

**Liquor Commission of Western Australia**  
**(Liquor Control Act 1988)**

- Applicant:** Chief Health Officer  
(Represented by Ms Caitlin Gilchrist of the State Solicitor's Office)
- Respondent:** Hoyts Multi-Plex Cinemas Pty Ltd  
(Represented by Mr Peter Fraser of Dwyer Durack)
- Objector:** Cancer Council Western Australia Inc.
- Commission:** Ms Pamela Hass (Presiding Member)  
Mr Paul Shanahan (Member)  
Ms Alya Barnes (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* (the "**Act**") for review of the decision of the Director of Liquor Licensing to conditionally grant a Special Facility (Cinema) licence for premises known as Hoyts Cinema Karrinyup, in the Karrinyup Shopping Centre, with a juvenile exemption pursuant to section 120(1)(e) of the Act and subject to ten trading conditions (listed in paragraph 4 below). The Applicant asks the Commission to impose a further three trading conditions on that licence (listed in paragraph 5 below).
- Premises:** Hoyts Cinema Karrinyup  
Karrinyup Shopping Centre  
200 Karrinyup Road Karrinyup, Western Australia, 6018
- Date of hearing:** 27 October 2021
- Date of determination:** 1 August 2022

**Determination:**

The application is allowed. The decision of the Director of Liquor Licensing (the “**Director**”) is varied and the application to conditionally grant a Special Facility (Cinema) licence in respect of the Premises is approved subject to the ten (10) trading conditions (which are listed in paragraph 4 below) and also subject to the addition of the following Trading Conditions:

11. Liquor may not be served or consumed in a cinema where a “G” or “PG” rated film is being screened, unless it is part of an 18+, adults only screening;
12. Liquor may not be served or consumed at any function or special event at the Premises that is specifically designed for, or targeted at, children and/or young people;
13. Subject to trading conditions 11 and 12 above, liquor may only be served at the Premises:
  - (a) from a discrete and clearly delineated fixed area of the Premises that is separate from the ‘Candy Bar’ area (i.e., separate from the area at the Premises used for the sale of confectionary, food, non-alcoholic drinks and other products to patrons including children); and
  - (b) by staff who are trained in the responsible service of liquor and who are employed by the Respondent to provide an in-cinema service for the sale of food and drinks (including alcoholic drinks) to patrons during the screening of a film as part of a ‘Gold Class’-type or ‘Hoyts Lux’-type operation (regardless of how that operation may be named), provided that those staff:
    - (i) may only serve liquor to patrons using serving trays of the sort used by restaurant waiters; and
    - (ii) may not use any kind of trolley or fixed structure within the cinema room as a sales point, or to store liquor (even temporarily), or to otherwise assist in the sale of liquor to patrons; and
14. The Licensee must display signage at the Premises advising that:
  - (a) the supply of liquor to juveniles is an offence; and
  - (b) night vision technology will be employed in the cinema to monitor patrons,and that signage must be large, clear, easy to read, prominently displayed and clearly visible to all patrons of the Premises.

The phrase “*separate from the ‘Candy Bar’ area*” in trading condition 13(a) above means that liquor sales operations and ‘Candy Bar’ sales operations can both be accommodated from a single counter structure at the Premises provided that the counter structure is:

- (a) sufficiently long to ensure; or
- (b) configured in a way that will ensure,

there is a clear separation between those two operations and a clear separation between patrons for liquor sales and patrons for ‘Candy Bar’ sales.

### **Authorities referred to in Determination**

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98

## BACKGROUND

- 1 This matter concerns an application by Hoyts Multi-Plex Cinemas Pty Ltd (the “**Respondent**”) lodged on 29 January 2021 for the conditional grant of a Special Facility (Cinema) licence (“**SFL**”) pursuant to sections 46, 62 and 68 of the *Liquor Control Act 1998* (the “**Act**”) for the whole of the premises, known as Hoyts Karrinyup situated at 200 Karrinyup Road, Karrinyup (the “**Premises**”) for the prescribed purpose of allowing the sale of liquor at a cinema to persons attending a film (the “**Application**”).
- 2 Part of the Application includes a juvenile exemption pursuant to section 120(1)(e) of the Act permitting unaccompanied juveniles to attend the Premises for the purpose of viewing a movie.
- 3 Objections to the Application in the first instance, were lodged by the Cancer Council WA and the Chief Health Officer.
- 4 On 31 May 2021, the delegate of the Director of Liquor Licensing (the “**Director**”) granted the Application for a conditional SFL subject to ten trading conditions (the “**Decision**”), being:
  - 1 Pursuant to section 46(3) of the Act and regulation 9A(4) of the *Liquor Control Regulations 1989* (“**Regulations**”), this licence is granted for the prescribed purpose of “Cinema”.
  - 2 During the permitted trading, the licensee is only authorised to sell and supply liquor for consumption on the licensed premises to persons who are attending the screening of a film and who possess a ticket that is valid for the film screening at the Hoyts Karrinyup on that day, for one (1) hour before the commencement of that film; during the screening of the film itself and for one hour after the conclusion of the film.
  - 3 The sale and supply of packaged liquor for consumption off the licensed premises is prohibited.
  - 4 Drink options that contain low alcohol liquor content as well as a range of non-alcoholic drink options must be available during all trading hours.
  - 5 The licensee shall not promote drinks which offer liquor by virtue of their ‘emotive’ titles such as, but not limited to ‘laybacks’, ‘shooters’, ‘test tubes’, ‘jelly shots’, ‘blasters’, or ‘bombs’.
  - 6 The number of persons that may be accommodated on the licensed premises, at any one time, must not exceed the numbers of persons/patrons as contained in the premises accommodation certificate as determined by the City of Stirling.
  - 7 Pursuant to section 120(1)(e) of the Act, unaccompanied juveniles are permitted to enter and remain on the licensed premises only where the juvenile is present on the licensed premises for the purpose of attending the screening of a film and who possess a ticket that is valid for the film screening at the Hoyts Karrinyup on that day.
  - 8 During the screening of a film, if juveniles are present within a cinema, an employee of the licensee trained in the responsible service of liquor (RSA officers) must check the cinema on at least two (2) occasions. RSA officer must utilise night vision goggles/binoculars for the purpose of such inspections to ensure compliance with the Act.

- 9 Each cinema must be equipped with CCTV with night vision capability.
- 10 A closed-circuit television video (“**CCTV**”) surveillance system, able to identify individuals and showing times and dates must be in place and operational. The CCTV system must comply with the requirements as identified in the Director’s Policy ‘Safety and Security at Licensed Premises’. It is expected that the system will provide and record continuous images of the entrances and exits to the premises during the normal trading hours and until one (1) hour after trading ceases. Images recorded via the CCTV system must be retained for, at least, twenty-eight (28) days (or such other period as the Director of Liquor Licensing specifies) and must be made available for viewing or removal by the Police or other persons authorised by the Director.

The recorded vision when viewed or removed must include:

- (i) Time/date stamp.
- (ii) Camera location.
- (iii) Camera identifier.
- (iv) Watermarking or method of verifying the original image for authenticity ensuring tamper prevention.

The details of any incident must be recorded in the Incident Register for the licensed premises.

- 5 The Applicant in the intervention in first instance, sought nine (9) trading conditions to ameliorate harm or ill-health concerns regarding the sale and consumption of liquor within areas of the premises that are shared, visible and accessible to juveniles. Two (2) of those conditions were granted in the Decision. The Applicant now seeks, by way of its review application, to secure three (3) of its other proposed conditions namely:

- (a) Prohibiting the sale and supply of liquor from the trolley (“**Condition 5**”);
- (b) Restricting the sale and consumption of liquor to a discrete and clearly delineated area of the venue, separate from the candy bar (“**Condition 4**”); and
- (c) Restricting liquor from being served in a cinema where a “G” or “PG” rated film is being screened (unless it is part of an 18+, adults only screening), or when there is a function or special event that is specifically designed for, or targeted at, children and/or young people (“**Condition 2**”),

(the “**Additional Trading Conditions**”).

6. The reference to ‘the trolley’ in paragraph 5(a) above is a reference to a wheeled mobile drinks trolley from which the Respondent proposes to sell liquor and other products to patrons of the cinema complex (the “**Trolley**”). The Respondent proposes to wheel the Trolley into a theatre room within which a film is to be screened during the period before the screening commences so that the patrons will have an opportunity to purchase liquor and other products from the Trolley without having to attend the sales areas in the foyer or lobby of the cinema complex and without having to leave the room. The Respondent proposes to wheel the Trolley from the theatre room before the screening commences.

## The Review

- 7 In support of the need for the Additional Trading Conditions, on 30 June 2021 the Chief Health Officer (the “**Applicant**”) applied, pursuant to section 25 of the Act, for a review of the Decision with respect to the conditions on the SFL (“**Original Conditions**”), and not the grant itself, based on the following three grounds:

### Ground 1

- (a) The Delegate has erred by imposing trading conditions consistent with conditions imposed by the Director in similar circumstances without considering the merits of this case and imposing conditions accordingly. In particular, the Applicant claims<sup>1</sup>:
- (i) The sale and supply of liquor from the Trolley is unique to the Application. The Director paid insufficient regard to the submissions made by the Applicant regarding a proposed condition prohibiting the sale of liquor from the Trolley as an important condition for reducing the alcohol related risk factors for children and young people attending the Premises and limiting the profile and availability of liquor for consumption at the premises, for the purposes of minimising harm and ill-health.
  - (ii) The Director’s decision to grant the licence without imposing conditions restricting the sale, supply and consumption of liquor to a discrete and clearly delineated area of the premises separate from the Candy Bar was irrational or unreasonable.

### Ground 2

- (b) The protective mechanism imposed by the Director’s proposed Condition 8 is ineffective because it would not be reasonably possible or practicable for an employee of the licensee to identify unaccompanied juveniles in a dark cinema with large numbers of people present, or to identify if any such unaccompanied juvenile is in possession of or consuming alcohol, or otherwise at risk from an adult who has been consuming alcohol.

### Ground 3

- (c) The Director paid insufficient regard to the submissions made by the Applicant regarding the harmful impact of the exposure and normalisation of alcohol on juveniles attending leisure settings, the subject of the Chief Health Officer’s submissions in the first instance, in not imposing any condition prohibiting the sale or consumption of liquor during the screening of a “G” or “PG” rated film and consequently the conditions fell short of the primary and secondary objects of the Act.

## Applicant’s Submissions

7. The Applicant submits that to ameliorate the harm or ill-health concerns for children and unaccompanied juveniles resulting from the Application, the Commission should quash the Decision and grant the licence with the Additional Trading Conditions (listed in paragraph 5 above) as trading conditions.

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<sup>1</sup> See Applicant’s Outline of Submissions at paragraphs 35 to 39.

8. The Applicant's submissions at the hearing on 27 October 2021 were in accordance with:
- (a) the 'Closing Submissions' letter dated 18 May 2021 which letter refers to the Chief Health Officer's Notice of Intervention dated 8 March 2021 (the "**Original Submissions**") summarised as:
- (i) the Applicant's intervention regarding the vulnerable nature of children and young people being exposed to alcohol in entertainment environments relates to both accompanied and unaccompanied children and young people;
  - (ii) in addition to secondary supply concerns, there are additional safety concerns associated with juveniles being in a setting with adults consuming alcohol;
  - (iii) there is the concern regarding the cultural impact of children being exposed to alcohol in leisure settings and adults consuming in front of them alcohol from the time of entry, given alcohol will be highly visible throughout the complex;
  - (iv) certain of the Respondent's 11 May 2021 submissions are opinion and provide no evidence to demonstrate children are not impacted by exposure to alcohol use and promotion in the environments they live, play and learn in;
  - (v) that other social environments contain alcohol does not make it less harmful to have alcohol in the cinema environment and contemporary expert evidence regarding future levels of harm and exposure of children to alcohol was presented in the intervention;
  - (vi) contrary to other environments, it is highly possible that unaccompanied children will attend the cinema and sit next to adult strangers drinking alcohol in a PG movie;
  - (vii) the fun feeling of movie attending will likely be associated by children with seeing adults drinking alcohol if alcohol visibility is not separated from the movie watching/attending experience;
  - (viii) expert evidence and contemporary national and international practice support the view alcohol exposure to children causes harm, hence the banning of alcohol advertising on public transport in WA;
  - (ix) tangible harm such as vehicle accidents, memory loss, blackouts and unprotected sex will not be immediately apparent but rather later on in life and elsewhere;
  - (x) it is the cumulative effect of the number and diverse places children are exposed to alcohol that causes risk and harm and consideration must therefore be given to how the Application will contribute to this;
  - (xi) exposure to adults consuming alcohol; safety and the development of unhealthy attitudes and behaviours where children are vulnerable and therefore an 'at-risk' group all justify the reasonable need to separate juveniles from alcohol in the cinema setting;
  - (xii) infrequent in-cinema inspections in dark and potentially full cinemas means monitoring for secondary supply or antisocial behaviour will be difficult; and

(xiii) as the entire complex is to be licensed including the public foyer area, alcohol will be very visible and prominent, thereby increasing the risk of harm to children and young people in the variety of tangible ways as outlined in the intervention,

therefore the Original Conditions are inadequate and the Additional Trading Conditions are required as an effective and reasonable harm minimisation approach;

- (b) the Applicant's Grounds and Proposed Orders (as per paragraphs 5-6 included above);
- (c) the Applicant's Outline of Primary Submissions dated 30 September 2021 summarised below; and
- (d) the Applicant's Responsive Submissions dated 13 October 2021 also summarised below.

### **Primary Submissions of the Applicant dated 30 September 2021**

- 9. The Applicant's primary submissions of 30 September 2021 are summarised in paragraphs 10 to 20 below.
- 10. The Applicant covers the background of this matter and notes the relevance of certain of its submissions in the Original Submissions that are relevant to this review being paragraphs 9 (a)-(d) of its 11 May 2021 Further Submissions and paragraphs 11 (a)-(h) of its 18 May 2011 Closing Submissions.
- 11. The Applicant asserts:
  - (a) the Respondent has not given evidence to show:
    - (i) exposing children and young people to the consumption of liquor does not cause harm<sup>2</sup>;
    - (ii) how an employee is to conduct a security check twice within one sitting on 336 people without causing disruption<sup>3</sup>; and
    - (iii) the negligible effect of day-to-day alcohol exposure on juveniles or daily consumption of alcohol in homes where juveniles are otherwise unexposed<sup>4</sup>;
  - (b) the Additional Trading Conditions would not prevent the Respondent from trading in the manner contemplated as those conditions apply to Hoyts Southlands and Carousel<sup>5</sup>;
  - (c) as to Condition 2, the Respondent has not shown that adults consume liquor in "G" or "PG" movies specifically such that it is catering to a requirement<sup>6</sup>;
  - (d) as to Condition 4, it is construed that the Respondent says this condition would prevent the consumption of liquor within a theatre<sup>7</sup>; and

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<sup>2</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 9(a).

<sup>3</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 9(b).

<sup>4</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 9(c).

<sup>5</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 9(d).

<sup>6</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 10(a).

<sup>7</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 10 (b).



- (e) as to Condition 5, the Respondent did not take into account the importance of reducing alcohol risk factors for children and young people attending the Premises and limiting the profile and availability of liquor for consumption at the Premises for the purposes of minimising harm and ill-health.<sup>8</sup>
12. The Applicant iterates several of its submissions in its Intervention and its Closing Submissions of 18 May 2021 as relevant to the review<sup>9</sup>, some of which are particularised in paragraph 8(a) above.
13. The Applicant recites the legal principles that apply to the Application<sup>10</sup> concluding that section 120(1)(e) of the Act, is, with respect to the Application, the only relevant exception to the Act's prohibition of unaccompanied juveniles from being permitted entry to, or remaining on, a place where the sale or supply of liquor is authorised. This section, coupled with the Applicant's interpretation of the Director's policy titled 'Juveniles present on licensed premises for reasons other than work/training policy' ("**Juveniles Policy**") require the Director to exercise its discretionary power as to imposing conditions with regards to the merits of the case<sup>11</sup>.

### **Ground 1**

14. As to the Ground 1(a) (which relates to the Trolley), the Applicant submits<sup>12</sup>:
- (a) the proposal to sell alcohol from the Trolley has not arisen before in cinema premises applications or decisions and the Director failed to consider the merits of this particular aspect of the Application and paid insufficient regard to the Applicant's previous submissions and evidence on point;
  - (b) the Trolley use will be during a period when juveniles will most likely be attending the Premises;
  - (c) the Trolley will exacerbate the exposure of juveniles to alcohol visually and by engagement because snack food, in addition to alcohol, will also be sold from the Trolley;
  - (d) research demonstrates leisure activity is significant in the formative years of life when identity development occurs for children and young people<sup>13</sup>; and
  - (e) failure to impose any condition preventing the sale and supply of alcohol from mobile trolleys (like the Trolley) was a missed opportunity to minimise harm and ill-health, a primary object of the Act, and encourage responsible attitudes and practices towards the consumption of liquor consistent with the interests of the community, a secondary object of the Act, by limiting the profile and availability of liquor for consumption and reducing alcohol related risk factors for children and young people attending the Premises.

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<sup>8</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 10 (a) to (c).

<sup>9</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 11 (a) to (h).

<sup>10</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraphs 18 to 32.

<sup>11</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraphs 33 to 38.

<sup>12</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraphs 39 to 49.

<sup>13</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 47.

15. As to Ground 1(b) (Restrict sale and consumption of liquor to a discrete and clear delineated area of the venue, separate from the candy bar), the Applicant submits:
- (a) the Delegate's decision to grant the licence without imposing conditions restricting the sale, supply and consumption of liquor to a discrete and clearly delineated area of the premises separate from the candy bar was irrational or unreasonable if one starts from the position that except in certain circumstances, unaccompanied juveniles must not, under the Act, enter or remain on licensed premises and therefore the rational decision would be to confine the consumption of alcohol to a particular area so juveniles can be supervised and managed appropriately, yet this has not occurred<sup>14</sup>.
  - (b) since no conditions were imposed with respect to restricting the area, concerns exist regarding the extensive exposure of alcohol to juveniles and the associated risk of harm;
  - (c) shared, visible and accessible alcohol consumption areas give rise to the risk of secondary supply, child safety concerns as to inebriated adults, normalisation of alcohol; and exposure and limiting availability and visibility is an appropriate harm minimisation mechanism<sup>15</sup>; and
  - (d) imposing a condition that restricts the sale and consumption of liquor to a discrete and clearly delineated area of the venue would minimise the specific harm that arises.<sup>16</sup>
16. The association of alcohol with traditionally alcohol-free leisure activities such as watching a movie, creates a sense for children and young people that alcohol is a normal everyday activity and an ordinary, harmless product<sup>17</sup>.
17. There is the risk of secondary supply of alcohol to juveniles due to an inability to properly monitor the premises where the whole of the premises are licensed; it is dark, there is no delineated area restricting sale and consumption<sup>18</sup>.

## **Ground 2**

18. As to Ground 2 (Protective mechanism ineffective – Condition 8), it is submitted that Condition 8 of the Original Conditions, which condition mirrors that in United Cinemas Rockingham decision determined 5 May 2021, would be ineffective to identify whether unaccompanied juveniles in the dark are at risk with respect to secondary supply and exposure to inebriated adults and the imposition of the condition in another case does not make it an effective condition in this Application<sup>19</sup>. It is submitted that the Additional Trading Conditions will serve to address some of the concerns as to secondary supply and potential interaction between unaccompanied juveniles and strangers drinking<sup>20</sup>.

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<sup>14</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021 paragraphs 50 to 53.

<sup>15</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021 paragraphs 54 to 56.

<sup>16</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021 paragraph 58.

<sup>17</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 59.

<sup>18</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraph 60.

<sup>19</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraphs 62 to 66.

<sup>20</sup> See Applicant's Outline of Primary Submissions dated 30 September 2021, paragraphs 67 to 69.

### **Ground 3**

19. As to Ground 3, (Insufficient regard paid to the submissions made by the CHO in relation to the harmful impact of the exposure and normalisation of alcohol on juveniles attending leisure settings) the Applicant submits, to summarise, that restricting liquor from being served in a cinema where a “G” or “PG” rated film is being screened (unless it is part of an 18+, adults only screening), or where there is a function or special event that is specifically designed for, or targeted at, children and/or young people (known as ‘Condition 2’), is a necessary alcohol-related harm minimising measure in the context no evidence was provided that shows adults consume liquor in “G” or “PG” movies specifically such that there is a consumer requirement to cater to, and conversely, young people may be exposed to large numbers of adults consuming alcohol in a child focussed movie which can result in a positive association between alcohol and enjoyment from the movie<sup>21</sup>.
20. The Grant of Licence should be subject to the following additional conditions (being the Additional Trading Conditions)<sup>22</sup>:
  - (a) a condition directed towards prohibiting the sale and supply of liquor from a mobile trolley, like the Trolley (“**Condition 5**”);
  - (b) to impose a condition directed towards restricting the sale and consumption of liquor to a discrete and clearly delineated area of the venue, separate from the candy bar (“**Condition 4**”); and
  - (c) to impose a condition directed towards restricting liquor from being served in a cinema where a “G” or “PG” rated film is being screened (unless it is part of an 18+, adults only screening), or when there is a function or special event that is specifically designed for, or targeted at, children and/or young people (“**Condition 2**”).

### **Respondents Submissions at the hearing**

21. At the review hearing the Respondent sought to rely on:
  - (a) Public Interest Assessment Submissions dated 29 January 2021;
  - (b) Respondent’s Further Submissions dated 11 May 2021;
  - (c) Closing Submissions dated 18 May 2021;
  - (d) All statements and letters of support lodged in support of the Application;
  - (e) Respondent’s Submissions dated 30 September 2021; and
  - (f) Respondent’s Submissions dated 13 October 2021.

### **Respondents Submissions dated 30 September 2021**

22. The Respondent’s Submissions of 30 September 2021 are summarised in paragraphs 23 to 38 below.

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<sup>21</sup> See Applicant’s Outline of Primary Submissions dated 30 September 2021, paragraphs 70 to 76.

<sup>22</sup> See Applicant’s Outline of Primary Submissions dated 30 September 2021, paragraph 77.

23. The Respondent, referring to Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 at [20] (“**Carnegies**”) submits the issue for determination is whether the Respondent Licensee has satisfied the Commission that the grant of the Application including the grant of a juvenile exemption, is in the public interest<sup>23</sup>.

#### Ground 1

24. Regarding Ground 1 of the Review, the Respondent submits the Director was correct to impose conditions consistent with conditions imposed by the Director in similar previous circumstances which conditions are supported by substantial evidence as to efficacy in preventing juveniles from gaining access to liquor<sup>24</sup>.

25. The Trolley has been the subject of previous applications, the subject of this Application and the Director expressly referred to it at paragraph 17 of the Decision<sup>25</sup>.

26. The evidence as to levels of consumption of alcohol, in the Respondent’s view, shows that the likely degree of harm to children that will result from the Application is negligible<sup>26</sup>.

27. Normalisation of liquor is not considered an issue and the Respondent relies upon its submissions in paragraphs 21-26 and 127-136 of their Further Submissions dated 11 May 2021<sup>27</sup>.

28. There is no evidence that juveniles are at risk if seated in a cinema with an adult consuming alcohol<sup>28</sup>.

29. As to secondary supply, paragraphs 77-131 of the Respondent’s Further Submissions dated 11 May 2021 are relied upon<sup>29</sup>.

#### Ground 2

30. As for Ground 2, the evidence shows the Respondent has considerable liquor licence operation experience in WA and over East and had never encountered any difficulties or problems associated with a juvenile either gaining access to liquor or having an adverse experience with an adult who has consumed liquor.

31. Juveniles would not be placed at risk by the grant of the Application.

32. There is no evidence to support a finding that the use of a mobile drink trolley would place any person at risk of alcohol related harm<sup>30</sup>.

33. In the absence of that evidence, there was no harm or risk to weigh against the interest in granting the Application and the Delegate was therefore correct in declining to impose the proposed condition<sup>31</sup>.

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<sup>23</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 12.

<sup>24</sup> See Respondent’s Submissions dated 30 September 2021, paragraphs 17 and 18.

<sup>25</sup> See Respondent’s Submissions dated 30 September 2021, paragraphs 20 to 22.

<sup>26</sup> See Respondent’s Submissions dated 30 September 2021, paragraphs 25 to 32.

<sup>27</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 34.

<sup>28</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 35.

<sup>29</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 36.

<sup>30</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 40.

<sup>31</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 42.

34. The delegate was not irrational or unreasonable in not imposing the restriction on the Trolley and relies upon Further Submissions and the Closing Submissions dated 11 May 2021 and 18 May 2021 respectively in support<sup>32</sup>.
35. The Respondent produced evidence that “*there has never been an issue arising from juveniles either attempting to purchase liquor at these cinemas or alternatively juveniles gaining access to liquor by secondary supply*”, this evidence is uncontested and therefore the Applicant’s Ground 2 in relation to the ineffectiveness of Condition 8 in the Decision, lacks foundation<sup>33</sup>.

### Ground 3

36. As for Ground 3 of the Applicant’s objection, which objection relates to insufficient regard being given to the Applicant’s submission as to the normalisation of alcohol, the Respondent points out Hoyts Millennium, Hoyts Carousel and Hoyts Southlands have no such restrictions<sup>34</sup> despite the Applicant seeking the restriction in each case and furthermore, there have been no adverse issues with respect to juveniles in those cinemas<sup>35</sup>.
37. There is no evidence to find that juveniles are at risk if seated in a cinema with an adult consuming alcohol which exposure is no different to witnessing alcohol consumption at a restaurant, in the home, at a sporting ground, a plane or alfresco areas<sup>36</sup>.
38. The Decision should be affirmed without amendment.

### **Applicant’s Responsive Submissions dated 13 October 2021**

39. The Applicant, in response to the Respondent’s Submissions of 30 September 2021 submits that the *Carnegies* case, whilst guiding, is distinguishable<sup>37</sup> and submits certain findings the Commission should make<sup>38</sup>.
40. Regarding Ground 1, the Applicant submits the evidentiary burden is hard to discharge when:
- (a) as to juveniles gaining, or not gaining, access to liquor at similar existing licensed cinemas, it would be impossible for the Respondent to produce such evidence in the absence of reporting requirements or access to the Respondent’s Incident Report, and it is unlikely the public would complain to the Western Australian Police Force about underage drinking given the effort required and the fact the cinemas are dark; and
  - (b) normalisation of alcohol related harm to children and young people, which is a general risk, whilst real, would not be immediately apparent<sup>39</sup>.
41. The Intervention does, nevertheless, refer to evidence of general risk of harm.

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<sup>32</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 43.

<sup>33</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 46.

<sup>34</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 48.

<sup>35</sup> See Respondent’s Submissions dated 30 September 2021, paragraph 49.

<sup>36</sup> See Respondent’s Submissions dated 30 September 2021, paragraphs 50 to 53.

<sup>37</sup> See Applicant’s Outline of Responsive Submissions dated 13 October 2021, paragraphs 2 to 8.

<sup>38</sup> See Applicant’s Outline of Responsive Submissions dated 13 October 2021, paragraphs 8 to 10.

<sup>39</sup> See Applicant’s Outline of Responsive Submissions dated 13 October 2021, paragraph 11 to 14.

42. If mobile drink trolleys (like the Trolley) are disallowed, then alcohol related risk factors for children and young people is limited, as is availability of liquor for consumption<sup>40</sup>.
43. Generally other cinemas do not have mobile drinks trolleys, although it is accepted the Applicant's cinemas do, and it is the general position that requires an additional condition to reduce the associated risks to achieve the objects of the Act<sup>41</sup>.
44. If consumers only drink, on the Respondent's evidence, 1 -2 drinks per movie session, there should be no reason not to limit alcohol access to Artie's Bar<sup>42</sup>.
45. The Trolley increases visibility and availability of alcohol throughout the premises and increases the risk of harm of normalisation of alcohol in children and young people with causation of normalisation and harm being evidenced in the Intervention<sup>43</sup>.
46. As to grounds 2 and 3, the Applicant repeats certain of its prior submissions.

### **Responsive Submissions dated 13 October 2021**

47. In response to the Applicant's Responsive Submissions of 30 September 2021, the Respondent Licensee repeats several of its prior submissions on:
  - the issues of unaccompanied juveniles;
  - application of the Juveniles Policy;
  - the grounds and proposed remedies;
  - restricting liquor sale to a discrete area;
  - protective mechanism ineffective; and
  - the issue of harmful exposure and normalisation of alcohol,

and submits further that:

- (a) The Applicant did not distinguish between accompanied juveniles and unaccompanied juveniles in its analysis of child safety, normalisation of alcohol and visibility of alcohol and says the risk is at any licensed venue whether accompanied or unaccompanied by an adult<sup>44</sup>.
- (b) Submits that Mr Bagley could not have given sworn evidence that there were no issues with respect to:
  - (i) juveniles attempting to purchase liquor; or
  - (ii) the secondary supply of liquor to juveniles,

if the incident report, which the Respondent is required by statute to keep, showed there were incidents and that Mr Bagley's evidence is not unreasonable or improbable and is not contradicted by other evidence<sup>45</sup>.

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<sup>40</sup> See Applicant's Outline of Responsive Submissions dated 13 October 2021, paragraph 15.

<sup>41</sup> See Applicant's Outline of Responsive Submissions dated 13 October 2021, paragraph 15.

<sup>42</sup> See Applicant's Outline of Responsive Submissions dated 13 October 2021, paragraph 18.

<sup>43</sup> See Applicant's Outline of Responsive Submissions dated 13 October 2021, paragraph 19.

<sup>44</sup> See Respondent's Responsive Submissions dated 13 October 2021, paragraphs 6 to 8.

<sup>45</sup> See Respondent's Responsive Submissions dated 13 October 2021, paragraph 9.

- (c) Mobile trolleys (like the Trolley) are used at each of the licensed venues Hoyts Millennium Fremantle; Hoyts Carousel and Hoyts Southlands<sup>46</sup>.
- (d) The evidence as to how staff conduct security checks is the use of two inspections with night goggles walking up and down aisles<sup>47</sup>.
- (e) Mr Bagley’s statement that adults wished to be able to consume liquor when viewing a movie at the Licensee’s venue and that PG movies are very popular with adults supports the contention that there is a requirement to consume liquor in “G” and “PG” movies specifically<sup>48</sup>.
- (f) Exposure to parents or adults drinking in the home, if they do, is one of the many ways juveniles are already exposed to alcohol and the consumption of alcohol<sup>49</sup>.
- (g) The *Carnegies* case is relevant and the test is to be applied<sup>50</sup>.
- (h) The starting position under Division 9 of the Act is that juveniles who are not accompanied by a responsible adult are not permitted entry to licensed venues<sup>51</sup> and as such, limiting juveniles’ exposure to alcohol is not the purpose of the Act<sup>52</sup>.
- (i) The Director’s Juveniles Policy contemplates that a juvenile exemption may be granted to a licensed cinema.
- (j) Liquor is not sold from the candy bar and unaccompanied juveniles do not have access to ‘back of house’ so technically they only have access to part of the licensed premises<sup>53</sup>.
- (k) The Original Conditions have been imposed at other cinema venues and are effective<sup>54</sup>.
- (l) The Decision should be affirmed without amendment.

## LEGAL AND STATUTORY FRAMEWORK

48. The Commission is not required to find error on the part of the Director when undertaking a review under section 25 of the Act, but the Commission instead undertakes a full review and makes a determination on the basis of the same materials that were before the Director when the decision was made (*Hancock v Executive Director of Public Health* [2008] WASC 224).
49. Section 25(4) of the Act states that on a review under section 25, the Commission may:
- (a) affirm, vary or quash the decision subject to the review; and
  - (b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and

<sup>46</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraph 32.

<sup>47</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraphs 9 and 41.

<sup>48</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraph 10.

<sup>49</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraphs 11 to 20.

<sup>50</sup> See Respondent’s Responsive Submissions dated 13 October 2021 paragraphs 12, 13 and 48.

<sup>51</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraph 23.

<sup>52</sup> See Respondent’s Responsive Submissions dated 13 October 2021 paragraphs 23 to 26.

<sup>53</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraph 37.

<sup>54</sup> See Respondent’s Responsive Submissions dated 13 October 2021, paragraph 42.

- (c) give directions:
    - i. as to any question of law, reviewed; or
    - ii. to the Director, to which effect shall be given; and
  - (d) make any incidental or ancillary order.
50. Section 16 of the Act prescribes that the Commission:
- (a) may make its determinations on the balance of probabilities [section 16(1)]; and
  - (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the Regulations make them apply [section 16(7)(a)]; and
  - (c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [section 16(7)(b)].
51. In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act (*Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).
52. The Director and Commission also:
- (a) must take into account those matters relevant to the objects of the Act; and
  - (b) may take into account the matters set out in section 38(4) of the Act.
53. Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- (a) the grant of the application would not be in the public interest; or
  - (b) 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; or
  - (c) that if the application were granted:
    - i. undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; 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; or
  - (d) that the grant of the application would otherwise be contrary to the Act.



## DETERMINATION

### Review of evidence and submissions

54. The Commission has undertaken a full review of the evidence and submissions, and the Commission now makes a determination on the basis of all the same materials that were before the Director when the Decision was made.

### The scope of issues in dispute

55. There is no dispute between the parties as to whether a conditional Special Facility (Cinema) licence should be granted for the Premises, as to whether a juvenile exemption should be allowed under section 120(1)(e) of the Act, or as to the ten trading conditions listed in paragraph 4 above. The only disputes between the parties concern the three Additional Trading Conditions that are sought by the Applicant, being trading conditions:

- (a) restricting liquor from being served in a cinema where a “G” or “PG” rated film is being screened (unless it is part of an 18+, adults only screening), or when there is a function or special event that is specifically designed for, or targeted at, children and/or young people (**Condition 2**);
- (b) restricting the sale and consumption of liquor to a discrete and clearly delineated area of the venue, separate from the candy bar (**Condition 4**); and
- (c) prohibiting the sale and supply of liquor from the Trolley (**Condition 5**).

56. Accordingly, although there is no dispute between the parties as to the Director’s approval of a juvenile exemption as such, there is a dispute as to what conditions should attach to the licence in order to allow that juvenile exemption.

### The public interest and *Carnegies Realty v Director of Liquor Licensing* [2015] WASC 208

57. The Applicant and the Respondent disagree about the application of the *Carnegies* decision (see paragraph 23 above) to the present case. The Respondent refers to His Honour Allanson J’s decision in the *Carnegies* case in support of a submission that the Commission must satisfy itself that the grant of the Application, including the grant of a juvenile exemption, is in the public interest. The Applicant contends that the *Carnegies* case is distinguishable.

58. Although the Commission agrees that the *Carnegies* case is distinguishable from the facts of the current case<sup>55</sup>, the Commission also notes that section 33(1) of the Act says “[s]ubject 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” (emphasis added). Accordingly, the Commission accepts that it must satisfy itself that the grant of the Application, including the grant of a juvenile exemption, is in the public interest. However, how that principle is to be applied in this case is less clear, as the parties agree that the Commission should grant the Application with a juvenile exemption and

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<sup>55</sup> The *Carnegies* decision is distinguishable from the present case as:

- (a) the *Carnegies* case concerned an application for an extended trading permit; and
- (b) in the *Carnegies* case, ss 38(1), 38(2) & 64(4)(g) of the Act and reg. 9F of Regulations collectively required the applicant to satisfy the licensing authority that the application was in the public interest; however
- (c) the present case does not concern an application for an extended trading permit and is not subject to the same provisions or the Act and Regulations.

only disagree as to the proposed addition of the Additional Trading Conditions. In those circumstances, the Commission does not believe that it needs to satisfy itself that each of the Additional Trading Conditions are in the public interest before it can impose those conditions.

59. Hypothetically, if the Commission were required to satisfy itself that the Additional Trading Conditions are in the public interest before it could impose those conditions, then the *Carnegies* case would require the Commission to take the following approach in considering the issue of the public interest<sup>56</sup>:
- (a) first, make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
  - (b) second, make findings about the likely degree of harm to result from the grant of the application;
  - (c) third, assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
  - (d) finally, weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.

### **Relevance of the Juveniles Policy**

60. The Applicant has submitted that it is appropriate to have regard to the Juveniles Policy (see paragraph 13 above) when deciding whether to adopt or reject the three Additional Trading Conditions. While the Commission does not disagree with that submission, there is no guidance in that policy as to what conditions should attach to a liquor licence issued with a 'juveniles exemption' under section 120(1)(e) of the Act, or even as to how the Commission should determine what conditions (if any) should be imposed. The only relevance of that policy in this case is that the policy appears to support the need for the Commission to carefully consider the potential for juveniles to suffer liquor-related harm at the Premises when the Commission determines what conditions should attach to the SFL with juveniles exemption that has been issued for the Premises. The Commission has considered that factor when making its determination in this case.

### **Onus of proof on the Objector**

61. The Objector made no appearance at the hearing of this matter. Section 73(10) of the Act provides that the burden of establishing the validity of any objection lies on the objector. Based on the materials before it, the Commission finds that the Objector has not discharged that onus.

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<sup>56</sup> See Respondent's Responsive Submissions dated 13 October 2021 paragraphs 12, 13 and 48.

## Onus of proof on the Applicant intervenor

62. The Applicant intervened in the proceedings in accordance with section 69(8a)(b) of the Act. The Applicant carries no burden of proof with respect to its intervention (see Greaves J's decision in *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98<sup>57</sup>). Indeed, the facts that:

- (a) in the circumstances of this case, unaccompanied juveniles can only be allowed onto the Premises while they are being used for the sale of liquor pursuant to section 120(1)(e) of the Act; and
- (b) section 120(1)(e) requires *inter alia* an 'authorised person' (in this case, the Respondent) to apply to the Director under that section and for the Director to give approval,

show that the Respondent (rather than the Applicant) is the party seeking a dispensation and indicate that any evidential onus would be owed by the Respondent (rather than the Applicant).

## Main arguments in support of the Additional Trading Conditions

63. The main arguments supporting the Additional Trading Conditions are the contentions that:

- (a) The Director had insufficient regard to the need to prohibit the sale of liquor from the Trolley in order to reduce alcohol-related risk factors for juveniles at the Premises, and the Director's decision to grant the licence without imposing conditions restricting the areas within which liquor can be sold and in which it can be consumed was irrational or unreasonable.
- (b) The eighth condition on the liquor licence set by the Director (requiring the Respondent to ensure employees trained in the responsible service of liquor inspect each cinema with night vision devices at least twice during each screening to confirm compliance with the Act and with the licence conditions) is likely to be ineffective. The Commission understands this contention is not intended to support the removal of the eighth condition, but is instead intended to support an argument that the conditions which have already been imposed by the Director are insufficient to protect juveniles from liquor-related harm at the Premises and, accordingly, the three Additional Trading Conditions are needed to provide necessary additional protection from that harm.
- (c) The Director had insufficient regard to the harm suffered by juveniles from being exposed to the sale and consumption of liquor at the Premises, and from the consequent 'normalisation' of those activities, when the Director determined the trading conditions that would apply to the liquor licence.

## The Trolley

64. The Respondent has stated in its Public Interest Submissions that it is intended that "*patrons will purchase their liquor at the same time as making other purchases at the [Premises] 'Candy Bar', or alternatively at Artie's Bar & Café, which is the [Premises] in-house bar/café*

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<sup>57</sup> See page 5 of the *Gull Petroleum* decision: "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."

[and which] are available to all ... ticketholders"<sup>58</sup> and that "[p]atrons will from time to time during heavy peak trading periods be able to purchase a small selection of hot food and beverages (including alcohol) within the cinema during a film screening via mobile trolleys that will be operated by suitably trained and RSA certified staff members"<sup>59</sup> (i.e., from the Trolley).

65. The Commission acknowledges that the Respondent's proposed provision of the Trolley to allow adult patrons of the cinema complex to purchase liquor in the theatre room before the screening of a film will increase the convenience and amenity of those adult patrons who wish to purchase liquor. The Commission acknowledges that this will provide the Respondent with an additional opportunity for the sale of liquor and the Respondent will hope to profit from that opportunity. The Commission also acknowledges that the sale of liquor from the Trolley will provide juveniles in the theatre with significant additional exposure to the sale and consumption of alcohol while they are attending the Premises to be entertained by a film, while they are expecting to have an enjoyable time and while they may be more receptive to new experiences.
66. As the Applicant notes (see paragraph 44 above), the Respondent also submits that adult patrons only consume one or two alcoholic drinks during each screening. The Commission finds it is a notorious fact that many adult patrons will not purchase any alcohol while at a cinema. Accordingly, even if the Trolley is only used during 'heavy peak trading periods' as the Respondent proposes (see paragraph 64 above), then the added convenience of the opportunity for adult patrons to purchase liquor from the Trolley during those periods would appear to be marginal when compared to the additional burden for those patrons to have to leave the room to purchase liquor from elsewhere at the Premises.
67. Although the Juvenile Policy does not generally impose limits on the area within any licensed premises within which liquor can be consumed, the operations of a cinema complex do not generally include the sale of liquor from a sales point that is inside the theatre room within which the film is to be screened, such as the Trolley.
68. The Respondent contends that the licensees at its other cinemas are allowed to sell liquor from mobile drinks trolleys (see paragraph 36 above), however:
  - (a) most cinemas do not sell liquor from mobile drinks trolleys (like the Trolley) and, although the Commission accepts that some of the Respondent's other cinemas sell liquor in that manner, selling liquor in cinemas in that manner is still relatively novel in the State of Western Australia;
  - (b) the proposal to sell liquor in that manner in a cinema does not appear to have been the subject of any previous decisions of the Commission; and
  - (c) the Commission is not bound by the decisions made by the Director in relation to similar proposals.

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<sup>58</sup> See paragraph 20 of the Respondent's 'Public Interest Assessment Submissions' dated 29 January 2021.

<sup>59</sup> See paragraph 25 of the Respondent's 'Public Interest Assessment Submissions' dated 29 January 2021.

## The risk of harm to unaccompanied juveniles

69. One risk which liquor sales at a cinema potentially pose to unaccompanied juveniles at that cinema is the risk of adults supplying liquor to those juveniles, which is sometimes referred to as the risk of the 'secondary supply'. In that regard, the Commission notes that:
- (a) the Applicant has not provided any evidence of 'secondary supply' at cinemas in circumstances similar to the current matter; however
  - (b) there is clearly at least some small risk of secondary supply based on the availability of liquor, based on the darkness in the theatre room while a film is screened, based on the ease with which adults can supply liquor to juveniles in those circumstances, and based on the notorious facts that:
    - i. there are adults within our community who provide liquor to their own older children and their friends, notwithstanding that it is unlawful to do so; and
    - ii. there are also some adults within our community who seek to sexually groom children, and who may seek to do this by supplying those children with liquor while they are both attending a screening in a darkened cinema.
70. The Commission also accepts:
- (a) the Applicant's submissions as to the difficulty of adducing clear evidence as to how many times juveniles gain access to liquor in cinemas that are licensed venues and as to the extent of the harm experienced by those juveniles (see paragraph 40 above);
  - (b) that there is evidence that juveniles are susceptible to being influenced by the environments that they are exposed to, and being exposed to an environment in which liquor is being freely purchased and consumed may:
    - i. 'normalise' the consumption of alcohol for those juveniles; and
    - ii. influence juveniles to be more accepting of a 'drinking culture', to be less aware of the dangers of underage drinking and to be less aware of the dangers of excessive drinking;
  - (c) that juveniles are likely to be more receptive and susceptible to those influences if they are exposed to those influences while they are attending a venue, like the Premises, to be entertained with their family and/or their friends, and where they feel safe;
  - (d) the fact that juveniles may be exposed to the purchase and consumption of alcohol in other environments does not make that exposure any less harmful at a venue like the Premises;
  - (e) that more juveniles will attend screenings that are rated "G" or "PG" (as compared to screenings with other ratings, such as "M", "MA15+", "R" and "X"), regardless of the number of adults who also attend screenings rated "G" or "PG"; and
  - (f) that the harm which juveniles may suffer from being exposed to environments in which liquor is freely purchased and consumed, and the harms caused by the attitudes to alcohol which that exposure may engender, may not be immediately apparent or even apparent for some years.

71. The Respondent also appears to accept that there is some risk to juveniles from the sale of liquor at the Premises, albeit that the Respondent contends that the ten conditions which have already been imposed are sufficient to address that risk (see the Respondent's submission referred to in paragraph 24 above).
72. The fact that the Respondent has not found any instances of the adult patrons supplying juveniles with liquor at its licensed cinemas (i.e., instances of 'secondary supply'), or evidence of any other kind of harm being suffered by juveniles as a result of liquor sales at its cinemas, does not mean that no harm is being suffered. The Respondent's submission that the use of night-vision goggles at its licensed cinemas has proven to be effective in preventing 'secondary supply' because the Respondent's staff have not found instances of 'secondary supply' using those night-vision goggles is fallacious. If the Respondent's use of night-vision goggles has not identified any instances of 'secondary supply' then that experience could also indicate that the use of those goggles is not an effective strategy for identifying instances of 'secondary supply' (i.e., rather than being an effective strategy in preventing such instances).
73. In light of the matters in paragraphs 69 to 72 above, the Commission also accepts that the degree of harm experienced by juveniles as a result of liquor being sold from a trolley in the room in which the film is screened (i.e., like the Trolley) is not negligible, as asserted by the Respondent (see paragraph 26 above).
74. The Commission accepts that, in light of the matters listed in paragraph 70(a), (b), (c), (e) and (f) above, the Director did not take into account the importance of reducing alcohol risk factors for children and young people attending the Premises when the Director imposed conditions on the grant of the SFL which still allowed the sale and supply of liquor from the Trolley and which also allowed the sale of liquor from areas within the Premises where those children and young people would be directly exposed to those sales, including the candy bar area.

### **The application of the *Carnegies* decision**

75. As already noted (see paragraph 58 above), the Commission does not believe it needs to satisfy itself that each of the Additional Trading Conditions are in the public interest before it can impose those conditions. However, even if the Commission was so required, then the Commission, applying the approach required by the decision in the *Carnegies* case (**the *Carnegies* approach**), is also satisfied that the Additional Trading Conditions are in the public interest. In that regard:
  - (a) as this case concerns only the issue of whether to require the Additional Trading Conditions in circumstances where:
    - i. the parties agree upon the grant of the SFL and the ten current trading conditions on that licence;
    - ii. unaccompanied juveniles can only be allowed onto the Premises when liquor is being sold from the Premises pursuant to section 120(1)(e) of the Act; and
    - iii. section 120(1)(e) of the Act requires the Respondent to apply to the Director for a dispensation to allow juveniles to attend the Premises and which also requires the Director to approve that dispensation, so that the Respondent (rather than the Applicant) is the party seeking a dispensation,

it would be necessary to modify the *Carnegies* approach case so as to compare:

- iv. the level of harm that would exist in relation to liquor sales at the Premises if the Additional Trading Conditions are imposed in addition to the ten current trading conditions (i.e., the outcome sought by the Applicant); as against
- v. the level of harm that exists in relation to liquor sales at the Premises if the Additional Trading Conditions are not imposed, but the SFL remains subject to those ten current trading conditions (which is the outcome sought by the Respondent),

as if the outcome referred to in sub-paragraph (a)(iv) above were the existing state of affairs and as if the outcome referred to in sub-paragraph (a)(v) above would be the situation the state of affairs if the 'application were granted' for the purposes of the *Carnegies* approach;

- (b) in accordance with the first step in the *Carnegies* approach, the Commission finds that juveniles attending the Premises would be exposed to minimal liquor-related harm if the Additional Trading Conditions are imposed;
- (c) in accordance with the second step in the *Carnegies* approach, the Commission finds that the juveniles attending the Premises are currently subject to liquor-related harm by being exposed to:
  - i. the sale of alcohol when they attend the Premises for a screening (in that regard, see the findings at paragraph 70(a), (b), (c), (e) and (f) above); and
  - ii. the risk of secondary supply of liquor by adult patrons at the Premises,although the Commission acknowledges that harm is very difficult to quantify;
- (d) in accordance with the third step in the *Carnegies* approach, the Commission finds that there would be a significant increase in the levels of liquor-related harm to juveniles attending the Premises if the outcome referred to in sub-paragraph (a)(iv) above were the existing state of affairs and if the outcome referred to in sub-paragraph (a)(v) above were the situation the state of affairs if the 'application were granted' for the purposes of the *Carnegies* approach; and
- (e) in accordance with the last step in the *Carnegies* approach, the Commission finds that weighing increased risk of harm against the factors raised by the Respondent in support of not imposing the Additional Trading Conditions (such as the increased convenience of the Respondent's adult patrons who wish to purchase and consume liquor while watching a film<sup>60</sup>), it would be in the public interest to impose the Additional Trading Conditions.

76. In light of the findings in paragraph 75 above, it is a moot point whether or not the Commission needs to satisfy itself that each of the Additional Trading Conditions are in the public interest.

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<sup>60</sup> See paragraph 47(e) above.

## Relevance of the objects of the Act

77. In determining this application, the Commission has considered the objects specified in section 5 of the Act and the other relevant requirements of the Act. The Commission has carefully weighed all of those objects against one another in the context of the facts of this case. For example, in this case:
- (a) the inconsistency between the primary object at section 5(1)(b)<sup>61</sup> (which, in the context of this case, favours licence conditions that will protect juveniles from liquor-related harm by limiting the sale and consumption of liquor to certain parts of the Premises where juveniles will not be allowed) and the primary object at section 5(1)(c)<sup>62</sup> (which, in the context of this case, favours less restriction on the sale and consumption of liquor at the Premises so as to better cater to the “*requirements of consumers for liquor and related services*”); and
  - (b) the inconsistency between the secondary object at section 5(2)(a) of the Act<sup>63</sup> (which, in the context of this case, favours less restriction on the sale and consumption of liquor at the Premises so as to better meet the “*requirements of consumers*” of liquor) and the secondary object at section 5(2)(f)<sup>64</sup> of the Act (which, in the context of this case, favours licence conditions that will “*encourage responsible ... practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community*” in preventing juveniles from consuming liquor at the Premises and in limiting the exposure of juveniles to the sale and consumption of liquor by others at the Premises).
78. In conducting that weighing exercise, the Commission has given precedence to the primary objects of the Act where there is any inconsistency between any primary object and any secondary object.
79. In this case, and while recognising the weight which must also be given to the other competing objects of the Act, the Commission believes that particular regard must be given to primary object at section 5(1)(b) of the Act, to the secondary objects at section 5(2)(d)<sup>65</sup> and 5(2)(f), and to the need to minimise harm to juveniles who attend the Premises to view the screening of a film.

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<sup>61</sup> The primary object at section 5(1)(b) of the Act is “*to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor*”.

<sup>62</sup> The primary object at section 5(1)(c) of the Act is “*to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*”.

<sup>63</sup> The secondary object at section 5(2)(a) of the Act is “*to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State*”.

<sup>64</sup> The secondary object at section 5(2)(f) of the Act is “*to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community*”.

<sup>65</sup> The secondary object at section 5(2)(d) of the Act is “*to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor*”.



## Determination

80. The Commission determines that:

- (a) the Applicant's application under section 25 is allowed;
- (b) the Decision of the Director is varied and the application to conditionally grant a SFL in respect of the Premises is approved subject to the ten trading conditions listed in paragraph 4 (above) and also subject to the addition of the following Trading Conditions:

- 11. liquor may not be served or consumed in a cinema where a "G" or "PG" rated film is being screened, unless it is part of an 18+, adults only screening (this is, effectively, the first part of Condition 2);
- 12. liquor may not be served or consumed at any function or special event at the Premises that is specifically designed for, or targeted at, children and/or young people (this is, effectively, the second part of Condition 2);
- 13. subject to the requirements of trading conditions 11 and 12 above, liquor may only be served at the Premises:

- (a) from a discrete and clearly delineated fixed area of the Premises that is separate from the 'Candy Bar' area (i.e., separate from the area at the Premises used for the sale of confectionary, food, non-alcoholic drinks and other products to patrons including children); and

- (b) by staff who are trained in the responsible service of liquor and who are employed by the Respondent to provide an in-cinema service for the sale of food and drinks (including alcoholic drinks) to patrons during the screening of a film as part of a 'Gold Class'-type or 'Hoyts Lux'-type operation (regardless of how that operation may be named), provided that those staff:

- (i) may only serve liquor to patrons using serving trays of the sort used by restaurant waiters; and

- (ii) may not use any kind of trolley or fixed structure within the cinema room as a sales point, or to store liquor (even temporarily) or to otherwise assist in the sale of liquor to patrons;

and

14. the Licensee must display signage at the Premises advising that:

- (a) the supply of liquor to juveniles is an offence; and

- (b) night vision technology will be employed in the cinema to monitor patrons,

and that signage must be large, clear, easy to read, prominently displayed and clearly visible to all patrons of the Premises;

and

(c) the phrase “separate from the ‘Candy Bar’ area” in trading condition 13(a) above means that liquor sales operations and ‘Candy Bar’ sales operations can both be accommodated from a single counter structure at the Premises provided that the counter structure is:

- i. sufficiently long to ensure; or
- ii. configured in a way that will ensure,

there is a clear separation between those two operations and a clear separation between patrons for liquor sales and patrons for ‘Candy Bar’ sales.

### **Section 64 of the Act**

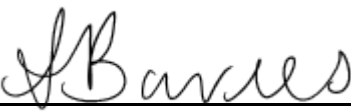
81. The Commission recognises that the trading conditions described in paragraph 80(b) above (as interpreted in accordance with paragraph 80(c) above) differ from the Additional Trading Conditions sought by the Applicant (i.e., Condition 2, Condition 4 and Condition 5). However, the Commission:

- (a) notes that in accordance with section 64(1) of the Act, the Commission has discretion to impose any additional conditions on the licence which the Commission considers to be appropriate, having regard to the tenor of the licence and the circumstances in relation to which the Commission intends that licence should operate;
- (b) also notes that it may exercise that discretion on its own motion in accordance with section 64(2) of the Act;
- (c) relies on that discretion to the extent the trading conditions described in paragraph 80(b) above (as interpreted in accordance with paragraph 80(c) above) differ from the Additional Trading Conditions; and
- (d) had determined that all of the trading conditions described in paragraph 80(b) above (as interpreted in accordance with paragraph 80(c) above) are in the public interest.



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**PAMELA HASS**  
**PRESIDING MEMBER**



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**ALYA BARNES**  
**MEMBER**



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**PAUL SHANAHAN**  
**MEMBER**