

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

**APPLICANT:** BAYTOWN HOLDINGS PTY LTD

**Premises:** CAPE CELLARS DRIVE-THRU

**Premises Address:** 231 BUSSELL HIGHWAY, WEST BUSSELTON

**APPLICATION ID:** A000057179

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

**DATE OF DETERMINATION:** 9 JUNE 2015

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### **Introduction**

1. This is an application by Baytown Holdings Pty Ltd (“the Applicant”) for the conditional grant of a liquor store licence for premises to be known as *Cape Cellars Drive-Thru* and situated at 231 Bussell Highway, West Busselton (“the premises”).
2. The application is made pursuant to ss 41 and 62 of the *Liquor Control Act 1988* (“the Act”) and was advertised in accordance with instructions issued by the Director of Liquor Licensing (“the Director”), which resulted in the lodgement of:
  - (a) notices of objection, pursuant to the provisions of s 73(2), by:
    - (i) Oakline Pty Ltd (licensee of *Albies Bar and Bistro*) and VB Enterprises Pty Ltd (licensee of *Vasse Café Bar*);
    - (ii) Tyra Wainwright and Warren Hancock; and
  - (b) a notice of intervention, pursuant to the provisions of s 69 of the Act, by the Commissioner of Police (“the Commissioner”).
3. To give effect to the provisions of s 16 of the Act, a document exchange process was initiated between the parties in order to ensure that each party was given a reasonable opportunity to present its case.
4. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which have been briefly summarised below.

### **Submissions of the Applicant**

5. The Applicant submitted that it seeks the conditional grant of a liquor store licence at the proposed premises, which has traditionally operated as a liquor store since 1999, notwithstanding that the proposed store will be a very different business from the previous one and designed to specifically address recent growth in the locality and the

Busselton region; as well as filling a noticeable void in both packaged liquor sales and drive-through convenience in West Busselton<sup>1</sup>.

6. To support its application, the Applicant lodged a Public Interest Assessment ("PIA"), as well as other submissions, in which it submitted that:

"Since the 2012 removal application was prepared, lodged and determined, circumstances in Busselton have changed considerably... There has been an extraordinary growth and development. The region has continued, even more significantly, to mature and evolve. There is now a pressing need for the premises the subject of this application to continue to be licensed as a liquor store, albeit with a very different format and range of services and facilities for the future."

7. The Applicant further submitted that one of the main drivers of contemporary consumer requirements is convenience, with there being an elevated expectation for the public to be provided with as much convenience as possible. Therefore, the proposed premises will offer "perfect convenience for drive-by shoppers, people travelling past with caravans, camper trailers and boats and residents living close by."
8. According to the Applicant, its business model focuses on extensive range, outstanding customer service and competitive pricing, with the Applicant proposing to jointly market both the existing *Cape Cellars* and the proposed *Cape Cellars Drive-Thru*.
9. The Applicant also submitted that the grant of the licence will enable continuity of a licence at the proposed premises, a factor that is clearly wanted by a significant section of the public.
10. Furthermore, it was submitted that having two retail liquor outlets in the south-west region will allow the Applicant to have better buying power, which in turn, will be passed on to customers in terms of range, stock and supply.
11. The Applicant's PIA included an analysis of those matters prescribed in s 38(4) of the Act and also submitted that the level of development in the area is so remarkable, that it has lead to the Applicant committing a substantial investment in the new premises, with the most significant feature being its design to accommodate drivers in tow, with greater height, width and overall standard than an average drive-through.
12. While the Applicant acknowledged the occurrence of crime in the area and that the consumption of liquor has the potential to cause some people to react negatively, it also submitted that the nature of the Applicant's proposal presents only very low risks, which will be mitigated by and heavily outweighed by the strong public interest considerations.

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<sup>1</sup> NB: a conditional removal was granted in May 2012 in respect of the previous liquor store licence.

13. The Applicant also submitted a letter from Mr Deon Homer, a resident of neighbouring Bower Road, to establish that the grant of the licence will not cause conflict between pedestrians and vehicles exiting into Bower Road.
14. To establish that the grant of the licence will cater to the requirements of consumers for liquor and related services, the Applicant lodged a public survey completed by 281 persons, 19 questionnaires, as well as 16 letters of support from business and tourism operators, residents and Troy Buswell MLA, Member for Vasse.
15. The Applicant also submitted that caravaners are a significant feature and well-known segment of the local tourism industry and a target market for the Applicant's new premises, with 91% of the respondents to the Applicant's public survey indicating that they "regularly observed caravans, camper trailers, boats or other such holiday trailers when travelling along Bussell Highway past the applicant's site." The Applicant further submitted that many of the personal comments in both the public survey and questionnaire relate to the need of respondents to access packaged liquor services with trailers.
16. In relation to outlet density, the Applicant noted that *Cape Cellars Drive-Thru* will not simply be another licence duplicating existing services and selling and supplying liquor in a non-descript manner, but rather has potential to make a meaningful contribution to services that support the local tourism industry and the local community.
17. According to the Applicant, existing liquor services in the locality, including the new *Cape Cellars*, are all situated some distance from the proposed premises and to the east, with West Busselton being "noticeably void" of services as a result of an uneven distribution of licences. As such, the Applicant submitted that the location and drive-through facility are two significant factors which will differentiate *Cape Cellars Drive-Thru* from other premises in the locality.
18. While acknowledging that the grant of another licence will add to outlet density, the Applicant submitted this would not be an impediment in the locality, given that it is a major tourist centre and a rapidly growing and developing area and because *Cape Cellar's Drive-Thru* will provide a different type of service in a different location, away from where most licences are located.
19. In conclusion, the Applicant submitted that the following factors demonstrate that the grant of the application is in the public interest:
  - (a) there is a void in packaged liquor services in the locality and drive-through services, particularly for drivers in tow;
  - (b) an enormous section of the public, which is much larger than the mere representative sample, has provided clear evidence of demand for and intended usage of, the proposed liquor service;

- (c) the Applicant has a proven ability to cater for the requirements of the locality in terms of packaged liquor;
- (d) the site is ideal, having successfully operated with a liquor store licence for many years;
- (e) there is current and proposed growth and development in Busselton, with significant numbers of people living in, resorting to and passing through the area, both now and in the foreseeable future; and
- (f) Busselton is an established and important tourist centre within the State and the local tourism industry must be supported.

### **Submissions of the Objectors**

#### *Oakline Pty Ltd and VB Enterprises Pty Ltd*

20. The objection of Oakline Pty Ltd, the licensee of *Albies Bar and Bistro* and VB Enterprises Pty Ltd, the licensee of *Vasse Café Bar* ("the licensee objectors") are based on the following grounds of objection:
  - (a) the grant of the application would not be in the public interest (refer s 74(1)(a) of the Act);
  - (b) the grant of the application would be likely to cause undue harm or ill-health to people, or a group of people, due to the use of liquor (refer s 74(1)(b));
  - (c) that if the application were granted:
    - (i) undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or persons travelling to or from an existing place of public worship, hospital or school, would be likely to occur (refer s 74(1)(g)(i)); or
    - (ii) the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be situated would in some other manner be lessened (refer s 74(1)(g)(ii)); and
  - (d) that the grant of the application would otherwise be contrary to the Act (refer s 74(1)(j)).
21. The licensee objectors submit that the proposed premises are to be situated in a locality that already contains full packaged liquor services (in the form of both liquor store and hotel/tavern licences) and that the Busselton and West Busselton post code area is currently serviced by ten packaged liquor outlets, including:
  - (a) *Busselton Liquor Store*, at 47 Albert Street, Busselton;
  - (b) *BWS*, at 65 Kent Street, Busselton;
  - (c) *BWS Busselton*, at 3 Caves Road, Busselton;

- (d) *BWS Busselton North*, at the corner of Armitage Drive and Marine Terrace, Busselton;
- (e) *Cape Cellars*, at Shop 1, at Lot 56 Bussell Highway, Busselton;
- (f) *Esplanade Hotel*, Marine Terrace, Busselton;
- (g) *Vasse Café Bar*, at 73 Duchess Road, Busselton;
- (h) *The Ship Inn, Busselton*, at 6 Albert Street, Busselton;
- (i) *Progressive Supa IGA, Busselton*, at 30 Kent Street, Busselton; and
- (j) *Albies Bar & Bistro*, at Queen Street, Busselton.
22. The licensee objectors also noted that *Cape Cellars* is located within 700 metres of the proposed premises.
23. As such, it is the assertion of the licensee objectors that the public residing in and resorting to the locality already have high-level access and exposure to packaged liquor and packaged liquor services; with the Applicant seeking to rely upon population growth levels in Busselton, which have little specific application to the locality; which as an established residential area, is experiencing very little population growth itself.
24. The licensee objectors also assert that the proposed premises will significantly increase the community's exposure to liquor and the availability of liquor in the locality, both of which present a number of potentially negative health and harm consequences, including increased consumption levels and resultant anti-social and harm issues.
25. Concern was also raised by the licensee objectors regarding alcohol-related harm or ill-health and:
- (a) the Applicant's justification for the grant of the licence representing a perceived desire on the part of local consumers for the convenience of drive-through shopping, which, according to the licensee objectors, will make the purchase of packaged liquor more accessible, particularly for road users and commuters on Bussell Highway and thereby encourage impulse purchases of packaged liquor, contrary to the findings of the Liquor Licensing Court in *Re: Gingers Roadhouse*;
- (b) the introduction of an additional liquor store in the locality will drive down prices to create a market conducive to harm or ill-health; and
- (c) there are existing levels of alcohol-related harm in Busselton, as evidenced by:
- (i) the *Impact of Alcohol on the Population of Western Australia – Regional Profile: South West Region* (Nov 2011), Drug & Alcohol Office Surveillance Report, which revealed *inter alia* that persons residing in the South West Health Region are "at risk" of alcohol-related harm and the relevant rates of hospitalisation for stroke, other alcohol-related diseases, road injuries and other alcohol-related injuries were significantly higher than the State rates; and

- (ii) the Office of Crime Prevention *Community Safety and Crime Prevention Profile* (2009-2010) for the Shire of Busselton show a higher level of alcohol-related assaults in the Shire of Busselton (48.9%), compared to the whole of the State (45.2%).
26. The licensee objectors also contend that the grant of the application will introduce a new packaged liquor facility within 700 metres of an existing liquor store facility, creating an undesirable density of outlets within a small area, contrary to the legislative intent behind the public interest test for the grant of a new licence, which was expressed as not leading to a proliferation of liquor licences.

27. It was also submitted that it would be contrary to the Act for an applicant:
- (a) to apply to remove the licence to a new site a short distance away from the existing premises, and then make application a short time later (through a related company) for the grant of a new licence at the original premises, thereby achieving an undesirable concentration of licensed facilities; and
  - (b) to represent in support of a removal application that the public interest lies in removing an existing licence to new premises and then (having obtained the grant of the removal) to represent through a related company that the public interest lies in granting a new licence in respect of the original premises, within such a short period of time (24 months).

*Tyra Wainwright and Warren Hancock*

28. The objection of Tyra Wainwright and Warren Hancock is based on the ground that if the application was granted:
- (a) undue offence, annoyance, disturbance or inconvenience would be caused to persons who reside or work in the vicinity, or to persons travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur (refer s 74(1)(g)(i)); and
  - (b) the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be situated would in some other manner be lessened (refer s 74(1)(g)(ii)).
29. In the relevant notice of objection and other submissions, Ms Wainwright and Mr Hancock submitted that:

“The basis for this objection of a drive-thru liquor store is a safety concern that if the application were granted it would result in extra traffic crossing a footpath to exit onto Bower Road. This footpath is used frequently by pedestrians, school children and families walking to and from school. The driveway exiting onto Bower Road is 37 metres from the school zone.

The driveway that vehicles will be exiting from is directly opposite our house and driveway and the increased traffic will have a direct impact on us

as increased car headlights shining directly into our house, increased noise, inconvenience and safety concerns regarding exiting out of our own driveway onto Bowler Road with the increased traffic."

30. Ms Wainwright and Mr Hancock noted that while a browse only liquor store has operated at the proposed premises since 1999, the proposed drive-through facility will be a significantly different form of packaged liquor facility, due to the drive-through being of a substantial size and having the potential to attract a large number of vehicles to the premises, particularly high impact vehicles such as caravans, camper trailers and cars towing trailers or boats, as detailed in the Applicant's PIA.
31. It was also noted by Ms Wainwright and Mr Hancock that:
  - (a) the Applicant proposes to trade longer under the proposed licence than was traditionally the case under the former licence, with the former liquor store generally trading from 9 a.m. until 8.30 p.m. and the proposed premises intending to trade until 10 p.m. in the summer months and 9 p.m. otherwise; and
  - (b) traffic to and from the proposed store, inclusive of high impact vehicles, will be redirected into Bower Street and directly past their residence.
32. Ms Wainwright and Mr Hancock further submitted that they have resided across the road from the previous liquor store for many years and are therefore well versed with the inconveniences associated with a browse-in liquor store. However, Ms Wainwright and Mr Hancock indicated that they were previously able to tolerate these types of annoyance, disturbance and inconvenience, because they were mitigated by:
  - (a) the previous liquor store only trading from 9 a.m. until 8.30 p.m.;
  - (b) the previous liquor store not attracting large vehicles and trailers; and
  - (c) most vehicles accessed the previous liquor store directly from Bussell Highway, rather than from Bower Road.
33. Ms Wainwright and Mr Hancock further submitted that any increase in the impact of such annoyance, disturbance and inconvenience would result in a loss of their "way of life" and in this context, noted that according to *Vandeleur v Delbra Pty Ltd* (1988) 48 SAR 156, regarding the test of what is undue for a new liquor licence is 'what can reasonably be expected to be tolerated in the interests of the need of the community for a further licence of the type contemplated.'
34. With this in mind, Ms Wainwright and Mr Hancock submitted that contrary to the operation of the previous liquor store, the grant of the current application will result in an intolerable level of annoyance, disturbance or inconvenience to them, which will be spread over a longer period of time. Ms Wainwright and Mr Hancock submitted that these factors will lead to a degradation of their quality of life and to a loss of their quiet

enjoyment of their home, which would be “undue” within the meaning of s 74(1)(g)(i) of the Act.

35. Also appended to Ms Wainwright’s and Mr Hancock’s submissions were letters of concern from:
  - (a) Mr Chris Boulton, Principal of the West Busselton Primary School, regarding the potential risk the grant of the application will pose to children walking to and from the school; and
  - (b) Mr Peter Dawson and Ms Priscilla Dawson, residents of Bower Road, who, while not opposed to the grant of a traditional liquor store licence, are strongly opposed to the proposed drive-through because of concerns about increased inconvenience to residents in Bower Road, given that current annoyance levels are likely to be exacerbated by any increase to the existing traffic of the shopping centre and a similar increase in associated annoyances, such as vehicular engine noise later into the night, car lights flashing into windows and random sounds of squealing tyres on Bower Road.

### **Representations of the Commissioner**

36. The Commissioner made representations that the grant of the application would result in public harm and/or disturbance, if conditions are not imposed on the licence; and on other matters relevant to the public interest. The Commissioner’s concerns related to the impact the proposed premises may have on the community, particularly with reference to existing alcohol-related harm in the locality.
37. Using data obtained from the Western Australian Police database Incident Management System, the Commissioner noted that between September 2013 and August 2014, there were 2,270 reported crimes in Busselton which, when filtered to remove non-relevant incidents, resulted in 1,103 relevant offences, with 114 of those offences being alcohol-related.
38. The Commissioner also noted that Busselton Police Station issues an average of three street drinking infringement notices per week, with a portion of these infringements issued in the vicinity of the proposed premises, at public open space known as Mitchell Park, which has a high incidence of street drinking and anti-social behaviour. Additional representations were made regarding the extent of youth alcohol abuse in Busselton, with reference to a newspaper article published in the *Busselton Dunsborough Times* in March 2013 entitled *City’s drink problem* (which was also appended to the notice of intervention.)
39. Representations were also made that:
  - (a) Busselton is already saturated with packaged liquor outlets and that another liquor store is not required;

- (b) the roads surrounding the proposed premises congest very quickly and any increase in customers to the vicinity, particularly those with caravans and trailers, would be dangerous;
  - (c) accessing Bussell Highway at the traffic controlled intersection of Queen Elizabeth Road is already known to be difficult, with or without a trailer; and
  - (d) there are recognised “at-risk” groups in the locality, which is of concern given that the rate of alcohol consumption per person in Busselton is higher than the Western Australian rate and is reflected in the high number of alcohol related assaults in Busselton.
40. In conclusion, the Commissioner submitted that due to existing levels of alcohol-related harm in Busselton and the already high level of outlet density, the grant of the application will not further the objects of the Act, in that it will not enhance the liquor industry or add to the amenity of the locality. However, notwithstanding this view, a number of conditions were recommended for imposition on the licence, should the application be granted.

### **Determination**

41. Before I proceed to determine this application, I think it relevant, as a preliminary matter, to note the history of the subject premises, which was previously licensed for many years under liquor store licence number 6030048116 held by Redport Enterprises Pty Ltd (“Redport”) a company that is related to the Applicant by virtue of the fact that they have a common sole director in Mr Robert Zahtila.
42. In May 2012 a conditional removal was granted in respect of that licence from the subject premises to new premises to be located approximately 680 metres away on Bussell Highway. That removal, which was made unconditional in April 2015, was predicated upon the new location being safer and more convenient than the subject premises, as well as providing more parking for patrons. At the time of that application, Redport argued that the removal of the licence to the new premises would “be able to satisfy a wide array of consumer needs for years to come” and “allow for a superior operation capable of catering for the requirements of consumers both now and into the future.” Furthermore, Redport submitted that the new location was ideal and “in fact much more suitable than the existing.”
43. Redport further submitted that it had been motivated by the changing needs of the local community “which it knew so well”, to devise the removal application and go “to the great cost and effort to secure new premises and to make this application in respect of a prime site.” In terms of the new location, Mr Zahtila submitted that it “provides much safer and more convenient access off Bussell Highway, a lot more parking and more convenient access for people located South of the Highway” and that in the proposed location, “the liquor store would not be located adjacent to

residences or anything else which might be considered incompatible with a liquor store.”

44. At that time, Redport also acknowledged that it had “a huge captive audience of loyal customers who require Cape Cellars to evolve, expand and improve precisely as proposed” (i.e. in the removal application) and while confirming that its business was already servicing tourists, submitted that the “applicant will be able to provide much improved services to tourists from the new location”, which it acknowledged was “in fact safer and much more appropriate.”
45. In terms of the current application, the Applicant submits that the grant of the liquor store licence will address a void in packaged liquor services in the area, particularly in terms of West Busselton and for drive-through services generally; and that the application is supported by an enormous section of the public, which is much larger than the mere representative sample lodged as part of the application.
46. In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227, Buss J noted that:

“By s 5(2), in carrying out its functions under the Act, the ‘licensing authority’...shall have regard to the primary objects of the Act and to certain secondary objects. The secondary objects include facilitating the use and development of licensed facilities, reflecting the diversity of the requirements of consumers in the State (par (a)).”

47. The primary objects of the Act, as set out in s 5(1) are:
  - (a) to regulate the sale, supply and consumption of liquor (s 5(1)(a));
  - (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor (s 5 (1)(b)); and
  - (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of, relevantly, the liquor industry in the State (s 5(1)(c)).
48. Pursuant to s 38(2), an applicant who makes an application for a liquor store licence must satisfy the licensing authority that granting the application is in the public interest, with s 38(4) prescribing certain matters the licensing authority may have regard to in determining whether the grant of an application is in the public interest.
49. Therefore, in determining whether the grant of an application is in “the public interest”, it is necessary for me to exercise a discretionary value judgement confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O’Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).

50. While the rules of evidence do not apply to proceedings before the licensing authority (refer section 16(7) of the Act), decisions of the authority must be made on the balance of probabilities and be based on the evidence before it. Furthermore, notwithstanding that s 5(2)(e) of the Act requires the licensing authority to provide as little formality or technicality as may be practicable, the evidence of the parties needs to be relevant, reliable and logically probative to assist the decision-maker to assess the probability of the existence of the facts asserted in each case (refer *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)).
51. Each application must be dealt with on its merits (refer s 33) but the licensing authority has an absolute discretion to grant or refuse an application for any reason that the licensing authority considers in the public interest (refer *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
52. After considering the evidence and submissions before me, I find that I am not persuaded by the Applicant's assertion that the grant of a licence will address a void in packaged liquor services in the area, particularly in terms of West Busselton.
53. I have formed this view because there is a liquor store, i.e. *Cape Cellars*, located only 680 metres away from the proposed site on Bussell Highway. This distance equates to approximately a two minute drive or 10 minute walk, a distance that I consider to be negligible under the circumstances, particularly given that much of the Applicant's evidence revolves around people driving on Bussell Highway. I have also noted that the licensee objectors have identified a significant number of other relevant licensed premises in the Busselton and West Busselton post code areas that are capable of selling packaged liquor to the general public.
54. Therefore, I find that there is not a void in packaged liquor services in the locality.
55. I also note that it was Mr Zahtila's evidence, to justify the removal of the licence, that his huge captive audience of loyal customers would follow his business to the new premises. As such, I have some trouble accepting Mr Zahtila's current evidence that the establishment of a liquor store at the site is a requirement of a significant section of the public.
56. The Applicant further submits that the proposed drive-through facility is also a significant factor that:
  - (a) distinguishes the proposed premises from other licensed premises in the locality; and
  - (b) will cater to a consumer requirement for access to packaged liquor by persons towing a trailer of some type,

however, I do not consider this to be a factual statement or that the consumer evidence is as conclusive as the Applicant submits.

57. Firstly, I note that two other licensed premises within the locality currently provide for drive-through liquor services, with *Albies Bar & Bistro*, located only 2.9 kilometres from the proposed site and the *Esplanade Hotel*, located some 3.7 kilometres from the proposed premises. Although, I have noted that the Applicant submits that these drive-through services cannot accommodate large caravans, boats or other trailers; or are otherwise difficult for tourists to find and inconvenient for West Busselton residents.
58. Second, despite the Applicant's claim that the results of both the public survey and questionnaire establish a consumer need to access packaged liquor services with trailers in tow, I have noted that of 281 respondents to the on-line survey, only 48.41% indicated that they do "sometimes drive past the applicant's site at 231 Bussell Highway whilst towing a trailer of some sort and want to be able to go to a drive-through take-away liquor service there."
59. Similarly, six of the 19 respondents to the public questionnaire indicated that they do not ever use a trailer or similar towing device and while eight respondents indicated that they do sometimes use such trailers, they provided no relevant explanatory information about when, how often or why they use the trailer. In fact, only two respondents to the public questionnaire provided any context around why they sometimes use a trailer, with Mr Andrew Whitter indicating that he sometimes uses a trailer when towing his boat from the yacht club and Mr Scott Jordon also indicating that he sometimes tows a boat. Other respondents to the questionnaire indicated that they intend to use both the removed *Cape Cellars* and the proposed drive-through outlet because one is close to home and the other is more convenient while shopping.
60. Similarly, many of the 16 letters of support from local businesses, tourism operators and people living and working in the area also indicate that the writers will shop at both the existing *Cape Cellars* and proposed *Cape Cellars Drive-Thru* depending on convenience at the time. However, I have noted the submissions of Mr Wayne Hutchins that as a tradesperson, he tows "a work trailer daily with thousands of dollars of tools and equipment" and that he does not like to leave his tools and equipment unattended.
61. Accordingly, based on the consumer evidence presented by the Applicant, I find that the provision of a drive-through service as proposed in the current application would cater to the requirements of some consumers. Furthermore, while I accept the Applicant's submissions that one of the main drivers of contemporary consumer requirements is convenience and note that 63.57% of respondents to the Public Questionnaire indicated that the proposed drive-through service appeals to them, s 5(1)(c) of the Act provides that the requirements of consumers for liquor and related services must be considered in the context of the proper development of the liquor industry in the State.

62. In this regard, both the licensee objectors and the Commissioner have raised concerns about the extent of alcohol-related harm in Busselton and contend that the grant of the application will increase both the community's exposure to liquor and the availability of liquor in the locality and thereby drive down prices, creating a market conducive to harm or otherwise having a negative impact on the community, including increased consumption levels and associated anti-social and alcohol-related harm. Furthermore, the licensee objectors also submit that the legislative intent behind the public interest test for the grant of a new licence was not to achieve a proliferation of licensed facilities.
63. While the Applicant acknowledges the occurrence of crime in the area and that the consumption of liquor has the potential to cause some people to react negatively, it submits that:
- the nature of the Applicant's proposal presents only very low risks, which are mitigated by and heavily outweighed by the strong public interest considerations; and
  - (b) *Cape Cellars Drive-Thru* will not simply be another licence duplicating existing services and selling and supplying liquor in a non-descript manner.
64. I find that the Applicant's contention that the grant of the licence will cater to tourists and the like who are towing caravans is largely unsupported by the consumer evidence, given that 91% of the respondents to the public survey were residents of the Busselton region, as were the majority of the respondents to the public questionnaire and the authors of the letters of support.
65. Therefore, it is my view that the Applicant has failed to properly establish how the grant of the application is consistent with the proper development of the liquor industry, particularly given the existence of *Cape Cellars*, located a mere 680 meters away, as well as a significant number of other relevant licensed premises in the Busselton and West Busselton post code areas that are capable of selling packaged liquor to the general public, including some with drive-through facilities. In this regard, s 47 of the Act simply provides that a liquor store licence authorises the sale and supply of packaged liquor for consumption off the licensed premises and regardless of whether patrons elect to browse in-store or utilise a drive-through service in a car, particularly while towing a caravan, it does not change the fact that they are purchasing packaged liquor from a liquor store.
66. Accordingly, I find the Applicant's statements regarding the grant of the licence distinguishing the proposed premises from other licensed premises in the locality to be somewhat overstated.
67. It is often the case when considering the merits of an application that conflict will arise in promoting the objects of the Act, particularly the object of minimising alcohol-related harm versus the object of catering to the requirements of consumers for liquor and

related services. In such circumstances, I must weigh and balance those competing interests ((refer *Executive Director Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258) and decide upon the degree of importance to be attributed to each of the relevant factors, as proven by the evidence in each case.

68. In relation to consumer convenience, I consider that the grant of the licence would only result in the minimal additional benefits of convenience in accessing liquor, given that most consumers indicated that they will continue to use the existing *Cape Cellars*, as well as the proposed *Cape Cellars Drive-thru*, depending on whether one-stop shopping is convenient for them while purchasing groceries at the West Busselton Shopping Centre or whether the drive-through service will be more convenient, depending on whether or not they are towing the trailer or boat, etc. There may also be a possible consumer benefit of some lower prices in the event of increased competition between liquor merchants in the locality or the joint marketing of both premises by Mr Zahtila. However, these marginal benefits must be balanced against the negative aspects of an additional licence in the locality, where an increase in the availability of liquor may lead to increased consumption and therefore to an increase in harm or ill-health due to liquor.
69. While I do not doubt that some members of the community will always find it desirable to be able to purchase packaged liquor with as much convenience as possible, the element of convenience must be weighed against the broader public interest considerations under the Act and the facts and circumstances of each case, including in this case the representations of the Commissioner that the rate of alcohol consumption per person in Busselton is higher than the Western Australian rate and is reflected in the high number of alcohol related assaults in Busselton. In this regard, I consider that the proliferation of packaged liquor outlets in the locality would not be consistent with the Act's harm minimisation object.
70. In regard to the residential objectors, the Applicant submits that there have been no previous traffic incidents around the site in relation to the operation of the store and the site has successfully operated for many years with a liquor store and other shops there, together with residents and the nearby school.
71. The Applicant also submitted that the Resident's objection is not supported by any evidence or corroborated by any other objection or intervention and is in fact contradicted by the evidence of Mr Homer. Accordingly, the Applicant submits that the objection of the residential objectors lacks evidence and has therefore not been made out.
72. However, by Mr Zahtila's own evidence it was submitted that:
  - (a) the proposed store will be a very different business from the previous one;
  - (b) the new store will alter traffic onto Bower Road, rather than directly onto Bussell Highway; and

- (c) one of the positive aspects of the removal application was that the store “would not be located adjacent to residences or anything else which might be considered incompatible with a liquor store.”
73. Therefore, I give little weight to the Applicant’s submission regarding the previous problem free existence of different users (i.e. commercial and residential) at the site or that the grant of the proposed licence would be virtually neutral on people who live or work in the vicinity.
74. In the alternative, I accept the submissions of Ms Wainwright and Mr Hancock that contrary to the operation of the previous liquor store, the grant of the current application will likely, on the balance of probabilities, result in annoyance, disturbance or inconvenience to them in the form of:
- (a) increased numbers of vehicles, including large vehicles such as caravans, camper trailers and cars towing trailers, accessing the proposed liquor store directly past their residence via Bower Street, instead of from Bussell Highway, as was previously the case;
  - (b) increased traffic congestion on Bower Street;
  - (c) increased vehicular noise; and
  - (d) vehicular headlights shining into the front living areas of their residence, which will be spread over a longer period of time, given the proposed trading hours and thereby lead to a degradation of their quality of life, which would be “undue” within the meaning of s 74(1)(g)(i) of the Act.
75. Part of the Applicant’s submissions to justify the new application is that Mr Zahtila now owns the subject property. Similarly, I have also noted Mr Zahtila’s evidence regarding the commercial benefits of having two retail liquor outlets in the region. However, the licensing authority has often stated that there is no absolute entitlement to the grant of a licence, even if the applicant meets all the requirements of the Act. Likewise, applications under the Act cannot proceed on the expectation that the commercial interests of an applicant will necessarily coincide with the public interest.
76. Therefore, I am not satisfied by the Applicant’s evidence that it is in the public interest to grant the application when all the facts and circumstances of the case are considered, bearing in mind that the onus is upon the Applicant to satisfy the licensing authority that the grant of the application is in the public interest. Accordingly, the application is refused.
77. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.

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



Brett Snell  
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING