purchase of liquor in the manner and under the circumstances contemplated by the proposed licence. There is no question of protecting the monopoly or market share of an existing licensee.'

These observations of course reflect the fact that the provisions of s 71(1)(b) were not carried through into the present Act.

Section 38(2b)(a) of the Act as amended employs different words from s 71(1)(b) of the 1970 Act. In my opinion, however, s 38(2b)(a) of the Act also poses a very different question from that posed by s 38(1) and (2) of the Act. These provisions have not been amended. The approach which the licensing authority is required to take under these provisions is the approach which the learned Chief Justice outlined in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* at 9 when he said:

'The court is required under this provision to determine whether the licensee's "necessary in order to provide for the reasonable requirements of the public for liquor and related services ... in that area", having regard to the considerations set out in subs (1).

... "necessary" is a word which has the same connotation as words such as "needs" and "need". Thus in *Buttery v Muirhead* [1970] SASR 334 at 337 Bray CJ said:

"'Needs of the public' must mean 'need' in the sense of 'demand', meaning by that a reasonable demand by contemporary standards. It cannot mean 'need' in the sense of necessity judged by some ethical or sociological test."

In the context of s 38(1) the test of what is "necessary" is in terms of "reasonable requirements." Thus the factual inquiry is directed at the issue of "reasonable requirements" of the public. The question then is whether the proposed licence is necessary in order to provide for those requirements. In this context "necessary" probably means no more than that the licence is "reasonably required" in order to provide for the "reasonable requirements" of the public. The word "reasonable" imports a degree of objectivity in that the word reasonable means "... sensible; ... not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate": see *Shorter Oxford Dictionary*, at page 1667.

In *Liquorland (Aust) v Hawkins* (1997) 16 WAR 325 at 334 Murray J examined the history of the application of these provisions in this way:

'There would appear to be a number of basic propositions about s 38 which have been endorsed by the decided authority. In the first place the onus rests upon the applicant for the ground of a licence to establish the grounds upon which it may be required. What must be established is the necessity for the ground of a licence, in the sense that the reasonable requirements of the public for liquor and related services in the affected area are not being met by the existing licences. So the reasonable requirements which are relevant are those of the public in the declared affected area and it is relevant to consider the extent to which they are presently being met by existing licence facilities. The matters referred to in subs (2) reinforce the main approach.

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It is clear, I think, that in considering a particular application under s 38, the Court is obliged, when considering the reasonableness of the requirements of the public, to consider the extent to which they may already be satisfied by other already existing licensed premises operating in the affected area. In my opinion, when ss 38, 74 and 5(a) are read together it becomes clear that the reasonableness of the requirements of the public under s 38 may be judged in an appropriate case having regard to the impact which the addition of the proposed licensed premises in the affected area may have upon the viability and the capacity to continue to offer services in respect of the supply of liquor and in related ways, to members of the public in the affected area, by existing licensed premises. At the same time, of course, it is clearly no part of the philosophy of the Act to protect a monopoly or the market share of an existing licensee. The matter is to be judged from the point of view of the reasonable requirements of the public.

... What will need to be borne firmly in mind is simply that the reasonable requirements of the relevant section of the public will be established by reference to the degree of convenience with which their needs may be met, having regard to the various factors and circumstances relevant in the particular case. That will always be a valued judgment and the obligation to make it has been reposed in the specialist tribunal established by the Act. It goes without saying that the making of the judgment will depend upon the facts of the particular cases as they are found to be on the evidence presented. ... Further, it has been recognised that the question is whether there is a reasonable requirement by the public for the purchase of a liquor in the manner and under the circumstances contemplated by the proposed licence and regard must be had to the location of that licence.'

His Honour expressed the opinion that his propositions which I have referred to are supported by the authority to which he refers. Scott J agreed with the reasons of Murray J.

In my opinion, it follows that s 38(1) of the Act requires an applicant for the grant of a liquor store licence to satisfy the licensing authority that, having regard to the matters mentioned in that section, the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services in the affected area. An applicant such as the present may do so in the way which the learned Chief Justice described in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (at 10) as follows:

'The requirements of the public in the affected area for liquor facilities may be proved by inference from the evidence of a representative sample of a relevant section of the population of the affected area: see *Coles Myer Limited v Liquorland Noranda* (unreported, Supreme Court, WA, Library No 8267, 28 May 1990), per Roland J, at p 8; per Nicholson J, at p 5. This is the "subject evidence". It is then necessary to determine whether the subjective evidence of requirements is objectively reasonable. If it is, it is then

necessary to determine whether the proposed licence will meet those requirements in whole or in part.

... It is plain that evidence that the grant of the proposed licence would provide a convenient service to a significant section of the public may in itself be sufficient to establish a reasonable requirement.'

In my opinion, s 38(2a) of the Act does not qualify the approach which the learned Chief Justice described. In my opinion, s 38(2a) is no more than a statutory acknowledgement that the licensing authority is required to determine the application on its merits (s 33(1)) and may do so in accordance with the scheme of the Act depending on the circumstances of the particular case. In the present case, I see no reason to depart from the now well established approach which the learned Chief Justice described.

Once an applicant for the grant of a liquor store licence, such as the present, has satisfied the licensing authority that the grant of the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services in the affected area, s 38(2b)(a) of the Act then requires the applicant to satisfy the licensing authority on the balance of probabilities that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area.

As in the case of s 71(1)(b) of the *Liquor Act*, this subsection raises a very different question from that posed by s 38(1) of the Act. If this were not so, Parliament would not have inserted s 38(2b)(a) by the *Liquor Licensing Amendment Act 1998* (WA).

Section 38(2b)(a) employs the words "the reasonable requirements of the public for liquor and related services" in the affected area, which words are employed in s 38(1). What s 38(2b)(a) requires is that the licensing authority shall not make a grant of a liquor store licence unless on the merits of the case the licensing authority is satisfied, as a value judgment, that those reasonable requirements cannot be provided for by the licensed premises already existing in the affected area. In my opinion, there remains no question of protecting the monopoly or market share of an existing licensee. Section 38(2b)(a) directs the licensing authority in each case to satisfy itself on the merits that the reasonable requirements of the public for liquor and related services in the affected area established in accordance with s 38(1) and (2), cannot be provided for by the licensed premises already existing in that area.

In my opinion in considering whether it is so satisfied in each case, it will not be useful for the licensing authority to substitute different words for those employed by Parliament. Section 38(2b)(a) requires the licensing authority in each case to make a value judgment whether, given the reasonable requirements of the public for liquor and related services in the affected area relied upon by the applicant, if established in accordance with s 38(1) in the manner which I have described, the licensing authority is satisfied that those reasonable requirements cannot be provided for by licensed premises already existing in the affected area. In this context, it is to be observed that Parliament has spoken of 'licensed premises already existing' and not 'the licensed premises already existing'. Whatever the reasonable requirements of the public for liquor and related services in the

affected area may be on the merits of the particular application, the licensing authority must be satisfied that those requirements cannot be provided for by licensed premises already existing in the affected area, before making a grant of a liquor store licence. In my opinion, this approach is consistent with that which Wallace J adopted in *Costopolous v Petona* as explained by the learned Chief Justice in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* in relation to the similar provision in s 71(1)(b) of the *Liquor Act*. The merits of each case will require to be determined on the material before the licensing authority relevant to the scheme of the Act as a whole.

In my opinion, in an appropriate case, it would be relevant for the Licensing Authority under this provision to have regard to the primary objects of the Act in s 5 in order to determine whether the grant of a further licence, and the consequent increased availability of liquor, is consistent with those objects and the scheme of the Act. What course the licensing authority takes in such case will depend upon the circumstances of the case revealed by the evidence and the value judgment which the licensing authority reaches on the merits. This is not such a case, because neither the parties, nor any person entitled to do so under s 69, nor the Court, has raised the question for consideration on the merits."

It is against the provisions of ss 5, 33(1) and (2), 38, 64(3) and 74(1)(b), (d) of the Act I turn now to identify the scheme of the amended Act, so that those considerations which are relevant to the exercise of discretion in the determination of the merits of this application may be ascertained in due course.

The scheme of the Act (as amended)

This exercise gives rise to a consideration of the four preliminary questions which I asked counsel to make submissions on at the hearing, namely:

- (1) On a proper construction of s 5(2) of the Act, to what extent is the Licensing Authority required, in applying s 38(1), (2), (2a) and (2b)(a) of the Act in the determination of an application for a category A licence under the Act, to consider whether the grant of the application would promote the primary objects in s 5(1)(a), (b) of the Act?
- (2) On a proper construction of s 5(1)(a) of the Act, is it a primary object of the Act to regulate the consumption of liquor off licensed premises, and if so, by what means?
- (3) On a proper construction of s 5(1)(b) of the Act is it a primary object of the Act to minimise harm or ill health due to the use of liquor other than physical harm or ill health?
- (4) On a proper construction of s 5(1)(b) of the Act, is it a primary object of the Act to minimise harm or ill health to people other than the consumer due to the use of liquor?

A further question arises in any consideration of the scheme of the Act in this context, namely on a proper construction of s 74(1)(b) of the Act and s 5(1)(b) of the Act, what is undue harm or ill health caused to people, or any group of people, due to the use of liquor?

For the applicant, counsel submitted that nothing in s 38 of the Act could possibly relate to health considerations under s 5(1)(b) of the Act. He submitted that in deciding the issues under s 38(1) and (2b)(a) of the Act, the Licensing

Authority is required to consider whether the grant of the application would promote only the primary object in s 5(1)(a) of the Act and not the primary object in s 5(1)(b) of the Act. Counsel for the applicant submitted that under the Act as amended the Licensing Authority may now impose conditions on a licence pursuant to s 64(3) of the Act which may in a pro-active way address the issue of consumption of liquor off licensed premises. He submitted that this, however, is a tool to be used upon or after the grant of a licence and not as a means to refuse the grant of an application such as the present. He submitted that the provisions of s 5(1)(b) and (2) of the Act are not a tool to refuse an application but rather a means to regulate licences generally by imposing conditions in a pro-active way on licences to deal with consumption generally. He acknowledged that the Licensing Authority itself potentially is empowered to raise the issues of harm and ill health under s 38(1)(d) and (2)(a) of the Act. Counsel for the applicant submitted that in terms of s 5(2) of the Act the Licensing Authority is not required to have regard to the primary object in s 5(1)(b) of the Act in carrying out its function under s 38(1) and (2b)(a) of the Act.

Counsel for the licensee objectors referred in this context to the provisions which I have mentioned. Like counsel for the applicant, he pointed out that s 38 contains no reference to the primary objects of the Act. He submitted that s 38(2b)(a) may be construed as giving effect to one or both of the primary objects of the Act, because it forms part of the structure of regulation of the supply and consumption of liquor by tending to restrict the number of outlets for the supply of liquor, thereby inhibiting its consumption; and, because it assists in the minimisation of harm, again by the inhibition of consumption through restriction on the number of outlets. Counsel also referred to s 18 of the *Interpretation Act 1984* (WA) and submitted that the objects in s 5 of the Act are not determinative of the operation of the Act. He submitted that the operative provisions must be construed in a manner which, if possible, seeks to give effect to the objects, but it is the operative provisions which are to be interpreted and applied in the light of the objects, not the objects viewed on their own.

Senior counsel for the intervenors submitted that the role of the long title of an Act and of the objects provision is generally limited to the provision of guidance where specific provisions of the statute are ambiguous or uncertain. He submitted that s 5(2) of the Act, contrary to the normal role of an objects section, evinces a specific and additional purpose in that it requires the Licensing Authority to have regard to the primary objects and other objects of the Act. He submitted that it is clear, therefore, that s 5(2) 'seeks to do more than perform the role previously performed by a preamble.

The resolution of this first question is important in the scheme of the Act because, if counsel for the applicant is correct, it follows that what ss 33(1), (2), 38 and 74 require the Licensing Authority to do, is first to determine the reasonable requirements of the public in the way which I have explained and then, only if the issue is raised in the particular case, consider the implications of s 5(1)(b) of the Act on the merits.

I do not accept that such a result was what Parliament intended. In my opinion, what Parliament intended, on a proper construction of ss 5(2), 33(1), (2), 38, 64(3) and 74 of the Act, was to direct the Licensing Authority to have regard to the primary objects of the Act in s 5(1) in all cases and, where the

Licensing Authority is of the view on the merits of the case that restricting the number of outlets may minimise harm or ill health by limiting the availability of liquor, exercise its discretion on the merits in accordance with that view.

I accept that in the determination of the merits of any one case, the Licensing Authority must first determine the facts in accordance with s 38 of the Act, in the case of a category A licence on the balance of probabilities. The issue under ss 38(1) and 74(1)(d) is one issue. Having done so, the Licensing Authority must then decide how to exercise its discretion on the merits having regard to those facts and to all the objects of the Act, including the primary objects in s 5(1) of the Act. At the conclusion of these observations about the relevant statutory provisions I shall say something further about the way in which the discretion of the Licensing Authority is to be exercised in the determination of any one case.

This conclusion, in my opinion, is consistent with the scheme of the Act as a whole because the Act conditions the grant of category A licences by the operation of s 38 in the wider context of the public interest under s 33(1) and the requirement in s 33(2) that each application is to be determined on its merits. It will also be seen that this conclusion is consistent with the conclusions which I have reached in the resolution of the second, third and fourth questions propounded. The merits of each case will govern how one application or another is to be determined.

I turn now to the second question for consideration. This question is expressed in terms of s 5(1)(a) alone. The question must, I think, be considered in the context of s 5 and the scheme of the Act as a whole. There is a distinction implicit in the question between the regulation of the consumption of liquor on the one hand off licensed premises and on the other, on licensed premises. Counsel for the applicant submitted that the primary object of the Act contained in s 5(1)(a) 'to regulate the sale, supply and consumption of liquor' can only apply in very limited circumstances to the consumption of liquor off licensed premises. Counsel referred to s 5(2)(d) which he said should be read down to action taken on licensed premises in the exclusive occupation of the licensee. He drew attention again to s 64(3) which he said, in my view correctly, applies to the imposition of conditions after the issue of a licence. He submitted that in regulating the sale and supply of liquor for consumption off licensed premises it is not a primary object of the Act to minimise harm or ill health caused to people, or any group of people, due to the use of liquor off licensed premises by refusing the grant of a licence authorising the sale of liquor for consumption off the premises.

Counsel for the licensees and for the intervenors each submitted that it is a primary object of the Act to regulate consumption of liquor off licensed premises by restricting the grant of new licences and by imposing conditions on existing licences in appropriate cases. It will be seen that these submissions are consistent with the conclusion which I have reached in answer to the first question propounded. In my opinion, on a proper construction of s 5(1)(a) of the Act, it is a primary object of the Act to regulate the consumption of liquor off licensed premises. In my opinion, the Licensing Authority may refuse the grant of a category A licence under ss 33 and 38 of the Act, where it is of opinion on the merits of the application that it should refuse the application to reduce availability of liquor in order to minimise harm or ill health caused to people, or any group of people, due to the use of liquor off licensed premises.

Likewise, the Licensing Authority may, depending on the merits, grant a category A licence and impose conditions on that licence in accordance with the Act.

The third question propounded is whether, on a proper construction of s 5(1)(b) of the Act, it is a primary object of the Act to minimise harm or ill health due to the use of liquor other than physical harm or ill health. Once again, this question must be approached in the context of s 5 and in the scheme of the Act as a whole. Counsel for the applicant submitted that harm, other than physical harm or ill health, potentially may include economic and social harm to individuals or groups and harm to the community. He submitted that it would be beyond the scope and purpose of the Act, which he said has as its underlying theme a licensing role, to expand the consequences to include other harm than simply physical harm unless expressly so provided.

Counsel for the licensees drew attention to the definition of "harm" in the *Macquarie* and *Shorter Oxford Dictionaries*. He pointed to the distinction between harm and ill health and submitted that ill health would seem to have a narrower meaning than harm. He submitted that harm includes the diversity of harm to the community which may occur through an increase in anti-social or injurious behaviour associated with liquor consumption.

Senior counsel for the intervenors submitted that statutes directed at the public health and safety are to be interpreted liberally and that the ordinary and natural meaning of "harm or ill health caused to people, or any group of people, due to the use of liquor" cannot be limited to the direct effect of alcohol consumption upon physical harm or its direct contribution to ill health. It seems to me that this submission in some way begs the question, although I accept the premise upon which the submission is founded, that whatever the proper construction of these words may be, their application to the circumstances of a particular case involves a question of fact to be determined on the merits.

I think that it may be helpful in the resolution of the third question propounded to consider at the same time the fourth question propounded, whether it is a primary object of the Act to minimise harm or ill health to people other than the consumer due to the use of liquor. Counsel for the applicant referred to s 38(2)(a) of the Act which requires the Licensing Authority to consider, inter alia, the interest of the community in the affected area in determining the reasonable requirements of the public. Counsel submitted that to conclude that it is a primary object of the Act to minimise harm or ill health to people, or any group of people, other than the consumer due to the use of liquor "would mean that the Act will have become far more than a licensing Act addressing social welfare issues". Counsel for the licensees submitted that the language of s 5(1)(b) of the Act is capable of including anyone who is in some way negatively affected by the consumption of liquor and not only those who purchase or consume liquor directly. He submitted that a paradigm instance would be the person harmed by a drunken driver.

Senior counsel for the intervenors submitted that the inclusion of the words "due to the use of liquor" in s 5(1)(b) of the Act reflect an intention on the part of Parliament to identify as a primary object, minimising harm or ill health caused to people or any group of people, due to the use of liquor, although not necessarily the consumer.

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In view of the conclusions which I have reached in answer to the first two questions propounded, it may be seen that the resolution of the third and fourth questions propounded is significant in the determination of the scope and purpose of the Act.

That must be so once it is acknowledged that in an appropriate case the Licensing Authority may refuse the grant of a category A licence if it is of the opinion on the merits of the case that the reasonable requirements of the public, viewed objectively, are not such that it is in the public interest that liquor should be made available at the proposed premises, and that to refuse the grant may minimise harm or ill health caused to people, or any group of people, due to the use of liquor.

In order to answer the third and fourth questions propounded, it is I think necessary to recognise that there is a tension between the primary objects of the Act in s 5(1)(a) and (b). Counsel for the applicant submitted that the two primary objects of the Act are quite separate and distinct and are not consistent or compatible. He submitted that Parliament could have merged the two primary objects by providing that regulation be so administered as to minimise harm or ill health.

In this context, it is necessary to keep in mind that s 74(1)(b) of the Act provides that objection may be made to the grant of a category A licence on the ground that the grant of the application would cause *undue* harm or ill health to people or any group of people due to the use of liquor. As I have already mentioned, this provision itself requires consideration in the context of s 5(1)(b), but for the moment it is sufficient to say that I am inclined towards the view that the primary object contained in s 5(1)(b) of the Act may be articulated in terms of an intention to minimise undue harm or ill health caused to people, or any group of people, due to the use of liquor.

In my opinion, such an approach reflects the intention of Parliament that the Licensing Authority should in an appropriate case relieve the tension between the two primary objects, and between making provision for the reasonable requirements of the public for liquor and related services and minimising harm or ill health caused to people, or any group of people, due to the use of liquor, by determining on the merits of each case whether the grant is in the public interest in that it is necessary to provide for the reasonable requirements of the public when considered against its propensity, if any, to cause harm or ill health to people, or any group of people, due to the use of liquor.

It is worth noting in this case, in passing, that counsel for the applicant acknowledged the tension between the primary objects of the Act which I have spoken about and acknowledged on the merits of the present case, which I have yet to consider, that:

“There has to be a heavy weight of support and an emphasis from a public interest perspective in favour of an application before your Honour should be influenced against the attitudes expressed by the health lobby.”

It remains to determine, however, in the context of the third and fourth questions propounded, whether it is a primary object of the Act to minimise harm and ill health caused to people, or any group of people, due to the use of liquor, other than physical harm or ill health to the consumer.

In considering the third and fourth questions in the construction of s 5(1)(b) of the Act I recognise immediately that to propound the questions as I have conditions the approach which I take to the construction of these provisions.

I have, however, had the benefit of submissions from counsel, each of whom acknowledged in the present case the place which the questions occupy in the construction of these provisions. Prior to the amendment of the Act, similar but not identical questions of construction arose in two cases before the Court. In what has come to be known as the *Re Action Food Barns (WA) Pty Ltd* (1996) 17 SR (WA) 317 case, the Executive Director Public Health objected to the grant of a liquor store licence on the ground that such grant would be contrary to the public interest, pursuant to s 74(1)(a) of the Act, prior to its amendment by the *Liquor Licensing Amendment Act 1998* (WA). In that case, the Court was required to determine whether the nature of the objection was such that, as a question of law, it was capable of being considered within the scheme of the Act (prior to its amendment), whether the ground of objection was expressed in terms of the requirements of the public for packaged liquor or the public interest or both. I observed (at 332):

"The sole ground of objection relied upon is that the grant of the Boulevard application would be contrary to the public interest, namely that the health of the members of the Broome community is likely to suffer if this application is granted. The particulars in support of this ground of objection reveal that they fall into two categories. Firstly, it is alleged that if the application is granted, the health of the members of the Broome community who purchased liquor from the proposed store and consume it, is likely to suffer. Secondly, it is alleged that if the application is granted, the health of the members of the Broome community (whether or not they purchase liquor at the proposed store and consume it) is likely to suffer in consequence of the behaviour of those who do purchase liquor at the proposed store and consume it."

Having examined the relevant provisions of the Act prior to its amendment, I continued (at 356):

"In my opinion, this review of the provisions of the Act reveals that the purposes of the Act do not include the control of the consequences, for the health of the consumer, of the consumption of liquor on licensed or unlicensed premises or in private. In my opinion, such an interpretation of the public interest in this legislation is definitely extraneous to any objects which the legislature had in view in enacting this legislation. . . . In my opinion, the examination which I have made of the Act reveals that it is an Act which seeks to regulate the sale, supply and consumption of liquor by limited prohibition on the sale and supply of liquor under the authority of a licence issued pursuant to the Act. The Act limits the number of licences for the purposes explained by the Chief Justice in the *Cabaret Owners Association of Western Australia v Cliveden Pty Ltd* (unreported, Supreme Court, WA, Full Court, No 8084, 23 February 1990) case. The Act extends to control consumption of liquor on licensed premises and in certain public places which are not licensed. It does not extend to control the consumption of liquor in private. I am equally of the opinion that it does not extend to control the sale, supply and consumption of liquor by having regard to the consequences which that consumption may have for the consumer, whether the liquor is consumed on licensed premises in public or in private."

I went on to observe in the course of the reasons in that case (at 359) that it was quite plain from the evidence led on behalf of the Executive Director

Public Health that the nature and extent of the objection in that case was such that it was of little consequence to the Executive Director Public Health whether liquor was purchased and consumed on licensed premises or purchased on licensed premises and consumed elsewhere. I made the following observation in this context (at 359):

"It is, however, a distinction which is quite plainly made in the scheme of this Act. It seems to me that, save in the case of juveniles, the Act only seeks to regulate the sale, supply and consumption of liquor on licensed premises. It is implicit in the scheme of the Act that it is only on licensed premises that a licensee may exercise such control. The scheme of the Act need not be so but in my opinion, at the moment, it is. . . . It seems to me that once this is acknowledged, it must lead necessarily to the conclusion that the Act does not seek to control the consumption of liquor purchased at premises such as those proposed to be licensed under a liquor store licence and consumed elsewhere. If that is so, it follows in my opinion that it is not the purpose of the Act to control the consequences which the health of the public of Broome may suffer as alleged from the behaviour of those who may purchase liquor at the proposed store and consume it elsewhere."

Following *Action Food Barns*, in *Re Woolworths Supermarket Derby* (1997) 17 SR (WA) 128, the Court was required to determine whether there was power under s 64 of the Act (prior to its amendment) to impose a condition on certain licences because of a perceived safety, health or welfare problem. At 137 I said:

"The director purported to impose these conditions having regard to the tenor of the licences and the circumstances in relation to which the Licensing Authority intends that they should operate. In my opinion, the tenor of each licence and the circumstances in relation to which the Licensing Authority intends that each should operate must be examined in the context of the public interest. No authority is necessary for the proposition that s 64 of the Act must be construed in the context of the Act as a whole and I am likewise of the opinion that no authority is necessary for the proposition that the public interest is central to the scheme of the Act."

Having reviewed once again the relevant provisions of the Act, I continued (at 138):

"The scope and purpose of the Act in this context is to restrict the sale of liquor by a scheme of limited prohibition in order to promote public order on and off licensed premises. It is not to restrict consumption in order to promote public health. In expressing this opinion, I acknowledge that Part IV, Division 9 prohibits the sale of liquor to juveniles and prohibits the consumption of liquor by juveniles on licensed premises. It does not prohibit the consumption of liquor off licensed premises in private. The director was of the opinion that s 64 recognises both individual and public health issues as being matters which the Licensing Authority may have regard to when imposing conditions. In my opinion, s 64(1) does not confer a power on the Licensing Authority to consider the facts and concerns relied upon by the director when having regard to the tenor of the licence and the circumstances in relation to which the Licensing Authority intends that each should operate in the public interest."

Reference to these two decisions prior to the amendment of the Act serves, I think, two purposes in the present context. It serves first to demonstrate that questions similar to those propounded have arisen previously in the construction of the Act prior to its amendment, and it raises for consideration the extent to which those earlier decisions are of any significance in the construction of s 5(1)(b) of the Act since its amendment.

The third and fourth questions propounded raise for determination the proper construction of s 5(1)(b) in the amended Act which was passed and proclaimed after the two decisions of this Court which I have mentioned. Senior counsel for the intervenors referred to *Re Woolworths Supermarket Derby* and the passage from the reasons which I have mentioned. He submitted that the provisions of s 5(1) of the Act as amended seem to address "the conclusion of the court that s 64(3)(c) of the Act prior to its amendment was not directed at the consequences of the consumption of liquor for those who purchase it at the licensed premises after they leave the licensed premises".

As I have said, counsel for the applicant submitted that in relation to the consumption of liquor the *Liquor Licensing Amendment Act* has introduced no change to the provisions of the Act prior to its amendment, notwithstanding s 5(1)(b) of the Act. He submitted that in the scheme of the Act as a whole, the amendment contained in s 5(1)(b) is not a tool to refuse an application but rather a means to regulate licences generally by imposing conditions in a proactive way to deal with consumption generally. Counsel for the applicant pressed upon me the submission that the proper construction of s 5(1)(b) of the Act should be approached in the light of his submission that the two primary objects of the Act are quite separate and distinct and are not consistent or compatible. He said that it followed that Parliament did not intend to restrict the circumstances in which liquor store licences could be granted or the types of outlets eligible for a new licence but rather intended to provide that the Licensing Authority could curtail the privileges of a licence, once granted, in an appropriate case. As I have mentioned, counsel for the applicant submitted that "harm or ill health ... due to the use of liquor" should not be construed to extend beyond physical harm or ill health to the consumer. Finally, counsel for the applicant submitted that the construction of s 5(1)(b) advocated by counsel for the intervenors and the licensees increased the scheme of limited prohibition upon the grant of new licences, depending on the merits of the case, which he said was not the intention of Parliament.

While it may be thought that the submissions of counsel for the applicant are not directly relevant to the proper construction of s 5(1)(b) and the third and fourth questions propounded, I am of the opinion that they deserve consideration, because they help to point up the question of the underlying purpose of the amended Act, the answer to which is itself I think relevant in the determination of the proper construction of s 5(1)(b) of the Act in the scheme of the Act and the determination of the third and fourth questions propounded.

I come, therefore, to consider these questions in the context of the new provisions of s 5(1)(b) of the Act which I accept were introduced in part to address the earlier decisions of this Court. I say in part because it is a matter of record that the introduction of a provision having the thrust of s 5(1)(b) was under consideration and review well before the two decisions of this Court which I have mentioned. I should explain also that, in saying that I accept that it was the intention of Parliament to address those two decisions, I do not wish

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to be understood to suggest that it was the intention of Parliament to correct what it regarded as an error in the construction and application of the relevant provisions of the Act prior to its amendment, which I have referred to. Rather, it seems to me that it was the intention of Parliament to change the law as it existed prior to the amendment of the Act by extending its scope and purpose. The third and fourth questions propounded arise, therefore, in the context of a change to the legislation the effect of which is fundamental and the extent of which is uncertain.

I do not accept the submission of counsel for the applicant that the division of the primary objects in s 5(1)(a) and (b) should lead the Court to conclude that s 5(1)(b), and those other sections of the Act which I have mentioned and which correlate to it, reflect an intention on the part of Parliament to make the purpose expressed in s 5(1)(b) subsidiary to the purpose expressed in s 5(1)(a) or the objects otherwise expressed in s 5(2), or to make that purpose otherwise residual to the purpose in s 5(1)(a) of the Act.

I should observe that I immediately acknowledge that the construction advocated by counsel for the intervenors and the licensees reflects a construction which involves what may sometimes be seen to be contradictory purposes. Such a predicament is not at all unusual in liquor licensing legislation elsewhere and now in this State which seeks, on the one hand, to provide for the reasonable requirements of the public for liquor and related services, while at the same time addressing the perceived consequences of the use and consumption of liquor.

There appears to be little disagreement in the field of liquor control that the complete prohibition of the sale of liquor is not effective in the control of the perceived consequences of the consumption and use of liquor. What Parliament has sought to do in this amended legislation is to achieve a balance between making liquor available in the community and curbing the perceived consequences of its consumption and use. I therefore reject the submission of counsel for the applicant that on a proper construction of these provisions it should be concluded that Parliament did not intend that the licensing authority may in an appropriate case on the merits refuse the grant of an application such as the present on the ground that to grant the application may cause undue harm or ill health to people, or any group of people, due to the use of liquor.

It remains to determine the extent of the perceived consequences expressed by the words "harm or ill health . . . due to the use of liquor" which Parliament intended should be taken into account in any determination of the balance between the two primary objects in s 5(1) and as propounded in the third and fourth questions under consideration. I accept the submission of counsel for the licensees when he says that s 5(1)(b) makes a distinction between what is "harm" and what is "ill health". He submitted that "ill health" would seem to have a narrower meaning than "harm". He said that "harm" includes the diversity of harm to the community which may occur through an increase in anti-social or injurious behaviour associated with liquor consumption, wherever that consumption takes place. He submitted that a wide reading of the term "harm" is supported by the second reading speech and debates in the Parliament. He said that the terms "public health", "public interest", "community issues", "community problems", "community concerns" demonstrate that the legislature intended that the amendments would have wide-reaching effects.

I turn to the place of the word "undue" in s 74(1)(b) in the scheme of the Act. It is to be observed that this word does not occur in s 5(1)(b), 64(3)(cc) or 69(8a) of the Act. In my opinion, it occurs in s 74(1)(b) of the Act owing to the grammatical construction of that subsection which provides for a ground of objection. Otherwise, I am of the opinion that the occurrence of the word "undue" in s 74(1)(b) of the Act does not, on a literal construction of this subsection, mean that this subsection is to be construed differently from those sections which I have mentioned where the similar provision appears. Given the balance which I have just mentioned, what I think the word "undue" in s 74(1)(b) of the Act means is that an objector who relies upon this ground of objection must establish on the balance of probabilities, and on the merits of the case as a whole, that the grant of the application would cause harm or ill health to people or any group of people which, on the evidence is found to be undue when considered against the weight of the evidence in support of the grant of the further licence applied for.

In considering all these submissions I have had regard to s 18 of the *Interpretation Act 1984* (WA) which provides:

"In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."

This is a case where the purpose or object underlying the written law is not expressly stated in the operative provisions of the written law other than in words directly correlated to the provision which the Court is required to construe in s 5(1)(b) of the Act. It is to be noted that Parliament has expressed its intention in terms of the minimisation, not the removal, of harm or ill health due to the use of liquor. In answering the third question propounded, therefore, I accept that on a proper construction of s 5(1)(b) in the context of s 5 and the scheme of the Act as a whole, Parliament intended the word "harm" to include harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor, and is not limited to physical harm. I accept that "ill health" has a narrower meaning than "harm" and it is in my opinion limited to the consequences which the consumption of liquor may have for the health of the consumer.

I also conclude, therefore, in answering the fourth question propounded, that Parliament intended (a) that the words "harm . . . of people, due to the use of liquor", should extend to harm caused to people other than the consumer due to the use of liquor; and (b) that the words "ill health" caused to people, or any group of people due to the use of liquor should be limited to the consequences which the consumption of liquor may have for the health of the consumer.

Given the balance which I have explained is inherent in the statement of the primary objects of the Act in s 5(1), I think that this construction of the words in s 5(1)(b) of the Act will promote the purpose or object underlying the Act, in accordance with s 18 of the *Interpretation Act*. I have found the preceding examination of the four questions propounded helpful in the exercise of determining the proper construction of s 5(1) in the scheme of the Act as a whole, having regard to the operation of s 33, 38, 64, 69(8)(a) or 74(1)(b) and (d) of the Act. I am in no doubt that by the introduction of s 5(1) of the Act and its correlates, Parliament intended to extend the scheme of the Act beyond the scope and purpose of the Act prior to its amendment, as determined by this

Court in the *Action Food Barns* case and in *Re Woolworths Supermarket Derby*.

In my opinion, the scope and purpose of the Act as amended now involves in this context attempting a balance between what may sometimes be seen to be contradictory purposes. Parliament has retained the scheme of limited prohibition of the sale of liquor under licence. The scope and purpose of that scheme now includes making provision for the reasonable requirements of the public for liquor for consumption on and off licensed premises. At the same time, it includes controlling the availability of liquor, and thereby its consumption on and off licensed premises, in order to promote public order and minimise harm or ill health to people, or to any group of people, due to the use of liquor.

As I have explained, I am further of the opinion that it was the intention of Parliament that the Licensing Authority should refuse the grant of a new licence or otherwise place conditions on the grant of a new licence where the Licensing Authority is of the opinion that such a course is necessary on the merits to minimise harm or ill health caused to people, or any group of people, due to the use of liquor. What the *Action Food Barns* case and in *Re Woolworths Supermarket Derby* did not decide, of course, was the nature of the harm or ill health which it was the intention of Parliament may, after a consideration of the merits in any one case, result in the refusal of a grant or the imposition of conditions within the scope of the Act. Owing to the conclusions which the Court reached about the scheme of the Act prior to its amendment, it was not necessary to consider and decide that question in those cases.

When the Licensing Authority comes to decide the merits of a particular application under ss 33 and 38 of the Act, it can now be seen that s 5(1)(b) in its context provides a positive indication of the considerations by which the decision is to be made in the exercise of its discretion in the public interest. It will be for the Licensing Authority in each case to consider the merits of the case on the evidence and information before it and determine how it should exercise its discretion within the scheme of the Act as I have explained it.

It will be necessary for the Licensing Authority to identify on the evidence and information before it in each case the fact or facts which it considers should on the merits activate its discretion to grant or refuse the grant of a category A licence under s 38 or 33 of the Act or to impose conditions upon a grant. In each case, the Licensing Authority may identify such fact or facts of its own motion in accordance with s 16(1)(b) of the Act and the general law relating to procedural fairness.

It seems to me, however, that it may not be necessary for the Licensing Authority to determine in every case whether controlling the availability of liquor may be effective to control consumption, and if so, whether it may be effective to minimise harm or ill health, as I have explained them. The Act as amended requires the Licensing Authority to attempt the balance which I have spoken about in each case and assumes that the attempt will, so far as possible, be effective in each case in whatever way the Licensing Authority exercises its discretion in accordance with the Act on the merits.

Otherwise, in carrying out its functions under s 38, 64(3), 74(1)(b) or 74(1)(d) of the Act, the Licensing Authority is required to have regard to the primary objects of the Act in s 5(1), as I have explained them, and to exercise its discretion under s 33(1) and (2) of the Act in the public interest. It may also

decide to exercise that discretion upon an intervention pursuant to s 69(8a) or 69(11) of the Act, such as those in this case. The Licensing Authority may formulate policy about those matters of which it requires to be satisfied in the exercise of its discretion in one application or another or in certain types of application, provided that policy is made known to interested parties. It may not formulate policy which seeks to pre-determine issues under the Act without consideration of the merits of the particular application.

The issues under ss 38(1), 38(2b)(a) and 74(1)(d) of the Act

The proposed premises the subject of this application are depicted variously on Exs 22-25. The applicant originally proposed that existing cash registers located at the existing servery should be the points of sale of liquor at the proposed premises. The applicant altered that proposal prior to the hearing and Ex 25 now depicts a separate servery and cash register within the proposed licensed premises. Exhibit 23 is a site plan which, inter alia depicts the location of a drive-through proposed for the liquor store in the future, in the area east of the point marked 'Existing dual fuel dispenser'.

The existing premises are variously described in the evidence. Mr Andrew Pawluk of Taylor Burrell, Town Planning Consultants, says at para 2.0 of Ex 35:

"Gingers' Roadhouse, the 'application site', is located on lot 30 and partially on lot 264 Great Northern Highway, Upper Swan near the corner of Orchard Street. The application site is within the metropolitan region and located approximately 25 km north east of the Perth Central Business District. (Figure 1.)

Gingers' Roadhouse is a modern and spacious new generation style service station and currently consists of a single building of glass and metal construction which has an approximate floor area of 437 m². The building was totally redeveloped and opened in January 1996. Approximately 122 m² is dedicated to the sale of goods which consists of groceries, car accessories and motor products. Other services provided include take away food, dine-in meals, video hire, Eftpos and an automatic teller machine (ATM). There are 27 marked car parking bays located on site. Space is also available for the parking of five trucks. There are 12 bowsers for fuel which can contain a total of 22 individual hoses. (See photos appendix B.)

The application site is located within Upper Swan which is primarily a rural settlement consisting mainly of small sized rural properties containing single residences. Land use fronting the western side of Great Northern Highway consists mainly of small rural lots, some containing residences and two service stations (including Gingers' Roadhouse). A road train assembly area is located just north of the corner of Great Northern Highway and Apple Street. On the eastern side there are larger rural lots, some containing residences, and a farm machinery sales and service outlet, located opposite the application site.

Access to the application site is provided to both south and north bound traffic, by two separate crossovers which both enjoy ingress and egress to Great Northern Highway. Both crossovers are wide and allow relatively high ease of accessibility to the site from Great Northern Highway.

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Highway to provide a service for motorists. Great Northern Highway provides the major link between the Perth metropolitan area and the state's north."

At para 3.0 of Ex 35, Mr Pawluk observes that it is the intention of the applicant to extend the licensed premises in the future to include a drive-through facility. He says that such a development has been approved by the local authority.

Mr Malcolm Green gave the principal evidence for the applicant which is contained in Exs 1 and 33. He has been a director of the applicant company since 1984. At para 46 et seq of Ex 33, Mr Green confirms much of the evidence of Mr Pawluk in relation to the existing premises and the proposed licensed premises. At para 76 et seq, Mr Green states:

"The inclusion of take away liquor products will mean that at one location, with the one stop, Gingers' customers will be able to meet their motor vehicle needs and also satisfy most of their household requirements. The intention is to establish the liquor store within the existing shop premises as quickly as possible should an approval be granted. This involves making the changes as detailed by Mr Oldfield the architect in his latest plan. If approved the internal liquor section could be operational within a couple of months.

In order to accommodate concerns expressed by the Director of Liquor Licensing, Mr Oldfield was instructed to include a servery counter with a cash register within the liquor section.

At a subsequent stage the building works can be planned and organised for the proposed drive-in facility to be added. This second stage will be a relatively complicated and rather slow exercise because it involves repositioning of the diesel pump. This involves removing and replacing the underground pipes and electricals and the reformatting of the driveways to accommodate the reposition [sic] diesel pump. The second stage to the liquor licence is a significant logistical and building exercise which could disrupt the whole site. It will not be developed until at least 12 months until after the initial stage is operational."

This evidence will require some consideration when I come to explain the evidence in support of the ground of objection under s 74(1)(b) of the Act and the evidence on behalf of the intervenors. For the present, it is sufficient to observe that the present application is for the conditional grant of a liquor store licence in respect of those premises depicted on Ex 25 which does not include the proposed drive-through. While the proposed drive-through would require separate approval as an extension of the licensed premises if this application is granted, I think that the proposed premises the subject of the present application must be viewed as premises which the applicant intends to extend by providing a drive-through facility after 12 months from any grant. It would, in my opinion, be quite inappropriate to regard the drive-through facility as the subject only of some future application and therefore not relevant to a consideration of the merits of this application. Depending on the merits of the case, such a course would, hypothetically, allow an applicant to seek to achieve in two steps what perhaps it could not achieve in one.

The applicant's answers to request for further and better particulars dated 9 June 1998 confirm the evidence of Mr Pawluk that the proposed licensed area depicted on Ex 25 is some 32 m². This comprises 14.5 m² of sales area and

17.5 m² of coolroom and storage area. It is to be observed that in the design of packaged liquor facilities, this is a particularly small area and that may partly explain why it is described as "initially" of these proportions. The proposed drive-through facility would plainly extend the licensed area considerably.

At para 87 of Ex 33, Mr Green explains that initially it is proposed to stock approximately 37 beers, 116 wines and 75 spirits at the premises. He says that once the drive-through facility is added the range will be similar but the quantity of stock carried will be larger. Annexure E to Ex 33 itemises the liquor products which it is proposed to make available. It will be observed that of the total range of stock proposed, spirits and ready to drink spirit mixes form a significant proportion, a proportion considerably greater in relation to the proposed range of liquor products than would be found in many packaged liquor outlets.

At para 75 of Ex 33, Mr Green says:

"The shop supplies a full range of merchandise such as groceries, cold drinks, confectionery, newspapers and magazines, snack foods, lubricants, car accessories, fresh produce and other associated products. In addition there are videos to hire, and ATM facilities. Rest rooms and shower facilities are also available for the public convenience as is a public telephone."

At para 84 of Ex 33, Mr Green itemises the range of products currently available in the convenience store. I have already referred to para 76 of Ex 33, where Mr Green says:

"The inclusion of take away liquor products will mean that at one location, with the one stop, Gingers' customers will be able to meet their motor vehicle needs and also satisfy most of their household requirements."

In the course of cross-examination, at pp 54-55 of the transcript, Mr Green acknowledged that the existing premises are not a supermarket. I do not accept the evidence of Mr Green that the existing or proposed premises are capable of satisfying most household requirements.

The proposed hours of the liquor store are 8 am to 10 pm six days a week. These are the maximum hours permitted for a liquor store under the Act. The existing service station premises trade 24 hours a day seven days a week and it is proposed that they should continue to do so.

At para 65 of Ex 33, Mr Green says that currently the number of transactions each week at the existing premises is in the range of 7,000 to 10,000. He says that a much higher number of transactions are for shop and café sales without fuel, compared to the transactions involving fuel sales. He goes on to say that information available to the applicant suggests that the existing premises enjoy patronage from residents living in Upper Swan, Muchea, Bullsbrook, Gingin and other surrounding communities as well as from people from further afield commuting through the area and passing by. He says that 40 to 45 per cent of Gingers' business comes from transient customers travelling to and from their destinations. During the week, a good number of tourists patronise the premises as they head north along Great Northern Highway. Mr Green says that on the weekend the premises are very busy with family customers on their way to nearby picnic areas.

I have already referred to some of the evidence of Mr Pawluk in Ex 35 in relation to the design of the existing and proposed premises. Mr Pawluk goes

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on to provide some information about the affected area which, as I have said, is a radius of 5 km from the proposed site. At para 4.0 of Ex 35, Mr Pawluk says that the affected area includes the localities or portions of the localities of Upper Swan, Bullsbrook, the Vines, Ellenbrook, Belhus, Henley Brook, Baskerville, Millendon and Brigadoon. He says that features located within the affected area include the Swan River, and its tributary, Ellenbrook. The southern portion of the affected area lies within the Swan Valley and the eastern portion lies within the Darling Range and Walyunga National Park. The Great Northern Highway which is part of the National Highway system and links Perth with north western Australia dissects the affected area. Two rail lines, one providing a freight link between Perth and Geraldton and the other linking Perth with the eastern States, cut through the affected area. A road train assembly area is also located within the affected area on the corner of Great Northern Highway and Apple Street, approximately 750 m from the site.

The localities which Mr Pawluk mentions are further described at para 7.5 et seq of Ex 33 and depicted in figure 10 of Ex 33. At para 7.9, Mr Pawluk gives particular attention to the locality of Upper Swan and rural surrounds when he says:

"The Upper Swan settlement and rural surrounds is best and conveniently defined by the boundary of the Australian Bureau of Statistics Collector District (CD5110117) within which it falls. (Refer figure 11.) The total population for the CD area was 662 persons in the 1996 census. A survey of the settlement area only found there to be 163 residences on the 203 lots. This represents a current population of 487 persons. The 40 vacant lots provide an additional 120 people based on current zoning.

The Upper Swan settlement and rural surrounds is physically separated from the rest of the localities within the affected area, as discussed above, by Ellenbrook and the Swan River. Access from and to the site is primarily limited to Great Northern Highway. Alternative access through the settlement is provided by Railway Parade although this road ultimately feeds all its traffic to Great Northern Highway at its intersection just south of the settlement. The Upper Swan settlement and neighbouring rural surrounds is quite isolated from other developed areas and commercial facilities.

The application site (Gingers' Roadhouse) and to a lesser degree the Shell Roadhouse provides the only convenient shopping to residents within the Upper Swan settlement and rural surrounds. The range of goods provided in the Shell Roadhouse is very limited in comparison to that produced at Gingers' Roadhouse. It has a markedly smaller floor area and a larger restaurant area than Gingers' Roadhouse. The inclusion of liquor sales to the retail function of Gingers' Roadhouse will provide further convenience to the local residents.

The closest liquor store to the Upper Swan settlement is Rakich's store located over the Swan River and the Perth-Geraldton railway line 3 km south of the subject site. To the north the Bullsbrook Hotel located within the Bullsbrook town site which is approximately 12 km north of the application site has over the counter sales for packaged liquor.

The Upper Swan settlement is zoned 'rural' under the Shire of Swan town planning scheme. There is no opportunity for additional commercial development. The only opportunity for the addition of a commercial use

within the settlement is through its inclusion in an already operating and approved commercial establishment."

At para 5.1 of Ex 33, Mr Pawluk says that Rakich's store is located on the corner of Haddrill Street and Great Northern Highway, Baskerville. He says that the store consists of a Foodland Supermarket which includes alcoholic beverages, a butcher and four fuel bowzers. The store is primarily an all-in-one complex, except for the butcher which although located within the store operates as its own entity. Purchases of food, alcohol and fuels are all paid for at the same cash register. The store is open until 6 pm on weekdays and Saturdays and between 10 am and 4 pm on Sundays. Rakich's store is located 3 km by road from the proposed premises. It is the only packaged liquor outlet in the affected area.

The evidence of Mr Pawluk is that the total population of the affected area at the 1996 census was 2588 people. The affected area experienced significant population growth between the 1991 and 1996 census. Mr Pawluk attributed this growth mainly to the Vines and Brigadoon.

The only other licence in the affected area is the Vines Resort Hotel. These premises offer no separate packaged liquor facility. There is no road access between the Vines and Upper Swan crossing Ellenbrook.

At para 8.0 of Ex 35, Mr Pawluk examines traffic movement trends within the affected area. At para 8.3 he says that traffic volumes increased on Great Northern Highway from 9890 in 1990/91 and 10,350 in 1992/93 to 11,320 in 1996/97. He says these figures represent an increase of 9.5 per cent and 9.1 per cent for the respective periods. They represent average weekday traffic volumes.

The applicant also relies on the evidence of Dr John Henstridge of Data Analysis Australia Pty Ltd who conducted a survey relating to the proposed liquor store in August 1998. The results of that survey are contained in Ex 36. The survey comprised two separate components, an intercept survey and a resident telephone survey.

The residents' survey was restricted to residents of Upper Swan and the immediate surrounding suburbs. Electronic sampling of this locality provided a representative sample of households with telephones. Face to face or personal interviewing was adopted for the intercept survey conducted at the proposed premises. Both surveys were managed by the David Hydes Consulting Group in accordance with Interviewers Quality Control Australia Procedures.

The questionnaires were designed in conjunction with the David Hydes Consulting Group with advice and final approval from Phillips Fox. Copies of the questionnaires are attached to Ex 36 in Appendix A. The resident telephone survey was carried out on Tuesday, 2 August 1998 when the target number of 200 interviews was obtained. The intercept survey was carried out from Thursday, 6 August to Saturday, 8 August 1998. The target of 400 interviews was not obtained as 74 of the interviewees had not purchased take away liquor in the last 12 months. As a result, a total of 326 respondents were surveyed in the intercept survey.

At para 2 of Ex 36, Dr Henstridge states:

"Data Analysis Australia Pty Ltd and the David Hydes Consulting Group were instructed by Phillips Fox to organise a survey of households and travellers to assess the need for a liquor outlet at the site of Gingers' Roadhouse situated at lot 236 Great Northern Highway, Upper Swan.

Issues to be covered in the survey include:

- current liquor purchasing behaviour of households in the area; and
- the propensity to shop for take away liquor at the proposed liquor store and their reasons."

I have to say that this is, at least, an inelegantly expressed statement of the purpose of the survey given the principal evidence for the applicant directed towards establishing that the grant of this application is necessary to provide for the reasonable requirements of the public for packaged liquor in the affected area, including the residents of the affected area, and those resorting to or passing through the affected area. What is clear, however, from this survey, as in many others relied on in this jurisdiction, is that it is directed towards demonstrating the subjective requirements for packaged liquor of a representative sample of a relevant section of the population resident in, resorting to or passing through the affected area. Its purpose, therefore, is not, for instance, to survey the preferences or priorities of the section of the public relied upon but to reflect the extent to which this section of the public has such a subjective requirement.

As a result, the intercept survey asked interviewees, inter alia, about the frequency of their visits to the existing service station premises. Page 5 of Ex 36 reveals that 43.6 per cent of interviewees visited the premises more than once a week. Page 6 reveals that 34.5 per cent of interviewees to the intercept survey resided in adjacent suburbs while 24 per cent resided elsewhere in the metropolitan area and 27.7 per cent in the north regional area. Later in the interview, the interviewees were given brief information about the proposed liquor store and asked whether, in the event the proposed liquor store is established, they will purchase take away liquor there. 68.7 per cent responded that they would do so while 23.9 per cent said they would not and 7.4 per cent did not know. Of those who responded that they would purchase take away liquor at the proposed premises, p 9 of Ex 36 reveals that 39.7 per cent said they would do so when purchasing fuel and 49.1 per cent said they would do so because it was convenient. Page 6 of Ex 36 also reveals that 29.1 per cent of the sample interviewed in the intercept survey had purchased packaged liquor at Rakich's store during the previous 12 months while 69.9 per cent had not done so and 0.9 per cent did not know whether they had done so.

Turning to the telephone survey of Upper Swan, p 12 of Ex 36 reveals that 21 per cent of the sample had visited the existing premises more than once a week in the previous 12 months, 64.5 per cent of the sample said they would purchase packaged liquor at the proposed premises (Ex 33, p 15) and 90.5 per cent of the sample had purchased packaged liquor at Rakich's store in the previous 12 months (Ex 33, p 12). Of the 64.5 per cent of the sample which would purchase packaged liquor at the proposed premises, 12.4 per cent said they would do so when purchasing fuel while 65.9 per cent said they would do so because it was convenient.

Counsel for the licensees criticised the evidence of Dr Henstridge in terms of the opinions which Associate Professor Kevin Durkin expressed in Ex 64, on behalf of the objectors. The first criticism which is made is that the telephone survey is not representative of the whole affected area, being conducted within a 2.5 km radius of the site. The applicant did not dispute the fact that the areas covered by the two surveys were different. In my opinion, a similar difference would be observed if the telephone survey had selected a sample from the

whole of the affected area. The intercept survey necessarily and expressly examines the requirements of that portion of the sample which does not reside in the affected area but is resorting to it or passing through it. What I think is perhaps more significant in the observation that the telephone survey is not representative of the whole affected area is that firstly, the applicant deliberately selected the locality of Upper Swan because it is closer to the premises and, secondly, the responses of the sample were consequently more likely to be favourable to the applicant owing to the proximity of the interviewees to the premises.

Professor Durkin acknowledges that it appears from the survey that the existing premises serve many customers who do not live nearby. He points out that much of the survey is concerned with a comparison between the proposed premises and Rakich's store. As will be seen, in my opinion any such comparison between the two premises in terms of the infinitely varied subjective opinions of the interviewees to these two surveys is not necessary in the determination of the issues under ss 38 and 74(1)(d) of the Act. Professor Durkin criticises the intercept survey because it was conducted at the premises. I have no doubt that such a survey does tend to favour the establishment where it is conducted. It seems to me to be unavoidable and must just be taken into account. He criticises the survey because it did not achieve its target of 400 persons who had purchased alcohol in the last 12 months. As he says, it is a minor failing. I do not think that Professor Durkin's criticism of question 2(a) in the intercept survey is of any consequence. I do accept his opinion that there is no basis for the view that the proposed liquor store may offer more competitive prices, although given the nature of this enquiry I doubt whether it is of any great consequence. Professor Durkin says that a recurrent problem with the data presentation is that several tables contain the note that "multiple response is possible for each respondent" and these tables indicate that they are reporting total (presumably total responses) rather than total respondents. In my opinion, the totals for the multiple response tables are total respondents.

Professor Durkin expresses the opinion also that some of the major problems with the report emerge in the conclusions. In my opinion, his criticisms of the sampling process are not made out. Otherwise, I do not find it necessary to determine the weight which should be attached to the conclusions which Dr Henstridge draws from the data obtained in these surveys and which I have referred to.

I do not accept the submission of counsel for the objectors that no meaningful conclusions can be drawn from Ex 36, because when the data is extracted in the way which I have attempted, I think it is sufficiently reliable to allow conclusions of fact to be drawn from it for the purposes of ss 38 and 74(1)(d) of the Act. This kind of evidence is regularly presented in this Court and, given its purpose, it can really serve as no more than a general guide to the subjective requirements of the section of the public surveyed to purchase packaged liquor at the proposed premises. What the evidence of Dr Henstridge tends to confirm is that trade at the existing premises comes roughly half and half from inside and outside the affected area and that a significant proportion of those customers from both inside and outside the affected area would purchase packaged liquor from the proposed premises if this application were granted. The subjective evidence of the witnesses called on behalf of the

essarily and expressly which does not reside in it. What I think is that a telephone survey is not necessarily, the applicant says it is closer to the truth and consequently more reliable in the proximity of the

the survey that the respondent is nearby. He points out that between the proposed survey and my opinion any such difference is infinitely varied and is not necessary in the context of the Act. Professor Greaves testified at the premises. The establishment where the survey was just be taken into account to achieve its target of 1000 calls. As he says, it is a criticism of question 2(a) of the survey in his opinion that there may be more responses than may offer more responses. I doubt whether it is a recurrent problem to note that "multiple responses" indicate that they are from different respondents. In my view, the respondents.

The major problems with the criticisms of the survey are not necessary to the conclusions which I have reached.

It is not that no reliable data is available to the applicant and the respondent to the court. The respondent's evidence is that the data is reliable.

applicant is to the like effect. It is also, in my opinion, consistent with the number of vehicles passing the proposed premises each day.

The evidence for the applicant to which I have referred leads me to the opinion that the applicant has established on the balance of probabilities the subjective requirements of the public resident in and passing through the affected area for liquor facilities by inference from the evidence of a representative sample of a relevant section of the population of the affected area. Those subjective requirements include the convenience of purchasing packaged liquor in conjunction with fuel or foodstuffs in due course at a drive-through facility.

As in many cases, it is then necessary to determine whether the subjective evidence of requirements is objectively reasonable. This is not a case where the sheer weight of numbers is sufficient in my opinion to establish that the subjective requirements of the public are objectively reasonable. It is a case, however, where there is only one relevant packaged liquor outlet existing in the affected area which is some 3 km distant from the proposed premises. It is also a case where, as I have said, a substantial proportion of the public which the applicant relies upon resides outside the affected area and is passing through the affected area, or to a lesser extent resorting to it. In such a case, it is necessary to discount the subjective evidence of the persons resorting to or passing through the affected area in considering whether the requirements of the public relied upon are objectively reasonable, because those people may be expected to purchase packaged liquor outside the affected area prior to commencing their journey or after completing it. This is not a case like the *Big Bombers* application where it could be expected that those passing through the affected area have come from a location where packaged liquor is not readily available such as the central business district of Perth, as in the *Big Bombers* case.

I therefore discount the subjective evidence accordingly. It is also necessary to take into account the services provided by Rakich's store but on the evidence it is in my opinion clear that the hours during which that store trades are not sufficient to provide the kind of service which this applicant proposes. I am, therefore, of the opinion that the subjective evidence of the section of the public which the applicant relies upon is objectively reasonable.

It is then necessary to consider the issue under s 38(2b)(a) of the Act. In this case, I am of the opinion on the evidence that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area, for the reason which I have mentioned and also because of the distance of Rakich's store from the proposed premises, its location on the eastern side of the highway and south of the West Swan Road intersection with Great Northern Highway.

I am therefore of the opinion that subject to the ground of objection under s 74(1)(b) of the Act and the discretion of the Court to refuse the application under s 33 of the Act, the applicant has established that the grant of the application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area. It has discharged its onus under s 38 of the Act and the ground of objection under s 74(1)(d) therefore fails.

The ground of objection under s 74(1)(b) of the Act, the interventions and the exercise of discretion under s 33 of the Act on the merits

I turn now to consider the ground of objection under s 74(1)(b) of the Act and the notices of intervention in accordance with the approach which I have already explained should be taken in the application of the relevant provisions of the Act. The further amended notice of objection dated 29 July 1998 lodged by the Liquor stores Association of Western Australia (Inc) particularises this ground of objection at p 3 as follows:

- “(1) The impact or likely impact on public health by reason of the sale of alcohol in conjunction with petroleum products.
- (2) The impact or likely impact on public law and order by reason of the sale of alcohol in conjunction with petroleum products.
- (3) The impact or likely impact on road safety by reason of the sale of alcohol in conjunction with petroleum products.
- (4) The impact or likely impact on public health by reason of the sale of alcohol from a petrol station.
- (5) The impact or likely impact on public law and order by the sale of alcohol from a petrol station.
- (6) The impact or likely impact on road safety by reason of the sale of alcohol from a petrol station.”

These particulars are repeated in the amended notice of objection of the Western Australian Hotels Association (Inc) dated 31 July 1998.

The Alcohol Advisory Council of Western Australia Inc relies, as I have said, on the ground of objection under s 74(1)(a) of the Act. Its notice of objection is dated 7 January 1998. The particulars attached to that notice contain, in part, the following statement:

“The Alcohol Advisory Council of Western Australia opposes the liquor licence application for Gull Liquor Stop, Gingers’ Roadhouse because granting this licence would set a precedent for the sale of liquor at petrol stations in Western Australia. This would stimulate a large number of similar applications from Gull’s competitors, greatly increasing the availability of alcohol. There is a wide body of research showing that increasing the availability of alcohol increases alcohol-related harm.

By granting this licence a strong relationship would be established between driving and the consumption of alcohol. Great Northern Highway is a major arterial route out of Perth, granting this licence would make purchasing alcohol easier for country driving. It is anticipated that granting a liquor licence for a service station roadhouse on the Great Northern Highway leading out of Perth will add to the accident rate on Great Northern Highway.

Sixty per cent of Western Australia’s road fatalities occur in country areas despite the fact that only 27 per cent of the State’s population live outside the metropolitan area. The level of alcohol sales has been shown to be associated with road crash fatalities and injuries both in Australia and overseas. Between 30 and 40 per cent of those killed on Australian roads, whether drivers, passengers or pedestrians have a blood alcohol concentration over the legal limit of 0.05 per cent.”

The notice of intervention by the Executive Director Public Health dated 8 June 1998 reads:

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"1. The sale of packaged liquor by metropolitan service stations will cause harm or ill health to people or any group of people having regard to the following:

- (a) The sale of liquor at service stations will:
 - (i) encourage impulse buying thereby increasing the consumption of liquor and in turn liquor related harm or ill health;
 - (ii) increase the likelihood of drink driving;
 - (iii) render it more difficult for those suffering from alcohol addiction to control their liquor consumption or abstain from consuming liquor.
- (b) Increasing the number of liquor outlets in given geographical areas is likely to result in an increase in liquor consumption and in turn liquor related harm or ill health.
- (c) Increasing the density of liquor stores in given geographical areas is likely to result in an increase in liquor consumption and in turn liquor related harm or ill health.
- (d) The sale of liquor by service stations is inconsistent with and will undermine the campaign to reduce drink driving."

The answers of the Executive Director Public Health to the applicant's request for further and better particulars dated 8 June 1998 allege that the sale of liquor at service stations will encourage impulse buying because persons attending service stations for reasons unrelated to the purchase of liquor may be persuaded to purchase liquor when confronted with the opportunity. They define "impulse buying" as "an unplanned purchase borne of convenience and opportunity". It is further alleged that the sale of liquor at service stations is inconsistent with the campaign to reduce drink driving and will undermine that campaign because those driving motor vehicles will find purchasing liquor easier and more convenient.

The notice of intervention of the Director of Liquor Licensing dated 27 March 1998 reads:

- "1. Whether it will contribute to the proper development of the liquor industry for metropolitan service stations to sell packaged liquor having regard to the following:
- (a) The sale of liquor at service stations will encourage impulse buying and the subsequent consumption of that liquor in a motor vehicle by the driver, an activity that is illegal under the *Liquor Licensing Act 1988* (WA).
 - (b) Liquor will be sold along with a large range of other items. Accordingly staff will not specialise in the sale of liquor and may not be sufficiently aware of the obligations imposed on them by the *Liquor Licensing Act 1988* (WA).
 - (c) Service stations have a high turnover and are often crowded. In addition, juveniles have legitimate and unfettered access to the premises. In these circumstances it is more difficult for staff to ensure juveniles are precluded from purchasing liquor.
2. Whether the sale of liquor by service stations would lead to an over-proliferation of liquor outlets thereby reducing the ability of the Licensing Authority to properly regulate and control the liquor industry.
3. Whether the sale of liquor by service stations would set a precedent

leading to a multiplication of applications by retailers who do not specialise in the sale of liquor thereby resulting in the effective deregulation of the liquor industry."

The case for the licensee objectors and the intervenors is in the present context very similar. It is that members of the section of the public which the applicant relies upon under s 38 of the Act, who may patronise the service station for petrol and motor vehicle accessories, convenience goods or the restaurant, may purchase liquor from the proposed premises on impulse and consume it immediately or subsequently while driving a motor vehicle. The objectors and intervenors then allege that the drivers of such motor vehicles are more likely to become involved in a single or multiple motor vehicle accident in which either they and/or others will suffer harm, within the meaning of the Act, in the form of bodily injury or death.

At para 32 of the applicant's outline of closing submissions, counsel submitted that the assertions in para 1(a) of the intervention notice by the Executive Director Public Health apply to any new grant, apply equally to all packaged and non-packaged outlets alike, if taken to their logical conclusion would result in prohibition, and ignore the rights of consumers to be given freedom of choice and be held accountable for their conduct. He submitted that the assertions in para 1(b) of the intervention notice are so generalised and unrelated to this application as to be meaningless in the context of this case. He submitted that the matter raised in para 1(c) of the intervention notice depends on the circumstances prevailing in the affected area. He said that to grant this application would add to the proper and orderly distribution of licences in the affected area. He submitted that the matter raised in para 1(d) of the intervention notice ignores what already exists and in any event is highly speculative.

Any examination of the evidence called in these proceedings in this context should I think begin with the acknowledgment of Professor Timothy Stockwell in Ex 48 at p 19 that "there is virtually no documented experience with this form of alcohol availability". At p 243 of the transcript, Professor Stockwell further acknowledged that "there is little experience internationally with providing alcohol in this format". He said that "it's very hard to research something that doesn't exist and isn't there to study". He continued:

"All one can do, in looking at a new proposal like this, is to look at similar experience elsewhere and try and project onto this new situation what is likely to happen, so I'm not pretending that I have definite or certain knowledge of what will happen. I don't think any of us here do."

Likewise, the evidence of Professor Robert Donovan of the Graduate School of Management and Department of Public Health, University of Western Australia, in Ex 59 suggests that there has been little research in Australia about the extent of impulse purchasing of liquor products at licensed premises generally and in particular at service stations. Professor Donovan accepted in cross-examination that no research has been conducted which might establish that the grant of this application would be counterproductive to drink driving campaigns.

Having said that, it is I think necessary to explain the evidence called by the applicant, the licensee objectors and the intervenors in this context before commenting upon it and considering its effect in the present proceedings.

The evidence of Dr Allan Quigley is contained in Ex 45. He is the Director

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of Policy and Research at the WA Alcohol and Drug Authority. Dr Quigley expresses the opinion that death and injury directly attributable to driving under the influence of liquor is easy to quantify. He says that the consumption of liquor while operating machinery is hazardous owing to its effects on cognition and neuro-motor functioning. These include effects on attention, information processing, visual-spatial judgment, reaction time and coordination. He says that the best known example is drink driving where at higher blood alcohol levels, the relative risk of all accident increases exponentially. He says that alcohol use has been estimated as a causal factor in approximately 37 per cent of male and 16 per cent of female road crashes. At p 3 of his report, Dr Quigley observes:

"A major finding from a recent study measuring alcohol related problems in WA was that estimates of per capita consumption across WA correlated significantly with local measures of harm across several domains: namely violent crime, drink driving, road crashes and morbidity. (The Measurement of Alcohol Problems for Policy Project: A first report of work in progress. National Centre for Research into the Prevention of Drug Abuse. Curtin University, Perth 1995.) Changes in the availability of alcohol strongly influences levels of problems. Recent research suggests that increased outlet density stimulates increased consumption and problems."

In the course of cross-examination, Dr Quigley expressed the opinion that he thought that there are peculiarities about the present proposal that makes the potential for drink driving greater than perhaps other petrol stations. He conceded that he was not aware of any research about the impact which the sale of liquor from service stations may have upon the health of the community.

In re-examination, he expressed the opinion that since something like 40 or 50 per cent of patronage likely at the proposed premises was from outside the affected area, "they were people who were going on journeys, so it did seem to me that you could reasonably expect that a significant number of those people would be purchasing alcohol as a refreshment beverage consumed while driving on a long journey".

Dr Quigley was asked whether he drew any distinction between a licence such as that proposed where a person may purchase liquor and consume it while driving and a licence where such a person may stop and consume liquor on the premises while travelling. He replied that generally people go to a petrol station not with the intention of drinking an alcoholic beverage.

Dr Quigley saw the traditional trade of a service station supplying fuel and motor accessories at premises which customers patronised for such products but not liquor as the factor which distinguishes the proposed premises the subject of this application from a drive-through packaged liquor facility. At p 213 of the transcript, Dr Quigley observed:

"I certainly think a drive-through liquor store presents a similar problem and I think the issue is to what extent do we want to have those facilities in locations where there is a very high likelihood that following the purchase of that alcohol, it will be consumed while the person is driving."

The intervenors next called Dr Brett Palmer, a medical practitioner employed at the Central Drug Unit in East Perth. His evidence is contained in Ex 46 where, at para 13 et seq Dr Palmer says:

"I see this application as a first step in a trend to make alcohol more readily available. ... My personal concern, based upon my experience

with people with alcohol problems, is that an increase in the availability of liquor, particularly in a petrol station/convenience store situation, will lead to greater impulsive purchasing and consumption.

It is in my experience difficult to say whether impulsiveness leads to an alcohol problem for some people, or whether an alcohol problem leads to impulsive behaviour which then exacerbates the alcohol problem. Either way, increased availability of alcohol in an impulse situation will simply be feeding impulse buying, and will be counter-productive to our efforts to maintain low risk alcohol drinking patterns."

In the course of cross-examination, Dr Palmer repeated that he viewed the current proposal as reflecting a trend of increasing availability of liquor. He expressed the opinion that liquor products should not be "included in impulsive buying techniques".

The next witness called on behalf of the intervenors was Dr Gerald Ryan, the Director of the Road Accident Prevention Research Unit, Department of Public Health, the University of Western Australia. His evidence is contained in Ex 47, dated August 1998. At p 7 et seq of Ex 47, Dr Ryan comments on aspects of the relationship between alcohol and road traffic crashes. He espouses the opinion that an increase in the blood alcohol concentration of a driver increases the risk of involvement in a crash in an exponential fashion. He says that at 0.08 grams per cent the risk of crash involvement is about two times that at zero, at 0.10 grams per cent the risk is five times that at zero and at 0.150 grams per cent the risk is 10 times that at zero.

Dr Ryan asserts at p 8 of Ex 47 that in Western Australia in 1996, 31.1 per cent of drivers or riders involved in a fatal crash and 28.9 per cent of pedestrians killed, had a blood alcohol concentration of 0.05 grams per cent. He says that for serious injuries, involving death or hospital admission, alcohol was involved to a lesser extent, 22 per cent of drivers and 26.5 per cent of pedestrians had a blood alcohol concentration of 0.05 grams per cent or above. For motor cyclists, 8.6 per cent of riders in property damage and casualty crashes, and 20.7 per cent of riders in single vehicle crashes, had a blood alcohol concentration of 0.05 grams per cent or greater. One quarter of single vehicle crashes at night (6 pm to 6 am) involved a driver with a blood alcohol concentration of 0.05 grams per cent or over, compared with 5.4 per cent of crashes in the daytime.

At p 10 of Ex 47, Dr Ryan observes:

"Selling alcohol in a service station in close proximity to the provision of services for motor vehicles, would tend to undermine the message of the anti-drink driving campaign currently being carried out by the Office of Road Safety of the Department of Transport. This campaign is intended to separate drinking and driving, whereas the current application tends to bring them closer together. Another aspect of the campaign is that of promoting host and server responsibility in licensed establishments. This expectation would perhaps be unrealistic for service station staff whose major preoccupation would be selling petrol and food and other convenience items."

In the course of cross-examination, Dr Ryan expressed the opinion that it is known that a higher proportion of drivers aged between 18 and 25 drive after consuming liquor than drivers of other ages.

Dr Ryan accepted that the statistics should be relied on with care as road

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accident information is poorly recorded with the exception of fatal crashes. He referred to p 8 of Ex 47 and explained by way of example that the "31.1 per cent of drivers or riders involved in a fatal crash" means drivers or riders who were controlling the vehicle in that crash in which someone was killed, not necessarily the driver or the rider.

Professor Timothy Stockwell followed Dr Ryan in the evidence on behalf of the intervenors. He is the Director of the National Centre for Research into the Prevention of Drug Abuse at the Curtin University of Technology. I have already referred to his evidence in Ex 48 in relation to the absence of research in the context of the sale of liquor from service stations. He begins his evidence at p 19 of Ex 48 by saying:

"The sale of alcohol in petrol stations is a highly unusual practice and for this reason there is extremely limited direct evidence regarding its impact on drinking or drink driving behaviour. In recent weeks I have asked a number of leading international figures in the alcohol research field while attending meetings in London and New York if they know of relevant data. I have also conducted a literature search using a variety of strategies including searching comprehensive electronic databases of health and medical research. There were two striking findings: firstly the experts in the field universally condemned the concept of alcohol sales in petrol stations and, second, there is hardly any published data."

Professor Stockwell summarises his concerns about the present proposal as follows:

- "(i) Excessive alcohol use is already associated with many serious social, health, legal and economic adverse consequences;
- (ii) There are many established relationships between increased alcohol availability, alcohol consumption and related harm and this proposal has the potential to result in a great expansion of the availability of alcohol in Western Australia;
- (iii) Specifically, there is also a strong likelihood of high risk and problem drinkers drinking during or immediately before driving their vehicle which, especially if they already have been drinking, doubles their risk of being involved in a road crash for each extra drink;
- (iv) Petrol stations are high risk environments and the sale of alcohol will increase the risk of fire from heavy drinkers, many of whom are smokers and also of pedestrian injuries from drunk persons walking in front of cars;
- (v) Greatly increase current difficulties with compliance and monitoring compliance with the law in relation to serving under age and intoxicated persons."

At p 22 of Ex 48, Professor Stockwell expresses certain specific concerns about alcohol in petrol stations:

"It is my understanding that the proposal is for alcoholic drinks to be sold in single cans and bottles immediately adjacent to the soft drinks area. This means that a large number of thirsty drivers will see and may be tempted to purchase one or more alcoholic drinks. We already know from WA Traffic Police data that are made exclusively available to the National Centre for Research into the Prevention of Drug Abuse that a significant number of persons who fail roadside breath tests ... or who have had a road crash subsequent to drinking ... give a vehicle as the last place in

which they consumed alcohol between July 1990 and June 1997. In addition, blood alcohol levels ... appear to be consistently higher among drink drivers who were last drinking in their vehicles as opposed to any other location."

Professor Stockwell then sets out the data at p 23 and continues:

"With reference to Tables 1 and 2 above, it should be noted that while drink driving frequencies appear similar for both metropolitan and country regions this was not in fact the case. As a proportion of all country road crashes, drink drivers who last drank in a vehicle contributed to approximately 3.4 per cent of the total. Comparatively metropolitan drink driver road crashes where the driver last drank in a vehicle constituted only 1.4 per cent of the total number of crashes occurring in that region. For drink driver charges, the proportion of country cases where the driver last drank in a vehicle was about 2.6 per cent and for metropolitan offences only 1.1 per cent."

In cross-examination, Professor Stockwell expressed the opinion that according to recent estimates, nearly half of all alcohol related deaths are due to the acute effects of alcohol on people who get drunk occasionally. He expressed the opinion that, therefore, most people who drink alcohol are at risk for that reason. He expressed the opinion that the proposed premises would make liquor available to "a whole new segment of the population ... in a planned or unplanned way". Professor Stockwell expressed the opinion that it was common sense to conclude that if liquor is made available at the proposed premises, that availability would increase the probability of a customer at the premises purchasing liquor at all.

Cross-examined by counsel for the applicant, Professor Stockwell agreed that recent research has focused on harm minimisation and reducing the harmful patterns of consumption such as binge drinking. Professor Stockwell went on to say that in his opinion the grant of this application would have an adverse impact because if similar applications were granted in the future, such licences would greatly increase availability and outlet density. He distinguished between these proposed premises and existing licensed premises with or without drive-through packaged liquor facilities. He drew the distinction again between visiting licensed premises to purchase packaged liquor and visiting a service station to purchase fuel and convenience goods, and there finding liquor available. In his opinion, the proposed premises increased the opportunity to drink liquor while or immediately before driving.

The next witness for the intervenors whose evidence I wish to refer to was Professor David Hawks who is Emeritus Professor of Addiction Studies at Curtin University of Technology and Honorary Professorial Fellow of the National Centre for Research into the Prevention of Drug Abuse. His evidence is contained in Ex 60 where he examines the association between the consumption of alcohol and alcohol related harm and says:

"There is a well attested link between the consumption of alcohol and the harm associated with that consumption, which can be observed at both an individual and societal level. There is in other words a close response relationship which can be observed at both an individual and population level. ... It follows therefore that anything that contributes to an increase in the consumption of alcohol is likely to increase the harm associated

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with it. Availability, while far from a straightforward concept, is one of the variables which impacts on the consumption of alcohol.

Increases in availability can be effected by lowering the age at which alcohol is available, increasing the hours during which it can be legally purchased, lowering its cost relative to disposable income and increasing the number of outlets at which it can be purchased. There are a number of studies which suggest that as alcohol is made more proximate the probability of its consumption is increased.

There is a relationship between the density of liquor outlets in any given area and the amount of alcohol consumed. It is not however clear whether it is the density of liquor outlets which results in an increase in the alcohol consumed or whether the retail trade chooses to increase the density of liquor outlets in areas already characterised by high consumption. For the same reason it is difficult to determine whether an increase in availability results in an increase in demand or whether availability follows demand. In all probability both factors operate."

Professor Hawks goes on to say that in his opinion it is reasonable to assume that the availability of liquor at the proposed premises would increase the probability of drivers choosing to consume that liquor. He goes on to express the opinion that drivers between the ages of 18 and 24 are over-represented among those who are involved in alcohol-related road crashes and as an age group characterised by binge drinking.

Professor Hawks concluded his evidence by suggesting that any increase in the level of harm caused by liquor in the community "can only be considered an exacerbation of an already critical situation". He also expressed the opinion that at both a symbolic and an empirical level there can be little question that the availability of alcohol from service stations would serve to undermine the current drink driving road safety campaign. He expressed the opinion that his evidence provided an empirical basis for this opinion, while the symbolic basis is self-evident.

At p 292 of the transcript, Professor Hawks adds his emphasis to the focus on moderate drinkers who occasionally drink to excess. He says that there is a need to address hazardous consumption as well as chronic high consumption. He says that recent research clearly establishes that there is a relationship between consumption of liquor and harm. At p 294 of the transcript, Professor Hawks continued:

"There are a number of factors, I think, which make the increase in availability affected by the licensing of this road house problematic and they are, first of all, its location. ... Then by the applicant's own admission, the current managers lack any experience of managing a liquor outlet, as does the company itself, and while it is reported in their application that of course such training will be provided, this doesn't, I think, immediately address the problem of their lack of experience. The potential for impulse buying is something that Professor Donovan has already instanced. It's well known in the scientific literature that as you provide cues to people who are dependent on drink, you increase the probability of their drinking. It's well established in the literature that as you increase the number of outlets or you provide a greater convenience in the purchase of alcohol you provide, such is particularly attractive to excessive drinkers. There is within such a setting the possibility of

discounting, as we have already heard. This particular road house sells a variety of goods. It is possible therefore to discount that alcohol and to offset that against the probability of its other sales and whereas the applicant says it is not their intention to discount, I would suggest that in the competitive environment in which they operate, almost certainly they will find it necessary to discount and there is a possibility of doing so in such an environment. The nature of the clientele, I think, is also a concern. People who pull up for petrol, and I accept that not everyone stopping at the road house currently purchase petrol, but those who stop for petrol are by definition those who are most using their cars. We know that those who most use their cars tend to be younger drivers who are already over-represented among those who have drink-driving accidents and commit drink-driving offences. Secondly, I think it would be difficult to judge sobriety and the age of passengers, many of whom will remain sitting in the car while purchases are made on their behalf.

... Alcohol is already very generally available in society. People are precluded from buying alcohol at the road house. It is not as if they will go without. It has already been emphasised that there are alternative outlets. The tendency in society has been to increase the access that people have to alcohol. There has been a movement up. There is very rarely a movement down. There are already places providing drive-in facilities.

... I think there is a tendency, and a very pervasive one, to regard it on the whole as no different from other commodities and therefore something that one should be able to purchase in a supermarket; one should be able to drive in and collect and I would argue to the contrary, that alcohol is not to be regarded as a commodity analogous to soap powder or whatever. It is a potentially dangerous commodity; the harm associated with we know to be profound, pervasive, which is not, however, to deny its benefits but it is to emphasise its harm."

Professor Hawks was of the opinion that it is open to distinguish between the consumption of liquor on premises where that consumption may be controlled by the licensee and consumption of liquor off licensed premises where no such control is possible.

During cross-examination by counsel for the applicant Professor Hawks accepted that once liquor is available, it is difficult fully to control the basis upon which people consume it, particularly if they take it off licensed premises. He conceded that people who have consumed liquor on licensed premises contribute disproportionately to the number of offences of driving under the influence of liquor.

Professor Hawks also acknowledged that until reading the evidence of Mr Green in these proceedings he was not aware of the number of instances in which liquor is currently available from service stations sharing forecourts or canopies or being in close proximity to licensed outlets. Professor Hawks concluded his evidence by observing:

"I acknowledge of course that the amount of alcohol consumed should also be one's responsibility, but that — one's ability to exercise that responsibility is adversely affected as you drink. I think it is, therefore, reasonable that someone who offers you that alcohol and earns their livelihood from doing so have some responsibility, exercise some duty of care to a person who, as a consequence of the supply of that commodity, is

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themselves rendered less able to make that judgement. So I think it is properly a responsibility shared between the provider of the alcohol, be they a commercial host or a private host, and the person who consumes that alcohol. I think that is the case at present and I wish it were more often enforced as being the case at present."

The final witness on behalf of the intervenors whose evidence I wish to mention is Nina Lyhne who is the Director of Policy and Strategy of the Office of Road Safety. Her evidence is contained in Ex 77. She says that the Office of Road Safety was established in February 1997 by the Western Australian Government. In the year ended 30 June 1998 the Office of Road Safety spent approximately \$2,000,000 on community education. It targets four main areas in its campaigns. These are drink driving, speed, restraints, and fatigue. Of these, drink driving and speed are the priority areas. At para 7 of Ex 77, Ms Lyhne states:

"Each of the above campaigns has required large amounts of advertising to educate the community. Further advertising will be needed to maintain community awareness of the messages behind the campaigns. The task of persuading the community to adopt the driving practices proposed in the campaigns is difficult because the campaigns aim to change often long held driver habits and attitudes. Driver attitudes like 'it is not dangerous' or 'it won't happen to me' require long term strategies to change. The relationship between attitude and behaviour is complex. Strategies involve community education, enforcement and community involvement. The same single minded message needs to be communicated by all elements of the campaign. I am concerned about anything that would damage the credibility of our campaigns or give mixed messages. If there is less than total commitment from government or regulating authorities in the content or delivery of a particular message the community may infer that the message need not be taken seriously. It is my experience, from a marketing perspective, that when a person receives mixed messages the person will often latch on to the message which he or she finds immediately most agreeable. I am concerned that if people see that alcohol is permitted to be sold at service stations they may see this as a weakening by government of its stand on drink driving. Any perceived weakening of the drink driving message may destroy the community's current level of acceptance of the drink driving message. An important target group for road safety messages is 17 to 24 year old males. I am particularly concerned that the sale of alcohol from petrol stations may damage the efforts of the Office of Road Safety to educate this group of drivers about the dangers of driving with a blood alcohol above 0.05 per cent by making the campaigns against drink driving less convincing."

In response to the evidence called by the intervenors, the applicant called Dr Phillip Norrie whose evidence is contained in Ex 31. Dr Norrie had access to the written opinions of the witnesses whom I have mentioned. At p 3 of Ex 31, he says that these witnesses discuss in detail the effects of alcohol abuse but fail to balance these negative aspects by also discussing in detail the many positive aspects of consuming alcohol in moderation. He says that Professors Stockwell and Hawks have previously addressed the recent evidence of the net health benefits of the moderate consumption of alcohol and its relationship to alcohol policy. Dr Norrie observes:

"I agree with these reports that there is alcohol abuse with its resultant morbidity, mortality and financial costs to the community, but that price pales by comparison with that of the medicinal virtues of consuming alcohol in moderation. The abuse is more a function of the consumer and not the product."

Commenting on this criticism at p 291 of the transcript, Professor Hawks says:

"No-one, I think, representing the public health point of view is arguing that Australia could, or even should, become an abstinent society. I don't see there's any relevance to his claim that alcohol has been used for some significant period of time. He also argues that the reports which he had been provided with, including my own, do not acknowledge the benefits associated with alcohol, and again I don't really see this as relevant to the particular application. No-one doubts that there are some benefits, though I think that Dr Norrie exaggerates their number, associated with the consumption of alcohol in moderation. To acknowledge this, however, is not to negate the profound, and I think scientifically established, harm to be associated with the excessive use of alcohol. There are, as I think other witnesses have drawn your attention to, at least 40 medical conditions in which the aetiological significance of alcohol is scientifically attested. Dr Norrie also points out, and again it seems to me not relevant to this application and in no way contentious, that alcohol can be protective, I think, again, Dr Norrie exaggerates the extent to which it is protective and the comments of Sir Richard Dal, whom Dr Norrie quotes, are really much more circumspect than those of Dr Norrie himself."

I accept the opinion of Professor Hawks that there is little contentious in the evidence of Dr Norrie. I accept the perspective in which Professor Hawks puts the evidence of Dr Norrie in reviewing the research evidence.

These witnesses were followed by Mr Fulvio Penna, the Executive Officer of the Alcohol Advisory Council of Western Australia Inc. His evidence is contained in Ex 54. The Alcohol Advisory Council of WA is a non-government organisation established in 1984 to influence public policy in relation to alcohol. Its aim is to minimise the harm associated with alcohol in the community. At para 3 of Ex 54, Mr Penna suggests that the effects of alcohol can be classified into chronic harm and acute harm. Chronic harm includes heart disease, stroke, liver disease and brain damage. Acute harm includes accidental injury, drink driving and violence.

At para 4 of Ex 54, Mr Penna summarises the council's objections to the present application when he says that:

"The Alcohol Advisory Council of Western Australia holds the view that the impact or likely impact on the health of Western Australians should be central to any liquor licensing decisions. The Alcohol Advisory Council of Western Australia opposes the application by Gull Petroleum in the belief that there will be an overall increase in the availability of alcohol and a resultant increase in alcohol related harm; that there will be an increase in the prevalence of under age drinking; and that there will be an increased association between drinking and driving."

At para 5 of Ex 54, Mr Penna goes on to say, among other things, that the council is of the opinion that alcohol consumption and hence alcohol related harm is greatly influenced by the availability of alcohol in terms of trading

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hours, price and number and type of outlets. He says that amongst other factors, availability is determined by accessibility. The more available and accessible alcohol becomes, the greater the level of consumption and hence the greater the possibility of acute and chronic related harm.

At para 6 of Ex 54, Mr Penna says that the council is concerned that the proposed premises will normalise the use of alcohol and expose under age customers to it. In cross-examination, Mr Penna acknowledged that prior to the hearing he was aware of certain licensed petrol stations in Western Australia but he was not aware of petrol stations where liquor is sold in the same premises as petrol, especially in the metropolitan area.

In this context, it is relevant to refer again to Ex 1, being the affidavit of Malcolm Ian Green sworn 10 March 1998 where Mr Green says at para 27 et seq:

"I have been advised that Phillips Fox has listed a variety of different types of premises within Western Australia that are known by Phillips Fox to sell 'alcohol in conjunction with petroleum products' or are licensed 'premises which sell petroleum products'. A copy of the list is annexed and marked 'MIG 7'. The majority of the premises on the list are liquor stores. I understand that the reference to 'PF Acted' in this list indicates that Phillips Fox has gained knowledge of the fact that both liquor and petroleum products can be bought in conjunction with each other at the same premises as a consequence of having acted for clients in relation to matters concerning those premises.

I further understand that the reference in the list to 'PF Telephoned' indicates that an employee of Phillips Fox has telephoned the relevant premises and has confirmed with an employee or the proprietor that both liquor and petroleum products are sold at those premises. I personally am familiar with some of the sites on the list. I have also been advised by Phillips Fox and believe the list certainly does not identify all sites in Western Australia which 'sell alcohol in conjunction with petroleum products' or which are licensed 'premises which sell petroleum products'. Rather the list has been quickly prepared simply to provide some examples. To the best of my knowledge the information contained in the list is accurate. Gull has been aware for quite some time of the fact that there are many liquor stores operating within petrol stations or in close proximity to petrol stations. For example in Rockingham the Gull Service station canopy is shared by both Gull and Hotel Rockingham. Gull does not claim to be breaking new ground in making these applications. Kirsty Watkins, a head office employee of Gull, has compiled a list of both Gull and other service stations which are either situated near a liquor outlet or operate as the one business. Annexed hereto and marked 'MIG 8' is a copy of that list. I have read the list and believe it to be accurate. In developing its new generation modern service station/convenience stores' concept and in creating the associated infrastructure Gull also does not claim to be breaking fresh ground or doing something which is unique in this state or elsewhere in Australia. In addressing the needs of the public Gull has consciously designed the sites to provide the most convenient and efficient shopping environment for the motorist. In so doing Gull has been influenced by the fact that many licensed premises are located within, alongside or nearby service stations in the metropolitan area of Perth

(particularly in relation to shopping centres) as well as in the country (particularly to serve the travelling motorists), and many liquor stores, taverns and hotels serve packaged liquor from driveways or as part of drive-in facilities these days and have done so for many years."

Annexure MIG 7 lists 10 liquor stores in country Western Australia which sell petroleum products and three liquor stores in the metropolitan area which sell petroleum products. It lists four country taverns which sell liquor products. It lists four licensed restaurants in country Western Australia which sell petroleum products. It lists one special facility licence in country Western Australia which sells petroleum products.

Annexure MIG 8 lists 14 Gull sites located next to a liquor outlet. It lists 53 other sites located next to a liquor outlet.

I turn now to the evidence on behalf of the licensee objectors. Mr Guiseppe Minissale has been the president of the Liquor Stores Association of Western Australia (Inc) for the last six years. He is the vice-president of the Liquor Industry Road Safety Association and the State manager of Porters Liquor (WA) Ltd.

The Liquor Stores Association has 350 members which represents approximately 83 per cent of all liquor store licensees in Western Australia. His evidence is contained in Ex 41 where he says at para 5.1 et seq:

"A specialised liquor store has a manager who is trained and experienced in the sale of liquor. The manager is usually someone who has worked in the industry for a number of years. They have experience in all aspects of retail liquor sales including knowing the laws which relate to the sale of alcohol; avoiding sale of alcohol to the juveniles; avoiding sale of alcohol to people who are drunk; avoiding the sale of alcohol to those who intend to supply juveniles; and responsible advertisement of alcohol. Because a specialised liquor store deals almost exclusively with the sale of liquor, staff are constantly gaining experience in these areas. It may be difficult for a service station which begins selling alcohol to gain employees who have experience in the sale of liquor. Further, any staff selling alcohol will presumably only be dealing with the sale of alcohol as one small part of their overall duties in relation to the service station. It will not, in my opinion, be easy for them to gain the experience necessary for the responsible sale of alcohol. I believe that there is, in this regard, a fundamental difference between a liquor store which begins selling petrol, and a service station which begins selling liquor. The manager and staff at the liquor store are already trained and experienced in the sale of alcohol. Those of a service station are not (unless specially employed). In a specialised liquor store management is in a good position to pay close attention to whether staff observe the laws in relation to selling alcohol, as this is the main activity undertaken. However, in a store where the primary focus is not on the retail of alcohol but rather on the selling of fuel and other convenience goods, the attention of management to ensuring the laws in relation to alcohol retail are observed must in my opinion necessarily be less than in a specialised store, because these other activities (one of which is potentially extremely dangerous) must be monitored. It is my expectation that staff at Gingers' would have an unusually difficult job in policing liquor sales properly, because they would be seeing so many customers (over 9,000 per week) many of whom would be buying other

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Mr Minissale goes on to speak about ready to drink products known as "RTD". He suggests that approximately 64 per cent of the consumption of spirits in Western Australia is in the form of RTD's. He says that these products are very definitely popular with and heavily targeted at the 18 to 30 age group. Mr Minissale also speaks about impulse buying which he says is a significant part of the retail of liquor in a liquor store. He says that some impulse items often bought are snack foods and RTD's which are sometimes placed close to the front of the store. He expresses the opinion that from his observation, males in the 18 to 38 age group are more likely to buy impulsively than any other age group and are the largest consumers of RTD's generally. He suggests that most customers in liquor stores have gone there for the purpose of buying liquor and impulse buying of liquor or other products adds to the planned purchases. Finally, Mr Minissale says that the association has a genuine concern in ensuring the safe and responsible sale and consumption of liquor. He expresses concern that the licensing of petrol or convenience store outlets would lead to an overall increase in liquor consumption because of the likelihood of impulse sales that would not otherwise take place. He says that many customers would be out driving for purposes other than purchasing liquor and as a result greater quantities of liquor might be consumed in unsafe situations such as driving.

It became apparent during the cross-examination of Mr Minissale by counsel for the applicant that prior to the hearing Mr Minissale was not shown a copy of the evidence of Mr Green in Ex 33. Mr Minissale accepted that it is not uncommon or unusual for a liquor store to operate with a drive-in facility and that it is quite normal for hotels and taverns to operate with drive-in packaged facilities. Mr Minissale also acknowledged that there are liquor store licences operating from premises that also sell fuel products both in the metropolitan area and around the State generally. Mr Minissale acknowledged that impulse sales have a large commercial potential in the liquor industry. He accepted that many members of his association adopted techniques to generate impulse sales of liquor. He accepted that the circumstances prevailing at one licensed premises may vary considerably from another and that it is not reliable to generalise about all service stations selling liquor in this context.

Mr Minissale insisted, however, that the grant of the present application would make liquor available at premises visited by customers who were not seeking liquor products in the first place.

The evidence of the general manager of Liquorland (Australia) Pty Ltd, Mr David Sinclair, is contained in Ex 52. That company is the licensee of Liquorland straton which is located outside the affected area. It is not necessary for me to examine his evidence in that regard and otherwise his evidence is in similar vein to that of Mr Minissale.

Exhibit 66 contains the evidence of Mr Stephen Castledine who is a director of Oasis Plains Pty Ltd, the licensee of Rakich's store. I have of course taken his evidence into account in considering the issues to be determined in this case under s 38 of the Act but for the reasons which I have already mentioned, it is not necessary for me to consider his evidence in detail. The same observations apply to the evidence of Mr David Plant who gave evidence on behalf of the

three licensed premises operated by associated companies in Midland under the business name Knox's.

In accordance with the directions which I have already given about the relevant statutory provisions and scheme of the Act, I now proceed to determine the merits of the application, the grounds of objection and the interventions on the evidence, including that to which I have referred.

I have already determined that the applicant has discharged its onus under s 38 of the Act and that therefore the ground of objection under s 74(1)(d) fails. In this context, I think that it should also be mentioned in passing that the evidence for the objectors and intervenors under s 74(1)(b) of the Act is predicated upon the assumption, justified as I have found, that the proposed premises would attract significant patronage for packaged liquor. It remains to determine the objection of the Alcohol Advisory Council under s 74(1)(a) of the Act, the objection of the licensees under s 74(1)(b) of the Act and the issues raised in the notices of intervention of the Executive Director Public Health and the Director of Liquor Licensing. Finally, it is necessary to determine whether the applicant, which has discharged its onus under s 38 of the Act should receive a conditional grant of a liquor store licence in the discretion of the Court under s 33 of the Act on the merits disclosed by the evidence.

The onus is upon the Alcohol Advisory Council and the licensee objectors to establish their grounds of objection under s 74(1)(a) and (b) of the Act on the balance of probabilities. I have already referred to the notice of objection of the Alcohol Advisory Council and the particulars in support of the ground of objection under s 74(1)(a) of the Act. I have treated that ground of objection as raising similar issues of fact to those raised by the Executive Director Public Health in para 1(a), (b), (c) and (d).

As I have already observed, there is no onus upon the intervenors in these proceedings to establish the assertions of fact and opinion contained in their respective notices of objection.

In determining these ultimate issues it is, as I have said, necessary to identify on the evidence and information before the Court the fact or facts which should on the merits activate its discretion to grant or refuse this application under ss 33 and 38 of the Act or to impose conditions upon any grant.

The evidence is that the Great Northern Highway provides the major link between the Perth metropolitan area and the north of Western Australia. Of the total range of liquor stock proposed at these premises, spirits and ready to drink spirit mixes form a significant proportion which is considerably greater in relation to the proposed range of liquor products than would be found in many packaged liquor outlets. The evidence before me is that drivers between the ages of 18 and 24 are over-represented among those who are involved in alcohol related road crashes and as an age group characterised by binge drinking. The evidence also is that a higher proportion of drivers aged between 18 and 25 drive after consuming liquor than drivers of other ages.

As a proportion of all country road crashes, drink drivers who last drank in a vehicle contributed to approximately 3.4 per cent of the total compared with 1.4 per cent of the total in the metropolitan area. In this context, I note the evidence that people who have consumed liquor on licensed premises contribute disproportionately to the number of offences of driving under the influence of liquor. I note also the evidence of Professor Hawks that the amount of alcohol consumed should be the responsibility of the consumer, but the

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ability to exercise that responsibility is adversely affected by the consumption of liquor. In considering the weight to be attached to the evidence in support of the objections under s 74(1)(a) and (b) of the Act and the merits of the application as a whole, I find that there is no recognised research in Australia about the sale of liquor from service stations. Equally, there is no recognised research about the occurrence and extent of impulse purchasing of liquor from service stations. The evidence is that at all other licensed premises, in common with many other retail premises, impulse purchasing of liquor regularly occurs.

The absence of such research leads me to conclude that the evidence relied upon by the objectors and intervenors is not of a truly expert nature. I make that observation without any criticism of the witnesses. I think that it is clearly open on their evidence to draw the inference that if this application is granted impulse purchasing of packaged liquor is likely to occur at the proposed premises to some extent, impulse consumption of packaged liquor is likely to follow in some cases by drivers of motor vehicles before or while driving, and that in such cases harm may follow to the consumer of such liquor or a third party or third parties who are road users and who suffer injury or death in consequence of the consumption of such liquor by the driver of a motor vehicle. It is, I think, a moot point whether the grant of this application would detract from campaigns to educate the public against drink driving. The evidence discloses that no research has been conducted which might establish that the grant of this application would be counter-productive to drink driving campaigns. More importantly, I think, it needs to be observed that this application should not be determined by the application of preconceived policy. That is particularly so where the legislation is silent about such policy when it was open to Parliament to legislate against the sale of liquor from service stations and it has not done so.

In considering the merits of the application and the weight to be attached to the evidence in support of it, it must of course first be observed that the applicant has discharged its onus under s 38(1) and 2b)(a) of the Act. It seems to me that it is almost trite to observe that the application, the objections and the interventions rest upon the foundation that the residents of Upper Swan, but more particularly that section of the public passing through the affected area by motor vehicle, will find it convenient to purchase packaged liquor at the proposed premises, and particularly so when the drive-through facility is established. The mobility of this section of the public is to some extent an equivocal factor in these proceedings. I have already observed that the evidence must be discounted because it is open to this section of the public to purchase packaged liquor outside the affected area at many different packaged liquor outlets. Members of this section of the public may also, nevertheless, be attracted to the proposed premises while they are intending to travel considerable distances on Great Northern Highway, because the premises are licensed to sell packaged liquor.

The applicant has put considerable reliance upon the evidence relating to existing licensed premises at or adjacent to service station facilities. Save in one respect, I am of the opinion that the evidence in this regard is due very little weight in these proceedings because quite clearly all the licences in question were granted prior to the recent amendment of the Act. The evidence is material insofar as it may be considered a manifestation of competition policy. On the evidence, I find that there is no empirical basis for making a distinction

between a service station selling liquor and a liquor store selling petrol. The licensee objectors place considerable emphasis upon the assertion that liquor store licensees and their staff are experienced in the sale of liquor. I do not think that this factor, so far as it is the case in the industry, is of significance in the determination of this application for a licence to sell packaged liquor for consumption off the premises. Furthermore, I can see no reason why this proposed applicant and its staff should not be trained and as well trained as many already existing in the industry.

To some extent, I accept the submission of counsel for the applicant that the case for the Alcohol Advisory Council, the licensee objectors and the intervenors applies to any new grant and applies equally to all packaged and non-packaged outlets alike. There is a great deal to be said for the view that the overall availability of liquor in the community is a relevant consideration in the determination of issues such as the present. In this regard, however, I find the evidence of Dr Quigley very pertinent. I accept his view that any liquor store with a drive-through facility is similar to that proposed. He emphasised that it is the location of the proposed premises and the likelihood that packaged liquor will be purchased and consumed before or while driving that is of prime importance in the consideration of an application of this nature.

I have also alluded to the underlying thrust of the case for the applicant that consumers of liquor should be given freedom of choice and held accountable for their conduct. Under the amended legislation, it seems to me that this factor is of significance in balancing the requirements of the public for packaged liquor at this proposed location and minimising harm to that section of the public and other road users.

The notice of intervention of the Director of Liquor Licensing raises in paras 2 and 3 issues relating to the proper regulation and control of the liquor industry. No evidence was advanced in support of those assertions and I make no comment upon them.

It is the implications of the evidence of the location of the proposed premises on Great Northern Highway which in the end I think in this case are of paramount importance in the determination of the merits of this application, these objections and the exercise of discretion under s 33 of the Act.

In my opinion, the Alcohol Advisory Council and the licensee objectors have established on the balance of probabilities that if this application were granted it would cause undue harm within the meaning of the Act to the groups of people whom I have already identified. I therefore find the grounds of objection under s 74(1)(a) and (b) made out on the evidence.

I am also of the opinion that even if these objectors had not discharged the burden upon them, the application should be refused on the merits in the public interest, notwithstanding that the applicant has otherwise complied with the requirements of the Act including the discharge of its burden under s 38 of the Act to establish that the grant is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area. I reach that conclusion on the same evidence in support of the grounds of objection under ss 74(1)(a) and (b) of the Act. In my opinion, the evidence establishes that the refusal of this application may reduce the consumption of packaged liquor in motor vehicles before or while driving long distances on Great Northern Highway, the reduction of such consumption may minimise harm to the consumer and third party road users which I have already

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users. In the exercise of my discretion under s 33(2) of the Act, therefore,
I am of the opinion that this application should be refused and I will direct
accordingly.

Solicitors for the applicant: *Phillips Fox*.

Solicitors for the first and second objectors: *Freehill Hollingdale & Page*.

Solicitors for the third objector: *Frichot & Frichot*.

Solicitors for the intervenors: Crown Solicitors Office.

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