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National Competition Policy Legislation Review

Liquor Licensing Act 1988

March 2001

Office of Racing, Gaming & Liquor
Perth, Western Australia

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INTRODUCTION

1. This report details a review of legislation governing the sale and supply of liquor in Western Australia. The review was undertaken in accordance with the commitments of the Western Australian Government under the National Competition Policy Agreement.
2. The legislation examined in this review was as follows —
 - (a) *Liquor Licensing Act 1988*;
 - (b) *Liquor Licensing Regulations 1989*.
3. The Liquor Licensing Act and Regulations provide the framework within which the sale and supply of liquor is permitted in Western Australia, both on and from licensed premises.
4. As required by the Competition Principles Agreement, the terms of reference for the review were to —
 - (a) clarify the objectives of the relevant legislation;
 - (b) identify the nature of any restrictions on competition;
 - (c) analyse the likely effect of the restrictions on competition;
 - (d) assess and balance the costs and benefits of the restriction; and
 - (e) consider alternative means for achieving the same result.
5. The review examined sections of the legislation that potentially restrict or constrain an individual or organisation from undertaking or participating in any economic activity. Constraints on economic activity were considered as restrictions on competition regardless of whether the constraint applies equally or unequally to all parties affected by the legislation. It may be argued that if the restriction applies equally to all participants in a particular industry then it is not considered to constitute a restriction on competition. However, from a broader perspective such restrictions may affect competition for resources between industries and thus potentially influence the allocation of productive resources through the economy. In this sense, National Competition Policy (NCP) is about identifying government regulation of any sort that creates friction for any economic activity. It is from this standpoint that this review was undertaken.

THE LIQUOR INDUSTRY IN WESTERN AUSTRALIA

6. Since the first liquor laws, which concerned only public revenue and drunkenness were passed following the foundation of the State in 1829, licensing laws in Western Australia have been reviewed 11 times through two Royal Commissions (1921, 1984), a Parliamentary Committee of Inquiry (1957), two independent Committees of Inquiry (1969, 1994), three departmental reviews (1911, 1987, 1990) and three consolidations (1856, 1872, 1880).
7. As the Chairman of the 1969 Committee of Inquiry, Mr Phillip Adams, QC, found, there were only two forms of licence in the period between the State's foundation in 1829 and 1856 when the first Acts were consolidated. These were a public house licence, which permitted the sale of liquor for consumption on or off the premises, and a retail licence which entitled the holder to sell liquor for consumption off the premises in quantities of not less than one gallon.
8. No licence was required to sell spirits in quantities of not less than 40 gallons or wine or beer in quantities of not less than 15 gallons. No public house could be licensed unless it contained one sitting room and one sleeping room for public accommodation and if, without reasonable cause, the keeper refused lodging and refreshment to any traveller and his horses at night or during the day, he committed an offence.
9. Public houses felt the pressure of regulation, however. In the 1856 consolidation they were required to provide at least two sitting rooms and two sleeping rooms and stabling for six horses and 12 bullocks, presumably to meet the needs of settlers on the move. The 1872 consolidation increased the number of licence types to 10 and banned liquor sales on Good Friday and Christmas Day, except to *bona fide* travellers. Sales on Sundays had been banned since 1855.
10. Trading hours were restricted for the first time under the Consolidated Wines, Beer and Spirit Act of 1880. The restrictions were from 4 a.m. to 10 p.m. in summer and 6 a.m. to 10 p.m. in winter, but licensing magistrates were permitted to waive the whole or any part of these restrictions. However, despite these restrictions, liquor became readily available on the Goldfields; three breweries and 23 hotels served 15,000 people in Coolgardie and a further 10,000 in surrounding districts.
11. In 1886 the statutory closing time was extended to 11 p.m. (before the influence of the temperance movement).
12. The Licensing Act of 1911, which repealed the 1880 Act and its amendments, contained 204 sections and introduced 15 different licences, as well as local option polls based on electoral districts to determine whether areas should be 'wet' or 'dry' and in 1921 the Government appointed a Select Committee, which became a Royal Commission, to review the Act "in the interests of the public".

13. Explaining the object of the review, the Chairman of the Commission said, “Until prohibition comes about, the Government desires to tighten up the liquor laws and exercise better control of the trade”.
14. After the Commission’s report, the Government approved 130 amendments to tighten up the Act ‘pending prohibition’, appointed a licences’ reduction board under pressure from those opposed to the liquor trade and provided for State-wide polls every five years to gauge public opinion on prohibition. These polls remained in the Act until 1950 when the last poll disclosed a turnaround in public thinking and fewer people wanted prohibition.
15. In the period after World War II, a maturing community influenced by overseas travel and the influx of European cultures accepted the benefits of more relaxed drinking. In line with these trends, the reports of the 1969 inquiry recommended that the law should be changed to “meet the varying needs and conveniences” of all sections of the public, provided that it was consistent with the safety and well-being of all. The Committee decided, first, that liquor is a service to the public; second, that those who sell liquor for consumption on the premises should also provide adequate food at all reasonable times for those who may require it; and third, that the interests of those engaged in the industry should be regarded as important, but not as important as the first two points.
16. In its report, the Committee stated —

It was put to us many times during the inquiry that any increase in the number of drinking outlets available for the consumption of liquor or any extension of hours during which liquor is available must inevitably increase consumption, with its attendant ill effects. After examining the evidence available on the subject, we came to the conclusion that there was no substance in this contention. Instead, we believe that drinking should be leisurely and that it should be done in comfortable and attractive surroundings. We also believe that less harm can come from liquor where drinking conditions are of a high standard.
17. As a result of this inquiry, the *Liquor Act 1970* permitted hotel trading hours to be varied to meet a public demand in special circumstances, lowered the drinking age from 21 to 18, introduced tavern licences to create smaller outlets without accommodation, established cabaret licences for restaurant-type nightclubs and hotels, changed grocery store ‘gallon’ licences (minimum of six large bottles) to single bottle store licences as a service to shoppers, particularly women, and dropped the tendering system for new licences.
18. At this stage, the pressure from the industry’s self-interest groups fighting for commercial protection increased, particularly between cabarets, hotels and liquor stores. As pressure increased, the system for resolving disputes and deciding the needs of industry and the community received a lot more attention.

19. In February 1983, the Government appointed a Committee of Inquiry (which later became an Honorary Royal Commission) with terms of reference that included to —
 - (a) give particular attention to the submissions of the representative groups in the liquor industry; and
 - (b) examine the operation of the present adversary system of applying for and objecting to licences and in particular the possibility of reducing the costs and expenses of appearing before the Licensing Court, whether as an applicant or as an objector.
20. Required under its terms of reference to examine the operations of the Licensing Court, the Royal Commission addressed concerns that the Licensing Court had a dual role of judging licence applications while its lay members and principal clerk administered the Act.
21. To overcome this problem, the Royal Commission recommended that the Licensing Court be reconstituted with a single judge of District Court status who would decide new licence applications after a proposed liquor commission had indicated that all requirements under the Act had been met. At the same time, the liquor commission, which would comprise a full time registrar who would be chairman and three other full time members, would relieve the Licensing Court of its administrative responsibilities. Appeals from the commission to the Court would be limited largely to whether the decision in question contravened a regulation or provision of the Act. However, this recommendation was not implemented.
22. Two years after the Honorary Royal Commission's report the *Liquor Amendment Act (No. 2) 1986* announced a Liquor Licensing Authority comprising a Liquor Licensing Court and a Director of Liquor Licensing. It was noted then that the Director, who had been given substantial discretionary powers, would be responsible to the Chief Executive Officer of the relevant Public Service Department (the Office of Racing and Gaming) for the efficiency and effectiveness of the newly created administrative Division, but not to the Minister or Executive Director on matters in which the Director has specific statutory authority.
23. Section 178 of the Liquor Licensing Act required that the Minister reviewed the operation of the Act as soon as was practicable after the expiration of five years from the Act coming into operation.
24. On the basis of section 178, the Act was due to be reviewed as soon as practicable after 1 February 1994, however on 6 February 1993 the Minister for Racing and Gaming announced that the review would be brought forward.

25. At the time of the Government's announcement, concerns were being expressed about liquor licensing laws, particularly in relation to the death on 26 July 1992 of a 24-year-old man following a competition to drink more than six 'snorters' at a South Perth Hotel. The Coroner found that the man had died accidentally of acute alcohol poisoning. Evidence was given that after the contents of eight wine glasses containing equal proportions of sambuca (about 39 per cent alcohol) and chartreuse (about 55 per cent alcohol) had been set alight, the man, who earlier had been playing football, 'snorted' the fumes and gulped the lot within 15 minutes.
26. The Coroner said his concern about the death was heightened by the knowledge that there had been at least five similar deaths during 1992, including one in Kalgoorlie only six weeks before and added, "Apart from the obvious problems of road traffic trauma and domestic violence, there is abundant evidence that people suffer from the abuse of alcohol in private homes and licensed premises".
27. The Coroner said he was impressed with the efforts being made to train some hotel bar staff in their legal obligations but it was clear from the witnesses before him that as casual bar staff they had no real understanding of their legal obligations when serving alcohol. It was time for those involved in both the management and regulation of licensed premises to get 'fair dinkum' about the problem of excessive consumption of alcohol on licensed premises.
28. Similarly, a District Court judge in the case where a truck driver who was involved in an accident in which two car drivers were killed commented, "It must have been obvious to hotel staff who served the truck driver that he was affected by alcohol". Notwithstanding the Judge's comments, the former licensee of the hotel criticised the law for making bar staff responsible for judging whether a person is drunk.
29. In his announcement that he was bringing the review forward, the Minister said, "It is the responsibility of those in the liquor industry to regulate the behaviour of their bar staff, but if they fail to do this, then new regulations may have to be imposed".
30. Other warnings had been given to the hotel industry before this. The Minister for Racing and Gaming in the previous government had urged publicans and other bar owners to ensure that their staff were aware of the Australian Hotels' Association code of conduct and the dangers of 'binge' drinking and alcohol abuse, "They have to be more responsible and acknowledge the fact that when it comes to alcohol the customer is not always right". Overcrowding, disturbances outside hotels and cabarets and under-age drinking were also causing concern.
31. The Independent Review Committee appointed to review Liquor Licensing in Western Australia published its report in April 1994. The report of the Minister for Racing and Gaming on the Review of the Liquor Licensing Act was tabled in Parliament in June 1995.

32. The *Liquor Licensing Amendment Bill 1998* was proclaimed to have effect as from 23 May 1998 and introduced some important changes to the regulation of the sale, supply and consumption of liquor in Western Australia.
33. In response to community concerns, the concept of minimising harm or ill-health caused by the use of liquor was introduced as one of the Act's primary objects. In his second reading speech on the introduction of the Liquor Licensing Amendment Bill, the Minister for Racing and Gaming said, "This will see the interests of licensees weighed against the legitimate expectations and interests of the wider community. In determining licensing applications, consideration will be given to the public interest as opposed to private commercial interests. Harm minimisation will be a ground for objection to licence applications".
34. Provisions were also introduced requiring licensees and managers to demonstrate mandatory knowledge of liquor licensing laws and responsible server practices and problems associated with the irresponsible promotion and excessive consumption of liquor were addressed by empowering the Licensing Authority to impose conditions prohibiting practices, such as drinking competitions, which encourage excessive or binge drinking. Similarly, the Licensing Authority was empowered to impose, vary or cancel licence conditions so as to give effect to the by-laws of a local authority made under the *Local Government Act* or an Aboriginal community under the *Aboriginal Communities Act*.

**CLARIFYING THE OBJECTIVES OF
THE LIQUOR LICENSING ACT**

35. In many cultures, including Western Australia's, there are very long traditions that seek to control or mediate in the consumption of liquor. This appears to be a consequence of the possible effects of the consumption of liquor on safety, social behaviour and public health. It is reasonable to assume that the Western Australian community has such an expectation.
36. The Liquor Licensing Act provides a legislative framework for the sale and supply of liquor in Western Australia by the adoption of a licensing model. As such, entry into the market of distributing and selling liquor can only be undertaken by a licence holder. Additionally, significant aspects of the market conduct of licence holders is controlled by regulations included in the legislation and by conditions imposed on licences, such as the regulation of trading hours and controls over the standard of premises.
37. Having established that competition is restricted, a competition policy review is required to assess whether these regulations are required to achieve public policy objectives. In the case of liquor licensing, what are the public policies that underpin the regulation of the sale, supply and consumption of liquor?
38. In this respect, the long title of the legislation provides that it is —
- An Act to regulate the sale, supply and consumption of liquor, the use of premises on which liquor is sold, and the services and facilities provided in conjunction with or ancillary to the sale of liquor, to minimise harm or ill-health caused to people, or any group of people due to the use of liquor, to repeal the *Liquor Act 1970*, and for related matters.
39. In addition, the objects of the Act, as outlined in section 5, are arranged into primary and other objects.
40. A primary object is one “of the first importance, principal, chief, of the first order in any sequence or process, especially of derivation or causation (Shorter Oxford Dictionary).
41. Generally, the role of the long title of an Act and of any objects provision is limited to the provision of general guidance where specific provisions of the statute are ambiguous or uncertain (*R v. Credit Tribunal; ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 345 per Barwick CJ at 552). However, section 5 (2), contrary to the normal role of an objects section, evinces a specific and additional purpose in that it requires that in carrying out its functions under the Act, “the Licensing Authority shall have regard to the primary objects of this Act...”
42. It is clear, therefore, by section 5 (2) that the objects provision of the Liquor Licensing Act seek to do more than perform the role previously played by a preamble.

43. As such, the primary objects of the Liquor Licensing Act are to—
- (a) regulate the sale, supply and consumption of liquor; and
 - (b) minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.
44. Other objects of the Act are to —
- (a) regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;
 - (b) cater for the requirements of the tourism industry;
 - (c) facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;
 - (d) provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (e) provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
45. Objects have the function of indicating the intended purpose of the legislation. They can be therefore used to help resolve ambiguities in the Act and should be borne in mind when a decision is made under the Act, and in this respect section 18 of the Interpretation Act provides:
- In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.
46. What is meant by “objects of the Act” was discussed by the Federal Court in *MOA v Lancaster* (1981) 37 ALR 559 at 579 by Evatt and Northrop JJ. The Court held that it was not sufficient to construe the words (“objects of this Act”) as referring only to the paragraphs in the relevant section of the Act (even though stated to be the chief objects of the Act), but that it was necessary to consider the method by which the Legislature had enacted those objects to discern “the objects of the Act”...
47. When the Liquor Licensing Bill was first introduced in 1988, the then Minister for Racing and Gaming¹ said in the Bill’s second reading speech —

¹ Hon Pam Beggs MLA

The Bill changes significantly the provisions relating to objections by widening the grounds of objection and classes of people who may object to applications, to give more scope for the general community to affect licensing decisions...

The Licensing Authority is given an overriding discretion to grant or refuse an application if the public interest so dictates... The paramount consideration will be the public interest rather than the specific interest of a sectional group.

The Government recognises the important role played by the liquor industry in the economic and social life of the State. Within the industry itself, there are several competing interest groups. With social legislation such as this there are also the legitimate expectations and interests of the general community to be considered. While maintaining regulation of industry interests through different licence categories and criteria, the Bill takes greater account of general community considerations by placing emphasis on the public interest and the requirements of the public in specific localities.

48. The emergence of public interest as a legitimate concern in liquor licensing determinations was further evinced by the subsequent comments of the Minister for Racing and Gaming², on 9 April 1998, in the second reading speech on the introduction of the Liquor Licensing Amendment Bill —

In response to community concerns, the concept of minimising harm or ill-health caused by the use of liquor has been introduced as one of the Act's primary objects. This will see the interests of licensees weighed against the legitimate expectations and interests of the wider community. In determining licensing applications, consideration will be given to the public interest as opposed to private commercial interests...

The Bill addresses problems associated with the irresponsible promotion and excessive consumption of liquor, by empowering the Licensing Authority to impose conditions prohibiting practices, such as drinking competitions, which encourage excessive or binge drinking. The Licensing Authority will also be able to impose conditions so as to give effect to the by-laws of a local authority made under the Local Government Act or an Aboriginal community under the Aboriginal Communities Act.

² Hon Max Evans, MBE, FCA, MLC

49. The legitimacy of public interest concerns in the administration of the Act in a manner facilitating proper regulation of the liquor industry (in accordance with object 5 (a)) is also noted in a decision of the Full Court of the Supreme Court of Western Australia in The Cabaret Owners' Association of Western Australia Inc and others v The Director of Liquor Licensing, where Malcolm CJ³ commented at paragraphs 45 - 46—

The objects of the Act set out in section 5 include the regulation and proper development of the liquor industry and the provision of adequate controls. One of the basic purposes of the Act is to regulate the sale of liquor by licensing in a manner that ensures that the reasonable requirements of the public are met. **This is achieved by limiting the number of licences of a particular category in any given area** [emphases added]. These purposes are apparent from the provisions of section 38. This sets out the matters to which the Licensing Authority is required to have regard in determining whether a licence is necessary to provide for the reasonable requirements of the public in the relevant area. Section 38 applies both to the grant or removal of a Category A licence it would not be in the public interest to have a licence granted in or removed to an area, if the result would be that the overall standard of services and facilities would fall because of significant adverse effects on the viability of the individual outlets in the area. The public, therefore, have an interest in the administration of the Act in a way which will take account of and be consistent with the objects and purposes of the legislation.

50. A wide reading of the term “harm” in object 5 (1) (b) is supported by the Second Reading Speech and debates on the Amendment Act in the Parliament. In both Houses there was strong support for the Bill and many Members welcomed the new object of harm minimisation, in particular with respect to the effect on the community. The terms “public health”, “public interest”, “community issues” and “community concerns” demonstrate that the legislature intended that the amendments would have far reaching effect⁴.
51. Proper regulation of the liquor industry and the minimisation of harm are important public policy objectives that, to some extent, have been acknowledged by governments, both in Australia and overseas. This reinforces the view that the commercial sale and consumption of liquor should be controlled and not left solely to market forces.

³ Unreported Decision Number 2154 of 1989 and 2155 of 1989, Library Number 8001, delivered on 21 December 1989

⁴ For example, see Hansard page 1554 and page 1570)

RESTRICTIONS ON COMPETITION

52. Before reviewing the legislation to determine potential restrictions on competition, it is necessary to define what would in general constitute a restriction on competition within the context and scope of the legislation.
53. The scope of the Liquor Licensing Act is focussed on regulation of the liquor industry. As such, the clause of the Competition Principles Agreement that is considered relevant for review of the Liquor Licensing Act is —
- (a) clause 5 (1), which states that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:
 - (i) the benefits of the restriction to the community as a whole outweigh the costs; and
 - (ii) the objectives of the legislation can only be achieved by restricting competition.
54. The Liquor Licensing Act requires licensing of persons and premises associated with the sale and commercial supply of liquor. Provisions of the Act are thus potentially important in —
- (a) restricting the individuals or organisations in society that can benefit from the sale and commercial supply of liquor;
 - (b) imposing costs on individuals or organisations engaged in the sale or commercial supply of liquor; and
 - (c) influencing competition between persons engaged in the liquor industry and generally in the tourism and hospitality industries.
55. The above generic descriptions of potential restrictions on competition were utilised to identify specific restrictions in the Act and regulations. The restrictions identified are described below.
56. The Liquor Licensing Act is reviewed below and potential restrictions on competition identified.

Part 1 — Preliminary

57. Sections 1 to 3 of the Act contain definitional provisions and were not considered to give rise to any potential restrictions on competition.
58. Section 4 of the Act provides for an interpretation on the point of sale, which gives rise to the following potential restriction —

- (a) where the delivery of liquor is to be effected in the State then, notwithstanding that the sale otherwise took place outside the State, the sale of that liquor is deemed to have been concluded in the State, unless the regulations provide otherwise.
59. Section 5 provides the objects of the Act, which are not considered to give rise to any potential restrictions on competition.
60. Section 6 provides that the Act does not apply in certain cases and is not considered to give rise to any potential restrictions on competition.

Part 2 — The Licensing Authority

61. Sections 7 to 30 provide for the constitution of the Licensing Authority and for proceedings before the Licensing Authority and are not considered to give rise to any potential restrictions on competition.

Part 3 — Licences and Permits

Division 1 - General matters

62. Section 30A provides for the Licensing Authority to grant licences to sell liquor. This section gives rise to the following potential restrictions —
- (a) a licence vests personally in the licensee to whom it was granted and is not capable of being made subject to, or used as security for, any charge or other adverse interest; or vested in any other person, except in accordance with the provisions of the Liquor Licensing Act.
63. Section 30B provides that power of attorney does not empower the donee to act for a licensee under the Liquor Licensing Act and is not considered to give rise to any potential restrictions on competition.
64. Section 31 provides general definitions in respect of licences and is not considered to give rise to any potential restrictions on competition.
65. Section 32 relates to the duration of licences and is not considered to give rise to any potential restrictions on competition.
66. Section 33 provides for the Licensing Authority to be vested with absolute discretion to grant or refuse an application under the Liquor Licensing Act on any ground, or for any reason, that the Licensing Authority considers in the public interest. This section gives rise to the following potential restrictions —
- (a) the exercise of the Licensing Authority's discretion to refuse an application, even if the applicant meets all the requirements of the Act or to grant an application, even if a valid ground of objection has been made out;

- (b) the requirement of the Licensing Authority to determine whether an applicant is a fit and proper person to hold a licence;
 - (c) the requirement of the Licensing Authority, when determining whether an applicant is a fit and proper person, for the person to demonstrate knowledge relevant to managing licensed premises;
 - (d) the requirement of the Licensing Authority to determine whether any premises are of a sufficient standard or suitable for the proper conduct of business there.
67. Section 34 places prescribed restrictions on certain applications. This section gives rise to the following potential restrictions —
- (a) the preclusion on the Licensing Authority from hearing or determining an application for the grant or removal of a licence, approval to the transfer of a licence; or approval to a person as a manager, trustee; or a person who holds a position of authority in a body corporate that holds a licence, where that person is of a type prescribed.
68. Section 35 prescribes the person who may hold licences as a natural person, a body corporate, an unincorporated body of persons where a trustee is appointed, or jointly, to two or more of the aforementioned. Similarly subsection (2) provides that where a licence is granted to two or more persons, those persons are jointly and severally liable as licensee and in respect of any civil or criminal liability that attaches to the licensee under the Liquor Licensing Act. These provisions are not considered to give rise to any potential restrictions on competition.
69. Section 35A provides that a trustee may hold a licence and is not considered to give rise to any potential restrictions on competition.
70. Section 35B prescribes procedures for the approval of persons as manager and is not considered to give rise to any potential restrictions on competition.
71. Section 36 prohibits the dual licensing of premises and gives rise to the following potential restriction —
- (a) the general prohibition on two or more licences not being granted in respect of the same part of any premises.
72. Section 37 specifies general requirements relating to licences and permits. This section gives rise to the following potential restrictions —
- (a) that the applicant, or one of the applicants, is a natural person or a body corporate, that the person is a fit and proper person to be a licensee of the premises to which the application relates;

- (b) that each person directly or indirectly interested in the application or in the business, or the profits or proceeds of the business, to be carried on under the licence or permit is a fit and proper person to be so interested;
 - (c) on any application the Licensing Authority may require to be satisfied that any approval, consent or exemption required under the law relating to planning to permit the use of the premises for the sale of liquor; and any written law, for the carrying out of building work that is to be carried out before the licence or permit sought has effect, has been obtained;
 - (d) an application will not be granted where the Licensing Authority is satisfied that an undue degree of offence, annoyance or disturbance or inconvenience to persons who reside or work in the vicinity of the place or premises to which the application relates or persons in, or travelling to or from, an existing or proposed place of public worship, hospital or school, would be likely to occur;
 - (e) every licence, other than a club restricted licence or an occasional licence, is subject to the condition that the licensee occupies, and retains a right to occupy, the licensed premises to the exclusion of others, and an application for the grant or transfer of a licence shall not be granted unless the Licensing Authority is satisfied that the applicant can, or on the grant of the application will be enabled to, comply with that condition; and if the licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, the interest of the licensee in the licence terminates.
73. Section 37A provides that a licensee, a person who occupies a position of authority in a body corporate which is a licensee, or a person approved as a manager who is convicted of any offence in any jurisdiction is to inform the Director within 14 days of being convicted. This section is not considered to give rise to any potential restrictions on competition.

Division 2 - Category A licences

74. Section 38 specifies the requirements for the grant or removal of a Category A licence. Provisions of this section give rise to the following potential restrictions —
- (a) an applicant for the grant or removal of a Category A licence must satisfy the Licensing Authority that the licence is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area;

75. Section 39 provides that an application to the Licensing Authority for the grant or removal of a licence, or for a change in the use or condition of any premises shall be accompanied by a certificate from the local government for the district in which the premises to which the application relates are situated, or are to be situated, unless the Licensing Authority otherwise determines and is not considered to give rise to any potential restrictions on competition. In this respect, any potential restrictions on business associated with complying with this, or any other requirements imposed by other Statutes should be considered as part of the National Competition Policy Legislative Review of that Act.
76. Section 40 provides that an application to the Licensing Authority for the grant or removal of a licence, or for a change in the use or condition of any premises shall be accompanied by a certificate from the authority responsible for town planning matters in the district in which the premises to which the application relates are situated, or are to be situated, unless the Licensing Authority otherwise determines and is not considered to give rise to any potential restrictions on competition.
77. Sections 41 - 47 prescribe the general conditions of the Act's Category A licences (ie. hotel, cabaret, casino liquor, special facility and liquor store licences). The provisions of these sections give rise to the following potential restrictions on competition —
- (a) the licence categories themselves and the licence conditions embodied in those licence types.

Division 3 - Category B licences

78. Sections 48 - 49 prescribe conditions relating to club or club restricted licences. The provisions of these sections give rise to the following potential restrictions on competition —
- (a) the holder of a club restricted licence is required to purchase liquor supplies from a list of hotel or liquor stores situated within 8 kilometres of the club premises, unless there is no such licensee, or there are so few that the club's choice would be unreasonably restricted if confined to them alone and the Director authorizes the purchase of liquor from an alternative supplier.
79. Section 50 - 58 prescribes the conditions relating to the commercial Category B licences (restaurant, producer's and wholesaler's licence). The provisions of these sections give rise to the following potential restrictions on competition —
- (a) the licence categories themselves and the licence conditions embodied in those licence types.

80. Section 59 provides for the grant of an occasional licence. This section gives rise to the following potential restrictions —
- (a) where the Director so requires, the liquor to be sold or supplied under an occasional licence is to be purchased from a supplier, or a supplier selected from a list of suppliers specified in the licence.
81. Sections 60 and 61 enable the Director to approve extended trading permits to existing licensees and are not considered to give rise to any potential restrictions on competition.

Division 5 - Conditional grants or approvals

82. Sections 62 to 62B enable the Director to grant a conditional licence if, at the final hearing of the application, the premises to which the application relates are incomplete. These provisions are not considered to give rise to any potential restrictions on competition.

Division 6 - Conditions, generally

83. Sections 63 to 65 provide for the Licensing Authority to impose, vary or cancel conditions of licences, of its own motion or on application of the licensee. These sections give rise to the following potential restrictions —
- (a) the Licensing Authority may impose conditions which it considers to be in the public interest.

Division 7 - Applications

84. Section 66 relates to plans and specifications. This section gives rise to the following potential restrictions —
- (a) an application for the grant of a licence, other than an occasional licence, the removal of a licence or for the approval of proposed alterations to, or redefinition of, licensed premises, must be accompanied by plans of the premises to which the application relates; and
 - (b) regulation 11 provides that plans submitted under section 66 are required to be drawn by a duly qualified architect, surveyor, town planner, engineer, builder or draftsman.
85. Section 67 provides for applications to be advertised in a daily newspaper specified by the Director, and in the case of a Category A licence, a notice is kept posted and conspicuously displayed on the premises, or land, to which the application relates. No potential restrictions on competition are considered to arise out of the requirement to advertise.

86. Section 68 prescribes requirements to be met in respect of notices of applications. No potential restrictions on competition are considered to arise out of these requirements.
87. Sections 69 and 70 relate to general procedural matters regarding the disposal of applications by the Licensing Authority and in intervening before the Director. No potential restrictions on competition are considered to arise out of these requirements.
88. Section 71 relates to setting the affected area in respect of an application for the grant or removal of a Category A licence. The provisions of this section give rise to the following potential restrictions —
 - (a) in setting an affected area, the Director may take into account existing or proposed licensed premises.
89. Section 72 relates to the requirement for consent by an owner or lessor, and objections by an owner, lessor, lessee or mortgagee. The provisions of this section give rise to the following potential restrictions —
 - (a) the Licensing Authority is unable to grant an application for the grant, transfer or removal of a licence; variation or cancellation of any condition imposed on a hotel licence requiring the provision of residential accommodation; approval to a proposed alteration to, or redefinition of, the licensed premises; or an extended trading permit in respect of any place which is to be comprised within the licensed premises unless the applicant can satisfy the Licensing Authority that the lessor has consented to the application.
90. Section 73 provides for the general right of objection against liquor licensing applications where an application has been advertised. The provisions of this section give rise to the following potential restrictions —
 - (a) a right to object is conferred on any resident of the affected area; and
 - (b) any person holding a Category A licence for premises which are, or are premises referred to under a licence granted under section 62 and are proposed to be situated in the affected area.
91. Section 74 makes provision for the general grounds of objection. The provisions of this section give rise to the following potential restrictions —
 - (a) an objection may be made on the grounds that the grant of the application would be contrary to the public interest; that the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; and on an application relating to a Category A licence, that the grant of the application is not necessary in order to provide for the requirements of the public.

92. Section 75 provides for applications for occasional liquor licences. The provisions of this section give rise to the following potential restrictions —
- (a) an application is required to be lodged in the prescribed manner and form, not later than 14 days before the licence is to take effect.
93. Section 76 provides for applications for extended trading permits. The provisions of this section give rise to the following potential restrictions —
- (a) an application is required to be lodged in the prescribed manner and form, not later than 14 days before the permit is to take effect.
94. Section 77 provides for applications for the alteration, or redefinition, of licensed premises. The provisions of this section give rise to the following potential restrictions —
- (a) an owner, occupier or licensee of licensed premises, is prohibited, without the prior approval of the Director, to make any alteration in the construction or completion of premises the subject of plans or specifications made under section 62, or any licensed premises;
 - (b) where the Director is satisfied in relation to a Category A licence that an alteration of the licensed premises or redefinition proposed is likely to lead to a substantial increase in actual or potential liquor sales; and reduce significantly the actual or potential liquor sales under a Category A licence held by any other persons, he may direct that the application is required to be advertised under section 67.

Division 8 - Removals

95. Section 78 provides that casino liquor licences are not removable. The provisions of this section give rise to the following restrictions —
- (a) a casino liquor licence is not capable of being removed without the consent of the Gaming Commission, and a licence of any class granted in respect of premises that at the time of the grant comprised within or adjacent to a casino complex shall not be removed to premises that are not within or adjacent to that complex as at the date of the application for removal.
96. Section 79 provides for applications for variation or removal of licences relating to a means of transport may be made informally. No potential restrictions on competition are considered to arise out of these requirements.
97. Section 80 provides for the temporary removal or redefinition of licensed premises where they are wholly or partially rendered incapable of use for the business carried on there under the licence. The section provides for the making of an informal application by way or writing. As such, no potential restriction on competition is considered to arise out of these requirements.

98. Section 81 provides for an application process for the removal of a licence from existing premises to proposed premises. No potential restrictions on competition are considered to arise out of these requirements.
99. Section 82 provides that the Director has the same power in relation to the approval of the transfer of a licence as the Licensing Authority, appropriately constituted, has in relation to the grant of a new licence of the same class. No potential restriction on competition is considered to arise out of these requirements.
100. Section 83 provides that certain licences are not transferable. However given that the section relates to the casino liquor licence; club licences and occasional licences, no potential restrictions on competition are considered to arise out of the requirements.
101. Section 82A provides for the transfer of licence between licence holders and section 84 provides for an application process to approve applications to transfer licences from the licensee to another party. Section 84 gives rise to the following potential restrictions —
 - (a) an application for transfer of licence is required to be made —
 - (i) pursuant to a contract for the sale or assignment of the right of the licensee to carry on business under the licence, the licensee consenting to the application;
 - (ii) by a person who has under section 86 a right to carry on the business of the licensee or may, under section 87, be granted a protection order; or
 - (iii) with leave of the Director.
 - (b) a licensee shall not purport to sell or assign the right to carry on business under the licence or to sell or assign the licence itself unless the contract of sale or assignment is subject to a condition precedent under which the prior approval of the Director of the proposed transfer of the licence is a prerequisite to the contract taking effect, or the Director has approved the proposed transfer;
 - (c) where an application for approval of a transfer is made on the grounds that the licensee has been evicted from, or has ceased to occupy or to carry on business at the licensed premises or that to the exclusion of the licensee the owner of the licensed premises has come into or become entitled to possession of those premises, the application shall not be determined unless the Director is satisfied that notice of the application was given by the applicant to the licensee at least 3 days before the last day on which objections should be given; and that all reasonable steps were taken to give notice to that licensee, and that any failure to give the notice is not attributable to the applicant or a person employed by the applicant; and

- (d) an applicant for the transfer of a licence must satisfy the Director that he/she is a fit and proper person to hold the licence and as to the matters referred to in section 37 (1) (a), (b), (c) and (d).

102. Section 85 provides that a transferee succeeds to certain of the transferor's liabilities. No potential restriction on competition is considered to arise out of these requirements.

Division 10 - Interim authorizations and protection orders

103. Section 86 provides for certain prescribed persons to carry on the business of the licensee for a period of 28 days following the death, bankruptcy or other disability of the licensee. No potential restriction on competition is considered to arise out of this requirement.

104. Sections 87 - 88 provides for the granting of a protection order in prescribed circumstances. An examination of the section gives rise to the following potential restrictions —

- (a) a protection order is specifically prohibited from being granted to the owner, lessor or mortgagee of premises to which a liquor store applies, but not other types of premises;
- (b) a protection order is specifically prohibited from being granted to a liquor store when the licence is suspended and a person satisfies the Director that loss is likely to result if an order is not granted, but not other types of premises.

105. Section 89 provides for the Director to intervene in disputes as to leases between an owner or lessor and a licensee or former licensee. No potential restriction on competition is considered to arise out of this requirement.

Division 11 - Suspensions

106. Sections 90 - 93 provide for licences to be placed into suspension at the informal request of the licensee, on grounds of public safety or where the licensee has ceased to carry on business at the licensed premises and for cancellation of such a suspended licence. No potential restriction on competition is considered to arise out of these requirements.

Division 12 - Surrenders

107. Section 94 provides for a process for licences to be voluntarily surrendered. No potential restriction on competition is considered to arise out of these requirements.

Division 13 - Disciplinary matters

108. Sections 95 - 96 provide for disciplinary action to be taken against a licensee and define the disciplinary powers of the Liquor Licensing Court. No potential restriction on competition is considered to arise out of these provisions.

Part 4 - The Conduct of Business

Division 1 - Hours of trading

109. Section 97 prescribes the permitted hours of trading under each of the licence classes. An examination of the section gives rise to the following potential restrictions —

- (a) different licence classes have different hours of permitted trade; and
- (b) liquor store licences are not permitted to trade on Sundays.

[Section 98 - repealed by No. 12 of 1999 s.69.]

Division 2 - Maintenance of the premises

110. Section 99 places an obligation on the licensee to keep the premises clean and in repair, and provides power for the Director to give directions to make alterations or provide facilities, services, etc. An examination of the section gives rise to the following potential restrictions —

- (a) every licence is subject to the conditions that the licensee maintain the licensed premises to a standard that is reasonable having regard to the class of licence, the locality and the expectations of the public; and keep the premises and all fittings and fixtures in the premises thoroughly cleansed, in a hygienic condition and in good repair.

Division 3 - Supervision and management

111. Sections 100 - 101 require that the conduct of business under a licence is always the responsibility of the licensee and shall be personally supervised and managed by a natural person. No potential restriction on competition is considered to arise out of these provisions.

112. Section 102 provides for approval of corporate management and control where a licensee is a company. An examination of the section gives rise to the following potential restriction —

- (a) a person may not assume a position of authority in a body corporate that holds a licence; or being a shareholder in a proprietary company that holds a licence, increases or decreases that shareholding, without the prior approval of the Licensing Authority.

113. Section 103 provides for compulsory notification of ownership of licensed premises. An examination of the section gives rise to the following restriction —
- (a) a person who becomes an owner of licensed premises is required to give notice in writing to the Director of the interest acquired within 7 days of acquiring it and an owner of licensed premises who changes from the address previously notified to the Director, shall within 7 days of the change, give notice of the change to the Director.

Division 4 - Profit sharing

114. Section 104 provides for a general prohibition on profit sharing. An examination of the section gives rise to the following potential restrictions —
- (a) an offence is committed by the licensee and the other person if the licensee enters into partnership with another person in relation to the business carried on under the licence; enters into any agreement or arrangement under which another person may participate in the proceeds of the business carried on under the licence; or remunerates another person by reference to the quantity of liquor sold, without the prior approval of the Director.

Division 5 - Lodgers

115. Section 105 provides that the holder of a hotel licence, other than a tavern licence, shall maintain a register of lodgers, in a form acceptable to the Director. An examination of the section gives rise to the following potential restrictions —
- (a) the licensee is required to ensure that the register is signed by the lodger; identifies the accommodation provided, and the period for which it was provided; includes the name and address of each lodger; is not obliterated, or removed, wholly or in part; and, unless otherwise approved by the Director, is kept on the licensed premises;
 - (b) on transfer, surrender or cancellation of the licence, the register shall be handed over to the transferee;
 - (c) the register is required to be retained by the licensee for six years after the last date appearing in the register; and must be made available for inspection by an authorized officer.
116. Section 106 provides for a number of conditions to be observed in the sale of liquor to lodgers. An examination of the section gives rise to the following potential restrictions —
- (a) the liquor shall not be supplied to, or consumed by, a juvenile;
 - (b) there shall be no more than 6 adult guests of each lodger present at the time the liquor is consumed; and

- (c) the liquor shall not be consumed, except either personally by a lodger, or by an adult guest of a lodger and at the expense of the lodger.

117. Section 107 provides for a liability of the licensee for the loss of property or damage to the property of a lodger. No potential restriction on competition is considered to arise out of these provisions.

Division 6 - The sale and consumption of liquor, etc

118. Section 108 provides for certain services to be provided by premises licensed under any hotel licence and a special facility licence, if that licence so provides. An examination of the section gives rise to the following potential restrictions —

- (a) the licensee shall not refuse to receive a person on the licensed premises or to sell liquor there to any person at any time that the premises are open for business during the permitted hours, unless the licensee has reasonable cause (as provided for in subsection (3));
- (b) to provide residential accommodation for any persons, breakfast for lodgers, between 7 a.m. and 9 a.m. and dinner for lodgers, between 6 p.m. and 8 p.m.; and
- (c) at a time when a licensee is authorized to sell liquor only with or ancillary to a meal, the licensee is required to cause a price list to be exhibited, showing the charges made for meals and for the various types of liquor supplied ancillary to meals, in a place clearly visible to customers.

119. Section 109 provides that the sale of liquor is to be authorized under the Liquor Licensing Act. An examination of the section gives rise to the following potential restrictions —

- (a) a person who, whether personally or by an employee or agent, sells any liquor commits an offence unless that person is the holder of a licence or permit, the operation of which is not suspended and which authorizes the sale.

120. Section 110 provides that a liquor licence only authorizes the sale or consumption of liquor under that particular class of licence. No potential restriction on competition is considered to arise out of these provisions.

121. Section 111 provides offence provisions for trading outside of permitted hours. No potential restriction on competition is considered to arise out of these provisions.

122. Section 112 provides information on the application of sections 109, 110 and 111. No potential restriction on competition is considered to arise out of these provisions.

123. Section 113 provides offence provisions for unlawful dealing in liquor. No potential restriction on competition is considered to arise out of these provisions.
124. Section 114 provides that a member of the Police Force can close a licensed premises if there is reasonable grounds for believing that at or in the vicinity of the premises there will be civil disorder, a breach of the peace or a threat to public safety is likely to occur or in the interests of maintaining the peace or ensuring public safety. No potential restriction on competition is considered to arise out of these provisions.
125. Section 115 deals with disorderly persons on licensed premises. An examination of the section gives rise to the following potential restrictions —
- (a) an offence is committed where a licensee permits drunkenness or violent, quarrelsome, disorderly or indecent behaviour to take place, or permits any reputed thief, prostitute or supplier of unlawful drugs to remain, other than for so long as is necessary to obtain reasonable refreshment; or permits or suffers to be conducted on the premises any gaming or betting which contravenes section 110 (1) of the *Gaming Commission Act 1987*;
 - (b) a person shall not, on licensed premises, sell or supply liquor, or cause or permit liquor to be sold or supplied to, a drunken person; allow or permit a drunken person to consume liquor; obtain or attempt to obtain liquor for consumption by a drunken person; or aid a drunken person in obtaining or consuming liquor.
126. Section 116 provides that certain documents are required to be kept on licensed premises, displayed and produced. An examination of the section gives rise to the following potential restrictions —
- (a) a person shall not carry on business for which a licence is required under any name other than that of the licensee unless the Director has approved the use of the name.

Division 7 - Complaints about noise, etc.

127. Section 117 provides for a process to consider complaints where it is alleged that the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed by reason of any activity occurring at the licensed premises. No potential restriction on competition is considered to arise out of these provisions.

Division 8 - Liquor on unlicensed premises

128. Section 118 provides that a person is liable for any contravention of the Act occurring in the course of the conduct of the business carried on at premises which are licensed premises, of which that person purports to be the licensee. No potential restriction on competition is considered to arise out of these provisions.

129. Section 119 provides for certain limitations to relate to liquor on unlicensed premises. This section contains definitional provisions that were not considered to give rise to any potential restrictions on competition.

Division 9 - Juveniles

130. Sections 120 - 126 deal with the presence of juveniles on licensed or regulated premises, with the possession and consumption by juveniles of liquor, sending juveniles to obtain liquor and suspected juveniles being required to produce evidence of age. An examination of the section gives rise to the following potential restrictions —
- (a) liquor is not permitted to be sold, supplied to or consumed by juveniles on licensed or regulated premises;
 - (b) a juvenile may not be employed or engaged in the sale, supply or serving of liquor on or from licensed premises.

Part 5 - Financial Provisions

Division 1 - Licence fees

131. Sections 127 and 128 provide for the payment of licence fees and the making of regulations relating to licence fees. An examination of the section gives rise to the following potential restrictions —
- (a) for so long as a licence is in force, the licence fee prescribed in respect of that class of licence is payable not later than such day as is prescribed in each year in respect of each licence period and a new licence shall not come into force until the licence has been paid, unless otherwise prescribed.

Division 2 - Subsidies

132. Section 129 contains definitional provisions and is not considered to give rise to any potential restrictions on competition.
133. Section 130 provides that subsidies are payable to wholesalers and producers in respect of such sales of liquor as are prescribed. An examination of this section gives rise to the following potential restriction —
- (a) subsidies are payable to producers and wholesalers but not to any other class of licence.
134. Sections 131 - 136 prescribe administrative arrangements for applying for, paying and correcting incorrect subsidy payments. No potential restriction on competition is considered to arise out of these provisions.

Division 3 - Power of Court with respect to moneys due

[Sections 139 - 142 were repealed by No. 56 of 1997 s.38]

135. Section 143 provides that the Court may, on application by the Director, make an order against a licensee or former licensee for payment of any amount that is payable by that person under the Act. No potential restriction on competition is considered to arise out of these provisions.

[Section 144 was repealed by No. 56 of 1997, s 40]

Division 4 - Records and returns

136. Section 145 provides that such licensees as are prescribed shall make and maintain a record of all transactions entered into by or on behalf of the licensee involving the sale or purchase or other disposal or acquisition of liquor. Similarly, a person who has applied for a subsidy in relation to the sale of liquor shall make and maintain such records relating to the subsidy as are prescribed. An examination of this section gives rise to the following potential restrictions —

- (a) a person who is required to make a record shall keep and retain the record on licensed premises, or in some other place in the State approved by the Director for the purpose, for 6 years after the date on which it was compiled and make the record available for inspection by an authorized officer.

137. Section 146 provides for a person who is required to make a record under section 145, if so required by the Director or so prescribed, to lodge returns with the Director containing such information as the Director may require or as is prescribed. No potential restriction on competition is considered to arise out of these provisions.

Division 5 - Recovery of illegal gains

138. Section 147 provides that where a person, by contravention of the Liquor Licensing Act or of a condition of a licence or permit, gains any financial advantage, the Court may estimate the amount of that advantage and the amount so estimated may be recovered as a debt due to the Crown. No potential restriction on competition is considered to arise out of these provisions.

Division 6 - Information

139. Section 148 provides that the Director may require any person to provide the Director with such information as may be required for the purpose of ascertaining whether any fee is chargeable or for the purpose of determining the amount of any subsidy or other monies due under the Act. No potential restriction on competition is considered to arise out of these provisions.

140. Section 149 provides for the Director to use, for the purposes of the Liquor Licensing Act, any information concerning the affairs of any other person acquired under or for the purposes of the Act. No potential restriction on competition is considered to arise out of these provisions.
141. Section 150 - 152 provide powers for the Director in respect of entry to premises and access to records, to assist other authorities and impose an obligation of secrecy upon the staff of the Licensing Authority. No potential restriction on competition is considered to arise out of these provisions.

Part 6 - Enforcement

142. Sections 153 -172 deal with enforcement issues where a breach of the Act may have occurred. No potential restriction on competition is considered to arise out of these provisions.

Part 7 - General

143. Sections 173 - 178 provide for such general matters as the power to make regulations, the effect of transitional provisions and for review of the Act. No potential restriction on competition is considered to arise out of these provisions.

SUMMARY OF RESTRICTIONS

144. To provide for an orderly analysis of restrictions on competition, the potential restrictions identified in the legislation are grouped into the following categories, according to the general area of application —
- (a) restrictions on persons who are able to be approved as fit and proper persons by the Licensing Authority;
 - (b) restrictions on business decisions;
 - (c) the licensing restriction; and
 - (d) discriminatory restrictions contained within licence classes, such as the payment of a commercial incentive (the liquor subsidy) to some licensees and not to others, and the differential treatment of licence classes with respect to prescribed hours of trade.
145. The potential restrictions on competition in each of these categories is summarised and numbered below.

ANALYSIS OF THE LIKELY EFFECT OF THE RESTRICTION ON COMPETITION AND ON THE ECONOMY GENERALLY

Restrictions on persons who are able to be approved as fit and proper persons by the Licensing Authority

146. **Restriction 1:** the requirement of the Licensing Authority to determine whether an applicant is a fit and proper person to hold a licence (section 37(1)).
147. **Restriction 2:** certain types of persons are statute-barred from participating in the liquor industry (section 34(2)).

Restrictions on business decisions

148. **Restriction 3:** a licence vests personally in the licensee to whom it was granted and is not capable of being made subject to, or used as security for, any charge or other adverse interest (section 30A (2) (a)).
149. **Restriction 4:** a licence vests personally in the licensee to whom it was granted and is not capable of being vested in any other person, except in accordance with the provisions of the Liquor Licensing Act new restriction (section 30A (2) (b)).
150. **Restriction 5:** the ability of the Licensing Authority to impose, vary or cancel conditions of licences, of its own motion or on application of the licensee (section 63).
151. **Restriction 6:** a licensee cannot sell or assign the right to carry on a business under the licence, or to assign the licence itself, without the prior approval of the Director of Liquor Licensing (section 84).
152. **Restriction 7:** every licence is subject to the conditions that the licensee maintain the licensed premises to a standard that is reasonable, having regard to the class of licence, the locality and the expectations of the public; and keep the premises and all fittings and fixtures in the premises thoroughly cleansed, in a hygienic condition and in good repair (section 99).
153. **Restriction 8:** a person may not assume a position of authority in a body corporate that holds a licence; or being a shareholder in a propriety company that holds a licence, increase or decrease that shareholding, without the prior approval of the Licensing Authority (section 102).
154. **Restriction 9:** a person who becomes an owner of licensed premises is required to give notice in writing to the Director of the interest acquired within 7 days of acquiring it and an owner of licensed premises who changes from the address previously notified to the Director, shall within 7 days of the change, give notice of the change to the Director (section 103).

155. **Restriction 10:** a licensee cannot enter into partnership with another person in relation to the business carried on under the licence; enter into any agreement or arrangement under which another person may participate in the proceeds of the business carried on under the licence; or remunerates another person by reference to the quantity of liquor sold, without the approval of the Director (section 104).
156. **Restriction 11:** when liquor is being sold to lodgers the liquor shall not be supplied to, or consumed by, a juvenile; there shall be no more than 6 adult guests of each lodger present at the time the liquor is consumed; and the liquor shall not be consumed, except either personally by a lodger, or by an adult guest of a lodger and at the expense of the lodger (section 106).
157. **Restriction 12:** a person shall not, on licensed premises, sell or supply liquor, or cause or permit liquor to be sold or supplied to, a drunken person; allow or permit a drunken person to consume liquor; obtain or attempt to obtain liquor for consumption by a drunken person; or aid a drunken person in obtaining or consuming liquor (section 115 (2)).
158. **Restriction 13:** a person shall not carry on business for which a licence is required under any name other than that of the licensee unless the Director has approved the use of the name (section 116 (3)).
159. **Restriction 14:** liquor is not permitted to be sold, supplied to or consumed by juveniles on licensed or regulated premises (section 121).
160. **Restriction 15:** a juvenile may not be employed or engaged in the sale, supply or serving of liquor on or from licensed premises (section 121 (5) (d)).
161. **Restriction 16:** a person who is required to make a record (of liquor transactions) shall keep and retain the record on licensed premises, or in some other place in the State approved by the Director for the purpose, for 6 years after the date on which it was compiled and make the record available for inspection by an authorized officer (section 145 (3)).

The Licensing Restriction

162. **Restriction 17:** the Licensing Authority may exercise discretion to refuse an application, even if the applicant meets all the requirements of the Act or to grant an application, even if a valid ground of objection has been made out (section 33 (2)).
163. **Restriction 18:** the Act's provisions for reviewing a decision of the Director of Liquor Licensing create a two-tiered application process (section 25).
164. **Restriction 19:** the general prohibition on two or more licences not being granted in respect of the same part of any premises (section 36).

165. **Restriction 20:** on any application the Licensing Authority may require to be satisfied that any approval, consent or exemption required under the law relating to planning to permit the use of the premises for the sale of liquor; and any written law, for the carrying out of building work that is to be carried out before the licence or permit sought has effect, has been obtained (section 37 (2)).
166. **Restriction 21:** every licence, other than a club restricted licence or an occasional licence, is subject to the condition that the licensee occupies, and retains a right to occupy, the licensed premises to the exclusion of others, and an application for the grant or transfer of a licence shall not be granted unless the Licensing Authority is satisfied that the applicant can, or on the grant of the application will be able to, comply with that condition; and if the licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, the interest of the licensee in the licence terminates (section 37 (5)).
167. **Restriction 22:** the requirements for the grant or removal of a Category A licence (section 38).
168. **Restriction 23:** where the Director so requires, the liquor to be sold or supplied under an occasional licence is to be purchased from a supplier, or a supplier selected from a list of suppliers specified in the licence (section 59 (4)).
169. **Restriction 24:** an application for the grant of a licence (other than an occasional licence), the removal of a licence or for the approval of proposed alterations to, or redefinition of, licensed premises, must be accompanied by plans of the premises to which the application relates (section 66).
170. **Restriction 25:** an application shall be in the form and manner prescribed and must be accompanied by the prescribed fees (section 68).
171. **Restriction 26:** in setting an affected area, the Director may take into account existing or proposed licensed premises (section 71 (2)).
172. **Restriction 27:** the Licensing Authority is unable to grant an application for the grant, transfer or removal of a licence; variation or cancellation of any condition imposed on a hotel licence requiring the provision of residential accommodation; approval to a proposed alteration to, or redefinition of, the licensed premises; or an extended trading permit in respect of any place which is to be comprised within the licensed premises unless the applicant can satisfy the Licensing Authority that the lessor has consented to the application (section 72).
173. **Restriction 28:** where an application is required to be advertised, a right to object is conferred on any resident of the affected area; and any person holding a Category A licence for premises which are, or are premises referred to under a licence granted under section 62 and are proposed to be situated in the affected area (section 73 (2)).

174. **Restriction 29:** an objection may be made on the grounds that on an application relating to a Category A licence, that the grant of the application is not necessary in order to provide for the requirements of the public (section 74 (1) (d)).
175. **Restriction 30:** an application for the grant of an occasional licence is required to be lodged in the prescribed manner and form, not later than 14 days before the licence is to take effect (section 75).
176. **Restriction 31:** an application for the grant of an extended trading permit is required to be lodged in the prescribed manner and form, not later than 14 days before the permit is to take effect (section 76).
177. **Restriction 32:** an owner, occupier or licensee of licensed premises, is prohibited, without the prior approval of the Director, to make any alteration in the construction or completion of premises the subject of plans or specifications made under section 62, or any licensed premises (section 77).
178. **Restriction 33:** where the Director is satisfied, in relation to a Category A licence, that an alteration of the licensed premises or redefinition proposed is likely to lead to a substantial increase in actual or potential liquor sales; and reduce significantly the actual or potential liquor sales under a Category A licence held by any other persons, he may direct that the application is required to be advertised under section 67 (section 77 (6)).
179. **Restriction 34:** the holder of a hotel licence, other than a tavern licence, shall maintain a register of lodgers, in a form acceptable to the Director (section 105).
180. **Restriction 35:** a person who, whether personally or by an employee or agent, sells any liquor commits an offence, unless that person is the holder of a licence or permit, the operation of which is not suspended, and which authorizes the sale (section 109).
181. **Restriction 36:** for so long as a licence is in force, the licence fee prescribed in respect of that class of licence is payable not later than such day as is prescribed in each year in respect of each licence period and a new licence shall not come into force until the licence has been paid, unless otherwise prescribed (section 127).

Discriminatory restrictions

182. **Restriction 37:** where the delivery of liquor is to be effected in the State then, notwithstanding that the sale otherwise took place outside the State, the sale of that liquor is deemed to have been concluded in the State, unless the regulations provide otherwise (section 4 (8)).
183. **Restriction 38:** the licence categories themselves and the licence conditions embodied in those licence types (sections 41-59).

184. **Restriction 39:** a casino liquor licence is not capable of being removed without the consent of the Gaming Commission (section 83 (1)).
185. **Restriction 40:** a protection order is specifically prohibited from being granted to the owner, lessor or mortgagee of premises to which a liquor store applies, but not other types of premises (section 87 (1) (a)).
186. **Restriction 41:** a protection order is specifically prohibited from being granted to a liquor store when the licence is suspended and a person satisfies the Director that loss is likely to result if an order is not granted, but not other types of premises (section 87 (1) (b)).
187. **Restriction 42:** different licence classes have different hours of permitted trade (section 97).
188. **Restriction 43:** liquor store licences are not permitted to trade on Sundays (section 97 (3)).
189. **Restriction 44:** the licensee of a hotel or special facility licence, where that licence so provides, are to provide certain services (section 108).
190. **Restriction 45:** subsidies are payable to producers and wholesalers but not to any other class of licence (section 130).

SUBMISSIONS TO THE REVIEW

191. A consultation program was undertaken to invite submissions to the review.
192. Invitations to make submissions to the review were made by written advice to persons and organisations with a known interest in the liquor industry and by way of public advertisement in a Saturday edition of *The West Australian* and an edition of the *Sunday Times* on 14 and 15 February 1998, respectively (see Appendix 1).
193. Submissions were received from the following persons —
 - (a) Alcohol Advisory Council of Western Australia Inc.
 - (b) Australian Democrats (Hon. Norm Kelly MLC).
 - (c) Australian Hotels Association (Western Australian Branch).
 - (d) Mr Greg Rickie.
 - (e) Mr Remo Augusto Ogden.
 - (f) National Centre for Research into the Prevention of Drug Abuse (Professor Tim Stockwell).
 - (g) Restaurant and Catering Industry Association of Western Australia (Inc).
 - (h) The Liquor Stores Association of Western Australia Inc.
 - (i) The Western Australian Network of Alcohol and Other Drugs Agency.
 - (j) Tourism Council Australia (Western Australia).
 - (k) Wine Industry Association of Western Australian (Inc).
 - (l) Woolworths (WA) Pty Ltd.
 - (m) The Australasian Association of Convenience Stores Inc.

ASSESSMENT OF RESTRICTIONS

194. The identified restrictions were broadly classified as “major” or “minor” in accordance with the Department of Treasury’s Legislation Review Guidelines. The following restrictions are regarded *a priori* as potentially having a substantial impact on the liquor industry and are therefore classified as major restrictions —
- (a) Restrictions 1 and 2 that restricts the persons who may be approved as fit and proper persons for the purposes of the liquor industry.
 - (b) Restriction 35 that restricts the sale and commercial supply of liquor to a person who is the holder of a licence or permit, the operation of which is not suspended, and which authorizes the sale.
 - (c) Restriction 22 that restricts the granting or removal of Category A licences.
195. All other potential restrictions on competition were classified as minor restrictions for the purposes of this review.

**RESTRICTIONS ON PERSONS WHO ARE ABLE TO
BE APPROVED AS FIT AND PROPER PERSONS**

RESTRICTION 1: the requirement of the Licensing Authority to determine whether an applicant is a fit and proper person to hold a licence (section 37 (1))

196. This restriction is considered anti-competitive because it requires the Licensing Authority to make judgements about applicants, which directly affects whether or not they can participate in the liquor industry.
197. The object addressed is 5 (2) (d) to provide adequate controls over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.
198. Section 37 (1) of the Act, requires that the Licensing Authority not approve an application for the grant of a licence, for approval to the transfer of a licence, or for a permit to be issued, unless satisfied —
- (a) that the applicant, or one of the applicants, is a natural person or a body corporate — is a fit and proper person to be a licensee of the premises to which the application relates;
 - (b) if the applicant, or one of the applicants, is a body corporate, that each person who occupies a position of authority in the body corporate is a fit and proper person to occupy that position in a body corporate that is a licensee of the premises to which the application relates;
 - (c) if the applicant is an unincorporated body of persons who will not be joint holders of the licence —
 - (i) that the persons have a common interest of a political, literary, sporting, social or other lawful nature and that the sale of liquor is incidental to, and not the primary purposes of, so associating; and
 - (ii) that a trustee is, or will be, appointed in accordance with section 35A;
 - (d) that each person directly, or indirectly interested in the application or in the business, or the profits or proceeds of the business, to be carried on under the licence or permit is a fit and proper person to be so interested.
199. In making a determination as to whether or not an applicant is a fit and proper person, the Licensing Authority is empowered by the provisions of section 33 (6) and (6a), to consider the following personal antecedents as relevant and amongst the matters to which consideration should be given —
- (a) the creditworthiness of that person;
 - (b) the character and reputation of that person;

- (c) the number and nature of any convictions of that person;
 - (d) the number and nature of any convictions of that person for offences in any jurisdiction;
 - (e) the conduct of the person in respect to other businesses or to matters to which the Liquor Licensing Act relates;
 - (f) any report submitted, or intervention made, under section 69; and
 - (g) whether or not the person can demonstrate knowledge relevant to managing licensed premises.
200. Historically, it appears that the main aim of providing for background checks into an applicant for the grant of a licence has been to ensure that their character and background (in terms of whether, for example, the person has a criminal record) is suitable. Today, the vetting of applicants also addresses the same issue, but also serves to minimise the incidence of persons obtaining a licence to exploit the ready gain from selling and supplying liquor, which may be available, in such a way that the public interest is damaged. This point is made at page 323 in *Review of South Australian Liquor Licensing Laws* (Government Printer, SA, June 1984) —
- a licence... is a legal authority for a person to sell a potentially harmful, often abused, drug to the adult public. Because of the nature of liquor, and the opportunities for making considerable revenue from its sale, it is essential that undesirable persons not be licensed; or
 - put another way, liquor has, in Australia, only ever been permitted to be sold by specific authorisation from the Government or an authority established by the Government. [Therefore] It is incumbent on the Licensing Authority to ensure that this privilege is extended only to suitable persons.
201. Similarly, at page 84 of the Victorian Government's *Liquor Control Act 1987 Review*, the issue of suitable persons and adequate knowledge was considered, where it was found that the suitable person provision requires the making of subjective judgements about applicants without any clear guidelines. Additionally, it was found that tests of adequate knowledge were not applied to all applicants and, therefore, could be regarded as potentially discriminatory.
202. Decisions relating to fit and proper persons are inherently subjective, even where, as in the Western Australian legislation, some guidance is given (section 33). In addition, it is likely that there are other issues that should also be taken into account, for example, over the past decade, many criminal offences previously deemed to be indictable are now dealt with summarily. For instance, in some jurisdictions, drug related offences, such as the possession of cannabis, are dealt with by way of infringement and may not be included on the person's police record. Yet these offences, as well as other types of offences (such as speeding offences, driving under the influence, or driving without a licence), could indicate

that the person has a propensity to disregard the law, and is therefore unsuitable to hold a liquor licence. This may be particularly relevant where the offences are recent or have occurred regularly over a period of time.

203. In Western Australia, the Licensing Authority views these types of offences as amongst the matters to which consideration should be given. However, the importance or weighting given to these offences is often where the subjectivity and potential discrimination emerges. This is partly due to the range of factors that can or may be considered by the decision maker, such as where the offence occurred; how many offences were committed; whether significant fines were imposed (which begs the question of what is a significant fine?); the age of the person at the time of the offence; the person's personality traits, family background and any other mitigating circumstances (ie. their psychological frame of mind at the time of the offence).
204. Another difficulty with this requirement is found in the reporting of convictions imposed interstate or overseas. Licensing authorities in Australia do not apply uniform criteria in determining whether a person is fit and proper, so it is not possible to approve someone on the basis of their interstate approvals. Similarly, it is often impossible for the Licensing Authority to obtain background information on persons who were born or have resided for any length of time overseas. In these instances the Licensing Authority relies on the person providing a Certificate of Clearance obtained from the relevant overseas country. Where this cannot be achieved, the person is generally required to lodge an affidavit stating that they have not been summonsed, charged or convicted or had any offence proved against them, which relies entirely on the subjective evidence of the person concerned. As such, it is difficult to rely on this type of information, which impacts negatively on the ability of the Licensing Authority to consistently make impartial decisions in determining whether or not a person is fit and proper.
205. This issue of whether or not a person can demonstrate knowledge relevant to managing licensed premises as part of their 'fitness and propriety' is a relatively new provision. *Liquor Licensing in Western Australia, Report of the Independent Review Committee* (April 1994, pages 77 - 85) considered the issue of mandatory industry training and made the following comments —

Research shows that while only about one-third of all alcohol sold in WA is consumed on licensed premises, approximately two-thirds of all problems of intoxication are associated with such consumption. Half of all drivers who fail a roadside breath-test have had their last drink on licensed premises; up to 60% of street offences (assaults, offences behaviour and offensive language) occur on or near licensed premises; and 72% of respondents who reported experiencing alcohol-related harm in a community survey did so after drinking on licensed premises.

These facts weaken the argument that the use of liquor licensing laws to combat alcohol problems involves punishing the many for the sins of the few. They suggest instead that our liquor laws should be framed to deter episodes of excessive consumption and promote moderation in the use of alcohol at all times and by all who like a drink.

While many submissions expressed the need for industry training, at least two submissions dealt with the subject in depth...the Liquor Industry Council of WA...[and] the National Centre for Research into the Prevention of Drug Abuse...[which] stated, “Australian legislation has few specific provisions dealing with the qualifications and training of licensees and permittees. Although applicants must be ‘fit and proper persons’, they are not generally required to demonstrate that they understand their responsibilities under the alcohol laws or have adequate experience in the hospitality industry...”

206. The Report recommended that a comprehensive and structured course of mandatory training be developed to serve all sections of the liquor industry and this recommendation was endorsed by the Minister in his June 1995 report on the Review of the Liquor Licensing Act 1988 where he recommended —

There should be a requirement that, as part of the licensing process, key liquor industry participants demonstrate their knowledge through some form of examination that is accredited by established procedures through the Skills Standards and Accreditation Board. This will allow people the flexibility to learn what they need to know...

207. In his submission to this review, the Executive Director of Public Health suggests that style of management of a licensed venue can consistently predict the likelihood of a range of serious alcohol related problems, such as violence and drink-driving, “In Perth, it has been shown that bars associated with an above average rate of drink driving and assault offences were significantly likely to have customers with blood alcohol levels in excess of 0.15mg/ml as they exited (Stockwell et al, 1992). A number of these setting characteristics and also patrons’ intoxication levels can be directly influenced by management”.
208. The restriction that applicants be found to be fit and proper persons addresses the issue of “adequate controls” and is a response to the obvious harms that might result if irresponsible persons, or persons who are ignorant of the obligations of licensees are permitted to obtain licences.

Potential Disadvantages of the Restriction

209. Applicants can be denied access to the liquor industry.
210. Concern has been expressed as to the subjectivity of the assessment process.
211. The cost of training licensees and approved managers will be borne by these individuals.

Potential Advantages of the Restriction

212. Undesirable persons are excluded from the liquor industry.
213. Key personnel are suitably trained to take on the responsibility of serving alcohol and supervising the serving of alcohol to, in some instances thousands of people each week, is important from a public health perspective.

214. Consumers are likely to have a greater range of properly run licensed premises.
215. Local amenity may be enhanced if the provision makes it more likely that licensees are properly aware of and pay due regard to their obligations under the Act.
216. Current licensees may benefit because excluding undesirable persons enhances the reputation of the industry.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 1.1	Applicants found not to be fit and proper can be denied access to the liquor industry.
How:	Restriction contained in the Liquor Licensing Act.
Impact:	Barrier to entry.
Impacts when:	On entry.
Impacts on whom:	Potential market entrants who are not found to be fit and proper.
Public objectives impacted:	Avoidance of public “bads”.
EFFECT 1.2	The process is subjective and may not be applied the same in every case.
How:	The Act does not contain a definition of what makes a person unfit.
Impact:	Barrier to entry.
Impacts when:	On entry.
Impacts on whom:	Potential market entrants who are not found to be fit and proper.
Public objectives impacted:	Avoidance of public “bads”.
EFFECT 1.3	The cost of training licensees and approved managers.
How:	Restrictions contained in the Liquor Licensing Act.
Impact:	Barrier to entry.
Impacts when:	On entry
Impacts on whom:	Market entrants.
Public objectives impacted:	Avoidance of public “bads”.

Potential Advantages and Benefits

EFFECT 1.4	Consumers are likely to have a greater range of properly run licensed premises.
How:	All licensees are deemed to be fit and proper.
Impact:	Increased consumer confidence in liquor merchants.
Impacts when:	Continually.
Impacts on whom:	Consumers.
Public objectives impacted:	Distributional, uncertainty/risk
EFFECT 1.5	Local amenity may be enhanced if the provision makes it more likely that licensees pay due regard to their obligations under the Act.
How:	Demonstrated capacity to obey the law.
Impact:	Increased consumer confidence in liquor merchants.
Impacts when:	Continually
Impacts on whom:	Consumers
Public objectives impacted:	Distributional/Consumer confidence
EFFECT 1.6	Current licensees may gain because excluding undesirable persons enhances the reputation of the industry.
How:	Irresponsible and criminal persons are denied access to the liquor industry.
Impact:	Increased consumer confidence in liquor merchants
Impacts when:	Continually
Impacts on whom:	Consumers
Public objectives impacted:	Distributional/Consumer confidence

Assessment of Public Benefit

217. While the Act does not clearly define the meaning of ‘fit and proper person’ and ‘adequate knowledge’ it does give some indication as to the antecedents the Licensing Authority should consider when determining whether a person is fit and proper (sections 33 (6) and (6a).
218. In practice, applicants are required to declare convictions to the Licensing Authority, and a copy of that declaration is provided to the WA Police Service for an independent police report on that person’s probity.

219. In 1997/98, 38 of a total of 356 applicants were referred to the Director of Liquor Licensing for consideration of their criminal records. Of those considered by the Director, 31 were finally judged to be fit and proper.
220. The success rate of applicants obtaining licences, despite their criminal records, would suggest that the legislative requirement pertaining to the character and fitness test is not unduly restrictive. It is possible however, that those persons with serious convictions or extensive criminal records are aware that the liquor industry is regulated and may not have applied for a licence in the first instance.

Alternative Means of Achieving the Legislative Objectives

221. Object 5 (2) (d) of the Act states that in carrying out its functions under the Act, the Licensing Authority shall have regard to providing adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor.
222. It is not considered possible to provide the “adequate control” envisioned by object 5 (2) (d) unless there is a legislative requirement for persons seeking to be directly or indirectly involved in the sale, disposal and consumption of liquor to be declared as fit and proper. It is appropriate that this occurs before the applicant is granted a licence and admitted to the liquor industry, because once a licence is granted, the holder has a legitimate interest that will be seriously affected by cancellation, or by revocation of approval. At a minimum, the holder has a “legitimate expectation” of the licence remaining effective for its stated term. The case will even be stronger where revocation can only be effected if misconduct of some kind is established...(see *General Principles of Administrative Law* 2nd Edition, Sykes, Lanham and Tracey, Butterworths, page 159).
223. Given contemporary concerns about the protection of personal information, which are now enshrined in legislation such as the Freedom of Information Act 1992 (WA), it is not considered possible or appropriate for the Licensing Authority to be able to determine the fitness and propriety of an applicant without, at the least, having access to an independent report from the WA Police Service. The intrusiveness of this requirement is somewhat mitigated by the fact that applicants are advised in writing that a copy of the form in which they are asked to declare convictions recorded against them will be provided to the Commissioner of Police, who may then check the truth of any of the statements made and report on them to the Director of Liquor Licensing.
224. As such, there is no legitimate alternative to achieving the Act’s objective of providing adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor.

Conclusion

225. Controls over persons directly or indirectly involved in the sale, disposal and consumption of liquor by requiring that applicants be found to be “fit and proper” persons provide an important safeguard to the community.

Recommendation

226. It is recommended that the restriction on an applicant being found to be a “fit and proper person” should be maintained.

RESTRICTION 2: certain types of persons are statute-barred from participating in the liquor industry (section 34 (2))

227. This restriction is considered anti-competitive because certain types of persons are statute-barred from participating in the liquor industry.

228. The object addressed is 5 (2) (d) to provide adequate controls over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.

229. This restriction sets out classes of persons who may not obtain licences (eg bankrupts, juveniles). The effect of this restriction is to exclude persons who are not considered to be suitable for approval to be a licensee or manager. This section provides that the Licensing Authority shall not hear or determine any application for the grant or removal of a licence; approval to the transfer of a licence; or approval to a person as a manager, trustee or the occupant of a position of authority in a body corporate that holds a licence, if the application is made by a person who —

- (a) is bankrupt or has assigned his or her estate to the benefits of creditors;
- (b) by reason of mental disorder, is incapable of managing his or her affairs;
- (c) is, or under any written law is deemed to be, under sentence of imprisonment;
- (d) being a body corporate, is an externally administered body corporate within the meaning of the Corporations Law; or
- (e) is disqualified from holding a licence, or holds a licence which is suspended, pursuant to an order made in disciplinary proceedings under the provisions of the Act;
- (f) by a juvenile; or
- (g) by a person who holds office or is employed in the Public Service of the State or the Commonwealth, or in any agency or instrumentality of the Crown; or is a sheriff’s officer, bailiff or other person employed or authorized to execute any legal process.

Potential Disadvantages of the Restriction

230. Limited discretion may be exercised by the Licensing Authority where a bankrupt person seeks approval as a manager, or a person who holds office in the Public Service seeks approval as a manager or licensee, where, in the opinion of the Licensing Authority, it is satisfied that special circumstances apply, or in the case of Public Servants, where there is no conflict of interest between the applicant's employment and the operation of the licence.
231. Absence of business opportunities for the types of persons prescribed.
232. Reduced services to consumers from licensees as a result of lower numbers of licensees and less competition between licensees than would occur in the absence of licensing.

Potential Advantages of the Restriction

233. Persons who are not financially viable or otherwise deemed unable to operate a licensed business are excluded from participating in the liquor industry, thereby leading to consumers having access to properly run licensed premises.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 2.1	The Licensing Authority may not hear or determine an application by persons prescribed in section 34 who are seeking approval as a licensee
How:	Restriction contained in the Liquor Licensing Act
Impact:	Barrier to entry
Impacts when:	On entry
Impacts on whom:	Potential market entrants who are bankrupt, mentally incapable of managing their affairs, deemed to be under sentence of imprisonment, externally administered (in the case of a body corporate); disqualified from holding a licence; juvenile (ie under the age of 18). Also impacts on potential market entrants who hold office in the Public Service of the State or Commonwealth, unless the Licensing Authority is satisfied that there is no conflict of interest between the applicant's employment and the operation of the licence.
Public objectives impacted:	Economic/Financial
EFFECT 2.2	The Licensing Authority may not hear or determine an application by persons prescribed in section 34 who are seeking approval as a manager, unless special circumstances apply
How:	Restrictions contained in the Liquor Licensing Act, unless the applicant can demonstrate reasons why the restriction should not apply

Impact:	Barrier to entry
Impacts when:	On entry
Impacts on whom:	Potential market entrants, as managers, who are bankrupt or who holds office in the Public Service of the State or Commonwealth
Public objectives impacted:	Economic/Financial
<i>Potential Advantages and Benefits</i>	
EFFECT 2.3	Consumers having access to properly run licensed premises
How:	Operators who are not financially sound or otherwise able to manage their business affairs are excluded from the liquor industry
Impact:	Increased consumer confidence in liquor merchants
Impacts when:	Continually
Impacts on whom:	Consumers
Public objectives impacted:	Distributional; Consumer confidence

Assessment of Public Benefit

234. Because this section prohibits the Licensing Authority from hearing or determining an application by those persons specified, it is difficult to ascertain the costs of this restriction, given that such persons generally do not apply for a licence.
235. The cost of this restriction is significantly mitigated in the approval of persons as managers of licensed premises. There have been several instances where persons employed in the Public Service have sought approval by the Licensing Authority, and almost in every case, once a letter from the employing agency has been received, in which it is stated that there is no conflict of interest in the applicant's public office and interest in the licence, approval has been granted.
236. Similarly, persons who are bankrupt or have otherwise assigned their estate to the benefits of creditors are able to seek approval as manager of licensed premises, where it can be demonstrated that special circumstances apply. This requirement is not onerous, in that generally a letter from the licensee indicating a willingness to employ the person, notwithstanding the difficulties of their personal finances, will suffice for approval.
237. Alternatively, object 5 (2) (a) requires the Licensing Authority to "...contribute to the proper development of the liquor, hospitality and related industries in the State," and object 5 (2) (d) to "provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor." The benefits of this restriction relate directly to those objects.

238. Persons who are incapable of managing their personal or business affairs are prevented from gaining approval from the Licensing Authority because of an implied assumption that their inability to manage their personal finances will flow on to their professional finances, thereby increasing the likelihood that they would be unable to properly manage a licensed premises. It would be the antithesis of objects 5 (2) (a) to permit licensed premises to be established and managed in an unprofessional and detrimental manner.
239. On balance, the benefits of retaining this restriction are considered to outweigh the costs of the restriction. It is in the public interest to retain a prohibition on the persons prescribed in section 34 (2).

Alternative Means of Achieving the Legislative Objectives

240. The alternative to the restrictions contained within section 34 is simply to allow any person to seek approval from the Licensing Authority without reference to their financial standing.
241. The disadvantage of this alternative is that while it may improve the competitiveness of those persons prescribed, which would constitute a significant personal benefit, it would be likely to lead to significant public detriment. The establishment of impaired licensed premises would be likely to lead to —
- (a) an increase in the irresponsible promotion and service of liquor;
 - (b) licensed businesses failing; and
 - (c) for all effects and purposes, the grant and issue of moribund licences,
- at a considerable financial and social cost, which will ultimately be borne by the public.

Conclusion

242. Although the provisions of the section prevent the prescribed classes of persons from entering the liquor industry, it is not considered a major restriction in that society does not expect that those persons could realistically compete within the industry.
243. The removal of the restrictions in section 34 would be contrary to many of the Act's objects, and specifically objects 5 (2) (a) and 5 (2) (d).

Recommendation

244. It is recommended that the restriction on the Licensing Authority hearing or determining an application by the types of persons prescribed in section 34 of the Liquor Licensing Act should be maintained.

RESTRICTIONS ON BUSINESS DECISIONS

RESTRICTION 3: a licence vests personally in the licensee to whom it was granted and is not capable of being made subject to, or used as security for, any lien, charge or other adverse interest (section 30A (2) (a))

245. This restriction is considered anti-competitive because a licensee cannot use a liquor licence as security.

246. The object addressed is object 5 (2) (a), to regulate and contribute to the proper development of the liquor industry.

Potential Disadvantages of the Restriction

247. Reduced incentives for licensees to develop licensed businesses due to the inability to capitalise on any value attached to a liquor licence.

Potential Advantages of the Restriction

248. Increased certainty to licensees by virtue of the fact that their liquor licence cannot be made subject to any adverse interest, and therefore cannot be interfered with, taken-over or re-possessed by any other person.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 3.1	Reduced incentives for licensees to develop licensed businesses/premises
How:	Licensees are unable to develop licensed businesses
Impact:	Licensees are prevented from using their liquor licence as a lien or security to raise capital.
Impacts when:	Continual.
Impacts on whom:	Liquor merchants.
Public objectives impacted:	Uncertainty/risk.

Potential Advantages and Benefits

EFFECT 3.2	Increased certainty to licensees by virtue of the fact that their liquor licence cannot be made subject to any adverse interest from any other party.
How:	Licensed businesses cannot be interfered with, taken-over or re-possessed by any person.
Impact:	Stability in the liquor industry; Avoidance of public “bads”.

Impacts when:	On going.
Impacts on whom:	Licensees
Public objectives impacted	Reduced uncertainty/risk

Assessment of Public Benefit

249. The prohibition on liquor licences being made subject to, or being used as security for any lien, charge or other adverse interest is assessed as causing no tangible costs to the liquor industry, while providing a measure of stability to licensees, by protecting and preserving the personal entitlements of licensees.
250. The restriction also relates to the ‘fit and proper’ requirement by preventing unfit persons from benefiting from, influencing or interfering with the business conducted under a liquor licence by asserting any claim to the licence arising from any lien, charge or other adverse interest.
251. As a full discussion of the ‘fit and proper’ requirement is considered at Restriction 1, it is not proposed to duplicate that discussion here.
252. This restriction will stand or fall on the basis of the recommendations in respect of Restriction 1.

Alternative Means of Achieving the Legislative Objectives

253. None identified.

Conclusion

254. Continuation of the restriction is justifiable.

Recommendation

255. It is recommended that the restriction preventing a liquor licence from being made subject to, or used as security for, any charge or other adverse interest should be maintained.

RESTRICTION 4: a licence vests personally in the licensee to whom it was granted and is not capable of being vested in any other person, except in accordance with this Act (section 30A (2) (a))

256. This restriction is considered anti-competitive because a licence cannot be vested in any person, except in accordance with the provisions of the Liquor Licensing Act.
257. The object addressed is object 5 (2) (d), to provide adequate control over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

258. Licensees are prevented from unrestrained trade in liquor licences.

Potential Advantages of the Restriction

259. Fair and proper conduct of the liquor industry by virtue of an increased ability of the Licensing Authority to maintain control over participants in the liquor industry.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 4.1	Licensees are prevented from unrestrained trade in liquor licences
How:	A licence cannot be vested in any person, except in accordance with the provisions of the Liquor Licensing Act
Impact:	Barrier to entry/exit from liquor industry
Impacts when:	On going
Impacts on whom:	Licensees; Entrants to the liquor industry
Public objectives impacted:	Avoidance of public “bads”.

Potential Advantages and Benefits

EFFECT 4.2	Fair and proper conduct of the liquor industry by virtue of an increased ability of the Licensing Authority to maintain control over participants in the liquor industry.
How:	No person is given control over a liquor licence without the approval of the Licensing Authority
Impact:	Increased consumer confidence in the fair and proper conduct of the liquor industry
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk

Assessment of Public Benefit

260. The prohibition on liquor licences being vested in any person, except in accordance with the provisions of the Liquor Licensing Act relates to the ‘fit and proper’ requirement.

261. As a full discussion of the ‘fit and proper’ requirement is considered at Restriction 1, it is not proposed to duplicate that discussion here.
262. This restriction will stand or fall on the basis of the recommendations in respect of Restriction 1.

Alternative Means of Achieving the Legislative Objectives

263. None identified.

Conclusion

264. Continuation of the restriction is justifiable.

Recommendation

265. It is recommended that the restriction preventing a liquor licence from being vested in any other person, except in accordance with the Act should be maintained.

RESTRICTION 5: the ability of the Licensing Authority to impose, vary or cancel conditions of licences, of its own motion or on application of the licensee (section 63)

266. This restriction is considered anti-competitive because the Licensing Authority has the power to impose conditions on licences in the public interest, —
- (a) in addition to the conditions specifically imposed by the Act; or
 - (b) in a manner as to make more restrictive a condition imposed by the Act.
267. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor and object 5 (1) (b), to minimize harm or ill-health caused to people, or any group of people, due to the use of liquor.
268. Until the 1990s, the primary role of liquor licensing authorities throughout Australia was to regulate the liquor industry in a way that ensured that liquor was sold in an orderly manner. That was usually achieved by placing some limitation or restriction on the number of outlets from which liquor may be sold, ensuring that certain standards of hygiene and service were maintained and making sure that only fit and proper persons held a liquor licence.
269. Since the early 1990s, there has been a growing focus on the health, social and economic costs that the community has to bear as a direct consequence of irresponsible liquor consumption. This has led licensing authorities to examine the role they and licensees play in reducing irresponsible consumption by individuals.

270. Section 5 of the Liquor Licensing Act provides that a primary object of the Act is harm minimization. Therefore, in its role of regulating the liquor industry, the Licensing Authority must have due regard to those factors associated with liquor consumption that cause harm or ill-health to individuals and communities.
271. It follows from this that, in exercising its functions under the Act, the Licensing Authority will assess the extent to which a particular licensee addresses harm minimization principles and responsible server practices to ensure, as far as possible, that liquor is consumed responsibly on licensed premises.
272. In recent times the Licensing Authority has also been requested by community groups to assist in resolving problems associated with the consumption of alcohol.
273. The Liquor Licensing Act empowers the Director to impose conditions on any licence or group of licences in an area that relate to public health issues. Similarly, the Director is also empowered to impose conditions on licences to ensure that there will be compliance with the local laws of a local authority under the *Local Government Act 1995*, or the by-laws of an Aboriginal community under the *Aboriginal Communities Act 1979* and to restrict liquor promotions and discounting that are likely to encourage binge drinking or excessive and rapid alcohol consumption.

Potential Disadvantages of the Restriction

274. A licence may be conditioned by the Licensing Authority in such a manner to make more restrictive a condition specifically imposed by the Act or to impose conditions restricting the style of trade under the licence, which it considers to be in the public interest, which can restrict trade.

Potential Advantages of the Restriction

275. The Licensing Authority, after due investigation and providing all affected parties with an opportunity to be heard, can impose conditions on licences which it considers to be in the public interest and which result in a public benefit.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 5.1	The Licensing Authority can impose conditions on liquor licences.
How:	At the request of the licensee or of its own volition.
Impact:	Trade can be restricted.
Impacts when:	On imposition of conditions on the liquor licence.
Impacts on whom:	Licensees; Consumers
Public objectives impacted:	Proper regulation of the liquor industry.

Potential Advantages and Benefits

EFFECT 5.2	The Licensing Authority can impose conditions on licences, which it considers to be in the public interest, and which result in a public benefit.
How:	After due investigation and providing all affected parties with an opportunity to be heard.
Impact:	Can be significant on public health and order.
Impacts when:	On imposition of conditions on the liquor licence.
Impacts on whom:	Consumers; General public; Persons and/or community affected
Public objectives impacted:	Health/life expectancy; Avoidance of public “bads”.

Assessment of Public Benefit

276. The ability of the Licensing Authority to impose restrictive conditions on licences ensures that liquor is not sold irresponsibly or in a way that offends public order, once the licence has been granted and issued.
277. The ability of the Director of Liquor Licensing to impose conditions on a licence is not expected to be the single solution to this complex social issue, but rather one part of a range of complementary strategies. In the paper *An examination of the appropriateness and efficacy of liquor-licensing laws across Australia*, the following example is cited —

An excellent example of a community-level response to alcohol problems is provided by the Aboriginal community at Halls Creek, in Western Australia. Initially the community addressed problems through treatment and counselling, then through a sobering-up shelter centre after 1990, which involve the setting up of an advisory committee to assist with its management. As a result the community developed a better understanding of the broader issues associated with alcohol problems and decided on a more comprehensive approach. They formed an Alcohol Action Advisory Committee (AAAC), which drew up a number of strategies, one of which was to have restrictions placed on the sale of packaged liquor. Following a negative response from local licensees, the AAAC petitioned the Director of Liquor Licensing who, in 1992, used his powers under the Liquor Act and imposed restrictions on trading hours, on also the amount and times certain liquors can be sold. In August 1993 the restrictions were credited with causing a 50% reduction in alcohol-related crimes and a reduction in illness around Halls Creek. There has also been a 15% average increase in birth weight following the imposition of restrictions.⁵

⁵ *An examination of the appropriateness and efficacy of liquor-licensing laws in Australia*, Report 5 in a series of reports prepared for the National Symposium on Alcohol Misuse and Violence, Edited by Tim Stockwell, Associate Professor and Deputy Director for the National Centre for Research into the Prevention of Drug Abuse, Curtin University of Western Australia, July 1994

278. Similarly, in an analysis of the impact of liquor restrictions in Derby, it was reported that while there was widespread support for the ban on 4 litre cask wines, and acceptance of reduced takeaway trading hours, public perception of the ban on packaged liquor sales on Thursdays was divided: while some people opposed the ban, others saw it as being marginally helpful. There was also "... widespread belief that the problems associated with alcohol mis-use are too persuasive, and too complex, to be adequately addressed by imposed restrictions..."
279. However the analysis reported an overall majority support for the trading restrictions amongst Derby residents, and for their continuation, although support was stronger amongst women than men, and it was qualified, in the sense that many people believed that other measures are also required
280. The study also reported that a significant drop (37 per cent) in the incidence of police offences in the categories of assaults, sexual offences, damage and threatening behaviour accompanied the trial measures.
281. Similar results were found in the evaluation of comparable liquor restrictions in the Northern Territory's Tennant Creek.
282. An independent evaluation of the impact of the trial of these liquor restrictions found that —
- (a) fewer Aboriginal women attended the hospital with injuries during the trial period;
 - (b) sixty-nine per cent of people interviewed in the community survey thought the trial had positive effects on the community as a whole. They thought the benefits were less drinking, improvements in personal welfare, there was less disruptive and violent behaviour, and cleaner and quieter streets; and
 - (c) overall 58 per cent of people in the town were in favour of the trial measures, 21 per cent were against, and 16 per cent had mixed a reaction,
- similarly, Jalalikari Council Aboriginal Corporation, who were instrumental in achieving the liquor restrictions, recognised that the restrictions were "...just part of the process involved in making improvements — they were not the solution."
283. The expectation of the wider community for the Licensing Authority to be able to restrict trading conditions of liquor licences was voiced in an editorial in the *Sunday Times* newspaper, soon after the Liquor Licensing Court overturned the Director's decision to impose more restrictive trading conditions in Derby —

Common sense and alcohol

The saddest outcome of the Liquor Licensing Court decision to overturn restricted liquor sales in Derby would have been further harm to Aboriginal people.

But instead, the community has reacted with responsibility and common sense to put together a plan for a better future based on control of alcohol abuse.

The Derby accord was drawn up on Friday in a spirit of co-operation and concern involving liquor outlets, departments, agencies and Aboriginal people.

It was decided not only to voluntarily reinstate restrictions removed by the Liquor Licensing Court but to work on further initiatives to lessen the impact alcohol was having on the town.

Woolworths should be congratulated for taking the initiative and changing its mind about opposing the restrictions.

The other liquor outlets immediately got behind that move and went even further. A meeting was called and an agreement reached within the hour.

While the Derby outcome is positive the Government should press on with proposed legislation which will allow the Director of Liquor Licensing to use matters such as public health and community benefit as the basis for licensing restrictions.

Alcohol abuse in the North-West is not restricted to the Aboriginal community but it is within that community that the result of restricted sales has been most measurable.

In communities with restrictions, domestic violence has been reduced and hospitalisation through alcohol-related injuries cut by up to 30 per cent. Arrests are also down.

Families outside supermarkets in Derby were carrying bags of groceries — not just grog.

It is unfortunate that the restrictions perhaps impinge on the rights of the rest of the community.

But if responsible Aboriginal communities and organisations as well as liquor outlets agree to greater self-regulatory powers on alcohol they should have full community support as well as congratulations for at least trying.

284. The imposition of restrictive conditions after due process recognises that there are conflicting public and private interests which sometimes need to be addressed by an independent body, such as the Licensing Authority, a fact which was recognised by Murray J, in *Liquorland v Hawkins* (1997), when he commented —

...What will need to be borne firmly in mind is simply that the reasonable requirements of a relevant section of the public will be established by reference to the degree of convenience with which their needs may be met, having regard to the various factors and circumstances relevant in the particular case. **This will always be a value judgment and the obligation to make it has been reposed in the specialist tribunal established by the Act** [emphasis added].

Alternative Means of Achieving the Legislative Objectives

285. An alternative to the Licensing Authority imposing more restrictive conditions on liquor licensing would be to allow licensees to restrict liquor sales by agreement.

286. The disadvantage of this alternative is demonstrated by the experiences of both the Halls Creek Alcohol Action Advisory Committee and the Jalalikari Council Aboriginal Corporation in Tennant Creek, who could not achieve liquor restrictions without the intervention of the Western Australian or Northern Territory Liquor Licensing Authority.

Conclusion

287. The ability of the Licensing Authority to impose more restrictive conditions on liquor licences can contribute to a reduction in harm or ill-health due to the use of liquor.

Recommendation

288. It is recommended that the ability of the Licensing Authority to impose more restrictive conditions on liquor licences of its own motion should be maintained.

RESTRICTION 6: a licensee cannot sell or assign the right to carry on the business under the licence, or to assign the licence itself, without the prior approval of the Director of Liquor Licensing (section 84)

289. This restriction is considered anti-competitive because a licensee cannot sell or assign the right to carry on business under the licence, or to assign the licence itself, without the prior approval of the Director of Liquor Licensing.

290. The object addressed is object 5 (2) (d), to provide adequate controls over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

291. A contract for the sale or assignment of the right to carry on business under a licence that is not subject to a condition precedent (under which the prior approval of the Director of the proposed transfer of the licence) may be void.
292. A contract for the sale or assignment of the right to carry on business under a licence is required to be consented to by the licensee.

Potential Advantages of the Restriction

293. Settlement of sales before the new licensee is vetted and approved is prevented, so that persons who are not fit to be licensed do not take over licensed premises.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 6.1	A contract for the sale or assignment of the right to carry on business under a licence that is not subject to the condition precedent may be void.
How:	Legislative requirement
Impact:	Contract may be void and parties may be deemed to have committed an offence under section 166 of the Act if condition precedent is not included
Impacts when:	At the time the licence is sought to be transferred
Impacts on whom:	Licensee, applicant and lessor
Public objectives impacted:	Proper regulation of the liquor industry
EFFECT 6.2	A contract for the sale or assignment of the right to carry on business under a licence is required to be consented to by the licensee
How:	Requirement of the <i>Liquor Licensing Act 1988</i>
Impact:	A licence may not be transferred under section 84 (1) (a) (ie pursuant to a contract for the sale or assignment of the right to carry on business under the licence) unless the current licensee consents to the application
Impacts when:	At the time the licence is sought to be transferred
Impacts on whom:	Licensee, applicant and lessor
Public objectives impacted:	Proper regulation of the liquor industry

Potential Advantages and Benefits

EFFECT 6.2	Settlement of sales before the new licensee is vetted and approved is prevented, so that persons who are not fit to be licensed do not take over licensed premise.
How:	Legislative requirement for Director's approval prior to the proposed transfer having effect
Impact:	Barrier to entry
Impacts when:	Prior to settlement on the transfer of business being effected
Impacts on whom:	Applicants who are seeking the transfer of a liquor licence.
Public objectives impacted:	Avoidance of public "bads".

Assessment of Public Benefit

294. For all intents and purposes, the process for transferring an existing licence from one party or another, is not entirely different from the process for the grant of a new licence, excepting that issues surrounding the amenity of the area and the impact of the grant of the licence have previously been addressed.
295. The approval process for the persons or companies comprising the new licensee is exactly the same as for the grant of a new licence, ie the persons have to be approved by the Licensing Authority as 'fit and proper' for the purposes of the liquor industry. A full examination of the 'fit and proper' restriction is discussed at Restriction 1 and will not be duplicated here.
296. The aim of the condition precedent in any contract for the sale or assignment of the right to carry on business under a licence is to prevent settlement occurring before the new licensee has been vetted and approved, so that persons who are not fit to be licensed do not take over licensed premises.

Alternative Means of Achieving the Legislative Objectives

297. For a full discussion on alternative means to the licensing requirement, see discussion on Restriction 35.
298. For a full discussion on alternative means to the 'fit and proper' requirement, see discussion on Restriction 1.
299. An alternative to requiring a contract for the sale or assignment of the right to carry on business under a licence being consented to by the licensee would be to allow an application to transfer the licence to be lodged by any party.

300. An alternative to requiring a contract for the sale or assignment of the right to carry on business under a licence to be expressly subject to the prior approval of the Director of Liquor Licensing is to amend section 84 (1) (a) to provide instead that every contract for the sale or assignment of a licensed business is impliedly subject to a condition that the contract does not take effect until the transfer is approved by the Director of Liquor Licensing. It should further be specified that the parties cannot agree to exclude this condition, but that they may apply to the Director to waive it in a particular case.
301. Related to this, it should be made clear that a contract referred to in section 84 (1) (a) is such a conditional contract.

Conclusion

302. The Licensing Authority should continue to control the transfer of licences.

Recommendation

303. It is recommended that restrictions on the ability of a licensee to sell or assign the right to carry on the business under the licence should be maintained, subject to the requirement for the condition precedent in every contract for the sale or assignment of a licensed business to be deleted and substituted with a provision that ensures that all such contracts are impliedly subject to a condition that the contract does not take effect until the transfer application is approved by the Director of Liquor Licensing.

RESTRICTION 7: every licence is subject to the conditions that the licensee maintain the licensed premises to a standard that is reasonable, having regard to the class of licence, the locality and the expectations of the public; and keep the premises and all fittings and fixtures in the premises thoroughly cleansed, in a hygienic condition and in good repair (section 99)

304. This restriction is considered anti-competitive because it imposes standards on licensees and requires mandatory compliance with those standards.
305. The object addressed is object 5 (2) (a), to contribute to the proper development of the liquor industry.
306. This restriction requires licensees to keep licensed premises at an acceptable standard. It also allows the Director to issue directions to licensees or owners of licensed premises to remedy defects in the premises.

Potential Disadvantages of the Restriction

307. The Licensing Authority imposes standards on all licensees.

Impacts on whom:	Licensees/Owners
Public objectives impacted:	Life expectancy/health

Assessment of Public Benefit

310. The requirement that licensees maintain licensed premises to a reasonable standard prevents commercial outcomes from competition in that a minimum standard is imposed on the liquor industry by a regulatory authority.
311. However, the effect of the restriction is mitigated by the fact that a minimum standard is imposed, and there is no restriction on licensees maximising commercial outcomes by exceeding the minimum standards and raising the standard of the licensed premises so that they are more competitive.
312. The Licensing Authority is cognisant of the legislative requirements of State and Local Government authorities and this recognition is adequately provided for in the Liquor Licensing Act. Unfortunately, the legislation of other authorities appears inadequate for the liquor industry, in that the legislation appears to specifically exclude provisions for setting standards for licensed premises.
313. It is the Licensing Authority's policy to use the standards of other authorities where they are adequate, and strengthen those requirements where they are found lacking. In some sectors of the liquor industry, no legislative body other than the Licensing Authority has the power to act.

Alternative Means of Achieving the Legislative Objectives

Allow the market and commercial outcomes to dictate minimum standards

314. An alternative to imposing standards on licensed premises is simply to allow consumers to determine what premises they prefer to patronise based on the standards of the premises, and let the market and commercial outcomes dictate acceptable minimum standards.
315. It is likely that the market would signal the need for a better standard of licensed premises in regional and other areas if consumer demand was not being satiated, with persons of entrepreneurial spirit developing new premises where commercial return was feasible. However, such an outcome would be unlikely to occur in those cases where the size of the market is too small to justify a new entrant.
316. While it could be argued that there would still be a choice between licensed and unlicensed venues, it is considered that the imposition of standards by the Licensing Authority achieves the intent of object 5 (2) (c). However, the Licensing Authority should only be empowered to impose such conditions in circumstances where market forces fail due to licensed premises enjoying a degree of monopoly power.

The Role of Local Government

317. Local Government councils are responsible for town planning, new developments, new buildings, modifications and extensions to existing buildings, public health and hygiene under the *Local Government Act 1995* and *Health Act 1911*.
318. However there are inadequacies in the application of those laws to licensed premises in that the —
- (a) Health Act specifically excludes from its operation certain aspects of the liquor industry; and
 - (b) Local Government Act limits the standards of the Building Code of Australia to building licences issued after their promulgation. Therefore, because these regulations cannot be enforced retrospectively, existing substandard licensed premises would remain substandard.
319. In the 1994 *Review of the Liquor Licensing in Western Australia*, the reviewing Committee considered the possibility of transferring the Licensing Authority's responsibility for setting the standards of licensed premises to Local Government Authorities through a State variation to the Building Code of Australia. This would effectively hand over the authority to control the building and maintenance of licensed premises to Local Government - subject to the Licensing Authority retaining reserve power to intervene, if necessary.
320. The Committee reasoned that this approach would remove an apparent duplication of duties undertaken by the Licensing Authority and Municipal Environmental Health Officers, and also eliminate industry complaints about varying standards between the Licensing Authority and Local Government.
321. However, this recommendation was predicated upon the deficient provisions of the Health Act and Local Government Act being strengthened.
322. The Review recommended —
- That to avoid duplication of building inspections, the requirements of the Liquor Licensing Division relating to bars and toilets be transferred to Local Government through a State variation to the Building Code of Australia; but that the Liquor Licensing Division retain powers to ensure that the standards of all licensed premises are maintained and to take into account any failure to observe local government or other statutory requirements.
 - That ongoing maintenance inspections of licensed premises become the responsibility of Local Government.
 - That all licensed premises be covered under the Health Act (Public Building Code) to enable Local Government to impose number limitations on licensed premises.

- Those sections of the Health Act dealing with “Eating Houses” being amended to apply to hotels, taverns and clubs to enable Local Government inspection.

Conclusion

323. From a public policy perspective, it makes more sense for issues relating to health and building standards to fall within the parameters of the Health Act and Local Government Act. If these existing laws are inadequate, it would appear preferable to amend those Acts so that they relate to licensed premises, rather than maintain discordant provisions within the Liquor Licensing Act.

324. It should be noted, in this respect, that the local government of the district in which the licensed premises are situated, or of any adjoining district are empowered by section 95 of the Act to make a complaint to the Liquor Licensing Court where the licensed premises —

- (a) have fallen into disrepair;
- (b) are otherwise in an unsatisfactory condition; or
- (c) contravene the requirements of a written law as to planning, building, health or safety,

and where proper cause for disciplinary action is found, the Court may issue a reprimand, impose a more restrictive condition on the licence, vary or cancel conditions on the licence, suspend or cancel the licence, or disqualify the licensee.

325. However, it is considered that a residual power to impose standards should be maintained by the Licensing Authority to achieve the intent of object 5 (2) (c), to be exercised only —

- (a) when requested by a local authority, after a licensee has failed, or refused to comply with the local authority’s requirements; or
- (b) where market forces fail, due to licensed premises enjoying a degree of monopoly power in regional areas.

Recommendation

326. It is recommended that —

- (a) the *Health Act 1911* and *Local Government Act 1995* be amended so that the provisions of those Acts relate to licensed premises;
- (b) section 99 (1) of the Liquor Licensing Act be amended to provide for standards of licensed premises to be determined by Local Government authorities;

- (c) section 99 (2) be amended to provide for the Director to require the licensee to take specified action, carry out specified works or provide specified things, if a Local Government authority advises the Director that a licensee has failed to comply with the standards required by that Local Government authority; and
- (d) section 99 (3) be relied upon to impose standards where market forces fail, due to licensed premises enjoying a degree of monopoly power in regional areas or country towns.

RESTRICTION 8: a person may not assume a position of authority in a body corporate that holds a licence; or being a shareholder in a proprietary company that holds a licence, increases or decreases that shareholding, without the approval of the Licensing Authority (section 102)

- 327. This restriction is considered anti-competitive because it prohibits changes to the corporate management and control of corporate licensees without the approval of the Director of Liquor Licensing.
- 328. The object addressed is 5 (2) (d) to provide adequate controls over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.
- 329. This restriction provides that approval must be obtained when a person assumes a position of authority in a licensee company, or changes a shareholding in a proprietary company.
- 330. The restriction relates to the 'fit and proper' requirement by preventing unfit persons from benefiting from a liquor licence by assuming a position of authority in a body corporate that holds a licence, or by acquiring shares in a proprietary company that holds a licence.
- 331. As a full discussion of the 'fit and proper' requirement is considered at Restriction 1, it is not proposed to duplicate that discussion here.
- 332. This restriction will stand or fall on the basis of the recommendations in respect of Restriction 1.
- 333. Any changes to the entities in the corporate structure, excluding any increasing or decreasing of shareholding by a person already approved by the Licensing Authority
- 334. However, the opportunity could be taken to simplify the provision so that the restriction in section 102 (1) (a) relates to any change in the corporate structure of a body corporate that holds a licence. Section 102 (1) (b) could also be amended so that the provisions do not apply in respect of persons who have previously been found to be 'fit and proper' who are increasing or decreasing their shareholding in a body corporate that holds a licence.

Recommendation

335. It is recommended that the restriction be maintained, but that section 102 (1) be amended so that a person may not, without the approval of the Licensing Authority make any change in the corporate structure of a body corporate that holds a liquor licence and that section 102 (1) (b) be repealed.

RESTRICTION 9: a person who becomes an owner of licensed premises is required to give notice in writing to the Director of the interest acquired within 7 days of acquiring it and an owner of licensed premises who changes from the address previously notified to the Director, shall within 7 days of the change, give notice of the change to the Director (section 103)

336. This restriction is considered anti-competitive because it requires the compulsory provision of information within a specified time frame.

337. The object addressed is object 5 (2) (a), to regulate and contribute to the proper development of the liquor industry.

Potential Disadvantages of the Restriction

338. An owner of licensed premises must comply with the requirement.

Potential Advantages of the Restriction

339. In certain circumstances an owner can exercise rights in respect of a licence (i.e. section 87) and notification of who the owner is can streamline these processes.

340. In certain circumstances, work orders can be served on owners of licensed premises. As such, information as to their identity and address is very important to the Licensing Authority.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 9.1	Owners must comply with the requirement.
How:	They must notify the Director in writing within 7 days of acquiring an interest in licensed premises or in changing registered address.
Impact:	Negligible.
Impacts when:	At time of purchase or change of address.
Impacts on whom:	Owners of licensed premises.
Public objectives impacted:	Accuracy of public records/information.

Potential Advantages and Benefits

EFFECT 9.2	Knowledge of owners of licensed premises and their addresses can assist the Licensing Authority in timely processing of certain applications.
How:	If the owners have notified the Director of their interest and/or address, specific inquiries in respect of these matters is not required when an appropriate application is lodged.
Impact:	Applications will not be hindered by additional inquiries into the identity/address of the owner.
Impacts when:	On going.
Impacts on whom:	Licensees/Owners; The Licensing Authority.
Public objectives impacted:	Uncertainty/risk.
EFFECT 9.3	Information as to the identity and address of owners is important because work orders can be served on owners of licensed premises.
How:	Legislative provisions of the Liquor Licensing Act.
Impact:	The ability of the Licensing Authority to carry out its functions is enhanced by the requirement for owners the Director.
Impacts when:	At the time the authority is requested to consider certain applications or when it wishes to serve orders on owners.
Impacts on whom:	The Licensing Authority
Public objectives impacted:	Proper regulation of the liquor industry.

Assessment of Public Benefit

341. The requirement that an owner of licensed premises advise the Director in writing within 7 days of acquiring an interest in licensed premises, or of changing their address, is a fairly minimal obligation and is unlikely to incur significant costs to the owner. Furthermore, the cost of the Licensing Authority being informed of the identity/address should not be borne by the public.
342. The Licensing Authority's need to be informed of the identity/address of owners is important to its overall effectiveness.

Alternative Means of Achieving the Legislative Objectives

343. While there are alternative means available to the Licensing Authority to inform itself about the identity and addresses of owners of licensed premises, such as searching certificates of title, these alternatives would impose additional costs on the Licensing Authority, either in terms of financial or human resources and therefore are not considered as suitable alternatives.

344. It would also be possible to simply rely on owners providing the required information at the time of lodging an application. However, this is not seen as a better alternative in that it may possibly lengthen approval processes and does not address issues relative to serving orders on owners.

Conclusion

345. That requiring owners of licensed premises to notify the Licensing Authority on acquiring an interest in licensed premises, or in changing their address, is an important source of necessary information.

Recommendation

346. It is recommended that the requirement for owners of licensed premises to notify the Licensing Authority on acquiring an interest in licensed premises or of changing their address should be maintained.

RESTRICTION 10: a licensee cannot enter into partnership with another person in relation to the business carried on under the licence; enter into any agreement or arrangement under which another person may participate in the proceeds of the business carried on under the licence; or remunerates another person by reference to the quantity of liquor sold, without the prior approval of the Director (section 104)

347. This restriction is considered anti-competitive because it infringes on a licensee's ability to enter into partnership and other types of agreements or arrangements, without the prior approval of the Director of Liquor Licensing.
348. The object addressed is 5 (2) (d) to provide adequate controls over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.
349. As with Restriction 8 (Approval of corporate management and control), the prohibition on profit sharing is another way that the Licensing Authority can ensure that 'unfit persons' do not benefit directly or indirectly from the sale, disposal or supply of liquor.
350. As a full discussion of the 'fit and proper' requirement is considered at Restriction 1, it is not proposed to duplicate that discussion here.
351. This restriction will stand or fall on the basis of the recommendations in respect of Restriction 1.

RESTRICTION 11: When liquor is being sold to lodgers there shall be no more than 6 adult guests of each lodger present at the time the liquor is consumed; and the liquor shall not be consumed, except either personally by a lodger, or by an adult guest of a lodger and at the expense of the lodger (section 106 (1) (b))

352. This restriction is considered anti-competitive because it limits the circumstances in which liquor can be sold to and consumed by lodgers at licensed premises.

353. The object addressed is object 5 (1) (a), to regulate the sale, supply and consumption of liquor.

Potential Disadvantages of the Restriction

354. The sale of liquor to lodgers becomes a complicated transaction.

Potential Advantages of the Restriction

355. It ensures that sales to lodgers are genuine.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 11.1	The sale of liquor to lodgers becomes a complicated transaction.
How:	The licensee must ensure that — <ul style="list-style-type: none">• there will be no more than 6 adult guests present for every lodger; and• liquor shall not be consumed, except by the lodger or by one of the 6 guests, at the expense of the lodger.
Impact:	Minor
Impacts when:	At time of sale.
Impacts on whom:	Licensees
Public objectives impacted:	Avoidance of Public “bads”.

Potential Advantages and Benefits

EFFECT 11.2	The restriction ensures that sales to lodgers are genuine.
How:	The number of persons to whom a lodger can supply with liquor is restricted and the lodger concerned must purchase the liquor.
Impact:	The sale of liquor to lodgers must be genuine.
Impacts when:	On going.
Impacts on whom:	Lodgers at licensed premises
Public objectives impacted:	Distributional

Assessment of Public Benefit

356. By limiting the number of guests to which a lodger may supply liquor to six, this restriction ensures that liquor sold outside of the permitted hours of trade is only to bona fide lodgers and their guests.
357. It provides for an unambiguous and quantifiable assessment of persons on licensed premises outside of permitted trading hours, and as such, is a useful tool in detecting breaches of the Act's permitted trading hours.
358. Alternatively, it is an arbitrary, inflexible number imposed on licensees and their lodgers that does not take into account the fact that lodgers may legitimately have more than six adult guests visiting the premises at one time.
359. In addition to the six guest threshold, section 106 (1) (c) provides that outside of the permitted hours of trade, liquor shall not be consumed except by a lodger or by an adult guest of a lodger, in the presence of the lodger and at the expense of the lodger.

Alternative Means of Achieving the Legislative Objectives

360. It is probable that should the six-guest limit be deleted, the provisions of section 106 (1) (c) would suffice to ensure that the guests of lodgers are genuine.
361. However, given that the deletion of the six-guest threshold would remove a useful tool in detecting breaches of the Act's permitted trading hours and instead rely on the honesty of the licensee to enforce the requirement, a residual power should be retained to enable the Director to impose a limitation on the number of guests a lodger may introduce, should a licensee be found to contravene this requirement.

Conclusion

362. The six-guest threshold on the number of guests a lodger may supply with liquor on licensed premises outside of the permitted trading hours cannot be justified.

Recommendation

363. It is recommended that —
- (a) section 106 (1) (b) of the Act be deleted; and
 - (b) section 64 (3) of the Act be amended to provide power for the Director to impose a condition limiting the number of guests a lodger may supply with liquor outside of the permitted trading hours.

RESTRICTION 12: a person shall not, on licensed premises, sell or supply liquor, or cause or permit liquor to be sold or supplied to, a drunken person; allow or permit a drunken person to consume liquor; obtain or attempt to obtain liquor for consumption by a drunken person; or aid a drunken person in obtaining or consuming liquor (section 115 (2))

364. This restriction is considered anti-competitive because it prevents sales by licensees to customers, who, albeit in a drunken state, wish to consume more liquor.
365. The object addressed is object 5 (1) (b), to minimize harm or ill-health caused to people, or any group of people, due to the use of liquor.
366. This issue was discussed in Victoria's *Liquor Control Act 1987 Review* (page 89) where it was found —

This restriction is anti-competitive because it prevents sales by licensees to customers who, albeit intoxicated, wish to consume more liquor.

Potential Disadvantages of the Restriction

367. Licensees forgo revenue from sales to drunken persons.

Potential Advantages of the Restriction

368. Drunken persons may not be aware of their own best interests, and the curtailment of further drinking reduces the risk of the harms of mortality and morbidity.
369. The associates of drunken persons have a reduced risk of experiencing unpleasant or dangerous outcomes, including violence and other patrons are afforded more congenial drinking conditions
370. Licensees are provided with a justification for not serving intoxicated persons.
371. Local amenity is protected by the containment of public nuisance, road trauma, accidents and the like.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 12.1	Licensees forgo sales to drunken persons.
How:	They are prohibited from serving drunken persons.
Impact:	Less sales by licensees.
Impacts when:	When a customer's speech, balance, coordination, or behaviour is noticeably affected by liquor.
Impacts on whom:	Licensees.
Public objectives impacted:	Life expectancy/health.

Potential Advantages and Benefits

EFFECT 12.2	Drunken persons may not be aware of their own best interests, and the curtailment of further drinking reduces the risk of the harms of mortality and morbidity.
How:	The Liquor Licensing Act prohibits a licensee from selling liquor to a drunken person.
Impact:	Minimisation of liquor related harm and ill-health
Impacts when:	When licensees refuse to sell or supply more liquor to drunken persons
Impacts on whom:	Drunken persons
Public objectives impacted:	Life expectancy/health
EFFECT 12.3	Licensees are provided with a justification for not serving intoxicated persons
How:	They can claim compliance with the Liquor Licensing Act and licence conditions
Impact:	It is easier for a licensee to refuse service to a drunken person
Impacts when:	The customer exhibits the prescribed characteristics of drunkenness
Impacts on whom:	Licensee/consumer
Public objectives impacted:	Reduced uncertainty/risk
EFFECT 12.4	Other patrons are afforded more congenial drinking conditions.
How:	Persons who display characteristics associated with drunkenness are prevented from further liquor consumption and are therefore more orderly
Impact:	Drunken persons do not disrupt the amenity of licensed premises.
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Avoidance of public “bads”.
EFFECT 12.5	Local amenity is protected by the containment of public nuisance, road trauma, accidents and the like
How:	Persons who display the prescribed characteristics of drunkenness are prevented from further liquor consumption and are therefore more orderly

Impact:	Persons who display the prescribed characteristics of drunkenness and are prevented from further consumption of alcohol are likely to display more socially acceptable behaviour
Impacts when:	On leaving licensed premises
Impacts on whom:	Neighbours
Public objectives impacted:	Avoidance of public “bads”.

Assessment of Public Benefit

372. The evidence in research literature regarding the association between high levels of liquor and harm indicates that the benefits of this restriction far outweigh its cost. The restriction places a socially important obligation on licensees to be responsible for not allowing the sale or supply of liquor to drunken persons on licensed premises. Given that licensees profit from the sale of liquor, it is an appropriate obligation to place on licensees.

Alternative Means of Achieving the Legislative Objectives

373. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

374. Continuation of restrictions on the ability of licensees to serve liquor to persons who display the signs of drunkenness appear to be justifiable.

Recommendation

375. It is recommended that the restriction on licensees selling or supplying liquor to drunken persons in section 115 (2) of the Liquor Licensing Act should be maintained.

RESTRICTION 13: a person shall not carry on business for which a licence is required under any name other than that of the licensee unless the Director has approved the use of the name (section 116 (3))

376. This restriction is considered anti-competitive because it diminishes the marketing potential of licensed premises by subjecting the names of licensed premises to an approval process.

377. The object addressed is object 5 (2) (a), to contribute to the proper development of the liquor industry in the State.

Potential Disadvantages of the Restriction

378. The ability of licensees to market their licensed premises by any trading name they deem suitable is restricted.

Potential Advantages of the Restriction

379. Approved trading names identify the specific nature of the premises.
380. Approving trading names avoids public offence through the use and promotion of inappropriate names.
381. Approving the trading names of licensed premises also seeks to address the risk to consumers of information asymmetry arising from licensees naming premises to indicate a type of liquor sale that may not be permitted under the licence.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 13.1	The ability of licensees to market their licensed premises by any trading name they deem suitable is restricted
How:	Trading names of licensed premises are required to be approved by the Licensing Authority
Impact:	Mandatory compliance with approval process is imposed on licensees
Impacts when:	On going
Impacts on whom:	Liquor licensees
Public objectives impacted:	Avoidance of public “bads”

Potential Advantages and Benefits

EFFECT 13.2	Approved trading names properly identify the specific nature of the premises
How:	The approval process does not permit a premises licensed under one type of licence to be promoted as if it operated under a different type of licence
Impact:	Consumers are better informed about the nature of the premises
Impacts when:	On going
Impacts on whom:	Consumers Members of the public
Public objectives impacted:	Uncertainty/risk Information asymmetry

EFFECT 13.3	Approval process for trading names avoids public offence through the use and promotion of inappropriate names
How:	Trading names of licensed premises are required to be approved by the Licensing Authority
Impact:	Inappropriate names are not approved
Impacts when:	On going
Impacts on whom:	Liquor licensees and the general public
Public objectives impacted:	Avoidance of public “bads”.

Assessment of Public Benefit

382. The public benefits associated with the Licensing Authority approving the trading names of licensed premises are associated with identifying the specific nature of the premises and not offending standards of public decency and are considered to outweigh the restriction imposed on business through the imposition of the approval process for names of licensed premises.

Alternative Means of Achieving the Legislative Objectives

383. Although Western Australia has a piece of legislation titled Business Names Act 1962 that includes provision for restricting the registration of business names that are undesirable, it does not contain provision for ensuring that names of businesses identify the specific nature of the business or accurately reflects the type of liquor licence the business trades under.

Conclusion

384. While there may appear to be a duplication of resources for the Commissioner for Fair Trading to register business names and for the Director of Liquor Licensing to approve the trading names of licensed premises, the reasons for the approvals are significantly different so as to justify continuation of the restriction contained within section 116 (3) of the Liquor Licensing Act.

Recommendation

385. It is recommended that the requirement for the trading names of licensed premises to be approved under section 116 (3) should be maintained.

RESTRICTION 14: liquor is not permitted to be sold, supplied or consumed to juveniles on licensed or regulated premises (section 121)

386. This restriction is considered anti-competitive because it restricts the opportunity of licensees to sell liquor to juveniles.

387. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (b), to minimize harm or ill health caused to people, or any group of people, due to the use of liquor.

Potential Disadvantages of the Restriction

388. Licensees forgo revenue from sales to under age persons.

Potential Advantages of the Restriction

389. Juveniles, who may not always understand their own best interests, are discouraged from drinking.

390. Local amenity is protected by containment of public nuisance, accidents and the like that may result from unrestricted consumption of liquor by juveniles.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 14.1 **Licensees forgo revenue form sales to under age person.**

How: They are prohibited from serving juveniles

Impact: Less sales by licensees

Impacts when: On going

Impacts on whom: Licensees

Public objectives impacted: Avoidance of public “bads”.

Potential Advantages and Benefits

EFFECT 14.2 **Juveniles, who may not always understand their own best interests, are prohibited from being present on licensed premises, unless unaccompanied by a responsible adult, and from consuming liquor on licensed premises**

How: Offence provisions included in the Liquor Licensing Act

Impact: Juveniles are prevented from being on licensed premises and consuming liquor on licensed premises

Impacts when: On going

Impacts on whom: Juveniles

Public objectives impacted: Avoidance of public “bads”;
Life expectancy/Health

EFFECT 14.3	Local amenity is protected
How:	Containment of public nuisance, accidents and the like that may result from unrestricted consumption of liquor by juveniles
Impact:	Public nuisance is lessened.
Impacts when:	On going
Impacts on whom:	Public of Western Australia; Juveniles
Public objectives impacted:	Avoidance of public “bads”.

Assessment of Public Benefit

391. There is an overwhelming public interest in the protection of juveniles from an association with licit and illicit drugs. As such, the restrictions on business contained in the Liquor Licensing Act in relation to the presence of unaccompanied juveniles on licensed premises and on the serving of liquor to juveniles on licensed premises clearly outweigh the costs imposed on licensees by prohibiting the service of liquor to juveniles and on the juveniles themselves, in preventing their unaccompanied access to licensed premises and consumption of liquor on licensed premises.

Alternative Means of Achieving the Legislative Objectives

392. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

393. Continuation of restrictions on the ability of licensees to selling or supplying liquor to juveniles or permitting unaccompanied juveniles to enter or remain on licensed premises appear to be justifiable.

Recommendation

394. It is recommended that the restriction on licensees selling or supplying liquor to juveniles or permitting unaccompanied juveniles to enter or remain on licensed premises in section 121 of the Liquor Licensing Act should be maintained.

RESTRICTION 15: a juvenile may not be employed or engaged in the sale, supply or serving of liquor on or from licensed premises (section 121 (5) (d))

395. This restriction is considered anti-competitive because it denies licensees the opportunity to employ persons under the age of eighteen in the sale, supply or service of liquor.

396. The object addressed is object 5 (2) (d), to provide adequate controls over persons directly involved in the sale of liquor.

397. At page 14 of its submission to this review, the Restaurant and Catering Industry Association of Western Australia (Inc) raise the issue of employment of minors on licensed premises —

The Restaurant and Catering Industry Association believes that the current restrictions relating to the employment of minors results in a market disadvantage to young persons. It should be reviewed and changed to allow for the employment of persons at 16 years of age where they are enrolled in a prescribed course of training for the hospitality industry.

398. Although section 121 (4) of the Act provides an offence for a juvenile to enter or remain on any part of a licensed premises, subsection (5) specifically states that subsection (4) does not apply to —

- (a) a juvenile engaged in a training course approved by the Director, when so present in accordance with the requirements of that course (subsection (5) (c)); and
- (b) the presence of a juvenile employed on the premises, otherwise than in the sale or supply of liquor (subsection 5 (d)).

399. The Restaurant and Catering Industry Association of WA (Inc) suggests that the prohibition on minors selling and supplying liquor is a “...direct restriction on employment and as such needs to be justified under competition policy.”

Potential Disadvantages of the Restriction

400. Employers face higher labour costs than would be applicable if juveniles could be employed.

401. Juveniles have restricted employment opportunities in the hospitality industry.

Potential Advantages of the Restriction

402. Juveniles may not have sufficient maturity or experience to make judgements about the possible intoxication of customers, and may be less capable of refusing service to minors and intoxicated persons.

403. Persons over the age of 18 who seek employment in the hospitality industry do not face competition from juveniles.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 15.1

Employees face higher labour costs

How:

Inability to employ junior staff in the sale and supply of liquor at lower rates of pay

Impact:

Unquantified

Impacts when:	On going
Impacts on whom:	Licensees
Public objectives impacted:	Economic/financial
EFFECT 15.2	Juveniles have restricted employment opportunities
How:	Prohibition on people under the age of 18 being employed in the sale and supply of liquor
Impact:	Unquantified
Impacts when:	On going
Impacts on whom:	Juveniles
Public objectives impacted:	Economic/financial; Distributional
<i>Potential Advantages and Benefits</i>	
EFFECT 15.3	Juveniles, may not have sufficient maturity or experience to make judgements about the possible intoxication of customers, and may be less capable of refusing service to minors and intoxicated persons
How:	Many of the requirements imposed on licensees by the legislation are also imposed on employees of the licensee
Impact:	Unquantified
Impacts when:	On going
Impacts on whom:	Public of Western Australia; Juveniles
Public objectives impacted:	Uncertainty/risk
EFFECT 15.4	Persons over the age of 18 who seek employment in the hospitality industry do not face competition from juveniles
How:	Licensees are prevented from employing juveniles for the sale and supply of liquor
Impact:	Unquantified
Impacts when:	On going
Impacts on whom:	Persons seeking employment who are over the age of 18
Public objectives impacted:	Employment

Assessment of Public Benefit

404. The restriction is based on the view that juveniles are unqualified to make judgements about the possible intoxication of customers, and may have difficulty in refusing service to other juveniles or to intoxicated persons.
405. Many of the obligations imposed on licensees are also imposed on their employees. As such, it would not be fair to hold a juvenile, who may well have immature judgement, as legally responsible for any contravention of the Act's provisions.

Alternative Means of Achieving the Legislative Objectives

406. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

407. While the prohibition on juveniles selling and supplying liquor undoubtedly impacts on employment and contributes to business costs, there is a clear public benefit in retaining the restriction and protecting juveniles from being placed in the invidious position of having to make important judgments in order to enforce legislative provisions, without necessarily having the maturity to realistically make those judgements.

Recommendation

408. It is recommended that the prohibition on the employment of juveniles in the sale and supply of liquor in licensed premises be maintained.

RESTRICTION 16: a person who is required to make a record shall keep and retain the record on licensed premises, or in some other place in the State approved by the Director for the purpose, for 6 years after the date on which it was compiled and make the record available for inspection by an authorized officer (section 145 (3))

409. This restriction is considered anti-competitive because it requires mandatory compliance with a statutory directive that records are kept for 6 years.
410. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor and object 5 (1) (b), to minimize harm or ill-health due to the use of liquor.

Potential Disadvantages of the Restriction

411. Persons required to make a record have to keep and retain the record for 6 years after the record was compiled.

Potential Advantages of the Restriction

412. There are significant public health benefits to be gained in the collection of wholesale liquor purchases.
413. Payments made by the State under the liquor subsidy scheme can be audited and verified.

Assessment of Costs and Benefits

<i>Potential Disadvantages and Costs</i>	
EFFECT 16.1	Persons are required to make a record and have to keep and retain the record for six years after the record was compiled
How:	Requirement of the Liquor Licensing Act
Impact:	Record keeping is imposed on prescribed licensees and may result in higher administrative costs
Impacts when:	On going
Impacts on whom:	The holders of wholesaler's, producer's and some special facility licences; the Licensing Authority
Public objectives impacted:	Economic/financial
EFFECT 16.2	There are significant public health benefits to be gained in the collection of wholesale liquor purchases
How:	Collected information is passed onto the National Centre for Research into the Prevention of Drug Abuse for analysis and to aid research into such things as harm minimization strategies
Impact:	Significant impact on research
Impacts when:	On going
Impacts on whom:	National Centre for Research into the Prevention of Drug Abuse; The Licensing Authority; The public of Western Australia.
Public objectives impacted:	Avoidance of public "bads"; Health/life expectancy

Potential Advantages and Benefits

EFFECT 16.3	Payments made by the State under the liquor subsidy scheme can be audited and verified
How:	By physical inspection and audit of the records
Impact:	Assists in correcting incorrect subsidy applications and in the avoidance of fraudulent claims
Impacts when:	On going
Impacts on whom:	The Licensing Authority
Public objectives impacted:	Economic/financial; Avoidance of public “bads”.

Assessment of Public Benefit

414. Although there is a personal cost related to keeping the records required by section 145 of the Liquor Licensing Act, the cost is mitigated by a number of factors, such as the fact that the records are likely to be required to be kept for taxation purposes in any event and that the persons who are required to keep the records benefit from payments under the liquor subsidy scheme.
415. Notwithstanding the above, there is a significant public benefit in the information collected from such records being provided, in strict confidence and in a manner that does not allow for identification of individual licensed premises, to public health researches, such as the National Centre for Research into the Prevention of Drug Abuse, to aid in achieving the Act’s harm minimization object.

Alternative Means of Achieving the Legislative Objectives

416. None identified.

Conclusion

417. The period stated is a standard period normally required in respect of accounting records to substantiate information/declarations lodged with the Licensing Authority and to support refunds or payments claimed, such as those under the liquor subsidy scheme.

Recommendation

418. That the restriction requiring prescribed persons to make a record and retain the record on licensed premises, or in some other place in the State approved by the Director for the purpose, for 6 years after the date on which it was compiled, and make the record available for inspection by an authorized officer should be maintained.

THE LICENSING RESTRICTION

RESTRICTION 17: the Licensing Authority may exercise discretion to refuse an application, even if the applicant meets all the requirements of the Act or to grant an application, even if a valid ground of objection has been made out (section 33 (2))

419. This restriction is considered anti-competitive because an applicant who meets all the requirements of the Act, or an objector who establishes a valid ground of objection can still be denied from achieving their aims by the exercise of the Licensing Authority's discretion.

420. The objects addressed are object 5 (2) (a), to contribute to the proper development of the liquor industry; and object 5 (2) (d), to provide adequate controls over the sale and disposal of liquor.

Potential Disadvantages of the Restriction

421. Exercise of the Licensing Authority's discretion can contribute to uncertainty in business decisions.

Potential Advantages of the Restriction

422. The operation of the Licensing Authority's specialist knowledge enables it to consider factors which are external to the interests of the applicant or objector in determining an application in making a decision that is in the public interest.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 17.1	Exercise of the Licensing Authority's discretion can contribute to uncertainty in business decisions.
How:	It is impossible for applicants/objectors to foresee how the Licensing Authority will exercise its discretion in the planning of their application/objection.
Impact:	Applicants/objectors cannot be certain of achieving their aim even if they comply with all of the Act's statutory requirements.
Impacts when:	On going
Impacts on whom:	Applicants; objectors; the public of Western Australia.
Public objectives impacted:	Distributional.

Potential Advantages and Benefits

EFFECT 17.2	The operation of the Licensing Authority's specialist knowledge enables it to make decisions that are in the public interest
How:	Through the exercise of its discretion, the Licensing Authority is able to consider factors that are external to the interests of the applicant or objector in determining an application
Impact:	The exercise of the licensing authorities discretion may mean that outcomes vary from those perceived by the parties
Impacts when:	On going
Impacts on whom:	Applicants; Objectors; The public of Western Australia
Public objectives impacted:	Proper regulation of the liquor industry

Assessment of Public Benefit

423. The Licensing Authority is empowered to investigate any matter before it and should be able to ensure that any relevant public interest matters not entered into evidence by the parties can, where appropriate, be entered into the proceedings by the authority itself.
424. However, in doing so, the Licensing Authority is constrained by section 33 (1) of the Act and can only exercise its discretion where it considers that to do so is in the public interest.
425. The importance of the ability of the Licensing Authority to exercise discretion was highlighted in the matter of an application for the conditional grant of a liquor store licence by Gull Petroleum (WA) Pty Ltd, where at page 35 of his decision, Judge Greaves commented —

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

When the Licensing Authority comes to decide the merits of a particular application under s33 and s38 of the Act, it can now be seen that s5 (1)(b) in its context provides a positive indication of the considerations by which the decision is to be made in the exercise of its discretion in the public interest. It will be for the Licensing Authority in each case to consider the merits of the case on the evidence and information before it and determine how it should exercise its discretion within the scheme of the Act...

It will be necessary for the Licensing Authority to identify on the evidence and information before it in each case the fact or facts which it considers should on the merits activate its discretion to grant or refuse the grant...In each case, the Licensing Authority may identify such fact or facts of its own motion in accordance with s16(1)(b) of the Act and the general law relating to procedural fairness.

426. The cost of this restriction is somewhat mitigated by the fact that in *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1991) 6 WAR 380, at 400, Malcolm CJ, with whom Pidgeon and Nicholson JJ agreed, said:

In my view, the public interest as ascertained from the scope and purpose of the Act involves satisfying the reasonable requirements of the public to have liquor outlets consistent with good order and propriety in relation to the distribution and consumption of liquor, the proper regulation of such order and propriety and the collection of revenue by way of licence fees from the sale of liquor.

427. Similarly, in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, Dixon J, at 505, referred to the discretion given to an administrative body as:

...unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to the objects the legislature could have had in view.

428. Further clarification is provided in *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors* (2000) WASCA 258, where Ipp J, at para 29, referred to the Licensing Authority undertaking a weighing and balancing exercise, in the public interest, when conflict between the Act's objects arise:

Section 33 of the Act confers upon the Licensing Authority an absolute discretion to grant or refuse an application on any ground that the Licensing Authority considers in the public interest. The potential for harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, would be a powerful public interest consideration.

429. Therefore, while the Licensing Authority appears to be given extremely wide authority, the effect of these observations has been to show that it is not open ended discretion, but one that must be exercised in accordance with the provisions of the legislature and the general law of procedural fairness.

430. In this respect, section 16 (11) of the Liquor Licensing Act provides that the Licensing Authority shall ensure that each party to a proceeding before it is given a reasonable opportunity to present its case and, in particular, to inspect any documents to which the Licensing Authority proposes to have regard in making a determination in the proceedings and to make submissions in relation to those documents. This provision ensures that any information introduced or considered by the Licensing Authority, that is not entered into evidence by the applicant (or objector) concerned is entered on the public record.

Alternative Means of Achieving the Legislative Objectives

431. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

432. Where decisions of the Licensing Authority are required to be made in the public interest, the Licensing Authority should be able to introduce and consider relevant information that may not be entered into evidence by the applicant or objector concerned, provided that due process is followed and parties are given a reasonable opportunity to respond.

Recommendation

433. It is recommended that the restriction on business embodied in the Licensing Authority's ability to exercise discretion to refuse an application, even if the applicant meets all the requirements of the Act or to grant an application, even if a valid ground of objection has been made out in section 33 (1) should be maintained.

RESTRICTION 18: the Act's provisions for reviewing a decision of the Director of Liquor Licensing create a two-tier application process (section 25)

434. This restriction is considered anti-competitive because it constitutes an additional or duplicate barrier to entry.
435. The provisions of section 25 permit any person who is, as a party to proceedings before the Director, dissatisfied with a decision made by the Director in respect of those proceedings, to apply to the Court for a review of that decision.
436. Prior to amendments to the Act in May of 1998, section 25 (3) specifically provided that a review of a decision of the Director of Liquor Licensing was to be in the nature of a re-hearing. However, this provision was specifically removed from the Act in an effort to streamline the application process and reduce the cost of appearing before the Licensing Authority, as evidenced in the Minister's Second Reading Speech —

The objection process will be modified by removing issues relating to the suitability of premises and the probity of individual applicants from public dispute. In future, the process will rely on the competency of the Director of Liquor Licensing to assess these elements of an application. However, the Bill provides for the exercise of natural justice so that any person found 'unfit' can seek a review in the Liquor Licensing Court of the Director's decision...

To help simplify the licensing process, all decisions relating to applications will originally be heard by the Director of Liquor Licensing. The Liquor Licensing Court will provide for review of decisions made by the Director and will continue to hear disciplinary matters. The Director will also be able to refer matters of importance or of significance to the Court for consideration.

437. These amendments to the Act were specifically aimed at simplifying the licensing application process by deleting the requirement for a re-hearing of the original application.
438. However, since the Act has been amended, the Liquor Licensing Court has continued to hear applications *de novo* simply by ordering so. This can be seen in the following extract from the Liquor Licensing Court decision in respect of an Application for Review of a decision of the Deputy Director of Liquor Licensing in the matter of an application for the conditional grant of a liquor store licence by Woolworths (WA) Pty Ltd —

This is an application to review the decision of the Director of Liquor Licensing of 7 January 1999, whereby he refused an application for the conditional grant of a liquor store for premises known as Woolworths Supermarket Gateways situated at the Gateway Shopping Centre, corner Beelier Drive and Wentworth Parade, Success. The applicant for the conditional grant is dissatisfied with that decision and seeks a review of that decision pursuant to s25 (1) of the Act. **On 2 March 1999, the court ordered, *inter alia*, that the application for review be heard *de novo* [emphasis added].** The Court is, therefore, required to determine the application for conditional grant afresh on the evidence before it and is not fettered in so doing by the decision of the Director of Liquor Licensing...

439. In effect the ability of the Liquor Licensing Court to re-hear an application *de novo* constitutes a second tier, or additional barrier to market entrants, on the basis that —
- (a) a party to proceedings before the Director is dissatisfied with a decision made by the Director; and
 - (b) an apparent failure by the Judge of the Liquor Licensing Court to appreciate the nature of the amendments to section 25 (see paragraph 444).

Potential Disadvantages of the Restriction

440. The Act's review process constitutes a second-tier, or additional barrier to market entrants.

Potential Advantages of the Restriction

441. A party to proceedings who is dissatisfied with a decision of the Director can use the Act's review processes to significantly alter an application that has been refused by the Director.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 18.1	The Act's review process constitutes a second-tier, or additional barrier to market entrants.
How:	Applications for review of the Director's decisions are heard de-novo.
Impact:	Applicants/objectors are required to run two applications/objections before the Licensing Authority
Impacts when:	Following determination of an application by the Director of Liquor Licensing
Impacts on whom:	Parties to the proceedings
Public objectives impacted:	Distributional

Potential Advantages and Benefits

EFFECT 18.2	A party to proceedings who is dissatisfied with a decision of the Director can use the Act's review processes to significantly alter their application/objection
How:	The Liquor Licensing Court determines such applications afresh on the evidence before it, notwithstanding that it may be substantially different from the evidence placed before the Director
Impact:	Significant costs are borne by applicants/objectors in running duplicate applications or objections before both the Director of Liquor Licensing and the Liquor Licensing Court
Impacts when:	On going
Impacts on whom:	Applicants; Objectors The public of Western Australia
Public objectives impacted:	Distributional

Assessment of Public Benefit

442. When an application is heard *de novo* it is quite common for applicants or objectors to introduce new evidence and arguments so that, in effect, a significantly different application is argued before the Court, with additional legal costs borne by parties, than was previously argued before the Director.

443. For many market entrants, the cost of a full trial before the Director and a subsequent re-trial before the Court, just because someone is dissatisfied with the decision of the Director, which is probable given the adversarial nature of liquor licensing matters, is too cost prohibitive and cannot be justified.
444. This point is made clear in the Reasons for Judgement⁶ handed down by Judge Greaves on 3 May 2000 on an application for costs associated with review of a decision of the Director of Liquor Licensing, where at page 3 of the decision the Judge says —

Mr Mossenson also raised the question of the applicant for the licence being required to conduct its case twice. That, I think, is not a fact which should lead to the court exercising its discretion in these proceedings other than in accordance with the well-established principles. **It seems to me that if anything, the applicant for the licence was required to conduct its case twice as a result of the amendments which were made to the legislation recently and for no other reason** [emphasis added].

Alternative Means of Achieving the Legislative Objectives

445. None identified.

Conclusion

446. While it is agreed that some form of judicial review of the Director's decisions is appropriate, it would appear more conducive to competition to—
- (a) provide that there are no grounds to seek a review of the Director's decision, except upon a question of law;
 - (b) to limit any review to the evidence originally placed before the Director; and
 - (c) to specifically provide that a review of a decision of the Director of Liquor Licensing is not to be in the manner of a re-hearing.

Recommendation

447. It is recommended that section 25 be amended to —
- (a) provide that there are no grounds to seek a review of the Director's decision, except upon a question of law;
 - (b) limit any review to the evidence originally placed before the Director; and
 - (c) specifically provide that a review of a decision of the Director of Liquor Licensing is not to be in the manner of a re-hearing.

⁶ LLC No. 02/99 South Hedland Liquor Supplies

RESTRICTION 19: the general prohibition on two or more licences not being granted in respect of the same part of any premises (section 36)

448. This restriction is considered anti-competitive because it prohibits licensees from allowing other licensed businesses to be established or operated on any part of the defined licensed area.
449. The objects addressed are object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor; and object 5 (2) (a), to contribute to the proper development of the liquor industry.
450. It is generally considered that it is not possible to have two or more licences granted to the same premises. The underlying reason for the restriction is that it would be practically impossible to determine which of the licensees for a particular premise was responsible for the conduct of the premises and therefore any breaches that may be committed under the Act. The effect of this restriction is that two or more licences are prohibited from being granted in respect of the same part of any premises.

Potential Disadvantages of the Restriction

451. This restriction may limit the ability of licensees to minimise the cost of establishing licensed premises by locating their business in existing licensed premises; thereby negatively impacting on potential competition between liquor merchants.
452. Additionally, the restriction impacts on the ability of a licensee to offer a broader range of services by sub-letting or allowing other businesses to operate on the premises, and could therefore possibly restrict competition between licensees, and between licensed and unlicensed businesses.
453. The cost of the restriction is somewhat mitigated by the fact that exceptions are made for occasional licences and club restricted licences and that more than one licence may be granted in respect of defined separate parts of the same premises.

Potential Advantages of the Restriction

454. The benefit of this restriction is relative to the important public objective of reducing uncertainty or risk. The current requirement for licensed premises to be separately defined provides for easy identification by members of the public, the Licensing Authority and police officers of who is in control and, who has ultimate responsibility, for the licensed premises and any activity that occurs there. This is very important for controlling inappropriate liquor promotions, imposing harm reduction initiatives as licence conditions and in establishing liability in civil actions against irresponsible licensees.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 19.1	The Licensing Authority may not grant two or more licence in respect of the same part of any premises
How:	Restriction contained in the Liquor Licensing Act
Impact:	Barrier to entry
Impacts when:	On entry
Impacts on whom:	Potential market entrants who may seek to minimize the cost of establishing licensed premises by locating their business in existing licensed premises

Public objectives impacted: Economic/Financial

EFFECT 19.2	Impacts on the ability of a licensee to offer a broader range of services by sub-letting or allowing other businesses to operate on the premises. Possibly restrict competition between licensees, and between licensed and unlicensed businesses
How:	Two or more licences cannot be granted in respect of the same part of any premises
Impact:	Barrier to entry
Impacts when:	On entry
Impacts on whom:	Potential market entrants; Licensees who may seek to diversify

Public objectives impacted: Distributional

Potential Advantages and Benefits

EFFECT 19.3	Members of the public, the Licensing Authority and police officers have clear knowledge of who is in charge and responsible for licensed premises
How:	Only one licensee is permitted per licensed area
Impact:	The responsibility of the licensee for what occurs on the licensed premises leads to increased consumer confidence in liquor merchants and easier identification of who is responsible should improper practices occur at licensed premises and lead to harm or ill-health (ie. civil liability for serving practices)
Impacts when:	Continually
Impacts on whom:	Consumers
Public objectives impacted:	Reduced risk/uncertainty

Assessment of Public Benefit

455. The private cost of the restriction is considered to be significantly inferior to the public benefit gained from the restriction. The cost is also mitigated by the fact that two or more licences can be granted in respect of defined separate parts of the same premises.
456. If licensees were permitted to set up business on top of, or as part of, an already defined licensed premises, the clear obligations and accountability expected of a licensee would be obscured and the risk of harm or ill-health to patrons would likely increase. Consumer uncertainty as to who was providing what service would also increase if multiple licences were granted in respect of the same licensed area and the licensing authorities ability to properly regulate would also be impaired.

Alternative Means of Achieving the Legislative Objectives

457. The alternative to the restrictions contained within section 36 would be to allow licensees to seek approval from the Licensing Authority to establish new licensed premises over the top of, or as part of, an existing licensed area.
458. However, for reasons of proper regulation of the liquor industry, this is not considered to be an acceptable alternative.

Conclusion

459. The removal of the restrictions in section 36 would appear to be contrary to the Act's objects, specifically objects 5 (1) (a) and 5 (1) (b).

Recommendation

460. It is recommended that the prohibition on the Licensing Authority approving two or more licences in respect of the same part of any premises should be maintained.

RESTRICTION 20: on any application the Licensing Authority may require to be satisfied that any approval, consent or exemption required under the law relating to planning to permit the use of the premises for the sale of liquor; and any written law, for the carrying out of building work that is to be carried out before the licence or permit sought has effect, has been obtained (section 37 (2))

461. This restriction is considered anti-competitive because an applicant may be required to satisfy the Licensing Authority that other legislative requirements have been met.
462. The objects addressed are objects 5 (2) (a), to contribute to the proper development of the liquor industry; and object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

463. Applicants are required to demonstrate to the Licensing Authority that any other necessary statutory approvals have been obtained.

Potential Advantages of the Restriction

464. The restriction ensures that liquor licences are not granted in situations where the sale or consumption of liquor would be unlawful.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 20.1	Applicants are required to demonstrate to the Licensing Authority that any other necessary statutory approvals have been obtained
How:	Provision of documentary evidence
Impact:	Applicants may be required to obtain other necessary statutory approvals prior to an application for the grant of a liquor licence being determined
Impacts when:	At time of application
Impacts on whom:	Applicants
Public objectives impacted:	Proper regulation of the liquor industry

Potential Advantages and Benefits

EFFECT 20.2	The restriction ensures that liquor licences are not granted in situations where the sale or consumption of liquor would be unlawful
How:	In circumstances where the issue may appear to be relevant, the Licensing Authority may require an applicant to demonstrate that the sale or supply of liquor would not be unlawful
Impact:	The Licensing Authority can require that all necessary statutory approvals be obtained prior to a licence being issued
Impacts when:	At time of application
Impacts on whom:	Applicants
Public objectives impacted:	Uncertainty/risk.

Assessment of Public Benefit

465. The Licensing Authority should not be expected to expend public moneys in the hearing and determination of applications where the sale and consumption of liquor would be unlawful, notwithstanding the fact that a liquor licence was issued.
466. The public benefit of the restriction (i.e. not expending public moneys unnecessarily) outweighs the private costs expended by applicants in obtaining necessary approvals.

Alternative Means of Achieving the Legislative Objectives

467. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

468. Continuation of the restriction where the Licensing Authority may be required to be satisfied that any other necessary approvals have been obtained would appear to be justifiable.

Recommendation

469. It is recommended that continuation of the restriction whereby the Licensing Authority may be required to be satisfied that any other necessary approvals have been obtained should be maintained.

RESTRICTION 21: every licence, other than a club restricted licence or an occasional licence, is subject to the condition that the licensee occupies, and retains a right to occupy, the licensed premises to the exclusion of others, and an application for the grant or transfer of a licence shall not be granted unless the Licensing Authority is satisfied that the applicant can, or on the grant of the application will be able to, comply with that condition; and if the licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, the interest of the licensee in the licence terminates (section 37 (5)).

470. This restriction is considered anti-competitive because it prohibits licensees from sub-letting, or allowing other businesses to operate on any part of the premises.
471. The objects addressed are object 5 (2) (a), to contribute to the proper development of the liquor industry; and object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

472. The ability of licensees to offer a broader range of services by allowing other businesses to operate on any part of the licensed premises is limited.

473. Consumers may be offered a more restricted range of services on licensed premises or face higher costs.

474. If licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, the interest of the licensee in the licence terminates.

Potential Advantages of the Restriction

475. The Licensing Authority, police and the public have a clear understanding of the principals of the business carried on at the licensed premises and who is responsible for business activities on the licensed premises.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 21.1	The ability of licensees to offer a broader range of services is limited
How:	Specialist businesses are not permitted to operate on any part of the licensed premises
Impact:	Mandatory compliance required
Impacts when:	On going
Impacts on whom:	Licensees, proprietors of potential businesses and the public of Western Australia
Public objectives impacted:	Proper regulation of the liquor industry
EFFECT 21.2	Consumers may be offered a more restricted range of services on licensed premises or face higher costs
How:	Specialist operators are prevented from establishing specialty markets on licensed premises
Impact:	Licensees and specialist operators are constrained from adopting innovative methods to meet changing consumer demands
Impacts when:	On going
Impacts on whom:	Licensees; Proprietors of specialist businesses; The public of Western Australia
Public objectives impacted:	Proper regulation of the liquor industry
EFFECT 21.3	If licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, the interest of the licensee in the licence terminates
How:	Statutory provision

Impact:	The licensee ceases to have any interest in the licence
Impacts when:	When the licensee ceases to occupy the licensed premises
Impacts on whom:	The licensee
Public objectives impacted:	Proper regulation of the liquor industry
<i>Potential Advantages and Benefits</i>	
EFFECT 21.4	The Licensing Authority, police and the public have a clear understanding of the principals of the business carried on at the licensed premises and who is responsible for business activities on the licensed premises
How:	The entire licensed premises are required to be controlled by the licensee
Impact:	The licensee is liable for any infringements of the Liquor Licensing Act that occur on the licensed premises
Impacts when:	On going
Impacts on whom:	Licenseses; Police officers; The Licensing Authority
Public objectives impacted:	Uncertainty/risk

Assessment of Public Benefit

476. Because of the range of activities that can occur on licensed premises, it is important from a regulatory viewpoint to know who bears ultimate responsibility for activities that occur on licensed premises.
477. The cost of this restriction is somewhat mitigated by the fact that licensed premises can be redefined to exclude areas that can then be utilised by other parties.

Alternative Means of Achieving the Legislative Objectives

478. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

479. The restriction subjecting every licence to the condition that the licensee occupies, and retains a right to occupy, the licensed premises to the exclusion of others; and terminating the interest of the licensee if the licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, appears to be justifiable.

Recommendation

480. It is recommended that the restriction requiring licensees to retain a right to occupy the premises to the exclusion of others in section 37 (5) of the Liquor Licensing Act should be maintained.

RESTRICTION 22: the requirements for the grant or removal of a Category A licence (section 38)

481. The National Competition Council released a paper in November 1996 entitled *Considering the Public Interest under the National Competition Policy*, which specifically addresses public interest considerations in National Competition Policy terms. In part the paper says:

A central feature of the National Competition Policy is its focus on competition reform ‘in the public interest’. In this respect, the guiding principle is that competition, in general, will promote community welfare by increasing national income through encouraging improvements in efficiency...

Despite this focus on increased competition, governments have some flexibility to deal with circumstances where competition might be inconsistent with the weighting placed by the community on a particular social objective. The aim of this paper is to point to those processes by which public interest matters can be considered within the National Competition Policy agenda. This paper offers guidance on the use of CPA⁷ subclause 1 (3) as a means of considering the community benefits and costs of reform, and discusses other mechanisms available to governments to maintain anti-competitive arrangements in the public interest.

Australians are increasingly recognising that improvements in the competitiveness of the Australian economy will improve economic efficiency and play a vital role in enhancing overall community welfare by increasing the productive base of the economy. Governments endorsed this view in signing the intergovernmental competition policy agreements in April 1995.

Nonetheless, while competition is generally consistent with economic efficiency goals and the interests of the community as a whole, there may be situations where there is conflict with certain social objectives.

482. This is certainly the case with liquor licensing legislation. As has been established elsewhere in this Review (principally in connection with the analysis of Restriction 35), liquor is not just another ordinary commodity, but rather “... a substance the supply of which to members of the public is controlled⁸.” This is because of the negative health and social consequences associated with the

⁷ Competition Principles Agreement

⁸ Owen J, in Supreme Court of Western Australia decision WASCA 21 dated 17 February 2000 (page 19)

misuse of liquor and the considerable tangible and intangible costs that these consequences subsequently cause to the community (also discussed in more detail in the analysis of Restriction 35). Hence the existence of a licensing regime for the sale of liquor.

483. Through the Liquor Licensing Act, the Western Australian Government has stated a clear social objective of minimizing harm or ill-health due to the use of liquor and, as has already been established, this is one of the Act's primary objects.
484. So, how is the minimization of harm or ill-health achieved by the provisions of section 38? Is it by direct or indirect restrictions on competition associated with governing entry of firms or individuals into the liquor market? And if so, how exactly does this policy response minimise harm?
485. As has already been established in the analysis of Restriction 1, section 37 (1) of the Act provides the means for the Licensing Authority to determine whether or not a person is "fit and proper" for the purposes of entering into the liquor market. Therefore, the threat associated with "unfit" persons entering the liquor industry, and the potential harm they pose to the health and safety of the public is avoided by virtue section 37 (1), i.e. they are prevented from entering the liquor market.
486. If fitness and propriety of proposed licensees is determined by section 37 of the Act, then what public purpose is achieved by section 38? The National Competition Council's paper provides some guidance in acknowledging that —

Governments also implement restrictions on competition for reasons of 'market failure'. This occurs where special features of a market mean that unfettered competition reduces the welfare of the community. Governments argue that it is in the 'public interest' to restrict competitive outcomes in such instances.

487. It is likely that this is the case with the liquor industry in Western Australia. Unfettered competition in the liquor industry has the potential to significantly reduce the welfare of the community through the negative health and social consequences already identified. However, if this premise is accepted, it then gives rise to consideration of whether —
- (a) section 38 adequately addresses 'market failure?'; and
 - (b) the continuation of these restrictions can be justified in accordance with National Competition Policy principles?
488. The provisions of section 38 are considered anti-competitive because they constitute a barrier to entry to the liquor retail market, based on the number, standard and trading patterns of existing market players. As such, these provisions are asserted to be prima facie anti-competitive in Woolworths' submission to this review —

In unregulated industries, the market should determine which business will prosper and which will fail. No matter what the relationship between existing firms and consumers in terms of product range, services, prices etc, a new firm should be free to enter and compete. If each competitor operates under the same rules including competition laws then, from an economic perspective, success for the entrant proves the market demand for the entrants mix of product and service — it established the community need. Section 38...allows potential entrants to be denied access on grounds that would not generally be acceptable under competition law.

The reasonable needs of consumers (the market) can only be judged by consumers. This is especially so once the choice of suppliers begins to hinge on levels of service quality.

489. Similarly, in its submission to this review, the Restaurant and Catering Industry of Western Australia Inc. suggests that the current differential treatment of hotels and taverns, where they receive a market protection associated with the needs test for licence applications, and restaurants do not, is a restriction that cannot be justified. Its effect, it is argued, is to cause the competition playing rules to be different to the advantage of the hotel and tavern sector of the market and to the disadvantage of the restaurant sector —

Restaurants, including BYO restaurants and hotels and taverns should be subject to equivalent licensing rules and have an needs test applied to them... This situation seriously weakens the ability of the licensing system to achieve the wider social and development objectives embedded in the legislation and which are a major reason why regulation is justified in the first place.

490. To be consistent, the Restaurant and Catering Industry of Western Australia Inc suggests that either the current reasonable requirements test needs to be applied consistently across all licence types, including restaurant applications, or it should not be applied in its current form at all.

Section 38 (1)

491. Section 38(1) of the Liquor Licensing Act provides that an applicant for the grant or removal of a Category A licence⁹ must satisfy the Licensing Authority that the licence is “necessary”.

⁹ Section 3 of the Act defines a Category A licence as meaning a —

- (a) hotel licence (including a hotel restricted licence and a tavern licence);
- (b) cabaret liquor licence;
- (c) casino liquor licence;
- (d) special facility licence; and
- (e) liquor store licence.

492. The section attempts to address ‘market failure’ by tying it to public need. As such, the section’s provisions require an applicant for the grant or removal of a Category A licence to satisfy the Licensing Authority that the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area, having regard to —
- (a) the number and condition of the licensed premises already existing in the affected area;
 - (b) the manner in which, and the extent to which, the premises are distributed throughout the area;
 - (c) the extent and quality of the services provided on those premises; and
 - (d) any other relevant factor, being a matter as to which the Licensing Authority seeks to be satisfied.

Potential Disadvantages of the Restriction

493. The restrictions contained within section 38 (1) are discriminatory in that they only apply to Category A licences.
494. The restrictions contained in section 38 (1) act as a general barrier to entry to the liquor retailing market where a Category A licence is required, based primarily on existing market players.
495. Realistically, only consumers can judge the reasonable needs of consumers (the market) and not the Licensing Authority (the regulator).

Potential Advantages of the Restriction

496. The restrictions contained in section 38 (1) address ‘market failure’ by reducing —
- (a) outlet density;
 - (b) pressures on licensees to serve irresponsibly; and
 - (c) levels of liquor-related problems,
- through restrictions on entry to the liquor market which reduces competition.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.1.1	The restrictions contained within section 38 (1) are discriminatory in that they only apply to Category A licence
How:	Legislative provision
Impact:	Is considered to be significant. Applicants for the grant of a Category A licences must establish that the grant of the licence is necessary, whereas there is no such impediment for the grant of a Category B licence
Impacts when:	On-going
Impacts on whom:	Entrants to the liquor industry
Public objectives impacted:	Economic/financial
EFFECT 22.1.2	The restrictions contained in section 38 (1) act as a general barrier to entry to the liquor retailing market where a Category A licence is required, based primarily on existing market players
How:	All applicants for the grant or removal of a Category A licence must address section 38 requirements
Impact:	Is considered to be significant. Provisions must be complied with, even where they are not relevant to a particular application
Impacts when:	On-going
Impacts on whom:	Entrants to the liquor market
Public objectives impacted:	Economic/financial
EFFECT 22.1.3	Realistically, only consumers can judge the reasonable needs of consumers (the market) and not the Licensing Authority (the regulator)
How:	Through market forces
Impact:	Significant. Evidence presented to establish the “reasonable requirements of the public” prior to the issue of a licence is only conjecture, which is borne out by the fact that some Category A liquor licences are not commercially viable after their grant, notwithstanding the fact that the applicant had established that the grant of the licence was necessary to meet “reasonable requirements”
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	None identified

Potential Advantages and Benefits

EFFECT 22.2.1	The restrictions contained in section 38 (1) have the net effect of reducing — (a) outlet density; (b) pressures on licensees to serve irresponsibly; and (c) levels of liquor-related problems, by restricting entry to the liquor market and reducing competition.
How:	Where an applicant for the grant or removal of a Category A licence cannot establish that the licence is necessary to provide for the “reasonable requirements for the public”, the application is refused.
Impact:	Significant
Impacts when:	On-going
Impacts on whom:	Licenseses Entrants to the liquor industry Consumers The general public
Public objectives impacted:	Distributional Life expectancy/Health Market failure

Assessment of Public Benefit

497. In his submission to this review, the Executive Director of Public Health suggests that “...restrictions which have the net effect of reducing outlet density are supported in that this reduces the pressure on licensees to serve irresponsibly and will reduce levels of problems by limiting overall levels of consumption...”

498. However, the Executive Director of Public Health has also acknowledged that —

The scientific literature on the relationship between outlet density and alcohol related harm is not straightforward. There is evidence that increased outlet density can have opposite effects on different categories of harm e.g. reducing road crashes while increasing liver cirrhosis (Smith, 1989). Certainly increased outlet density is highly associated geographically with increased levels of consumption. Gruenewald et al (1993) present intriguing evidence from the USA that increased availability is most usually driving demand for alcohol rather than the reverse. A relationship has also been found between outlet density and the incidence of violent assault in the USA (Schribner et al, 1995).

Other studies are also suggestive of physical availability directly contributing to increased consumption (Edwards et al, 1994) though, as ever, precise causal relationships are difficult to establish.

One of the difficulties with the scientific literature in this area has been a lack of precise data on alcohol sales as opposed to just outlet density. In Western Australia, precise data has been made available to researchers regarding wholesale alcohol sales by individual licensed establishment. From these data it has been shown that there are strong general relationships between the extent of local alcohol sales and rates of serious alcohol related harm such as physical and sexual assault, night-time road crashes, night-time violence, drink-driving offences and alcohol-related hospital admissions (Stockwell, et al, 1996). Outlet density was not a significant contribution to rates of problems independent of extent alcohol sales. Despite this apparently conflicting research evidence, there are strong public health grounds for wishing to retain the ability to limit the numbers of licensed premises in a given area. It is a basic economic principle that increased competition will drive down prices and therefore increase demand. It is also extremely plausible to suggest that the greater the pressure of competition then the greater the pressure to ignore what could be considered to be anti-competitive restrictions such as limiting service to drunk and underage persons.

499. While increased competition may contribute to lower prices and therefore increased demand, where that demand is generated by reasonable¹⁰ adult consumers, there is no apparent conflict with the Act's harm minimisation principles.
500. In fact, as commented by Judge Greaves in his published decision in respect of an application for a liquor store by Gull Petroleum (WA) Pty Ltd, one of the principle functions of the Liquor Licensing Act is to make liquor available —

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

There appears to be little disagreement in the field of liquor control that the complete prohibition of the sale of liquor is not effective in the control of the perceived consequences of the consumption and use of liquor. What Parliament has sought to do in this amended legislation is to achieve balance between making liquor available to the community and curbing the perceived consequences of its consumption and use.

¹⁰ "reasonable" is defined by *The Australian Concise Oxford Dictionary* as meaning '1 having sound judgement; moderate; ready to listen to reason. 2 in accordance with reason; not absurd. 3 a within the limits of reason; not greatly less or more than might have been expected. b inexpensive; not extortionate. c tolerable, fair.'

501. As identified by Judge Greaves, Parliament has attempted to achieve a balance between making liquor available to the community and curbing the perceived consequences of its consumption and use, or more properly put, the perceived consequences of its consumption and misuse, resulting in harm or ill-health caused to people, or groups of people, due to the use of liquor.
502. That being the case, the question arises as to how the effects of competition from new market entrants can be held responsible for existing licensees undertaking illicit sales to drunken and underage persons? It is illogical that the threat of competition from a market entrant can be held to be liable, in public policy, for an existing market player electing to trade illegally.
503. Similarly, it is illogical that these matters should be considered as a licensing issue and be employed to deny market entrance.
504. Similarly, it is difficult to relate the “reasonable requirements” criteria contained in section 38(1) back to the Act’s objects and establish a causal link with object (1) (a) relating to regulation and control. Furthermore, the provisions of section 38(1) appear inconsistent with some of the objects identified in section 5 (2), in that the “need requirements” sometimes —
- (a) work against the requirements of the tourism industry in that innovative ideas to cater to tourists are required to be justified as being necessary to provide for the reasonable requirements of the public; and
 - (b) frustrate the development of licensed facilities reflecting the diversity of consumer demand because they are required to be justified as being necessary to provide for the reasonable requirements of the public.
505. Similarly, there are inconsistencies in the application of the requirements of section 38 in that they apply only to Category A licences and apparently do not recognise the effect of Category B licences on the community.
506. Therefore, for the purposes of this Review, it is not possible to justify the continuation of section 38 (1), in its current form.

Alternative Means of Achieving the Legislative Objectives

Public Interest as a licensing criteria

507. Although unfettered competition in the liquor industry has the potential to reduce the welfare of the community through negative health and social consequences, the means of addressing these problems should not be predicated upon the number of existing market players and the condition of existing licensed premises.
508. Generally speaking, the issue of the grant of a licence should turn on the question of whether it is in the public interest for the applicant to sell and supply liquor and not on whether the licence is necessary *per se*.

509. Given the objects of the Act and the identified public interest of minimising harm or ill-health, the issue of the grant of licences should turn solely on the question of whether it is in the public interest for the applicant to sell and supply liquor and not on whether the licence can be considered as ‘necessary’.
510. As such a viable alternative to the section’s current provisions would be to shift the focus from the applicant having to satisfy the Licensing Authority that the licence is necessary to one where the applicant must establish that the grant or removal of the licence is in the public interest.
511. In this way, all applications for the grant or removal of a liquor licence would be required to focus on public interest considerations, which would address the deficiency with the current legislation failing to recognise that not all harm or nuisance is related to Category A licences.
512. To a large extent, once an applicant has demonstrated that the grant of the licence is in the public interest, the market will then be better positioned to determine community ‘needs’ for licensed premises and market forces will be able to shape which businesses satisfy the expectations of consumers.
513. Unfortunately, the term ‘public interest’ is recognised by the National Competition Council as being largely undefined —

Australian policy makers have left defining the ‘public interest’ for trade practices purposes to case-by-case assessment rather than trying to be prescriptive. In this respect, anything deemed to be of value to the community could be judged to be in the public interest. Consistent with this approach, subclause 1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.

514. Interestingly, this is the approach the Australian Competition and Consumer Commission (ACCC) takes when assessing an application for authorisation —

...the ACCC examines the effect on competition in the market overall, rather than the effect on individual competitors. In making judgements about each particular case, the ACCC seeks factual evidence of benefits and costs to assess whether the net benefit to the public arises, although its absence does not mean that there are not other public benefits.

For governments facing requests from sectional interests for ‘special treatment’, the authorisation process provides a systematic, arms length assessment of the public benefit. Thus, an advantage of requiring an interested party to apply for its activities to be authorised by the ACCC is that the public benefit of the activities must be justified in an independent forum. Adoption of such an approach on a consistent basis could reduce the pressure on governments to exempt anti-competitive behaviour through a section 51 exemption of some other means.

515. Of necessity and as recognised by the National Competition Council, assessing the public interest requires examination of issues on a case-by-case basis. This is because a broad range of considerations will apply, and will not be relevant in every circumstance.
516. Section 33(1) of the Act already provides that all decisions of the Licensing Authority are predicated upon the public interest—
- Subject to this Act, the licensing authority has absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest.
517. As such, the consideration of each application for the grant or removal of a liquor licence where the interest of the public is the over-riding determinant (after fitness and propriety) will provide for a systematic, arms length assessment as recommended by the ACCC.
518. However, in a number of cases, the determinations of the Licensing Authority (how ever constituted), made in the public interest, purportedly under the authority's absolute discretion (see section 33(1)) have been overturned or varied by courts of appeal.
519. In these circumstances, the courts of appeal have found that the decision-maker erred in considering information, ostensibly in the public interest, which was not within the scheme or intent of the legislation.
520. Therefore, while it is not intended to define or prescribe the 'public interest' for liquor licensing purposes, but rather to continue to rely on case-by-case assessments, it is proposed to prescribe a number of public interest criteria. This will enable the Licensing Authority to legitimately consider those issues prescribed, at its discretion and only where relevant, when having regard to public interest matters. The veracity of such considerations will then be put beyond doubt.
521. It is important that the Licensing Authority is empowered to refuse a liquor licensing application in circumstances where the facts of the application demonstrate that the grant of the application would not be in the public interest.
522. In this respect, the onus should remain on the applicant to satisfy the Licensing Authority that the grant of the application is in the public interest, rather than the authority having to justify why an application should be refused.
523. What type of criteria should the Licensing Authority be able to have regard to in considering whether the grant of an application is in the public interest?
524. As has already been noted, one of the criteria considered by the ACCC when assessing an application for authorisation is the effect on competition in the market overall, rather than the effect on individual competitors.

525. In the liquor licensing context, the ability of the Licensing Authority to consider, where appropriate, the effect of an application on competition in the liquor market, or part of the market, i.e. on the retail liquor market or in a particular area, but not on individual competitors, may enable identification of important, but otherwise undisclosed public interest matters.
526. Such an approach would enable concerns about outlet density and propensity for harm to be considered. While the relationship between outlet density and alcohol related harm is not conclusive, it would appear premature to remove it from amongst the matters the Licensing Authority may consider.
527. Also of relevance would be criteria similar to that which the Licensing Authority may have regard to under the provisions of section 64(3) of the Liquor Licensing Act, which provides —

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

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

- (d) ensure public order and safety, particularly where circumstances or events are expected to attract large numbers of persons to the premises or to an area adjacent to the premises;
- (e) limit —
 - (i) the kinds of liquor that may be sold;
 - (ii) the manner in which or the containers, or number or types of containers, in which liquor may be sold;
 - (iii) the days on which, and the times at which, liquor may be sold;
- (f) prohibit persons being, or limit the number of persons who may be, present on, or on any particular part of, the licensed premises or any area which is subject to the control or management of the licensee and is adjacent to those premises;
- (g) prohibit the provision of entertainment, or limit the kind of entertainment that may be provided, on, or in an area under the control of the licensee adjacent to, the licensed premises;
- (ga) prohibit promotional activity in which drinks are offered free or at reduced prices, or limit the circumstances in which this may be done;
- (gb) prohibit any practices which encourage irresponsible drinking;
- (h) otherwise limit the authority conferred under a licence or permit...

528. These provisions are closely related to the policy of harm reduction and could provide the basis for drafting effective public interest criteria for insertion within section 33 of the Act.

529. The prescription of public interest criteria addressing harm minimisation is not a new or novel concept.

530. The New South Wales Licensing Court publishes a practice direction¹¹ that requires applicants to satisfy the Court that practices will be in place and will remain in place at the licensed premises to ensure that as far as is reasonably practicable, liquor will be sold, supplied and served responsibly on the premises and that all reasonable steps will be taken to prevent intoxication on the premises.

531. For example, the practice direction requires applicants to lodge affidavit evidence —

¹¹ See Appendix 2 for the entire NSW Licensing Court Practice Direction.

- relating to responsible service of alcohol courses undertaken or proposals for the undertaking of such courses;
- of the existence of a written house policy detailing responsible service of alcohol practices that are in place, and will remain in place at the premises. Such a house policy should as a minimum having regard to the size and nature of the premises, deal with the provision of training for staff, adoption of responsible liquor promotions, safe transport options for patrons and the availability of low alcohol and non-alcoholic beverages;
- of the availability of low alcohol beer and non-alcoholic beverages at all times that the premises will be trading and the proposed costing of low alcohol beverages compared to full strength beverages and proposals to maintain appropriate price differentials in the future;
- of whether there is a Liquor Consultative Committee (or, in Western Australian terms a Liquor Accord Committee) in the area in which the premises will be located and whether the licensee proposed to be an active participant in meetings of the Committee and willingly adopt resolutions of that Committee relevant to harm minimisation and responsible service of alcohol issues;
- of membership of any industry association and willingness to adopt policies of that association relevant to harm minimisation and responsible service of alcohol issues;
- of proposed practices to ensure that unaccompanied juveniles do not gain access to licensed premises in a manner that contravenes the Act's requirements;
- of any controls to prevent the removal of packaged liquor, if appropriate, from the premises;
- of any policies relating to the non-admission of patrons after certain hours;
- of any policies relating to cessation of sale of liquor prior to closing time;
- of food being available whenever liquor is consumed on the licensed premises; and
- as to any use of non-standard measures for drinks.

532. While the criteria identified as possible public interest criteria has been sourced from —

- (a) comments by the Executive Director of Public Health (in respect of outlet density);
- (b) the existing provisions of section 64(3); and
- (c) the practice direction of the NSW Licensing Court,

they have not been presented in this Report as draft legislation, because the drafting of legislation is the primary responsibility of Parliamentary Counsel.

533. However, notwithstanding the above, these matters have been identified as likely public interest criteria for the purpose of prescription for the purposes of section 33.

534. This will allow such issues to be considered by the Licensing Authority on a case-by-case basis. In addition, applicants will be better informed of the issues likely to be considered by the Licensing Authority in the determination of applications.

535. For reasons of consistency, the ground of objection provided by section 74 (1) (d) should also be deleted. In almost any other market, this kind of objection to the establishment of a new business would not be facilitated by legislation.

536. Amending the Act's requirements for the grant of a licence in this way may lead to an increase in the number of applications for licences. However, in many areas the expansion in licence numbers, which has occurred since the current Liquor Licensing Act has been operational, will likely mitigate this effect. It is also doubtful that a growth in licence numbers would, in itself, have a significant impact on consumption. More than likely, there would primarily be a change in the pattern of sales between outlets, reflecting consumer demand and convenience.

537. Even if consumption was to increase, it cannot be assumed that problems of misuse will increase exponentially. The Act will continue to contain other controls, which address problems of irresponsible service more directly¹².

More restrictive application of the needs test?

538. A case for a more restrictive application of the Act's current needs test is presented by the Liquor Industry Council's report entitled *Liquor Licensing in Western Australia*, prepared by Economic Consulting Services.

¹² see *Liquor Control Act Review*, Victorian Government (page 162)

539. In that report the Council asserts that the number of licences now issued exceeds the needs of the Western Australian community and that more licences would produce negative community benefits. Council members believe that the industry is not as profitable as the level of investment demands, which has led to intense competition and the potential for liquor sale practices that are not in the community's best interests.
540. The Liquor Industry Council suggests that rather than trying to measure the desirable number of licences (the supply), an alternative is to monitor the demand for licences. The value of the "goodwill" attached to a licence is a reflection of its earning capacity. This capacity will include the intangible elements associated with the premises such as its name and reputation, but it will also reflect underlying perception of the long term profitability of that licence. Too many licences in operation will lower "goodwill" values while a shortage will see values rising. The Council proposes —

... that goodwill values are falling and that the needs based evaluation has become too liberal. The evaluation should become more rigorous with a restoration of the underlying logic of adequate licence numbers restored as the base case... Western Australia has a large number of licences in issue, and that reductions in licence values reflect the over-supply of some licence types. A continuation of this trend will see smaller and marginal operators forced into a search for alternative business approaches...some will resort to promotional methods to boost sales that are apposite to community expectations.

Businesses faced with declining profitability and declining capital values will seek to sell out or strive to improve sales. There is widespread concern in the industry that a determination to survive and hence for increased sales has the potential for alcoholic promotion and distribution practices which are not in the community's best interests.

Western Australia is well served with liquor licences and an increase in the overall number can only contribute to a greater potential for increased consumption and the consequential social and economic problems. Competition within the industry is already strong and further licensed outlets can only make this more intense. A fight for survival among the more marginal businesses would introduce promotion and sales practices encouraging alcohol consumption with poor standards of responsible alcohol delivery. Such competition would undermine many of the government and industry reforms introduced with the current legislation. A responsible attitude towards alcohol service includes the necessity to restrict sales where the consequences are not in the individuals or community's interests.

541. In summary, the Liquor Industry Council states: "The Liquor Industry Council supports a continuation of a needs based approach to licensing but believes that there is no case for the issue of additional licences over the next three to five years in the State. Rather, a period of adjustment is needed in which marginal businesses are allowed to relocate or sell out."

542. Preventing entry into the liquor market of potential competing suppliers for the next three to five years would result in an absolute barrier and effectively limit who can sell and supply liquor to those persons already licensed. The market should determine, as much as is possible for a regulated market, such as the liquor industry, community 'needs' for licensed premises and market forces should shape which businesses satisfy the expectations of consumers; not existing industry players.
543. On the whole, the submission fails to establish that tighter restrictions on the grant of a licence will achieve any net public benefit, excepting perhaps, concerns about the more marginal businesses resorting to promotion and sales practices that encourage alcohol consumption with poor standards of responsible alcohol delivery.
544. The current cost to entrants to the liquor market is an application fee of up to \$750 and associated advertising costs. However, costs to applicants would increase dramatically should any sort of moratorium be placed on the granting of liquor licences, a fact that was borne out during the life of the *Liquor Licensing (Moratorium) Act 1983*.
545. The moratorium imposed by that Act created an artificially high price for country hotel and tavern licences purchased with the object of removal to the metropolitan area, which created a backlash from some country areas where the loss of a licensed facility resulted.
546. One of the effects of the moratorium was the development of a market in the purchasing of licences from country locations and their subsequent removal to the metropolitan area or the large country towns, with some communities expressing concern or frustration that they had no power to prevent or object to the removal of local licences. The high price that a tavern, hotel or liquor store licence commanded in the market that flourished under the moratorium made it attractive to a licensee to sell their licence for removal, notwithstanding that a reasonable profit was being made in the original location. This was possible because the moratorium created an artificial market for licences.
547. Concerns about competition escalating high risk competitive practices, such as price discounting targeting young drinkers and the serving of underage and/or drunken customers, as well as liquor "sales and promotions that encourage alcohol consumption with poor standards of responsible alcohol delivery" should properly be addressed as compliance matters, rather than as licensing issues.
548. Similarly, if the Act's disciplinary provisions are not adequate to remove licensees whose business practices question their fitness and propriety to continue in the liquor industry, then it may be that some strengthening of those provisions is required.

Conclusion

549. That the grant or removal of a liquor licence should not be predicated upon the concept of need, but rather on whether the grant of the licence is in the public interest.

550. Accordingly, the provisions of section 38 (1) cannot be justified.

Recommendation

551. That —

- (a) section 38 (1) should be repealed;
- (b) section 33 of the Act should be amended so that the grant or removal of any liquor licence is dependent upon the Licensing Authority being satisfied that the grant of the licence is in the public interest, with the prescription of public interest criteria that the Licensing Authority may consider at discretion; and
- (c) prescribed public interest criteria are to include references, but not be limited to —
 - (i) the likely effect of an application on competition in the liquor market, or part of the market, i.e. on the retail liquor market or in a particular area, but not on individual competitors, to enable identification of important, but otherwise undisclosed public interest matters, i.e. outlet density and propensity for harm or ill-health;
 - (ii) new provisions similar to those already existing in section 64(3), directly related to harm minimisation; and
 - (iii) new provisions similar to those contained in the practice direction of the NSW Licensing Court relating to Harm Minimisation (see Appendix 2).

Section 38 (2)

552. Subsection (2) provides that when taking into account the matters referred to in subsection (1), the Licensing Authority in considering what requirements of the public may be shall have regard to —

- (a) the population of, and the interest of the community in, the affected area;
- (b) the number and kinds of persons residing in, resorting to or passing through the affected area, or likely in the foreseeable future to do so, and their respective expectations; and
- (c) the extent to which any requirement or expectation —

- (i) varies during different times or periods; or
- (ii) is lawfully met by other premises, licensed or unlicensed.

Potential Disadvantages of the Restriction

- 553. The market, not regulators, should determine the requirements of the population in the affected area.
- 554. The extent to which any requirement or expectation of the population of the affected area varies during different times or periods or is lawfully met by other premises, licensed or otherwise is an additional barrier to entry, based on existing market players and businesses existing outside of the market.

Potential Advantages of the Restriction

- 555. The interest of the community is considered in the determinations of the Licensing Authority.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.2.1	The market, not regulators, should determine the requirements of the population in the affected area
How:	Through market forces
Impact:	Likely to be significant
Impacts when:	On going
Impacts on whom:	Entrants to the liquor market
Public objectives impacted:	Economic/financial
EFFECT 22.2.2	The extent to which any requirement or expectation of the population of the affected area varies during different times or periods or is lawfully met by other premises, licensed or otherwise is an additional barrier to entry, based on existing market players and businesses existing outside of the market
How:	Entrants can be denied entry to the liquor market based on existing premises, licensed or unlicensed
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Entrants to the liquor market
Public objectives impacted:	Economic/financial; Distributional

Potential Advantages and Benefits

EFFECT 22.2.3	The interest of the community is considered in the determinations of the Licensing Authority
How:	The applicant for the grant or removal of a Category A licence is required to submit evidence about the population of, and the interest of the community in, the affected area.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The population of an affected area
Public objectives impacted:	Distributional; Environmental

Assessment of Public Benefit

556. There is an important public benefit in the Licensing Authority being able to consider the population of, and the interest of the community in the affected area.

557. However, following the recommendation to amend the provisions of section 38 (1) so that the basis for granting liquor licences relates to questions of public interest, analysis of the population and interest of the community in the affected should no longer be considered in isolation. This is especially so given the ability of residents to object to liquor licensing applications and thereby directly convey their interest to the Licensing Authority, which can then be considered by the Licensing Authority in the wider context of “the public interest”.

Conclusion

558. The continuation of section 38 (2) in its current format cannot be justified.

Recommendation

559. That the provisions of section 38 (2) should be repealed and that similar provisions relating to the interest of the population or community and the persons who pass through it should be inserted into the “public interest criteria” to be prescribed for the purposes of section 33.

Section 38 (2a)

560. Subsection (2a) provides that in considering what the reasonable requirements of the public may be for the purposes of an application under subsection (1) the licensing authority may have regard to —

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

- (b) whether or not the grant or removal of the licence will convenience the public or a section of the public in the affected area,

but the Licensing Authority may disregard either or both such considerations as it sees fit.

Potential Disadvantages of the Restriction

561. The provisions appear repetitious of the provisions of section 33.

Potential Advantages of the Restriction

562. The Licensing Authority is able to exercise discretion.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.3.1	The provisions appear repetitious
How:	The section specifies what the licensing authority may have regard to in determining the reasonable requirements of the public, and further that the licensing authority may disregard such considerations.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Entrants to the liquor industry
Public objectives impacted:	None identified

Potential Advantages and Benefits

EFFECT 22.3.2	The Licensing Authority is able to exercise discretion
How:	In considering what the reasonable requirements of the public may be, the Licensing Authority can disregard such considerations as it sees fit.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Entrants to the liquor market
Public objectives impacted:	None identified

Assessment of Public Benefit

563. Section 33 of the Act provides that the Licensing Authority has absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest. As such, the provisions of section 38 (2a) appear repetitive in that the Licensing Authority, in its absolute discretion, may already have regard to the subjective requirements of the public and disregard such consideration as it sees fit.
564. Additionally, section 33 (2) provides that an application may be refused, even if the applicant meets all of the requirements of the Act, or may be granted, even if a valid objection is made out, but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit.
565. However, following the recommendation to amend the provisions of section 38 (1) so that the basis for granting liquor licences relates to what is in the public interest, questions about the subjective requirements or convenience of the public may still be relevant in determining the “public interest”.

Conclusion

566. That the continuation of section 38 (2a) in its current format cannot be justified.

Recommendation

567. That section 38 (2a) should be repealed and that similar provisions relating to the subjective requirements or interest of the public be inserted into the “public interest criteria” to be prescribed for the purposes of section 33.

Section 38 (2b)

568. Subsection (2b) provides that notwithstanding anything else in section 38 —
- (a) a liquor store licence shall not, other than in accordance with paragraph (b), be granted in respect of, or removed to, premises unless the Licensing Authority is satisfied that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area; and
 - (b) where an application is made for the removal of a liquor store licence to premises situated not more than 500 metres from the premises from which the licence is sought to be removed, the Licensing Authority need not have regard to the reasonable requirements of the public for liquor and related services in the affected area.

Potential Disadvantages of the Restriction

569. Holders of liquor store licences are discriminated against.

570. Market forces are arbitrarily constrained.

571. Applications for the removal of a liquor store licence are prejudicially affected.

Potential Advantages of the Restriction

572. The holders of other liquor licence types are afforded a degree of protection from competition.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.4.1 Holders of liquor store licences are discriminated against

How: Additional barrier to entry only for liquor store licences

Impact: Significant

Impacts when: On going

Impacts on whom: Applicants for the grant or removal of a liquor store licence

Public objectives impacted: None identified

EFFECT 22.4.2 Market forces are arbitrarily constrained

How: The ability of consumer demand to dictate the type of premises from which liquor is sold is constrained, because a further barrier to entry is applied for the grant or removal of a liquor store licence.

Impact: Significant

Impacts when: On going

Impacts on whom: Licensees generally
 The holders of liquor store licences;
 Consumers

Public objectives impacted: None identified

EFFECT 22.4.3 Applications for the removal of a liquor store licence are prejudicially affected

How: Section 38 (2b) (b) imposes certain restrictions on the Licensing Authority when considering the removal of a liquor store licence, that is not imposed by section 81 on similar applications by other licence types

Impact:	Significant
Impacts when:	On going
Impacts on whom:	Holders of liquor store licences
Public objectives impacted:	None identified
<i>Potential Advantages and Benefits</i>	
EFFECT 22.4.4	The holders of other liquor licence types are afforded a degree of protection from competition
How:	Section 38 (2b) provides that a liquor store licence shall not be granted unless the licensing authority is satisfied that the reasonable requirements of the public cannot be provided for by licensed premises already existing in that area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Existing market players
Public objectives impacted:	None identified

Assessment of Public Benefit

573. There are no public benefit factors identified in the provisions of section 38 (2b).

574. Questions about the subjective requirements or convenience of the public in the affected area are only one public interest criteria to be considered by the Licensing Authority. Following the earlier recommendation to amend the provisions of section 38 (1) so that the basis for granting liquor licences relates to the public interest, there is no reason to continue this as a separate restriction.

Conclusion

575. The continuation of section 38 (2b) cannot be justified.

Recommendation

576. That section 38 (2b) should be repealed.

Section 38 (3)

577. Subsection (3) provides that having regard to likely future demand for residential accommodation or other facilities, amenities or services, the Licensing Authority on the grant or removal of a Category A licence may impose a condition that —

- (a) in respect of a hotel licence (other than a tavern licence) or a special facility licence, residential accommodation; and

(b) in all cases, facilities, amenities or services,

be provided, or be extended or improved, on or adjacent to the licensed premises, if and when the licensing authority so requires.

Potential Disadvantages of the Restriction

578. The provisions of section 38 (3) interfere with market forces, in that if there is sufficient demand for residential accommodation and other facilities, amenities or services, persons of entrepreneurial spirit will develop facilities to cater for that need.

Potential Advantages of the Restriction

579. The possible future needs of the public are considered in the Licensing Authority's determinations.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.5.1 **The provisions of section 38 (3) interfere with market forces, in that if there is sufficient demand for residential accommodation and other facilities, amenities or services, persons of entrepreneurial spirit will develop facilities to cater for that need**

How: The Licensing Authority is empowered to make decisions concerning the likely future demand for residential or other facilities and to impose relative conditions on licences, rather than market-forces dictating consumer needs.

Impact: Unknown

Impacts when: At the time a relevant application is determined.

Impacts on whom: Applicants;
Members of the Public

Public objectives impacted: None identified

Potential Advantages and Benefits

EFFECT 22.5.2 **The possible future needs of the public are considered in the Licensing Authority's determinations**

How: The Licensing Authority may impose conditions on the grant or removal of a licence to provide or improve specified services.

Impact: Unknown

Impacts when: At the time a relevant application is determined.

Impacts on whom: Applicants;
Members of the Public

Public objectives impacted: None identified

Assessment of Public Benefit

580. Following the recommendation to amend the provisions of section 38 (1) so that the basis for granting liquor licences relates to what is in the public interest, as opposed to establishing the reasonable requirements of the public, it is also likely that the public benefit favours the market determining when facilities, amenities or services should be provided by licensed premises and not the regulator.

Conclusion

581. Continuation of the provisions of section 38 (3) cannot be justified.

Recommendation

582. That section 38 (3) should be repealed.

Section 38 (4)

583. Subsection (4) provides that in section 38, a reference to licensed premises already existing in an affected area, in respect of which —

- (a) a conditional grant is made under section 62;
- (b) a licence is granted; or
- (c) an application for the removal of a licence to those premises is granted.

584. Section 38 (4) is not considered to contain any restrictions, given that it is definitional in nature in that it provides that a reference to licensed premises within the section also includes a conditional grant and an application for the removal of a licence that has been granted.

585. However, given that section 3 provides for the interpretation of words used in the Act, it would make more sense for the provisions of section 38 (4) to be moved to the definition of “licence” in section 3.

Recommendation

586. That section 38 (4) be amended by deletion from section 38 and insertion in the definition of “licence” in section 3 of the Act.

Section 38 (5)

587. Subsection (5) provides that where an application to which this section applies is not granted by reason of a finding that a licence of the class to which the application related is not necessary in order to provide for the requirements of the public in any area, no application for the grant or removal of a licence of the same class in respect of the same premises or land may be lodged within 36 months of the date of that finding unless the Director certifies —

- (a) that the affected area in relation to the proposed application would be substantially different to that specified in relation to the application which was not granted; or
- (b) that the proposed application is of a kind sufficiently different from the application which was not granted to be distinguished and heard notwithstanding the previous finding.

Potential Disadvantages of the Restriction

588. Applicants may be delayed in obtaining a licence.

589. Consumers may have fewer licensed premises to choose from in the short term.

Potential Advantages of the Restriction

590. Objectors to licence applications are less likely to have their funds exhausted by repeated applications from wealthy applicants.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.6.1	Applicants may be delayed in obtaining a licence
How:	Applicants who have previously been unsuccessful are statute barred from re-lodging the application for 36 months
Impact:	Significant
Impacts when:	For 36 months following the finding that the licence was not necessary to provide for the reasonable requirements of the public
Impacts on whom:	Unsuccessful applicants
Public objectives impacted:	Distributional
EFFECT 22.6.2	Consumers may have fewer licensed premises to choose from in the short term
How:	Applications refused on the grounds that the licence was not necessary to provide for the reasonable requirements of the public are prevented from being established for at least 36 months

Impact:	Unknown
Impacts when:	For 36 months after the initial finding that the licence was not necessary
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Distributional
<i>Potential Advantages and Benefits</i>	
EFFECT 22.6.3	Objectors to licence applications are less likely to have their funds exhausted by repeated applications from wealthy applicants
How:	Unsuccessful applicants are statute barred from re-lodging the same application for at least 36 months
Impact:	Potentially significant
Impacts when:	For 36 months after the initial finding that the licence was not necessary
Impacts on whom:	Objectors to the original application
Public objectives impacted:	Distributional

Assessment of Public Benefit

591. Following the recommendation to amend the provisions of section 38 (1) so that the basis for granting liquor licences relates to the public interest, as opposed to public need, it also makes sense to similarly amend the provisions of section 38 (5).
592. Amendments to this section could provide that where an application is not granted by reason of a finding that the grant or removal of the licence was not in the public interest, no subsequent application should be made, unless the Director certifies that the application is of a kind sufficiently different from the application which was not granted to be distinguished and heard notwithstanding the previous finding.
593. Amending the provisions in this way will mean that an applicant, whose previous application was refused on the grounds that it was not in the public interest, will be able to address those deficiencies and, where the Director certifies that the application is sufficiently different from the previous one, to reapply without having to wait for any prescribed period.

Conclusion

594. That the provisions of section 38 (5) should be retained in an amended format.

Recommendation

595. That section 38 (5) be amended —

- (a) by deletion from section 38 and insertion into section 34 (Restrictions on certain applications); and
- (b) so that where an application is not granted by reason of a finding that the grant or removal of the licence was not in the public interest, no subsequent application may be made, unless the Director certifies that the application is of a kind sufficiently different from the application that was not granted to be distinguished and heard notwithstanding the previous finding.

Additional matters associated with Restriction 22

Issue of regulation of unlicensed restaurants

596. At page 13 of its submission, the Restaurant and Catering Industry of Western Australia Inc states that it considers the current position in relation to the non licensing of bring-your-own (BYO) restaurants is untenable from a competition policy perspective and from the perspective of achieving the social objectives laid down in the legislation.

597. Although no competition policy inconsistency is conceded in the non-licensing of BYO restaurants and the licensing of licensed restaurants, given that it is an exercise in personal choice to apply or not apply for a licence, it would appear that the Association's comments, especially in respect of not achieving the social objectives of the Act in the non regulation of BYO restaurants, have some credence —

In point of fact, a strong argument can be made that the failure to licence BYO restaurants along lines as fully licensed restaurants is detrimental to public benefit. BYO restaurants account for about two thirds of all restaurants. It is estimated that a similar portion of alcohol consumption occurs through BYO establishments. This means that a very significant element of public alcohol consumption is left outside of the current licensing conditions. This seems entirely inconsistent with the bulk of the stated objectives of the legislation. In particular it appears inconsistent with the primary objective as set out in section 5 (1) (a) which is to:

“to regulate the sale, supply and consumption of liquor;”.

The treatment of BYO currently leaves a significant component of restaurant alcohol consumption outside of the regulatory structure. The opportunities to consume alcohol are arguably greater in the BYO restaurant than in the fully licensed restaurant when the customer is allowed to bring an unlimited amount for consumption and where no responsibilities are defined that require the owner to monitor and act in a case of excessive consumption by a patron. This seems highly inconsistent with 5 (1) (b) which states that a primary objective of the Act is to:

“to minimize harm or ill health caused to people, or any group of people due to the use of liquor.”

The intent of this objective seems to be to use the regulation to reduce the incidence of and costs associated with excessive consumption...

598. The proposition that consumption of alcohol in BYO restaurants is no less likely to be harmful or less likely to be excessive than is the case for a licensed restaurant is not logical¹³.

Potential Disadvantages of the Restriction

599. Expansion of the existing level of regulation for unlicensed restaurants.

Potential Advantages of the Restriction

600. Minimization of harm or ill health associated with the consumption of liquor at regulated premises.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 22.7.1	Expansion of the existing level of regulation for unlicensed restaurants
How:	Promulgation of new offence provisions relating to the supply of liquor to drunken persons on regulated premises
Impact:	Unknown
Impacts when:	On going (from proclamation)
Impacts on whom:	Proprietors of regulated premises
Public objectives impacted:	Health/Life Expectancy.

Potential Advantages and Benefits

EFFECT 22.7.2	Minimization of harm or ill health associated with the consumption of liquor at regulated premises.
How:	Host responsibility initiatives are extended to regulated premises.
Impact:	Significant
Impacts when:	On going (from proclamation)
Impacts on whom:	Proprietors of regulated premises; The public of Western Australia

¹³ *Submission to the Review of the Liquor Licensing Act 1988*, Restaurant and Catering Industry Association of Western Australia (Inc) (pp 13 – 14)

Assessment of Public Benefit

601. The issue of harm associated with the consumption of liquor in regulated premises is an important one in terms of the Act's primary objects. As already indicated, object 5 (1) (a) concerns the regulation of the sale, supply and consumption of liquor, notwithstanding where that liquor is consumed. Similarly, object 5 (1) (b) concerns the minimising of harm or ill-health caused to people, or any group of people, due to the use of liquor, likewise without reference as to where that harm or ill-health may occur.
602. Existing provisions of the Liquor Licensing Act address issues of liquor consumption directly. In particular, section 64 (3) includes a number of issues the Licensing Authority may consider when imposing conditions on licences, which it considers to be in the public interest or which it considers desirable in order to —
- (a) ensure that liquor is sold and consumed in a responsible manner;
 - (b) minimise harm or ill health caused to people or any group of people, due to the use of liquor;
 - (c) prohibit promotional activity in which the drinks are offered free or at reduced prices, or limiting the circumstances in which this can be done; and
 - (d) prohibit any practices which encourage irresponsible drinking.
603. These provisions are directed at regulating the effects of liquor that occur both on and off the licensed premises and amendments could easily provide that these provisions also apply to regulated premises. Particularly relevant is section 64 (3) (ca), which specifically empowers the Licensing Authority to impose conditions to ensure that liquor is consumed in a socially responsible manner, without reference to the place of consumption.
604. While it would be the antithesis of national competition policy principles to apply the same level of regulation contained in the liquor licensing regime to unlicensed premises, it is conceded that some level of regulation is required to fully achieve the Act's social objectives of regulating consumption and minimising harm.
605. Section 122 of the Act already describes a number of types of premises as regulated premises, and subsection (1) (d) specifically provides that "any premises where foods, light refreshments or non-intoxicating drinks are ordinarily served or sold to the public for consumption on the premises" are regulated premises. In addition, subsection (2) provides that it is an offence for a person to sell or supply liquor, or permit the sale or supply of liquor, to a juvenile on regulated premises, with a penalty of \$2000 applying.
606. The creation of new provisions to prohibit the supply of liquor to a drunken person on regulated premises is not too far removed from Act's existing provisions for regulated premises.

607. The offence provisions could be modelled on the Act's offence provisions contained with section 115 (2) of serving a drunken person on licensed premises. The provisions could provide that it is an offence on regulated premises for a person to —

- (a) supply liquor to a drunken persons;
- (b) allow or permit a drunken person to consume liquor;
- (c) obtain or attempt to obtain liquor for consumption by a drunken person;
or
- (d) aid a drunken person in obtaining or consuming liquor in regulated premises,

with penalties applying to the proprietor of the regulated premises, any employee or agent of the proprietor and any other person involved in that supply of liquor.

Alternative Means of Achieving the Legislative Objectives

608. A negative 'licensing scheme' was considered, whereby BYO businesses would be disqualified from allowing consumption of liquor on their premises following the violation of responsible server initiatives.

609. However, the application of a negative licensing scheme is seen as imposing a greater compliance burden on the proprietors of unlicensed premises than the promulgation of offence provisions.

Conclusion

610. That the creation of offence provisions for serving drunken persons with liquor at regulated premises will achieve significant public benefit associated with minimizing harm or ill health due to the use of liquor.

611. Following the expansion of offence provisions for regulated premises, it may be appropriate to consider whether the Act should continue to be titled as the "Liquor Licensing Act", given that the scope of the Act appears to have been shifted from a strict licensing focus to one of more general application, relative to both licensed and unlicensed premises.

612. It may now be more appropriate for the Act to be retitled as the "Liquor Control Act", in recognition of movement of the Act away from the relatively narrow focus of liquor licensing *per se* to one that recognises the wider role now played by the Licensing Authority in also minimizing harm.

Recommendation

613. That a new provision relating to regulated premises be modelled on section 115 (2) to mirror the offence of serving a drunken person on licensed premises and providing an offence for a person to —

- (a) supply liquor to a drunken persons;
- (b) allow or permit a drunken person to consume liquor;
- (c) obtain or attempt to obtain liquor for consumption by a drunken person;
or
- (d) aid a drunken person in obtaining or consuming liquor,

in regulated premises, with penalties applying to the proprietor of the regulated premises, any employee or agent of the proprietor or any other person.

614. The Act should be retitled as the “Liquor Control Act”, given that the scope of the Act appears to have been shifted from a strict licensing focus to one of more general application, relative to both licensed and unlicensed premises and from the relatively narrow focus of liquor licensing *per se*, to one that recognises the wider role now played by the Licensing Authority in also minimizing harm.

RESTRICTION 23: where the Director so requires, the liquor to be sold or supplied under an occasional licence is to be purchased from a supplier, or a supplier selected from a list of suppliers specified in the licence (section 59 (4))

615. This restriction is considered anti-competitive because the holder of an occasional licence is required to purchase liquor from a third party as a condition of the licence, notwithstanding the fact that the applicant initially specified whom the third party would be.

616. It is difficult to establish a significant relationship between this restriction and the objects of the Liquor Licensing Act.

617. As part of the occasional licence application process, applicants nominate liquor merchants as part of the occasional licence application process. Nominated liquor merchants are then endorsed as the liquor suppliers under the occasional licence. However, commercial outcomes from competition are frustrated by conditioning occasional licences in this manner because liquor merchants who subsequently offer more competitive prices are excluded from supplying liquor under the occasional licence, unless further application is made to vary the licence accordingly.

Conclusion

618. The restriction requiring the liquor to be sold or supplied under an occasional licence to be purchased from a supplier, or a supplier selected from a list of suppliers specified in the licence is not justifiable.

Recommendation

619. It is recommended that the restriction requiring the liquor to be sold under an occasional licence be purchased from a list of suppliers specified in the licence cannot be justified and that section 59 (4) of the Act should be repealed.

RESTRICTION 24: an application for the grant of a licence (other than an occasional licence), the removal of a licence or for the approval of proposed alterations to, or redefinition of, licensed premises, must be accompanied by plans of the premises to which the application relates (section 66)

620. This restriction is considered anti-competitive because of the

- (a) requirement for plans to be submitted; and
- (b) the persons who are specified as being able to prepare the plans.

621. The object addressed is object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

The requirement to lodge plans

622. Section 66 of the Act requires that an application for —

- (a) the grant of a licence, other than an occasional licence;
- (b) the removal of a licence; or
- (c) approval of a proposed alteration to, or redefinition of, licensed premises,

must be accompanied, unless the Director otherwise approves, by plans of the premises to which the application relates.

Restriction on who may draw plans

623. Regulation 11 (2) prescribes the type of plans to be submitted under section 66 and provides that such plans should be drawn —

- (a) by a duly qualified architect, surveyor, town planner, engineer, builder or draftsman in ink on opaque drafting bond paper of at least A1 size, or be xerographic photocopies which are of the same size as the original within a tolerance of 5 per cent; and

- (b) so as to comply with Australian Standard 1100, Technical Drawing Part 101 — 1984 General Principles and Part 301 — 1995 Architectural Drawing of the Standards Association of Australia,

and shall show the date of preparation, the scale, the direction of north and the name of the person who prepared the plan.

Potential Disadvantages of the Restriction

624. A duly qualified architect, surveyor, town planner, engineer, builder or draftsman must draw the plans.

Potential Advantages of the Restriction

625. An accurate understanding of the premises to be licensed can be gained from the plans.

626. The licensed area can be accurately defined.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 24.1	A duly qualified architect, surveyor, town planner, engineer, builder or draftsman must draw the plans
How:	Statutory requirement
Impact:	Increased cost to applicants because other persons who are capable of preparing plans to the standard required are prevented from doing so
Impacts when:	Whenever plans are required to be lodged
Impacts on whom:	Applicants
Public objectives impacted:	None identified

Potential Advantages and Benefits

EFFECT 24.2	An accurate understanding of the premises to be licensed can be gained from the plans
How:	Plans are required to be factual
Impact:	Applicants are required to provide factual plans
Impacts when:	Whenever plans are required to be lodged
Impacts on whom:	The Licensing Authority, licensee or applicant, persons who visit to the licensed premises
Public objectives impacted:	Uncertainty/risk

EFFECT 24.3	The licensed area can be accurately defined
How:	Licensed area is defined on the floor plans of the premises
Impact:	All interested parties can clearly determine what part of the premises is licensed for the sale, supply and consumption of liquor
Impacts when:	On going
Impacts on whom:	Licensees, the Licensing Authority, police officers and members of the public
Public objectives impacted:	Uncertainty/risk

Assessment of Public Benefit

627. The provision of plans to the standard required by regulation 11 is integral to the process of licensing buildings or other premises. Section 3 of the Liquor Licensing Act defines “licensed premises” as meaning the premises specified or defined by the Licensing Authority in relation to a licence as the building or place to which that licence relates.
628. Therefore, given that the licence relates only to the licensed premises specified or defined by the Licensing Authority, it is very important for plans of the premises, which become legal documents after they are defined as licensed premises, to be accurate and factual.
629. However, rather than specifying who may draw the plans, it would be preferable to simply prescribe the standard and allow plans to be drawn by any person who can prepare the plans to that standard.

Alternative Means of Achieving the Legislative Objectives

630. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

631. The restriction on competition which requires the compulsory provision of plans of premises is justified, however the restriction should be simplified to allow any person to prepare the plans who is capable of doing so.

Recommendation

632. It is recommended that the restriction relating to the requirement to lodge plans of premises should be maintained, subject to deletion of the requirement for plans to be drawn by a duly qualified architect, surveyor, town planner, engineer, builder or draftsman as currently prescribed in Regulation 11 (2) (a).

RESTRICTION 25: an application shall be in the form and manner prescribed and must be accompanied by the prescribed fees (section 68).

633. This restriction is considered anti-competitive because it prescribes an application process to be followed and requires the payment of prescribed application fees.

634. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (d) (2), to provide adequate controls of persons directly or indirectly involved in the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

635. Additional costs incurred by liquor merchants in applying for licences and furnishing information to the Licensing Authority.

Potential Advantages of the Restriction

636. Fair and proper system for the processing and issuing of new licences.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 25.1	Additional costs incurred by liquor merchants
How:	Costs of applying for licences and furnishing information to the Licensing Authority
Impact:	Total application costs of up to \$750.00
Impacts when:	On going
Impacts on whom:	Liquor merchants
Public objectives impacted:	Economic/financial

Potential Advantages and Benefits

EFFECT 25.2	Fair and proper system for the processing and issuing of new licence
How:	The application process provides for the provision of all the necessary information to allow liquor licensing applications to be determined on their own merits
Impact:	Applications are determined in an orderly manner
Impacts when:	On going
Impacts on whom:	The Licensing Authority, applicants, the general public
Public objectives impacted:	Proper regulation of the liquor industry

Assessment of Public Benefit

637. Given the nature of the liquor industry and the opportunities that exist to maximise profit at the expense of the well-being of consumers, an effective application process is judged to be essential in regulating the industry.
638. The prescribed application fees are not excessive, given that the maximum application fee is \$750.00¹⁴ and the levying of an application fee is in accordance with Government policy that the cost of providing a service should be met by the persons who benefit from that service.

Alternative Means of Achieving the Legislative Objectives

639. While a licensing regime is imposed on liquor merchants there must be an orderly process in which relevant applications can be made.
640. As such, it is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

641. The application process, while constituting a restriction on competition, should be maintained.

Recommendation

642. It is recommended that the restriction on applications being in the form and manner prescribed and accompanied by the prescribed application fees should be maintained.

RESTRICTION 26: in setting an affected area, the Director may take into account the existing or proposed licensed premises (section 71 (2) (b), (d) and (g))

643. This restriction is considered anti-competitive because when setting the affected area, the Director may take into account information relating to existing market players and potential competitors of an applicant. In this respect, it is closely linked with section 38 (2) of the Act, which has been considered in the discussion on Restriction 22.
644. The object addressed is object 5 (2) (a), to contribute to the proper development of the liquor industry.

¹⁴ Other than for an occasional licence where the anticipated number of persons attending the function is anticipated to be in excess of 5 001)

645. Section 71 (1) of the Act provides that where a notice of application is lodged for the grant or removal of a Category A licence, the Director shall cause an area surrounding the place where the premises to which the application relates are, or are proposed to be situated, to be specified as the affected area.

Potential Disadvantages of the Restriction

646. The affected area can constitute a barrier to entry because in specifying the affected area, the Director may take into account existing or proposed licensed premises.

Potential Advantages of the Restriction

647. Residents of the affected area have an opportunity to influence the decisions of the Licensing Authority because a right to object is conferred upon any resident of the affected area.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 26.1	The affected area can constitute a barrier to entry
How:	In specifying the affected area, the Director may take into account existing or proposed licensed premises
Impact:	Constitutes a barrier to entry
Impacts when:	At time the affected area is specified
Impacts on whom:	Applicants for the grant or removal of a licence
Public objectives impacted:	None identified

Potential Advantages and Benefits

EFFECT 26.2	Residents of the affected area have an opportunity to influence the decisions of the Licensing Authority
How:	A right to object is conferred upon any resident of the affected area
Impact:	An application shall not be granted where the Licensing Authority is satisfied that an undue degree of offence, annoyance or inconvenience would be likely to be caused to persons who reside or work in the area
Impacts when:	At time of decision determining the application
Impacts on whom:	Residents of the affected area, the applicant and the Licensing Authority
Public objectives impacted:	Environmental quality

Assessment of Public Benefit

648. Setting an affected area confers a right to object on residents or other persons likely to be adversely affected by the establishment of licensed premises in close proximity to where they live, work, worship, etc. There is an important public benefit in the people who may be affected by a decision being given status to be able to influence that decision.
649. However, the specification of the affected area should not be predicated upon the number of existing or proposed licensed premises in the vicinity of the applicants proposed premises.

Alternative Means of Achieving the Legislative Objectives

650. Section 73 (2) (a) (i) of the Act provides that where an application is required to be advertised a right to object is conferred in any case where an affected area is specified, on any resident of the affected area. Section 73 (2) (b) subsequently provides a right to object in relation to any application, on such persons, or persons of such class as may be prescribed or specified by the licensing authority and defined in the relevant advertisement.
651. Regulation 14 provides that in any case where an affected area is not specified, a right to object to an application is conferred under section 73 (2) (b) on any person and on any ground permitted by section 74.
652. While the setting of an affected area could be viewed as a valid action for empowering residents to affect the decisions of the Licensing Authority that may adversely affect them, the setting of any area by an Authority external to the local area is likely to be somewhat arbitrary and potentially detrimental to those residents who may be located just outside of the area set, but nonetheless feel aggrieved by the application on a ground permitted by section 74.
653. Similarly in setting an affected area, consideration should not be given to the number of existing or proposed premises in the area surrounding the proposed licensed premises.
654. An alternative would be to repeal section 71 and remove the requirement for the Director to set an affected area, and make consequential amendments to regulation 14 to confer a right to object to an application under section 73 (2) (b) on any person and on any ground permitted by section 74.

Conclusion

655. Following the recommendation of this Review to repeal many of the provisions of section 38, it logically follows that section 71 should also be repealed.

Recommendation

656. It is recommended that continuation of the restriction associated with the Director having to consider the nature and location of the places from which the prospective licensee may derive trade; or the existing or proposed licensed premises in the area in the specification of an affected area (section 71) cannot be justified and that —

- (a) section 71 should be repealed; and
- (b) consequential amendments should be made to section 73 (2) and regulation 14 to provide that where an application is required to be advertised a right to object to the application is conferred on such persons, or classes of persons of such a class, as may be prescribed, or specified by the Licensing Authority and defined in the advertisement required to be made relating to the application, on such grounds permitted under section 74 as may be so prescribed or specified.

RESTRICTION 27: the Licensing Authority is unable to grant an application for the grant, transfer or removal of a licence; variation or cancellation of any condition imposed on a hotel licence requiring the provision of residential accommodation; approval to a proposed alteration to, or redefinition of, the licensed premises; or an extended trading permit in respect of any place which is to be comprised within the licensed premises unless the applicant can satisfy the Licensing Authority that the lessor has consented to the application (section 72)

657. This restriction is considered anti-competitive because licensees are prevented from making business decisions without reference to the premises' owner.

658. It is difficult to relate this restriction back to the Act's objects, except in the case of any proposed alteration to licensed premises, which would address objects 5 (2) (a), to regulate the proper development of the liquor industry; and object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

659. Section 72 of the Liquor Licensing Act precludes the Licensing Authority from granting an application for —

- (a) the grant or transfer of a licence;
- (b) variation or cancellation of any condition imposed on a hotel licence and requiring the provision of residential accommodation;
- (c) approval to a proposed alteration to, or redefinition of, the licensed premises; or
- (d) an extended area permit in respect of any place which is to be comprised within the licensed premises,

unless the applicant satisfies the Licensing Authority that the owner, and where the licensed premises or proposed licensed premises are occupied, or are to be occupied, under a lease, the lessor, has consented to the application.

Potential Disadvantages of the Restriction

660. Licensees are unable to make business decisions under their liquor licence without written consent from the owner of the licensed premises, who has no interest in the licence.

Potential Advantages of the Restriction

661. The interests of owners of licensed premises are protected.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 27.1 **Licensees are unable to make business decisions under their liquor licence written consent from the owner of the licensed premises**

How: Requirement of the Liquor Licensing Act

Impact: Negligible

Impacts when: On going

Impacts on whom: Licensees

Public objectives impacted: None identified

Potential Advantages and Benefits

EFFECT 27.2 **The interests of owners of licensed premises are protected**

How: Licensees are required to obtain written approval from an owner before the Licensing Authority will determine an application for alterations to licensed premises

Impact: Negligible

Impacts when: On going

Impacts on whom: Licensees and owners

Public objectives impacted: Protection of personal property

Assessment of Public Benefit

662. It seems reasonable to conclude that the only legitimate interest of the Licensing Authority in the opinion of an owner of licensed premises is whether or not they have assigned exclusive tenure of the premises over to the applicant/licensee, as required by section 37 (5).

663. So long as the licensee has a legal right to possess the premises, any additional covenants between the parties, including whether or not the owner of the premises realise that the proposed use of the premises is going to include the sale or consumption of liquor, are really the personal concerns of the relevant parties and subject to private contractual agreements.
664. Similarly, the interests of owners of licensed premises, where those premises have been lawfully let to another party, can only be relative to ensuring that contractual obligations of the lease agreement are met, ie that rent is paid on time. The only other time the interests of an owner would appear to be legitimate are relative to the provisions of section 87, which provides that an owner of licensed premises may apply for the grant of a protection order, in circumstances where a licensee ceases to occupy, or to carry on business in the licensed premises.

Alternative Means of Achieving the Legislative Objectives

665. The goal of this restriction could be achieved by relying on the conditions of the lease agreement between lessor and lessee.
666. It is the role of the parties involved to ensure that any lease agreement entered into contains the necessary covenants to protect their personal, property and business interests.

Conclusion

667. Once an owner has agreed to lease a premise and a licence has been lawfully granted or transferred to a lessee, the owner should have no further interest in the licence, excepting perhaps under the provisions of sections 86 and 87.
668. It is the business of property owners to ensure that their property is properly protected under the terms of a lease or other agreement and not that of the Licensing Authority.
669. Any application made under the Liquor Licensing Act without the approval of the owner could be pursued as a civil action.
670. Consequential amendments should also be made to delete references to the interests of an owner being prejudicially affected by a lawful application.

Recommendation

671. It is recommended that —
- (a) the restriction on business imposed by requiring that applications before the Licensing Authority be accompanied by consent of the owner, lessor, lessee or mortgagee cannot be justified and that section 72 should be repealed; and
 - (b) consequential amendments be made to delete any references throughout the Act to the interests of an owner being prejudicially affected by a lawful application.

RESTRICTION 28: where an application is required to be advertised, a right to object is conferred on any person holding a Category A licence for premises which are, or are premises referred to under a licence granted under section 62 and are proposed to be situated in the affected area (section 73 (2))

672. This restriction is considered anti-competitive because a right to object to an application is conferred on existing market players and potential competitors of an applicant, thereby frustrating commercial outcomes from competition.

673. It is difficult to relate this aspect of the restriction back to the Act's objects in any meaningful way.

Potential Disadvantages of the Restriction

674. Existing market players can restrict the entry of potential competitors into the liquor market.

Potential Advantages of the Restriction

675. None identified.

Conclusion

676. Conferring a unique right to object on any person holding a Category A licence in the affected area does not appear relevant to whether or not the grant of a licence is in the public interest, especially given that it has already been recommended (see discussion at Restriction 27) that section 73 (3) may need amending to clarify that a licensee may object as a "resident" of the affected area, where in the opinion of the Licensing Authority, that resident (i.e. licensee) has a proper interest in the affected area, other than as a licensee.

Recommendation

677. It is recommended that the restriction on entry constituted by conferring a right to object on any person holding a Category A licence in the affected area cannot be justified and that section 73 (2) (a) (ii) should be repealed.

RESTRICTION 29: an objection may be made on the grounds that on an application relating to a Category A licence, that the grant of the application is not necessary in order to provide for the requirements of the public (section 74 (1) (d))

678. This restriction is considered anti-competitive because it restricts the entry of potential competitors into the liquor market on the basis that the grant of the application is not necessary.

679. As with Restriction 21 (section 38 requirements), it is difficult to relate this aspect of the restriction back to the Act's objects in any meaningful way.

Conclusion

680. Rather than requiring applicants to try and prove beforehand that the licence is necessary to provide for the requirements of the public, it should be left to market forces to determine which premises succeed, based upon the commercial outcomes of competition.
681. It is important to state that in reaching this conclusion, it has been assumed that the application process will continue to determine whether harm or ill health will be caused to people, or any group of people, due to the use of liquor.

Recommendation

682. It is recommended that the restriction on competition embodied in the ground of objection that a licence is not necessary is not justifiable and that section 74 (1) (d) should be repealed.

RESTRICTION 30: an application for the grant of an occasional licence is required to be lodged in the prescribed manner and form, not later than 14 days before the licence is to take effect (section 75)

683. This restriction is considered anti-competitive because it requires mandatory compliance with a time period for the lodging of an application.
684. The object addressed is object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (d), to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

685. An occasional licence may not be granted unless the application is lodged not later than 14 days before the licence is to take effect.

Potential Advantages of the Restriction

686. Proper processing time for occasional licences ensures fair and proper conduct by the persons responsible under occasional licences.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 30.1	An occasional licence may not be granted unless the application is lodged not later than 14 days before the licence is to take effect
How:	Requirement of the Liquor Licensing Act
Impact:	Statutory time period is imposed on applicants
Impacts when:	At lodgement time

Impacts on whom:	Persons seeking the grant of an occasional licence
Public objectives impacted:	Proper regulation of the liquor industry
<i>Potential Advantages and Benefits</i>	
EFFECT 30.2	Proper processing time for occasional licences ensures fair and proper conduct by the persons responsible under occasional licences
How:	Applications can be properly considered
Impact:	Fewer incidents of public disturbance caused pursuant to the sale and consumption of liquor under an occasional licence
Impacts when:	On going
Impacts on whom:	Applicants, the Licensing Authority and the public of Western Australia
Public objectives impacted:	Uncertainty/risk

Assessment of Public Benefit

687. Public benefits associated with providing for a fair and orderly process for the issuing of occasional licences are relative to the health and well being of people who attend functions under occasional licences and for residents who reside in the locality of the premises.

688. The cost of this restriction is mitigated by the following factors —

- (a) planning for licensed functions is usually preceded by more than 14 days;
- (b) the 14 day period is the minimum period permitted and there is nothing to prevent the application from being lodged as part of the initial planning process for the function; and
- (c) the Director is able to exercise discretion and permit an application to be lodged within the 14 day period.

Alternative Means of Achieving the Legislative Objectives

689. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

690. Continuation of the 14-day lodgement period for an occasional licence is justifiable.

Recommendation

691. It is recommended that the restriction contained in section 75 (1) of the Liquor Licensing Act requiring an application for the grant of an occasional licence to be lodged no later than 14 days before the licence is to take effect should be maintained.

RESTRICTION 31: an application for the grant of an extended trading permit is required to be lodged in the prescribed manner and form, not later than 14 days before the permit is to take effect (section 76)

692. This restriction is considered anti-competitive because it requires mandatory compliance with the manner, form and time period for the lodging of an application.

693. The object addressed is object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

694. An extended trading permit may not be granted unless the application is lodged not later than 14 days before the permit is to take effect.

Potential Advantages of the Restriction

695. Proper processing time for extended trading permits ensures fair and proper conduct by the persons responsible for the conduct of the permit.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 31.1	An extended trading permit may not be granted unless the application is lodged not later than 14 days before the permit is to take effect
How:	Requirement of the Liquor Licensing Act
Impact:	Statutory time period is imposed on applicants
Impacts when:	At lodgement time
Impacts on whom:	Licensees seeking the grant of an extended trading permit
Public objectives impacted:	Proper regulation of the liquor industry

Potential Advantages and Benefits

EFFECT 31.2	Proper processing time for extended trading permits ensures fair and proper conduct by the persons responsible for the conduct of the permit
How:	Applications can be properly considered
Impact:	Fewer incidents of public disturbance caused pursuant to the sale and consumption of liquor under an extended trading permit
Impacts when:	On going
Impacts on whom:	Licensees; The Licensing Authority; and The public of Western Australia
Public objectives impacted:	Uncertainty/risk

Assessment of Public Benefit

696. Public benefits associated with providing for a fair and orderly process for the issuing of extended trading permits are relative to the health and well-being of people who attend functions under such permits and for residents who reside in the locality of the premises.

697. The cost of this restriction is mitigated by the following factors —

- (a) planning for licensed functions is usually preceded by more than 14 days;
- (b) the 14 day period is the minimum period permitted and there is nothing to prevent the application from being lodged as part of the initial planning process for the function; and
- (c) the Director is able to exercise discretion and permit an application to be lodged within the 14 day period.

Alternative Means of Achieving the Legislative Objectives

698. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

699. Continuation of the 14-day lodgement period for an extended trading permit is justifiable.

Recommendation

700. It is recommended that the restriction contained in section 76 (1) of the Liquor Licensing Act requiring an application for the grant of an extended trading permit to be lodged no later than 14 days before the permit is to take effect should be maintained.

RESTRICTION 32: an owner, occupier or licensee of licensed premises, is prohibited, without the prior approval of the Director, to make any alteration in the construction or completion of premises the subject of plans or specifications made under section 62, or any licensed premises (section 77)

701. his restriction is considered anti-competitive because it restricts the ability of an owner, occupier or licensee of licensed premises to make any alteration in any licensed premises, without the Director’s prior approval. The object addressed is object 5 (2) (a), to contribute to the proper development of the liquor industry.

Potential Disadvantages of the Restriction

702. Licensees are constrained in their ability to alter a licensed premise and present it as a ‘new’ or ‘improved’ venue.

Potential Advantages of the Restriction

703. Licensed premises are not altered in a manner that conflicts with the proper development of the liquor industry.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 32.1	Licensees are constrained in their ability to alter licensed premises and capitalise on its presentation as a ‘new’ or ‘improved’ venue
How:	Alterations cannot be undertaken without the prior approval of the Director of Liquor Licensing
Impact:	Application process is imposed
Impacts when:	On-going
Impacts on whom:	Licensees, owners and/or occupants of licensed premises
Public objectives impacted:	Distributional

Potential Advantages and Benefits

EFFECT 32.2	Licensed premises are not altered in a manner that conflicts with the proper development of the liquor industry
How:	Alterations to licensed premises are subject to standards imposed on licensed premises by the Licensing Authority
Impact:	Likely to be significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk

Assessment of Public Benefit

704. Subsection (3) defines an alteration as changes that comprises or consists of —
- (a) a material change, whether structural, decorative or otherwise, affecting the premises or the accommodation or facilities provided;
 - (b) a substantial change to the use of any premises, accommodation or facilities; or
 - (c) an addition to, or reduction in the area of the premises.
705. While the restriction can clearly be linked to objects 5 (1) (a), 5 (2) (a), (b) and (c), it is questionable as to whether the current level of regulation should be maintained. While some level of regulation over physical alterations to licensed premises should be retained, there is opportunity to significantly amend the provisions of section 77 so that —
- (a) licensees and/or owners of licensed premises can be relatively more innovative; and
 - (b) the industry in general be more exposed to the benefits of commercial outcomes from competition.
706. It is recommended that the provisions of section 77 (3) be amended so that an alteration requiring the prior approval of the Director is restricted to only those alterations that result in an addition to, or reduction in the area of the premises.
707. All other lawful alterations, whether structural, decorative or otherwise; or any substantial change in the use of the premises which do not result in an addition or reduction in the licensed area of the premises should be left to the discretion of the licensee/owner concerned.
708. Subsection (6) (a) should be amended so that it coincides more closely with the intentions of object 5 (1) (b). In this respect, all applications likely to effect an increase or decrease in the area of the licensed premises and, logically a subsequent increase in the premises' actual or potential liquor sales, should be required to be advertised and subject to scrutiny by the local community.
709. This would thereby present an opportunity for the submission of objections relative to the minimisation of harm or ill-health caused to people or any group of people, due to the use of liquor and would also appear consistent with object 5 (2) (a) in that any proper development of the liquor industry must have due regard to the interests of the wider community, with consideration given to the public interest as opposed to private commercial interests.

Alternative Means of Achieving the Legislative Objectives

710. An alternative to requiring the prior approval of the Director to any proposed alteration to licensed premises would be to permit licensees to alter their premises as they see fit, with the subsequent requirement that plans of the altered premises be lodged for redefinition of the licensed area. At that time, the Director would have power to give directions in relation to the alteration where it is not considered to be up to standard.
711. However, this alternative is not considered as an adequate alternative because licensees would be in a position to increase their licensed area without any independent consideration of whether the increase would negatively impact on harm minimization concerns or the amenity of the neighbourhood.
712. Similarly, the giving of directions after a premise has been altered may result in more cost to the licensee concerned.

Conclusion

713. The restriction embodied in section 77 should remain, albeit in an amended format. Licensees should have the ability to present their premises to consumers in the most attractive or commercially viable way without the requirement for formal approval by the Licensing Authority, provided that there is no increase in the licensed area.
714. Where an alteration is likely to effect a material change in the licensed area should continue to require the prior approval of the Director.

Recommendation

715. It is recommended that the restriction associated with requiring approval for minor and decorative changes to licensed premises cannot be maintained and that section 77 (3) should be amended so that an alteration requiring the prior approval of the Director is restricted to only those alterations which will effect an increase or decrease in the licensed area of the premises.

RESTRICTION 33: where the Director is satisfied, in relation to a Category A licence, that an alteration of the licensed premises or redefinition proposed is likely to lead to a substantial increase in actual or potential liquor sales; and reduce significantly the actual or potential liquor sales under a Category A licence held by any other persons, he may direct that the application is required to be advertised under section 67 (section 77 (6))

716. This restriction is considered anti-competitive because the Director's determination about whether or not an application should be advertised is based on the effect of the application on the actual or potential liquor sales of market competitors.
717. As such, it is difficult to relate the restriction in any meaningful way to the Act's objects.

Conclusion

718. The restriction on requiring an application for alteration of licensed premises to be advertised solely on the basis of its possible effect on other licensees cannot be justified.

Recommendation

719. It is recommended that the restriction embodied in the Director requiring an application for alteration or redefinition of licensed premises to be advertised on the basis of the application's effect on the actual or potential liquor sales of the licensee or any other holder of a Category A licence cannot be justified and that section 77 (6) should be repealed.

RESTRICTION 34: the holder of a hotel licence, other than a tavern licence, shall maintain a register of lodgers, in a form acceptable to the Director (section 105)

720. This restriction is considered anti-competitive because it imposes record keeping on licensees and requirements in respect of the maintenance of those records.

721. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

Potential Disadvantages of the Restriction

722. Owners are required to maintain and keep a register of lodgers in a form acceptable to the Director of Liquor Licensing.

723. Higher administrative costs to licensees.

Potential Advantages of the Restriction

724. Maintenance of the register provides the licensee with *prima facie* evidence, in any proceedings where the question may be relevant, that a person was a lodger at the premises at a time when liquor is not authorized to be sold to persons other than lodgers.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 34.1	Owners are required to maintain and keep a register of lodgers in a form acceptable to the Director of Liquor Licensing
How:	Statutory requirement
Impact:	Maintenance and keeping of registers of lodgers can be a significant burden, especially for large hotels
Impacts when:	On going

Impacts on whom:	Hotel licensees
Public objectives impacted:	None identified
EFFECT 34.2	Higher administrative costs for licensees
How:	Records are required to be kept and maintained
Impact:	Costs are incurred in connection with record keeping
Impacts when:	On going
Impacts on whom:	Licensees
Public objectives impacted:	Hotel licensees

Potential Advantages and Benefits

EFFECT 34.3	Maintenance of the register provides the licensee with <i>prima facie</i> evidence, in any proceedings where the question may be relevant, that a person was a lodger at the premises at a time when liquor is not authorized to be sold to persons other than lodgers
How:	Statutory provision
Impact:	A defence is provided in the Liquor Licensing Act
Impacts when:	In any proceedings where the question may be relevant
Impacts on whom:	Licensees
Public objectives impacted	None identified

Assessment of Public Benefit

725. The keeping of registers of lodgers imposes compliance and administrative costs on licensees, while also providing them with a means of defence where people are found consuming liquor on licensed premises after the permitted hours of trade. This defence is important given that offence provisions for serving liquor outside of permitted hours are significant —

- (a) in the case of a licensee or approved manager to penalty is \$5,000; and
- (b) in the case of any other employee, \$2,000.

726. However, it is not certain whether cost of the restriction outweighs its benefit, given that the benefit appears to relate primarily to providing licensees with a defence; which should probably be the responsibility of the licensee to establish in any event.

Alternative Means of Achieving the Legislative Objectives

727. Given that a licensee can face substantial punitive measures for selling and supplying liquor outside of the permitted hours of trade, it would appear reasonable to expect that licensees would voluntarily maintain a record if it could provide them with a defence. In this respect —

- (a) section 105 (5) currently provides that where a persons is found on premises to which a hotel licence relates at a time when the sale of liquor to persons other than lodgers is not authorized, if in relation to that person any requirement of this section is contravened it is *prima facie* evidence against that person and against the licensee, if any proceedings in which the question is relevant, that the person was not at that time a lodger; and
- (b) section 112 (1) (d) currently provides that the provisions in respect to trading outside of permitted hours do not prohibit or restrict, as regards licensed premises —
 - (i) the taking of liquor from the premises by a person who resides there;
 - (ii) the supply of liquor to a person (not being a lodger) who resides, or carries on or is in charge of the business, there, or the possession or consumption of liquor supplied at the expense of that person in a private room reserved for the personal use of that person by any members of the family or private guests of that person; or
 - (iii) the supply of liquor for consumption there, to persons employed for the purpose of the business carried on under the licence, at the expense of their employer or a person carrying on or in charge of the business there, or the possession or consumption of the liquor so supplied,

but the burden of providing that this paragraph applies lies on the person charged with the offence.

728. In a similar manner, rather than imposing mandatory record keeping in respect of lodgers on hotel licensees, it would be possible to achieve the object of the restriction by simply providing that any register of lodgers voluntarily maintained by the licensee will provide a *prima facie* defence against any proceedings in which the question as to whether the person is a lodger is relevant. In any other case (ie where a register of lodgers is not voluntarily maintained), similar to the provisions of section 112 (1) (d), the burden of establishing that the person was a lodger would lay with the persons charged with the offence.

Conclusion

729. The keeping and maintenance of a register of lodgers cannot be justified.

Recommendation

730. That restriction requiring hotel licensees to maintain a register of lodgers should be deleted and replaced with provisions providing that the burden of establishing that the person was a lodger should lay with the persons charged with the offence.

RESTRICTION 35: a person who, whether personally or by an employee or agent, sells any liquor commits an offence, unless that person is the holder of a licence or permit, the operation of which is not suspended, and which authorizes the sale (section 109)

731. This restriction is considered anti-competitive because it imposes a licensing regime on liquor merchants.

732. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (b), to minimize harm or ill health to people, or any group of people, due to the use of liquor.

733. In *Together Against Drugs*, the WA Strategy Against Drug Abuse Action Plan, published in June 1997, the Minister Responsible for the WA Drug Strategy said —

Drug abuse is a problem for Western Australia as it is nationally and internationally. It is a major concern for our whole community... Together Against Drugs is a comprehensive and continuing program to deal with abuse of both legal and illegal drugs in the State...

734. *Together Against Drugs* publishes the Western Australian Government's policy framework in relation to drug abuse and emphasise two principles —

- (a) first and foremost, opposition to drug abuse; and
- (b) second, harm reduction, recognising the need for strategies to reduce the risks and harm to those continuing to use drugs and the wider community, whilst taking care that such strategies do not encourage or normalise drug abuse.

735. It is important to include this policy framework in an analysis of the effect of the licensing restriction because it introduces the important concept of the restriction effectively contributing to a reduction in the incidence of drug taking or, in the case of liquor, in a reduction of drug abuse. While acknowledging that liquor is a legal and socially acceptable drug, it is also important to recognise that it is also open to wide scale abuse. The public objective impacted is prevention of public "bads". Closely related to this effect is a reduction in the risk of illness, injury or fatality associated with the consumption of liquor.

736. Entry to the liquor market is restrictive, for no person may trade in liquor without the grant of a licence by the Licensing Authority. Additionally, the category of licence granted to a licensee further restricts the supply of the product and ancillary services associated with the product, in that the licence provides what form of liquor may be supplied by the licensee, how the liquor may be supplied, from exactly where the liquor may be sold, and during what statutory hours the licensee may trade.
737. The licensing requirement is also seen as encompassing an additional barrier of perceived difficulty (ie. in terms of time, cost and procedure), which is almost customarily associated with the application process.
738. While the need to have a licence imposes licensing and compliance costs on licensees, these are relatively minimal. Section 68 of the Act requires an application to be accompanied by the prescribed application fee and regulation 11 imposes a cost on applicants by requiring the lodgement of plans which are required to be drawn by a duly qualified architect, surveyor, town planner, engineer, builder or draftsman. Similarly, sections 39 and 40 require applicants to seek local government approvals, which incur other incidental costs.
739. Once granted, the annual prescribed licence fee for commercial licence types is \$105, except in the case of wholesalers, where it is set at \$265. It is likely that costs will also be incurred where applicants are required to undertake training to meet the Act's mandatory knowledge requirements.
740. The fees associated with lodging an application and the annual licence fee impose a minor financial burden on licence applicants/holders, however it is not considered sufficient to establish a barrier to entry.
741. More significant costs are associated with the application process, especially those relating to the adversarial hearing of contested applications, however, while these may pose a greater financial burden on licence applicants/holders, they are optional and are borne at the discretion of the individuals concerned, not imposed by legislation.
742. One side effect of the adversarial licensing process is that existing market holders have some measure of protection from competition, which generally results in the ability to earn higher profits through the setting of higher prices. Theoretically, this leads to lower demand and consumption, which, while favouring licensees at the expense of consumers, is also important from a harm minimization perspective.
743. However, licensees have questioned the fairness of this aspect of the licensing restriction, as demonstrated by the comments of the Restaurant and Catering Industry Association of Western Australia, at page 5 of their submission to this review —

From a competition policy perspective, the restrictions associated with liquor licensing directly control the number of competitors and related aspects of the sale of liquor. However, much of the identified harm is associated with alcohol consumption, and restrictions in the Act do not control consumption. This is an important issue for any overall review because economic argument would be based on the idea that problems resulting from the misuse of liquor are likely to be more effectively dealt with through specific instruments as opposed to a general reduction on the number and location of liquor outlets.

744. Conversely, it has also been suggested by health professionals that the licensing restriction is a valuable tool for limiting harm, as suggested by Professor Tim Stockwell in *An Examination of the Appropriateness and Efficiency of Liquor Licensing Laws Across Australia* —

Control over the availability of alcohol via liquor licensing is one of the most significant powers at the disposal of governments for limiting alcohol problems...

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 35.1	Restricts the lawful sale and commercial supply of liquor to people who are specifically licensed for this purpose
How:	The Liquor Licensing Act requires a person to be licensed to sell liquor
Impact:	Continual
Impacts when:	On going
Impacts on whom:	Potential market entrants who must apply for the grant of a licence and established liquor merchants who must comply with their licence conditions.
Public objectives impacted:	Economic/Financial
EFFECT 35.2	Higher administrative costs for licensees
How:	Licensing incurs administrative costs.
Impact:	Reduced consumption as a result of higher prices
Impacts when:	Continual
Impacts on whom:	Liquor merchants, who must become licensed, and liquor consumers (because licensees pass on these costs in prices)
Public objectives impacted:	Economic/Financial

EFFECT 35.3	Existing market holders have limited protection from competition
How:	The licensing requirement, as a barrier to entry, prevents competition
Impacts when:	Continual
Impacts on whom:	Consumers have less choice of where to purchase liquor products
Public objectives impacted:	Distributional
<i>Potential Advantages and Benefits</i>	
EFFECT 35.4	Increased consumer certainty about the quality of products and services at licensed premises
How:	The Liquor Licensing Act requires licensed premises to display certain details at, or near the entrance of the premises, to inform consumers that the premises is licensed, the type of licence and to identify the licensee. Consumers know the type of services that can be provided under different liquor licences.
Impacts when:	Continual
Impacts on whom:	Consumers
Public objectives impacted:	Reduced uncertainty/risks
EFFECT 35.5	Licensing requirement contributes to a reduction in drug abuse
How:	Restrictions on the availability of liquor via the licensing restriction impacts on the subsequent consumption of liquor
Impact:	<ul style="list-style-type: none">▪ Liquor products are only available from licensed premises at certain times, thereby limiting the general availability of liquor.▪ The Liquor Licensing Act requires licensees to ensure that liquor is sold in a responsible manner and to control consumption of liquor on licensed premises.
Impacts when:	Continual
Impacts on whom:	Consumers, liquor merchants and the whole community
Public objectives impacted:	Prevention of public 'bad'; Life expectancy/health.

Assessment of Public Benefit

745. The existence of the liquor licensing system is, by definition, anti-competitive since it presupposes that access to the market of selling and supplying liquor needs to be regulated. Section 31 of the Act provides that a licence holder may sell and supply liquor in accordance with the terms of a licence and section 109 makes it an offence to sell liquor without a licence or permit. Taken together, these provisions restrict the lawful sale and commercial supply of liquor to people who are specifically licensed for this purpose.
746. As a consequence, the licensing restriction also has an effect on the distribution of products through limiting the facilities available for distribution and consumption of alcoholic beverages, by affecting the pricing structure of liquor, and of restricting or preventing the entry of new distributors to the industry. The effect of this restriction is that existing market holders are protected from competition and are able to earn higher profits through setting higher prices, which in turn leads to lower demand and consumption, and favours producers at the expense of consumers.
747. The economic costs to Australia from the hazardous use of alcohol are substantial. At page 23 of their submission to this review, the Alcohol Advisory Council of Western Australia (Inc) refer to a study by Collins and Lapsley (1996) which estimated that alcohol abuse cost the Australian community \$4.5 billion or \$264 per person. Approximately \$3.5 billion were tangible costs attributed to loss of production, health care, accidents and law enforcement. Intangible costs accounted for \$900 million.
748. Although acknowledging that these figures are substantial, the Alcohol Advisory Council also quotes an additional study by Wodak (1995), which states the figures of Collins and Lapsley are conservative, because they do not include costs associated with absenteeism and workplace accidents, and furthermore, when it was not possible to estimate costs, they were assumed to be zero and finally, the estimates only included figures for alcohol abuse and not use. Therefore, costs associated with productivity losses resulting from “immoderate drinking episodes of employees whose aggregate consumption was moderate” were not included in the study.
749. In addition, a review of overseas studies shows that the costs ignored by Collins and Lapsley contribute 50-80 per cent of the social costs of alcohol. Wodak claims that when these costs are incorporated into the Collins and Lapsley estimates, the economic costs of alcohol usage range from \$6.7 billion to \$17.4 billion, with a “best estimate” of \$12.05 billion. The alcohol Advisory Council suggests —

If these are costs already associated with alcohol in a regulated market then the social costs in a deregulated market can only increase. One can only speculate how much of the projected \$23 billion per annum or \$1500 per household in wealth will be spent on dealing with the increase in alcohol related harm...

750. The licensing restriction also imposes administrative costs to government in that the Licensing Authority (the Liquor Licensing Court and Director of Liquor Licensing) is required to administer the Act and are funded out of the State's Consolidated Fund. The 1997/98 budget for the Liquor Licensing Division is \$1.8 million.
751. In Executive Director of Public Health's submission to this review, it is stated that —
- The costs of maintaining the existing restrictions which collectively and indirectly result in restrictions on the density of licensed premises are significant... Too few premises may lead to some of the following types of problems: increased distances for drinkers to travel increasing the likelihood of alcohol-related crashes; large and over-crowded venues dedicated solely to the consumption of alcohol. Too many premises may lead to the irresponsible serving and promotional practices leading to increases in excessive consumption and harm.
752. Public opinion on this issue tends to be conservative with only a minority supporting the proposal that the number of licensed outlets should actually be reduced (Commonwealth Department of Health and Human Services (1996) National Drug Strategy Household Survey 1995. Canberra: AGPS) and just a few supporting the introduction of additional premises such as licensed grocery stores (Giesbrecht, N., Paglia, A. & Room, R. (1998) Public opinions on alcohol policies: exploring the contributions of drinking locations, drinking patterns and perceived benefits and complications. Presented at the 2nd International Conference on Drinking Patterns and their Consequences, Perth, Western Australia, 1-5 February 1998).
753. There are also costs of not effectively restricting the number of licensed premises if any system of regulation at all is to be maintained; more premises increases monitoring and enforcement costs. Too many premises may also, as outlined above, lead to excessive consumption and increased harm.
754. A flow-on effect of the licensing restriction is increased certainty about the quality of products and services. The trading styles of the different licence classes contribute to consumer confidence about what can be expected, in terms of products and services, in different licensed premises, and in terms of juveniles, about who can and cannot lawfully enter licensed premises. The relevant public objective is reduced uncertainty/risk.

Alternatives

755. The following alternatives, or combinations thereof, are presented as substitutes for the existing licensing regime—
- (a) self-regulation - standards set and enforced by industry through an industry association;

- (b) co-regulation - standards set and enforced by industry through an industry association but subject to government oversight or ratification;
- (c) registration - simple inclusion on a register of industry participants without any restriction on entry to the market;
- (d) public education;
- (e) negative licensing - no restrictions on entry to the market but removal from the market where specified standards are breached; and
- (f) providing an exemption from the Act for small social transactions of liquor.

Self-regulation

756. Self-regulation would depend on the liquor industry setting and enforcing standards through membership rules or a code of practice, the application of which would be voluntary. The submission of the Executive Director of Public Health to this review, comments on the self-regulation of the liquor industry, by examining the introduction of industry Accords —

In Australia, a new form of self-regulatory strategy has emerged known as the “Accord” (Rydon, P., & Stockwell, T. (1997) Local regulation and enforcement strategies for licensed premises. In Plant, M., Single, E., & Stockwell, T. (Eds.) *Alcohol: Minimising the Harm*. London: Free Association Books, 211-229). These are usually described as ‘gentlemen’s agreements’ between licensees, city councils and police to effect that certain restrictions will apply to promotional and serving practices in that area. Most accords include measures which increase the profitability of participating establishments without increasing alcohol sales: eg banning of price discounting (‘happy hours’) and the introduction of door charges late at night. Several features of Accords are worth noting: they are vulnerable to being undermined when a single rogue licensee breaks ranks and reintroduces cheap drink nights; they involve considerable time and effort in attending meetings to maintain commitment; evaluation to be conducted to date of an Accord-type program have produced mixed results (Graham, K. & Hommel, R. (1997) *Creating safer bars*, In Plant et al (Eds) *Alcohol: Minimising the harm*, Free Association Books: London/New York; Hawks, D., Rydon, P., Stockwell, T., White, M., Chikritzhs, T., McLeod, R. & Heale, P. (1998) *The Fremantle Police - Licensee Accord: Impact on Serving Practices, Harm and the Wider Community*. Presented at “Drug Trials and Tribulations: Lessons for Australian Policy, an international symposium hosted by the National Centre for Research into the Prevention of Drug Abuse Curtin University. Hyatt Regency, 6th February 1998; Rumbold, G., Malpass, A., Lang, E., Cvekovski, S. & Kelly, W. (1998) *An Evaluation of the Geelong Local Industry Accord*. Melbourne: Turning Point Alcohol and Drug Centre Inc. and the Victoria Police) given the nature of ‘gentlemen’s agreements’ they have not usually involved prosecutions of offending licensees.

Launched in March 1996, the Fremantle Accord was an agreement between local licensees, authorities and police to promote responsible server practices (Hawks *et al.*, 1998). In addition to following such practices, a commitment was made by those involved to participate in an independent evaluation of the Accord's effectiveness. Hotels and nightclubs were specifically targeted during the evaluation as these types of licensed premises are most often associated with alcohol related harm. A control site, Northbridge, was selected for comparison...

A variety of measures were employed to assess the impact of the Fremantle Accord. These include a survey of the number of occasions pseudo drunk patrons were refused service, a survey of the number of times pseudo under age patrons were asked for proof of age, surveys of local residents and businesses, an audit of alcohol related admissions to the emergency department of Fremantle hospital, drink driving citations and accidents for which a selected premises was nominated as the last place of drinking, assault data (recorded by police), a survey of taxi drivers servicing the Fremantle Central Business District on Friday and Saturday evenings, a patron survey, focus groups held with local police and incident logs kept by both police and local licensees.

Overall, the Accord appears to have little impact on responsible server practices, public perceptions of the safety of the late night environment in Fremantle or the levels of alcohol related harm experienced. The refusal of services to intoxicated patrons and the checking of identification improved only slightly with the introduction of the Accord, there was no decrease in the number of assaults occurring in or in the vicinity of licensed premises and public perception of the safety of Fremantle as measured by business and resident surveys showed no improvement, although a greater police presence was noted by respondents...

Although the authors caution against attributing causality to the Accord, a reduction in the rate of total assaults and property damage since its introduction was evident from police records (Rumbold *et al.*, 1998). A few baseline measures were available against which to assess changes in alcohol related harm since the introduction of the Accord, comparisons were also made between Geelong and two other regional centres, neither of which had an industry agreement in place. Geelong premises were found to be superior to the control venues on a number of variables such as security practices, serving practices, availability of food, availability of non alcohol beverages and promotion of free or cheap alcohol. However, Geelong premises did not differ from the control venues in indices of crowding and intoxication.

In evaluating the success of the Accord concept, it is important to note two important differences between the above studies with apparently conflicting results: (i) the Geelong Accord evaluation examined total assault data while the Fremantle evaluation examined only assaults which occurred on or near to licensed premises only; (ii) the Fremantle study employed objective measures of serving practices by means of pseudo patrons while Geelong only employed subjective ratings from key informants some of whom would have had a stake in a positive perception of the agreement. Data for total crime for Fremantle before and after the Accord have been prepared by the Crime Research Centre (Inermauer, personal communication) and they too found about a 30% drop in total crime in the area after the Accord. How can this be reconciled with the finding of increased assault rates on licensed premises *per se*? One explanation

is that the greater the police presence in and around licensed premises in Fremantle following the Accord resulting in greater likelihood of assaults being reported to the police - they are usually under-reported (Homel, R., Tomsen, S. & Thommeny, J. (1992) Public Drinking and Violence: Not Just an Alcohol Problem. *Journal of Drug Issues*, 22, 3, 679-697)... Most estimates of the *direct* involvement of alcohol in assaults put the figure at around 30% (eg English, D. & Holman, D., *et al* (1995) *The Qualification of Drug-Caused Morbidity and Mortality in Australia 1995*, Commonwealth Department of Human Services and Health, Canberra Australian Government Publishing Service). Estimates of the proportion of these associated with drinking on licensed premises put the figure at around 40% (Stockwell, T. (Ed) (1995) *Alcohol Misuse and Violence No. 5: An examination of the appropriateness and efficacy of liquor licensing laws across Australia*. Canberra: Australian Government Publishing Service, 287-303).

In other words, assaults on licensed premises directly account for about 12% of all assaults. It would seem unlikely, therefore, that in either Fremantle or Geelong that a reduction of total assault rates in the region of 30% could be attributed only to the impact of an Accord. An assessment of the impact on a more specific indicator such as night time assaults (Stockwell, *et al.* 1995) is warranted in both locations. Clearly any reduction is desirable and some of this may have been contributed by the Accord. Against this conclusion, however, is that fact that in Fremantle there were no measurable changes in objective measures of serving practices and in Geelong, while there were undoubtedly improvements in some aspects of responsible management practices, these did not impact on the key risk factors of crowding and level of intoxication.

Therefore, researches conclude that police-industry Accords have not been the unqualified success that they are sometimes claimed to be... Accords should not be hailed as a reason for not requiring a formal regulatory process.”

757. While being the least restrictive option, self-regulation has some significant defects. Self-regulation by an industry body —
- (a) is voluntary in nature;
 - (b) excludes consumers from the regulatory process;
 - (c) has the possibility to create inherent conflicts of interest with the one body both drafting and enforcing the rules; and
 - (d) can have a reluctance to recognise that members standards are inadequate.
758. While self-regulation is seen as an important constituent element of any regulation of the liquor industry, it is not regarded as likely to provide a satisfactory, stand alone alternative to the licensing requirement.

Co-regulation

759. Co-regulation of the liquor industry would involve self-regulation with an added element of government oversight or ratification of standards developed by the industry. The Fair Trading Act 1987 provides for the prescribing of codes of practice, which are enforceable before a Commercial Tribunal. Before a code of practice can be prescribed, however, there must be agreement amongst representatives of those to be bound by the code (section 42 (5) of the Fair Trading Act) and, at this time, it is not known whether such a consensus would be likely to be reached between the different sectors of the liquor industry, given the propensity of each sector to seek its own advantage, in terms of trading hours and conditions.
760. While co-regulation would be a significant improvement on self-regulation, it too is not considered as likely to provide a satisfactory, stand alone, alternative to the licensing requirement.

Registration

761. Registration is a means of dealing with market failure represented by information asymmetry. Registration provides a public record of relevant information about service providers, but the granting of registration is a purely administrative act, with no real discretion to refuse to register.
762. A register of licensed premises would provide consumers with information as to the identity and location of liquor merchants. Registration could be enhanced by requiring all persons conducting a business of selling or commercially supplying liquor to be registered, but the actual process of registration would have to be automatic on provision of the relevant information, otherwise it becomes de facto licensing.
763. Registration would require legislative support to operate and a registering authority to administer it, however, given the absence of significant discretion, the administration could be handled by a smaller administration than is currently the case. The integrity of the register could be supported by making it an offence to provide false or misleading information for inclusion on the register.
764. Registration would have the effect of increasing compliance costs to the industry and the registering authority (although they would be much less than for the current licensing restriction), thereby reducing cost to government. Registration does not seek to establish minimum standards for entry to the market and would not achieve the objects of the Liquor Licensing Act.

Public Education

765. The Executive Director of Public Health has identified public education as a possible alternative and less restrictive means of achieving the same result as the licensing restriction —

Reviews of the scientific evidence suggests that evidence for this strategy is weakest of all other than where these support on the ground initiatives such as drink driving enforcement and extensive professional education (Homel, R. Carseldine, D. & Kearns, I. (1988) Drink-driving counter measures in Australia. *Alcohol, Drugs and Driving*, 4: 113-44); Casswell, S., Gilmore, L., Maguire, V. & Ransom, R. (1989) Changes in public support for alcohol policies following a community-based campaign. *British Journal of Addiction*, 84, 515-521.

An example of an effective publicity campaign in the area of liquor licensing is the McKnight and Streff (1992) enforcement study which was preceded by a local campaign to advise the public and licensees that the laws regarding serving drunk customers would be enforced. The dramatic increase in compliance with these laws demonstrated in this study occurred immediately and even before any on the ground police activity had begun.

In other words, without an effective regulatory environment it is unlikely that public education about service to drunk customers will work.

Civil actions against irresponsible licensees

766. The Executive Director of Public Health has also identified civil actions against irresponsible licensees as an alternative and less restrictive means of achieving the same result —

There is evidence suggesting that publicity surrounding server liability can deter irresponsible serving practices (Wagenaar A., & Holder, H. (1991) Effects of alcoholic beverage server liability on traffic crash injuries. *Alcoholism: Clinical and experimental research*, 15, 6, 942-947). However, opinion research in both the USA and Australia indicates only limited public sympathy for laws which render bar staff legally culpable for the actions of their customers (Room. R., Greaves, K., Giesbrecht, N. & Greenfield, T., (1992) *Trends in public opinion about alcohol policy initiatives in Ontario and the US, 1989 - 1991*. Paper presented at the 36th International Congress on Alcoholism and Drug Dependence, Glasgow, August 1992; Lang, E., Stockwell, T., Rydon, P. & Lockwood, A. (1993) Public perceptions of responsibility and liability in the licensed drinking environment. *Drug and Alcohol Review*, 1, 13-22). There have been a limited number of civil actions against licensees for serving intoxicated customers, a few of which have succeeded. While there is clear potential under Australian Law for such suits to succeed even when damages are inflicted by a drunken person after they leave the premises (Solomon R. (1996) *Alcohol liability in Canada and Australia: Sell, serve and be sued*. National Centre for Research into the Prevention of Drug Abuse, Curtin University) this is a rare occurrence and unlikely to deter irresponsible server practices.”

Negative licensing

767. Negative licensing is a process whereby there is no screening of market entrants but persons are prohibited from operating in the industry if shortcomings in their operations are identified, such as breaches of general consumer protection or other relevant laws, or breaches of high level standards. Any negative licensing scheme which enabled a person to be removed from an industry for breach of low level standards would constitute de facto licensing.

768. Negative licensing requires legislative support because the sanction is to prohibit a person from carrying on an otherwise lawful function. Because judgements must be made of a person's behaviour, negative licensing would also require an administering authority.

Providing an exemption from the Act for small social transactions of liquor

769. Section 3 of the Liquor Licensing Act provides for interpretation of words for the purpose of the Act's provisions. The Act's definition of "sell", in relation to liquor, is very conclusive and includes —

- (a) agree or attempt to sell;
- (b) offer or expose for the purpose of selling;
- (c) send, forward or deliver for sale or on sale;
- (d) barter or exchange;
- (e) dispose, by lot or chance or by auction;
- (f) supply, or offer, agree or attempt to supply —
 - (i) gratuitously, but with a view to gaining or maintaining custom or other commercial advantage.

770. However, section 6 of the Liquor Licensing Act and regulation 8 of the Liquor Licensing Regulations prescribe certain scenarios where the provisions of the Act does not apply, such as —

- (a) the sale or supply of liquor together with flowers, a food parcel or a gift hamper to be delivered by the vendor or supplier as a gift to a person other than the purchaser, vendor or supplier, where —
 - (i) the quantity of liquor sold or supplied does not exceed 2 litres; and
 - (ii) that liquor was purchased by the vendor or supplier from the holder of a hotel licence or a liquor store licence.

771. The minimum application fee for the grant of an occasional licence (where the number of persons likely to attend is less than 250 people) is \$25.00. In circumstances where the amount of liquor proposed to be sold or where liquor is proposed to be supplied gratuitously, the \$25.00 application fee represents a significant cost that, in many cases, may not be recovered from the sale of liquor.

772. Notwithstanding this fact, compliance with the licensing requirement is mandatory.

773. However, given that the Act and Regulations already provide for some exemptions for the sale and supply of liquor, and that these provisions are almost routinely contravened, it may be appropriate to amend the Act to provide for small social transactions of liquor to be exempt from the Act's provisions.
774. This would provide for very small sales of liquor to take place without a licence, such as the sale of a limited number of glasses of wine or beer following a meeting of an association or club, such as a P&C Association, or for the gratuitous supply of liquor, such as the provision of a complementary glass of wine at the opening of a business, where the supply of liquor could not be viewed as gaining or maintaining custom or other commercial advantage.

Possibility of the licensing requirement to impact on wider consumption issues

775. Under the licensing regime, the Licensing Authority possesses a unique capacity for the reduction of harm. However, while harm minimisation is one of the Act's primary objects, it has been suggested in the submission to this Review by the Restaurant and Catering Industry Association of Western Australia that a consideration of both of the Act's primary objects poses a possible competition policy inconsistency —

Taking the...two objectives together indicates a potential competition policy inconsistency. From a competition policy perspective, the restrictions associated with liquor licensing directly control the number of competitors and related aspects of the sale of liquor. However, much of the identified harm is associated with alcohol consumption, and restrictions in the Act do not control consumption. This is an important issue for any overall review because economic argument would be based on the idea that problems resulting from the misuse of liquor are likely to be more effectively dealt with through specific instruments as opposed to a general reduction on the number and location of liquor outlets.

776. Conversely, it has also been argued that —

Control over the availability of alcohol via liquor licensing is one of the most significant powers at the disposal of government for limiting alcohol problems...¹⁵

777. As such, regulation is the fundamental approach to the control of the consumption of liquor, as shown by the history of liquor licensing legislation in this jurisdiction and under the preceding United Kingdom regime, which have consistently operated on the basis of proscribing the sale and supply of liquor and then permitting that sale at specific and controlled locations, at specific times and under limiting conditions.

¹⁵ *An Examination of the Appropriateness and Efficiency of Liquor Licensing Laws Across Australia*, Professor Tim Stockwell (p)

778. Given that licensing authorities only have power to grant or not and to subsequently impose conditions on licences – and not on members of the community, the only way that this regulation can effectively be achieved is through —

- (a) the restriction on the grant of licences; and
- (b) to the extent necessary to address any issue, the imposition of conditions on the licence.

779. Indeed, the statutory mechanisms available to the community to impact upon the consumption of liquor appears to be limited to a restriction on the grant of licences, and to a lesser extent, the imposition of conditions on licences.

780. Counsel for the Executive Director of Public Health and the Director of Liquor Licensing, in a submission in respect of an application before the Liquor Licensing Court (CRT 13 of 1998), establishes a link between supply and control of liquor abuse, particularly in respect of off-premises consumption —

[there are]...a number of interrelated means by which the consumption of alcohol (off premises) may be controlled...control of price, the number of outlets, trading hours and the restrictions on the availability by reference to age group as some of those. These are mechanisms by which the consumption of liquor off license premises can be controlled. Published data confirms that these mechanisms do have a direct impact upon the consumption of liquor...

It must be assumed that the above mechanisms provided by statute are the ones to be utilised by the Licensing Authority, in restricting, in an appropriate case, the consumption of alcohol off-licence premises...

781. The objects clause of the Act itself gives no indication as to the scope of the object “to regulate the consumption of liquor”. Prior to the introduction of the Liquor Licensing Amendment Bill, the Court held in *Woolworths Supermarket Derby* (14/97, unreported 7 April 1997), that the Licensing Authority did not have the power to regulate the trading hours of a liquor store “for public health reasons” in connection with the ultimate consumption of liquor. At page 22 the Court said —

In my opinion, it is the act or neglect of the licensee placing the safety, health or welfare of persons who may resort to the licensed premises at risk while at the premises which s64 (3) (c) is directed at, **and not the consequences of consumption of liquor for those who purchase it at the licensed premises after they leave the licensed premises** *[emphasis added]*.

782. The Act addresses this issue directly. Section 64 (3) includes a number of considerations for the authority when imposing conditions on licences —

- (a) inclusion of the words “which it considers to be in the public interest” – changing the focus of s64(3) from general suggestions or considerations to mainly public health considerations;

- (b) insertion of paragraph (3) (ca) to ensure that liquor is sold and consumed in a responsible manner;
- (c) insertion of paragraph 3 (cc) to minimise harm or ill health caused to people or any group of people, due to the use of liquor (reflecting object 5 (1) (b) directly);
- (d) insertion of paragraph (3) (ga) prohibiting promotional activity in which the drinks are offered free or at reduced prices, or limiting the circumstances in which this can be done; and
- (e) insertion of paragraph (3) (gb) prohibiting any practices which encourage irresponsible drinking.

783. These provisions are directed at regulating the effects of liquor that occur both on and off the licensed premises. Particularly relevant is section 64 (3) (ca), which specifically empowers the Licensing Authority to impose conditions to ensure that liquor is consumed in a socially responsible manner, without reference to the place of consumption.

Conclusion

784. On page 30 of the submission of the Liquor Stores Association of Western Australia Inc, it is suggested that the "... West Australian liquor licensing system has developed over the years and maintains a successful relationship between the regulators, the public need and the public interest."

785. On balance, it would appear that the most appropriate policy response for this industry is the retention of the licensing requirement for liquor merchants. The licensing system is necessary to achieve regulation of the sale, supply and consumption of liquor and to minimize harm or ill-health caused to people, or any group of people, due to the use of liquor. Although some of the abovementioned alternatives or a combination thereof, are worthy of consideration, it is not believed that they are, or could be, a satisfactory alternative to the current licensing requirement.

786. Given that the Act and Regulations already provide for some exemptions for the sale and supply of liquor it may be appropriate to amend the Act to provide for small social transactions of liquor to be exempt from the Act's provisions.

Recommendation

787. It is recommended that —

- (a) the licensing requirement for liquor merchants should be maintained; and
- (b) the Act be amended to exempt small social transactions of liquor from the Act's provisions.

RESTRICTION 36: for so long as a licence is in force, the licence fee prescribed in respect of that class of licence is payable not later than such day as is prescribed in each year in respect of each licence period and a new licence shall not come into force until the licence has been paid, unless otherwise prescribed (section 127)

788. This restriction is considered anti-competitive because it imposes the payment of a licence fee on liquor merchants.

789. The object addressed is object 5 (1) (a), to regulate the sale, supply and consumption of liquor.

Potential Disadvantages of the Restriction

790. Liquor merchants are required to pay a licence fee.

Potential Advantages of the Restriction

791. The collection of revenue by the Government of Western Australia.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 36.1	Liquor merchants are required to pay a licence fee.
How:	Licensing requirement contained in the Liquor Licensing Act.
Impact:	Minimal, retail licensees pay a maximum annual licence fee of \$105 annually and wholesale licensees pay a maximum annual licence fee of \$265
Impacts when:	Prior to the grant of the licence and annually thereafter.
Impacts on whom:	Licensees
Public objectives impacted:	Economic/financial

Potential Advantages and Benefits

EFFECT 36.2	The collection of revenue by the Government of Western Australia.
How:	Collected licence fees are paid into the State's consolidated fund.
Impact:	Actual \$Dollar amount
Impacts when:	On or before 1 January each year, prior to grant of a new licence
Impacts on whom:	The Government of Western Australia
Public objectives impacted:	Economic/financial

Assessment of Public Benefit

792. It is fair and proper that the persons who benefit from selling and supplying liquor under the licensing regime should contribute towards the proper regulation of the industry through the payment of an annual licence.

793. Cost recovery of services provided is in accordance with Government policy.

Alternative Means of Achieving the Legislative Objectives

794. None identified.

Conclusion

795. Licence fees should continue to be paid by liquor merchants.

Recommendation

796. It is recommended that the Act's provisions in respect of licence fees should be maintained.

DISCRIMINATORY RESTRICTIONS

RESTRICTION 37: where the delivery of liquor is to be effected in the State then, notwithstanding that the sale otherwise took place outside the State, the sale of that liquor is deemed to have been concluded in the State, unless the regulations provide otherwise (section 4 (8))

797. This restriction is considered anti-competitive because it may be interpreted as restricting goods and services from other parts of Australia.
798. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (b), to minimize harm or ill health to people, or any group of people, due to the use of liquor.
799. Section 4 (8) of the Liquor Licensing Act provides that where delivery to a purchaser of liquor is to be effected in the State, then notwithstanding that the sale otherwise took place outside of the State, the sale of that liquor shall for the purposes of the Act be deemed to have been concluded in the State, unless the regulations otherwise provide.

Potential Disadvantages of the Restriction

800. This provision could be seen as discriminatory in that it effectively acts to restrict the entry of liquor products from other parts of Australia by creating an additional barrier to competition. By defining an out of state sale direct to consumers in Western Australia as a sale occurring within the State, the Act creates a requirement for that person to be licensed in Western Australia, notwithstanding the fact that the seller may be a liquor merchant who is already licensed in the other State or Territory.
801. Although the Office of Racing, Gaming and Liquor obtained legal advice from the Solicitor General that the provisions of section 4 (8) would not seem to involve an infringement of either section 90 or 92 of the Constitution, concerns that the provision is of a protectionist character remain.

Potential Advantages of the Restriction

802. Non identified [Sale of liquor to the public (end consumer) is under the State's regulatory authority (normal licensing requirements)].

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 37.1	This provision could be seen as discriminatory in that it effectively acts to restrict the sale of liquor products directly to consumers from other parts of Australia
How:	By defining an out of state sale directly to a consumer within Western Australia as a sale occurring within the State, the Act creates an additional barrier to competition by requiring that person to be licensed in Western Australia, notwithstanding the fact that the seller is a liquor merchant who is already licensed in the other State or Territory
Impact:	As this is a new provision, it is difficult to assess its impact
Impacts when:	On going
Impacts on whom:	Interstate liquor merchants; Consumers
Public objectives impacted:	Distributional
EFFECT 37.2	There is a possibility that the requirement offends section 92 of the Constitution, in that it may discriminate in favour of intrastate trade and be of a protectionist character
How:	Western Australia is the only State or Territory that requires liquor merchants selling directly to the public (ie via mail order sales) to be licensed both in the State of origin and in Western Australia
Impact:	Interstate licensees are required to hold two liquor licences for liquor sales within Australia
Impacts when:	On going
Impacts on whom:	Interstate liquor merchants
Public objectives impacted:	Distributional

Assessment of Public Benefit

803. It is difficult to establish a genuine link between the objects of State legislation and a transaction that occurs beyond the State's boarder, except for a very generalised interpretation of object 5 (1) (b), to control liquor coming into the State in an effort to minimize harm.

804. The section was originally inserted after concerns were expressed by some liquor retailers that liquor entering the State and being sold directly to the public was affecting competition because —

- (a) no licence fee was paid in Western Australia, thereby leading to a loss of revenue to the State; and

- (b) it could not be guaranteed that a licence fee was being collected in the originating state because some of the sales were made under a producer's licence, for which no licence fee was levied,

thereby creating a disadvantage to the Western Australia liquor retail sector who was not able to compete with the artificially lower prices. However, following changes to the licensing fee scheme, there remains a possible link in the continuation of the restrictions in section 4 (8) and the payment of the liquor subsidy scheme. Subsidy payments are currently paid to the holders of a producer's licence. Theoretically, it is possible that an unfair advantage could be given to interstate producers if they receive a subsidy payment from both the State in which the liquor is produced (ie. Western Australia) and the State where the liquor is sold, thereby resulting in a disadvantage to local producers.

Alternative Means of Achieving the Legislative Objectives

805. As Western Australia is the only State or Territory to enact this type of provision, and the other States and Territories have not seen such a requirement as necessary, the most obvious alternative is to remove the restriction and allow competitive outcomes from competition to be more fully realised.

Conclusion

806. In light of the fact that no other Australian State or Territory has felt it necessary to enact similar legislation to overcome the perceived problem, it is difficult to argue uniqueness for Western Australia and to justify the restriction.

Recommendation

807. It is recommended that the restriction on competition embodied in the defining of a sale of liquor which took place outside of the State to be concluded as having been concluded in the State, where the delivery of liquor is to be effected in the State, cannot be justified and section 4 (8) should be repealed.

RESTRICTION 38: the licence categories themselves and the licence conditions embodied in those licence types (sections 41-59)

808. This restriction is considered anti-competitive because it restricts competition by imposing specified licence types and trading conditions.
809. The objects addressed are object 5 (1) (a), to regulate the sale, supply and consumption of liquor; and object 5 (2) (d) to provide adequate controls over the sale, disposal and consumption of liquor.
810. The Restaurant and Catering Industry Association of WA (Inc) (page 9) suggests that the Act's differential treatment of licence categories is inconsistent with competition policy principles —

Competitive neutrality requires that where firms compete, they should do so under the same terms and conditions. In the provision of food and liquor combined on the premises, restaurants and taverns and hotels compete. Hence the principles underpinning competition policy would seem to require that they operate under similar licensing arrangements.

Part of the problem here is the proliferation of licence types that have occurred within liquor licensing...Our view is that a business should simply be licensed or not licensed to sell alcohol and that the form and mix of sales should be determined in the competitive market place. Such a policy would appear ultimately to be inconsistent with the basic objectives of the Act relating to regulation and control. However, it highlights the very real nature of the problem. Although the mix for food and alcohol varies across establishments they are effectively in competition with each other.

811. The number and type of licences and permits were significantly reduced from 30 under the repealed *Liquor Act 1970* to 13 on the introduction of the Liquor Licensing Act. As such, it is not conceded that there has been a proliferation of licences or that 13 is too many categories for licences. The current licensing classification provides a guide to assist applicants in choosing a prescribed licence where such a licence reasonably meets the requirements of an applicant.
812. Licence types also contribute to the public's increased certainty about the quality of products and services offered at licensed establishments. Members of the public can discern the type of services offered under a cabaret licence as distinct from a restaurant licence.
813. In the submission of the Australian Democrats (WA Division) the concept of a limited rationalisation is also suggested. However, the benefits of this particular proposal would be confined to hotel licences only, thereby presenting an additional differential treatment to only one sector of the liquor industry.
814. Under the Australian Democrats' proposal, hotels would have the opportunity to split their licence into two categories, one licence restricted to on-site consumption and the other restricted to take-away sales. The latter category would include "... current liquor stores and the 'bottleshop' component of hotels who wish to split their licence." A hotel that elects to split its licence could continue to hold both licences or sell one and retain the other, or sell both separately (but could not apply to rejoin them).
815. Some of the possible advantages identified by Democrats in the proposal for the hotel sector may be —
 - (a) more flexibility in the running of two components of the business. Unprofitable or overcapitalised assets could be sold off, while stronger, more profitable businesses could be retained;
 - (b) funds from the sale of one asset could be used to revitalise the other; and
 - (c) the take-away component of hotels could be relocated for better positioning (subject to the Act's provisions).

816. However, the submission of the Australian Democrats constitutes a new initiative and, as such, is beyond the scope of the current examination, which has as its focus the Act's existing provisions. However, if government considers that the proposal has merit, it should be the subject of a separate report on whether or not it complies with national competition policy objectives.

Types of licence

817. The sections of the Act prescribing the different licence types have a significant impact on competition in the market place.

Hotel licences (section 41)

818. Section 41 prescribes the generic trading conditions of a hotel licence.

819. Subsection (1) separates the hotel class of licence into three distinct sub-classes of —

- (a) hotel;
- (b) tavern; and
- (c) hotel restricted licence.

820. Subsection (2) provides that during the permitted hours the licensee of a hotel licence is authorized to keep open the licensed premises, or a part of those premises, and while those premises are open, is required —

- (a) to sell liquor on the premises to any person for consumption on the premises; and
- (b) unless the hotel is a hotel restricted licence, to sell packaged liquor for consumption on and from the premises to any person.

821. Subsection (3) provides that when a sale of packaged liquor to any other person would not be within permitted hours, the authority to sell packaged liquor to a lodger extends only to such quantities as might reasonably be consumed by the lodger on that day.

822. Subsection (4) provides that a hotel licence, unless it is a tavern licence, is subject to a condition that the licensee, subject to subsection (5) and to any variation under subsection (6), provides —

- (a) residential accommodation for any person;
- (b) breakfast for lodgers, between 7 a.m. and 9 a.m.; and
- (c) dinner for lodgers, between 6 p.m. and 8 p.m.

823. Subsection (5) provides that a licensee is not required to comply with a condition of the kind referred to in subsection (4) if —

- (a) the person seeking the residential accommodation or the meal is a person whom, under section 108 (3), the licensee would have cause to refuse to receive;
- (b) the licensee has no available accommodation, or cannot provide a meal, by reason of prior bookings; or
- (c) some other proper reason exists.

824. Subsection (6) provides that where the Licensing Authority is satisfied —

- (a) that there is not, at any time or during any specific period, a significant need for residential accommodation in the locality;
- (b) that, notwithstanding the existence of such a need, adequate residential accommodation is available to the public; or
- (c) that circumstances exist that would justify a temporary removal of the licence or redefinition of the licensed premises exist,

and that in consequence no useful purpose will be served by the continuance, or the continuance during that period, of a requirement to provide residential accommodation, the Licensing Authority may, on application, vary the conditions of a hotel licence so as to reduce the extent of the accommodation required or the times at which it is to be provided or may order that, either permanently or at specified times, the licence shall have effect as a tavern licence.

825. Subsection (7) provides that where the Licensing Authority is satisfied that, at any time or during any specific period, there is no significant need to provide for the sale of packaged liquor to persons other than lodgers it may, on application, vary the conditions of a hotel licence so that it has effect as a hotel restricted licence.

Potential Disadvantages of the Restriction

826. Licence types and conditions hinder the commercial outcomes of competition.

827. A hotel licence, unless it is a tavern licence, is subject to a condition that the licensee provides breakfast for lodgers, between 7 a.m. and 9 a.m.; and dinner for lodgers, between 6 p.m. and 8 p.m.

828. Market forces are prevented from determining what services and facilities the holders of hotel licences provide. The market and not regulators should determine whether —

- (a) there is not, at any time or during any specific period, a significant need for residential accommodation in the locality;

- (b) notwithstanding the existence of such a need, adequate residential accommodation is available to the public; or
- (c) at any time or during any specific period, there is no significant need to provide for the sale of packaged liquor to persons other than lodgers.

Potential Advantages of the Restriction

- 829. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.
- 830. Licence types and conditions contribute to the public's increased certainty about the types of products and services offered at licensed premises.
- 831. Licence types and conditions make it possible to determine the potential for harm that they present.
- 832. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.1.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licenseses can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holders of hotel licences; Consumers
Public objectives impacted:	Economic/financial Distributional
EFFECT 38.1.2	A hotel licence, unless it is a tavern licence, is subject to a condition that the licensee provides breakfast for lodgers, between 7 a.m. and 9 a.m.; and dinner for lodgers, between 6 p.m. and 8 p.m.
How:	Consumer demand, not licence conditions, should dictate whether or not a licensee provides meals for lodgers and the times that those meals are offered to lodgers
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Holders of hotel licences
Public objectives impacted:	Economic/financial; Distributional

EFFECT 38.1.3	Market forces are prevented from determining what services and facilities the holders of hotel licences provide
How:	Licensees are required to satisfy the Licensing Authority that prescribed facilities or services are no longer required
Impact:	Significant
Impacts when:	On-going
Impacts on whom:	Holders of hotel licences
Public objectives impacted:	Economic/financial; Distributional
<i>Potential Advantages and Benefits</i>	
EFFECT 38.1.4	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type
Impact:	The liquor industry is effectively regulated
Impacts when:	On going
Impacts on whom:	Licensees; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”.
EFFECT 38.1.5	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk

EFFECT 38.1.6	Licence types and conditions make it possible to determine the potential for harm that they present.
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk
EFFECT 38.1.7	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry.
Public objectives impacted:	Economic/financial Distributional Uncertainty/risk

Assessment of Public Benefit

833. There is a generic public benefit associated with prescribed licence types and trading conditions in that members of the public have an increased certainty about the range of services and products likely to be offered at premises licensed under a particular licence type.
834. Prescribed licence types also contribute towards more meaningful regulation of the liquor industry in Western Australia by assisting with the policing of licensing conditions.
835. However, competition should be the driving force behind the facilities and services provided by the holders of hotel licences and not compliance with a statutory obligation.
836. Hotel licensees should be able to determine what mixture of services they provide at their licensed premises, based on consumer demand for those services and also have the ability/flexibility to extend or withdraw those services to meet any peaks and troughs in consumer demand.

837. The ability of hotel licensees to achieve such flexibility is currently hindered by the provisions of section 41, which —
- (a) require the licensee to satisfy the Licensing Authority that there is no significant need for accommodation or for the sale of packaged liquor; and
 - (b) provide for a hotel licence to be converted to either a tavern or a hotel restricted licence, but not for a tavern or hotel restricted licence to be varied so as to have effect as a hotel licence, notwithstanding the fact that hotels, taverns and hotel restricted licences are all variations of the one licence type.
838. Similarly, the requirements of section 41 (4) and 41 (2) (b) impact on the competitiveness of hotel licensees by requiring that a hotel licensee shall provide —
- (a) residential accommodation for any person;
 - (b) breakfast for lodgers, between 7 a.m. and 9 a.m.
 - (c) dinner for lodgers, between 6 p.m. and 8 p.m.; and
 - (d) the sale of packaged liquor (unless it is a hotel restricted licence) on and from the premises to any person.
839. Realistically, these are services that hotel licensees should be able to decide to provide in order to meet consumer demand. There are many unlicensed establishments that now offer accommodation for persons without any legislative requirement to provide breakfast or dinner for lodgers, but do so in order to meet consumer demand.
840. Similarly, while hotels have historically been venues where persons could be guaranteed to obtain a meal, there are now many licensed and unlicensed establishments providing meals to people in excess of those hours specified in section 41 of the Act, such as fast food and convenience stores, which are often operated in conjunction with petrol stations.
841. There is no reason that hotel licensees should be obligated to provide such services simply because they possess a licence to sell liquor. Where a hotel licensee offers accommodation, market forces, not legislation, should dictate whether a particular licensee supplies meals for lodgers and the times that those meals are offered.
842. Similarly, market forces should likewise dictate whether a hotel licensee sells packaged liquor for consumption off the premises, or concentrates on on-premises sales.
843. Section 108 also places obligations on the holder of a hotel licence to —

- (a) receive a person on the licensed premises; or
- (b) sell liquor there to any person,

at any time that the premises are open for business during the permitted hours.

844. Additionally, section 108 reinforces the obligation of a hotel licensee to observe the requirements of sections 41 (5) and 41 (4).
845. The obligation to receive persons onto licensed premises presents as a competition policy issue because it is not applied uniformly across all licence types, placing hotels at a competitive disadvantage when compared to such market competitors as liquor store or cabaret licences.
846. Given that the recommendations of this Report in respect of section 38 of the Liquor Licensing Act seek to move away from the concept of “public need” to one of “public interest”, the public benefit would be better met by levelling the playing field between the licence types by relieving hotel licensees of this compliance obligation, rather than requiring other licence types to comply. The provisions of section 108 are considered at Restriction 45.
847. However, in order for the licensee of a hotel licence to continue to qualify for that licence type, the premises must, as necessity, continue to present as a hotel and offer a mix of sales for consumption on the premises and for consumption off of the licensed premises.

Alternative Means of Achieving the Legislative Objectives

848. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

849. The public benefit of retaining the hotel class of licence is greater than the public benefit likely to be achieved by removing the licence category.
850. However, amendments (as outlined in paragraph 853) should be made to section 41 to increase the competitiveness of the licence type and to enable hotel licensees to easily respond to changes in consumer demand and determine which mix of services they will offer to the market.

Recommendation

851. Section 41 should be amended to provide for the —
- (a) three sub-classes of hotel licence to be rationalised into one ‘hotel’ licence type with appropriate trading conditions imposed on licences, and able to be varied upon application by the licensee so that the licence has effect as a hotel, tavern or hotel restricted licence and vice versa, with appropriate conditions being specified on the licence. (section 41 (1));

- (b) deletion of the requirement for a licensee to sell liquor while the premises are open and insertion of a provision that authorizes a licensee to sell liquor while the premises are open during permitted hours (section 41 (2) (a));
- (c) deletion of the requirement for hoteliers to provide residential accommodation or meals for lodgers (sections 41 (4)); and
- (d) repeal of sections 41 (5), 41 (6) and 41 (7).

Cabaret licences (sections 42 and 43)

852. Section 42 prescribes the generic trading conditions of a cabaret licence.
853. Subsection (1) provides that during the permitted hours, the licensee of a cabaret licence is authorized to sell liquor for consumption on the licensed premises only, ancillary to continuous entertainment provided live by one or more artists present in person performing there or by way of recorded music presented personally by a person employed or engaged by the licensee to do so.
854. Subsection (2) provides that for the purpose of determining whether or not entertainment is continuous, no account shall be taken of reasonable intervals between acts, or between the performances of artists, so long as substantial compliance with the requirement for continuity is observed.
855. Subsection (3) provides that every cabaret licence is subject to the condition that liquor shall not be permitted to be consumed on the licensed premises except at a time when live entertainment is being provided there and liquor may be lawfully sold under the licence unless an extended trading permit applies.
856. Section 43 provides that an applicant for the grant of a cabaret licence must satisfy the Licensing Authority that the premises to which the licence is sought —
- (a) are constructed so as to enable entertainment of a kind referred to in section 42 to be provided there; and
 - (b) are suitable, having regard to any condition imposed as to the nature or extent of the entertainment required to be provided.

Potential Disadvantages of the Restriction

857. Licence types and conditions hinder the commercial outcomes of competition.
858. A cabaret licence only authorizes the sale or supply liquor ancillary to the provision of live entertainment.

Potential Advantages of the Restriction

859. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.
860. Licence types and conditions contribute to the public's increased certainty about the types of products and services offered at licensed premises. Licence types and conditions make it possible to determine the potential for harm that they present.
861. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.2.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licencees can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holderes of cabaret licences; Consumers
Public objectives impacted:	Economic/financial Distributional
EFFECT 38.2.2	A cabaret licence only authorizes the sale or supply liquor ancillary to the provision of live entertainment.
How:	Legislative restriction
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Holderes of cabaret licences; Consumers
Public objectives impacted:	Distributional

Potential Advantages and Benefits

EFFECT 38.2.3	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type.
Impact:	The liquor industry is effectively regulated
Impacts when:	On going

Impacts on whom:	Licenseses; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”.
EFFECT 38.2.4	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk
EFFECT 38.2.5	Licence types and conditions make it possible to determine the potential for harm that they present.
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk
EFFECT 38.2.6	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry.

Public objectives impacted: Economic/financial
Distributational
Uncertainty/risk

Assessment of Public Benefit

862. There is a generic public benefit associated with prescribed licence types and trading conditions in that members of the public have an increased certainty about the range of services and products likely to be offered at premises licensed under a particular licence type.
863. Prescribed licence types also contribute towards more meaningful regulation of the liquor industry in Western Australia by assisting with the policing of licensing conditions.
864. However, competition should be the driving force behind the facilities and services provided by the holders of cabaret licences and not compliance with a statutory obligation.
865. The structuring of the cabaret licence so that it authorizes the sale of liquor only ancillary to the provision of continuous live entertainment, constitutes a *de facto* “primary purpose” for the businesses, that has only a casual link to the sale and supply of liquor and which has a significant impact on competition in the market place.
866. The driving force behind the services provided by premises should be the demands of consumers. Businesses are more likely to be efficient and innovative when unconstrained by regulations that limit or impose a “primary purpose”.
867. Although it is clear that there are a range of licences sufficient to cater for many types of businesses, once a licence is issued the business is then bound, in those licence types where it applies, by its “primary purpose”, which is then reinforced by its licence type and trading conditions.
868. As such, cabaret licences are constrained in achieving efficiencies and innovation because of the business focus imposed by the *de facto* “primary purpose” of their business, as reinforced by the prescribed trading conditions of a cabaret licence.
869. The “primary purpose” approach to some licence types (including cabaret licences), does not appear to relate in any meaningful way to the Act’s objects, i.e. it does not assist in —
- (a) regulating the sale and supply of liquor;
 - (b) minimizing of harm or ill-health;
 - (c) contributing to the proper development of the liquor, hospitality and related industries in the State;
 - (d) catering to the tourism industry; or

- (e) facilitating the use and development of licensed facilities to reflect the diversity of consumer demand.
870. The primary purposes specified in the objects of the Act concern regulating the sale, supply and consumption of liquor and the minimization of harm or ill-health caused to people, or any group of people, due to the use of liquor and not to confine the businesses that sell and supply liquor to a “primary purpose”, such as the provision of continuous live entertainment.
871. Abandonment of the de facto “primary purpose” for those licence types concerned would not lead to an uncontrolled market.
872. The restriction imposed on cabaret licences that only authorizes the sale of liquor ancillary to the provision of continuous live entertainment cannot be justified in the public interest.
873. The public’s interest in attending licensed premises that are permitted to trade late hours would be better served if section 42 were amended to provide that the licensee of a cabaret licence is authorized, during permitted hours, to sell liquor on the licensed premises, for consumption on the premises only.
874. The *Australian Concise Oxford Dictionary* defines the word “cabaret” as meaning “an entertainment in a nightclub or restaurant while guests eat or drink at tables; or such a nightclub.”
875. Given that most cabaret licences actually present and are marketed as nightclubs with dance floors and the like, and are seldom set up with chairs and tables for eating or drinking or offering a cabaret style of entertainment, it would appear that the designation of the licence as a “cabaret licence” may be a misnomer that, for the purposes of properly informing members of the public, might be corrected if the licence was designated as a “nightclub” licence.

Alternative Means of Achieving the Legislative Objectives

876. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

877. The public benefit of retaining the cabaret class of licence is greater than the public benefit likely to be achieved by removing the licence category. However amendments (as outlined in paragraph 881) should be made to section 42 to increase the competitiveness of the licence type.

Recommendation

878. That section 42 be amended to —

- (a) delete the requirement for the licensee of a cabaret licence to only sell liquor ancillary to continuous entertainment provided live by one or more artists present in person performing there by way of recorded music presented personally by a person employed or engaged by the licensee to do so, and provide instead that the licensee of a cabaret licence is authorized to sell and supply liquor for consumption on the licensed premises during permitted hours;
- (b) repeal subsection (2); and
- (c) repeal subsection (3).

879. Similarly, section 43 should be repealed on the basis that where an applicant for the grant of a cabaret licence proposes to provide continuous live entertainment at the premises, the suitability of the proposed premises for that purpose is really a matter for consideration by the local planning authority.

880. It is also recommended that the cabaret licence be retitled as a “nightclub” licence.

Casino liquor licence (Sections 44 and 45)

881. A casino liquor licence is authorized, during permitted hours, to sell liquor for consumption on the premises at the casino, or at other premises within the casino complex concerned with or adjacent to that complex, within such one or more defined areas as may from time to time be approved by the Gaming Commission.

882. At present, and since the inception of this licence type, there has only ever been one casino liquor licence granted in Western Australia.

883. The conditions of this class of liquor licence do not achieve anything that could not be adequately accommodated under a special facility licence and the continuation of such a restrictive class of licence cannot be justified in the public interest.

884. It is therefore recommended that the class of casino liquor licence be abolished and that the current casino liquor licence be duplicated and re-issued as a special facility licence. However, this recommendation should be conditional upon similar amendments to the Casino (Burswood Island) Agreement Act.

885. This move would also remove a differential anomaly in that the casino liquor licence is the only class of licence where a body other than the Licensing Authority can exercise discretion over whether the licence should be granted or not.

Recommendation

886. That sections 44 and 45 be repealed and the current casino liquor licence be duplicated and re-issued as a special facility licence, subject to appropriate amendments being made to the Agreement scheduled to the Casino (Burswood Island) Agreement Act when and if that agreement is next renegotiated.

Special facility licences (section 46 and regulation 9A)

887. In the Second Reading Speech on the introduction of the Liquor Licensing Bill, the special facility licence was introduced as a suitable licence "...where no other single licence is reasonably adequate," with the proposition of the Licensing Authority being "...able to grant a licence subject to whatever conditions are needed to satisfy the special needs which have been established... Special facility licences will be able to be sought for developments which enhance tourism or are themselves tourist attractions, where no other licence type is reasonably adequate. Developers in these cases will no longer have to modify their proposals to fit the licensing laws. Instead, a licence can be obtained which is moulded to suit the special needs of the project..."

888. Section 46 (1) provides that the Licensing Authority may, in accordance with the Liquor Licensing Act, grant a special facility licence to provide for the needs of persons of a particular class or in particular circumstances, or for a particular purpose.

889. Section 46 (2) provides that a special facility licence shall not be granted where a licence of another class, or the imposition of a condition on a licence of another class, would be reasonably adequate.

890. Subsection (3) provides that a special facility licence —

(a) may, without limiting the discretion of the Licensing Authority under subsection (1), be granted to provide for the needs of persons of a prescribed class, in prescribed circumstances or for a prescribed purpose; and

(b) is to be granted on such terms and conditions as are necessary to ensure that the licence is used only for the reasons for which it is to be granted.

891. Subsection (4) provides that the licensee of a special facility licence is authorized to sell liquor in accordance with the terms and conditions of the licence.

892. Subsection (5) provides that at a time when a sale of packaged liquor to any other persons would not be within permitted hours or at a time authorized by the licence, any authority conferred by a special facility licence to sell packaged liquor to a lodger or to any other specified class of person extends only to such quantities as might reasonably be consumed by the person to whom the liquor is sold on that day.

893. Subsection (6) provides that if the Director so approves, section 37 (5) or section 38, or both of those provisions, do not apply in respect of a special facility licence of a type prescribed.

Potential Disadvantages of the Restriction

894. Licence types and conditions hinder the commercial outcomes of competition.

895. A special facility licence cannot be granted where a licence of another class, or the imposition of a condition on a licence of another class, would be reasonably adequate for the purposes the licence was sought.

Potential Advantages of the Restriction

896. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.

897. Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises.

898. Licence types and conditions make it possible to determine the potential for harm that they present.

899. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.3.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licencees can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holders of special facility licences; Consumers
Public objectives impacted:	Economic/financial Distributional
EFFECT 38.3.2	A special facility licence cannot be granted where a licence of another class, or the imposition of a condition on a licence of another class, would be reasonably adequate for the purposes the licence was sought
How:	Legislative restriction
Impact:	Significant

Impacts when:	On going
Impacts on whom:	Applicants for the grant of a special facility licence Liquor Merchants Consumers
Public objectives impacted:	Distributional
<i>Potential Advantages and Benefits</i>	
EFFECT 38.3.3	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type.
Impact:	The liquor industry is effectively regulated
Impacts when:	On going
Impacts on whom:	Licensees; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”.
EFFECT 38.3.4	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk
EFFECT 38.3.5	Licence types and conditions make it possible to determine the potential for harm that they present.
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application.
Impact:	Significant

Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk
EFFECT 38.3.6	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry.
Public objectives impacted:	Economic/financial Distributinal Uncertainty/risk

Assessment of Public Benefit

900. While there is a generic public benefit associated with prescribed licence types and trading conditions, in that members of the public have an increased certainty about the range of services and products likely to be offered at premises licensed under a particular licence type, there are circumstances where rigidly applying a prescribed licence type does not result in a net public benefit.
901. The special facility licence provides for such circumstances, provided that the trading conditions sought by the applicant do not correspond to the prescribed trading conditions of a licence of another class, or cannot be made to comply, if the prescribed licence type was specifically conditioned in such a manner by the Licensing Authority.
902. However, any disproportionate proliferation of special facility licences would undermine the Act's scheme of licence types and impinge the Licensing Authority's ability to properly assess the extent and nature of the liquor industry in Western Australia.
903. In a joint submission dated 8 December 1999 the Australian Hotels Association (WA Branch) ("AHA") and the Liquor Stores Association of WA ("LSA") sought amendments to the Liquor Licensing Act which, *inter alia*, sought to limit the ability of the Liquor Licensing Authority to grant special facility licences.
904. The submission identifies the substance of the proposed amendments as to —

- (a) maintain the integrity of the licence classification system which provides for differing licences, with differing rights and obligations, of well defined categories with clear and distinct functions in the market place;
- (b) restore the “special facility licence” category to that of a licence “of last resort”, catering to very special circumstances faced by particular facilities in meeting particular purposes;
- (c) thereby, limiting the proliferation of special facility licences granted, ostensibly, for purposes such as “tourism” but in fact servicing, predominantly, needs which could be met by other licences;
- (d) restricting the excessive flexibility of extended trading permits, to ensure that they do not become, in turn, substitutes for special facility licences;

while preserving the flexibility of the special facility for well established categories of “special” purpose, including substantial “high value” resort type developments requiring greater flexibility in the combination of multiple liquor/food venues.

905. The submission proposed that the type of “high value” resort type development worthy of the grant of a special facility licence should be included in the Act’s interpretive provisions and defined as an “integrated tourist resort”, which would mean “premises which provide (a) substantial accommodation for lodgers; (b) a reception desk which is operated 24 hours per day; (c) a dining area or areas which provide substantial meals 7 days per week; (d) room service for lodgers 24 hours per day; (e) housekeeping services for lodgers 24 hours per day; and (f) an area or areas used exclusively for functions or receptions.”
906. In commenting on the submission of the AHA and LSA, the Western Australian Tourism Commission responded —

They [*the proposed amendments*] have been prepared on behalf of two industry bodies whose objects are to maintain market shares of members, to protect the financial interests of hotels, taverns and liquor stores and to avoid grants of new licences generally whenever there is potential to impact adversely on the commercial position of members...

The proposed amendments are not conducive to promoting tourism. The amendments are directed to protect commercial interests of licensees and are highly likely to inhibit tourism development. The amendments would put new projects at risk and may make existing businesses questionable. The tourist provision which is proposed...talks in terms of integrated tourist resorts and in respect of consumption on the premises only. This would mean a Special Facility Licence cannot sell packaged or takeaway liquor. The draft (on page 4 section3) dealing with integrated tourist resort amendment defines an integrated tourist resort to mean a particularly high standard facility with which the State is poorly endowed. None of our city based 4/5 star hotels fit this category nor indeed such operations as the Vines Resort (all of which currently have tourism Special Facility Licences.) Burswood Resort potentially might meet that description. It is difficult to think of a regional establishment that would qualify. There are likely to be very few facilities which would ever reach the contemplated level. By limiting the Special Facility Licence in this way in the tourism area, it would clearly reduce opportunities for future licences and mean that flexibility would be lost and diversity of consumer demand would be denied.

907. The special facility category of licence was included in the 1988 Act. In the second reading speech the Minister stated —

This licence category will absorb those which now exist for theatres, ballrooms, works canteens, reception lodges, historic inns, boats and aircraft, and for major sporting venues which are the headquarters of sport in the State. Special facility licences will also be able to be sought for developments which enhance tourism or are themselves tourist attractions, where no other licence is reasonably adequate.

Developers in these cases will no longer have to modify their proposals to fit the licensing laws. Instead, a licence can be obtained which is moulded to suit the special needs of the project. This will assist considerably our most important tourism industry.

908. The 1998 amendments provided the licensing authority with greater flexibility to grant special facility licences. In the second reading speech the Minister stated —

The special facility licence will be retained as a legitimate licence category where no other licence is suitable. However, the Bill will provide the licensing authority with greater flexibility to grant special facility licences. This will facilitate a diversity of licensed premises to cater for consumer demand, including newer forms of liquor outlets such as food halls and mobile caterers.

909. The Western Australian Hotels Association and the Liquor Stores Association are unhappy with recent decisions of the Liquor Licensing Court, granting special facility licences (subsequently endorsed by the Full Court of the Supreme Court on appeal). The cases are Redheads and The Good, the Bad and the Ugly (“GBU”).

910. It is the view of the AHA and the LSA that the grant of these licences undermines the system of separate licence classification which, it is asserted, has been one of the cornerstones of the Liquor Licensing Act; and reflects how the liquor industry is organised and operates in this State. The effect of the Redheads¹⁶, GBU¹⁷ and Exchange Hotel¹⁸ decisions, is that these three premises can sell liquor for consumption on the premises during those times that are not available to the holders of hotel or tavern licences. The special facility licences were granted mainly on the basis that trading beyond the hours permitted by a hotel or tavern licence was necessary to provide for the needs of “persons of a particular class or in particular circumstances, or for a particular purpose”, which is a requirement for a special facility licence.

911. A further unfair advantage which the hoteliers see in respect of special facility licences is that the trading hours granted by the Court are of a permanent nature, unlike an extended trading permit, which can be withdrawn at any time. In the Court’s judgment on the Redheads application, one of the grounds for granting the special facility licence was that a hotel or tavern licence with an extended trading permit could not enjoy the same certainty of trading hours as could a special facility licence.

¹⁶ Supreme Court reference: [APPEAL FUL 5 of 98]

¹⁷ Supreme Court reference: [FUL 186 of 97]

¹⁸ Liquor Licensing Court reference: [LLC 8/99]

912. The changes to section 46 (special facility licences) and the repeal of regulation 9A (prescribing special facility licences) proposed by the AHA and the LSA represent a major diminution in the discretion of the Liquor Licensing Authority. It would undoubtedly affect the interests of potential applicants, who would be required to ensure that their proposed mode of operation complied with one of the prescribed special facility licence types; which appears, on face value, to defeat the purpose of the special facility licence type.
913. The Western Australian Tourism Commission shares these concerns, suggesting that not only are the proposals not conducive to promoting tourism, but that they appear to be directed at protecting the commercial interests of licensees and are highly likely to inhibit tourism (see comments in paragraph 906).
914. It is not considered that the changes sought by the AHA and LSA can be justified, in National Competition Policy terms, as being within the public interest.
915. As such, retention of the restrictions on the granting of a special facility licence, as contained with section 46, can be justified as preventing a subversion of the Act's licence classification system, subject to subsection (6) being amended to delete the reference to section 38 and provide only for the Director to determine that section 37 (5) does not apply in respect of a special facility licence of a type prescribed.
916. It is considered that applicants for any special facility licence, even one of those types prescribed, should be required to establish that the grant of the licence is not contrary to the public interest (see the analysis of section 38 at Restriction 22).

Alternative Means of Achieving the Legislative Objectives

917. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

918. The possibility of a special facility licence being tailored to meet the exact requirements of an applicant and the relevant market targeted in the application, in terms of trading conditions and trading hours constitutes an important public benefit. Retaining the special facility category of licence is considered more beneficial than any public benefit likely to be achieved by removing the licence category.
919. The restrictions on the grant of a special facility licence are justifiable in terms of proper regulation of the liquor industry.

Recommendation

920. That section 46 should be amended to provide that all applications for the grant of a special facility licence are required to be subject to the "public interest" criteria as recommended by this Review in respect of section 38.

Liquor store licences (section 47)

921. Section 47 provides that during the permitted hours, the licensee of a liquor store is authorized to keep open the licensed premises and to sell packaged liquor on and from the premises to any person.
922. Subsection (2) provides that the licensee of a liquor store licence is authorized to supply liquor, by way of free sample —
- (a) for consumption on a part of the licensed premises approved for the purpose by the Director; or
 - (b) for consumption off the premises.

Potential Disadvantages of the Restriction

923. Licence types and conditions hinder the commercial outcomes of competition.

Potential Advantages of the Restriction

924. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.
925. Licence types and conditions contribute to the public's increased certainty about the types of products and services offered at licensed premises.
926. Licence types and conditions make it possible to determine the potential for harm that they present.
927. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.4.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licencees can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holder of liquor store licences; Consumers
Public objectives impacted:	Economic/financial Distributional

Potential Advantages and Benefits

EFFECT 38.4.2	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type.
Impact:	The liquor industry is effectively regulated
Impacts when:	On going
Impacts on whom:	Licenseses; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”.
EFFECT 38.4.3	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk
EFFECT 38.4.4	Licence types and conditions make it possible to determine the potential for harm that they present.
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk

EFFECT 38.4.5	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry.
Public objectives impacted:	Economic/financial Distributional Uncertainty/risk

Assessment of Public Benefit

928. There is a generic public benefit associated with prescribed licence types and trading conditions, in that members of the public have an increased certainty about the range of services and products likely to be offered at premises licensed under a particular licence type.

Alternative Means of Achieving the Legislative Objectives

929. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

930. The public benefit of retaining the liquor store class of licence is greater than the public benefit likely to be achieved by removing the licence category.

931. However, the opportunity could be taken to amend the provisions of section 47 (2) to delete the requirement for the licensee of a liquor store licence to supply liquor by way of free sample, in order to provide consistency with other licence types that are permitted to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for that purpose by the Director.

Recommendation

932. That section 47 (2) be amended to provide that the licensee of a liquor store licence is authorized to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director or for consumption off the premises.

Club and club restricted licences (section 48)

933. Club licences are not ‘commercial’ licences in the sense that they do not permit the sale and supply liquor in competition with other licence types, but rather as a service to club members and their bona fide guests. As such, it has been determined that many of the restrictions relative to club licences are outside of the scope of the national competition policy review.
934. However, the following restrictions on club licences do impact on other liquor licence types —
- (a) subsection (1) (b) (i) provides that liquor may only be purchased by a club licence from a list of suppliers nominated by the Club Secretary in writing and approved by the Director of Liquor Licensing; and
 - (b) subsection (7) provides that the list of suppliers to be nominated by the Secretary of a club that holds a club restricted licence shall consist of licensees who have hotels or liquor stores situated within 8 kilometres of the club premises, unless there is no such licensee, or there are so few licensees that the club’s choice of supplier would be unreasonably restricted if confined to them alone and the Director so authorises.
935. From a competition policy perspective, the licensee most deserving of supplying liquor to a club restricted licence should be based on who is most competitive and not on locality.

Recommendation

936. That section 48 be amended to —
- (a) delete the requirement for a club restricted licence to purchase liquor from a list of suppliers approved by the Director in section 48 (8) and instead provide that a club restricted licence must purchase liquor from a liquor merchant; and
 - (b) repeal section 48 (1) (b) (i), which provides that a club restricted licence is subject to a condition restricting the sale of liquor to liquor purchased from a list of suppliers nominated by the Secretary of the club in writing to, and approved by, the Director.

Restaurant licences (section 50)

937. Section 50 provides that, subject to the Liquor Licensing Act, the licensee of a restaurant licence is, during the permitted hours, authorized to sell to any person liquor on the licensed premises for consumption on the premises ancillary to a meal supplied by the licensee to, and eaten by, that person there.
938. Subsection (1a) provides that where the licensee of a restaurant licence holds an extended trading permit under section 60 (4) (ca) (authorizing the sale of liquor for consumption on the premises, whether or not ancillary to a meal, during hours which

are permitted under a hotel licence) in respect of the premises, the licensee is authorized to sell liquor to a person, whether or not ancillary to a meal eaten by the person, if —

- (a) the liquor is consumed at a dining table; and
- (b) not more than 20 per cent of the seating capacity for customers on the premises is available, or being used at any one time, for persons to consume liquor other than ancillary to a meal.

939. Subsection (2) provides that where the licensee of a restaurant licence holds an extended trading permit under section 60 (4) (c) in respect of residential accommodation provided to the public by the licensee on the same or adjacent premises, the licensee is authorized to sell liquor to a lodger in a room or place in the area to which that permit applies that is reserved for the private use of lodgers, whether or not ancillary to a meal.

940. Subsection (3) provides that every restaurant licence is subject to the condition that —

- (a) the business conducted at the licensed premises must consist primarily and predominantly of the regular supply to customers of meals to be eaten there; and
- (b) liquor must not be consumed by a person on the licensed premises, except ancillary to a meal supplied or to be supplied, by the licensee to, and eaten by, that person there.

941. The major restriction on this class of licence is found in subsection (3).

942. This licence type is subject to a “primary purpose” of providing meals to customers, with the sale and supply of liquor being a complementary, but ancillary provision. The prescribed trading conditions imposed by section 50 restricts the ability to sell liquor conferred by a restaurant licence by subjecting it to the provision of a genuine meal supplied by the licensee to, and eaten by, a person at the restaurant.

Potential Disadvantages of the Restriction

943. Licence types and conditions hinder the commercial outcomes of competition.

Potential Advantages of the Restriction

944. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.

945. Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises.

946. Licence types and conditions make it possible to determine the potential for harm that they present.

947. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.5.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licencees can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holderes of restaurant licences; Consumers
Public objectives impacted:	Economic/financial Distributional

Potential Advantages and Benefits

EFFECT 38.5.2	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type.
Impact:	The liquor industry is effectively regulated
Impacts when:	On going
Impacts on whom:	Licencees; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”
EFFECT 38.5.3	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk

EFFECT 38.5.4	Licence types and conditions make it possible to determine the potential for harm that they present.
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk
EFFECT 38.5.5	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry
Public objectives impacted:	Economic/financial Distributional Uncertainty/risk

Assessment of Public Benefit

948. There is a generic public benefit associated with prescribed licence types and trading conditions, in that members of the public have an increased certainty about the range of services and products likely to be offered at premises licensed under a particular licence type.
949. Prescribed licence types also contribute towards more meaningful regulation of the liquor industry in Western Australia by assisting with the policing of licensing conditions.
950. However, for the same reasons as those discussed in connection with cabaret licences, competition should be the driving force behind the facilities and services provided by the holders of restaurant licences and not compliance with a de facto “primary purpose”, which acts to constrain efficiency and innovation in licensed restaurants.

951. The structuring of restaurant licences so that the sale of liquor is authorized only ancillary to a meal has a significant impact on competition in the market place. However, recent amendments to the Act, which allow restaurateurs to sell and supply liquor without a meal, go some way in addressing the impact of this restriction on competition in the market place. The ability of a restaurant to sell and supply liquor without a meal, even in the limited circumstances envisioned by section 50 (1a), attenuates the apparent nexus between the supply of food and liquor under a restaurant licence.

952. In its submission to this review, the Restaurant and Catering Industry Association of WA asserts that the actual 20 per cent figure represents a direct restriction on competition that needs to be justified under competition policy —

The recent increase to 20 per cent improves the competitiveness of restaurants and delivers a service that consumers want. However it will result in inefficiencies and some disappointment for consumers. The inefficiencies arise from the transaction costs associated with the requirement for the restaurant to police and enforce the rule. The consumer disappointment will arise from the need to turn away consumers with a reasonable demand in situations where the restaurant management assesses that the 20 per cent figure has been met. Removal of the 20 per cent restriction is consistent with competition policy and also with the stated objectives of the legislation relating to development of the tourism industry and diversity of demand. It does not conflict with the objectives of regulation and minimizing the harm associated with alcohol consumption.

953. Conversely, the submission of the Australian Hotels Association (Western Australian Branch) suggests that any extension beyond the 20 per cent limit and an ability to serve liquor at a bar in a restaurant would "...substantially undermine the fine balance of licensing differentials which exist under the current market..."

954. National Competition Policy recognises that a balance of objectives and costs will exist in an area such as liquor licensing. However the fundamental principle for legislation reviews is that legislation should not restrict competition unless it can be shown that the benefits of regulation to the community outweigh the costs, and further, that the objectives of the legislation cannot be achieved in any other way.

955. This means that where licensing and licence conditions applying to liquor sellers, are considered necessary, they should go no further in restricting competition than is necessary to achieve the legislation's stated objectives. In particular, where licensing is differential across different operators in an industry, this differential treatment should be demonstrably consistent with the objects of legislation and should not restrict competition, or potential competition, between market operators, unless that restriction can be shown to be, on balance, in the public interest, and can be shown to not be achievable with a less restrictive approach.

956. In regard to this, the Restaurant and Caterers Association of WA say —

One view is that a business should simply be licensed or not licensed to sell alcohol and the form and mix of sales should be determined in the competitive market place. Such a policy would appear ultimately to be inconsistent with the basic objectives of the Act relating to regulation and control. However, it

highlights the very real nature of the problem. Although the mix of food and alcohol sales varies across establishments they are effectively in competition.

957. While it is conceded that different sectors of the liquor industry are effectively in competition, there is a marked difference in the public's expectations in relation to premises licensed under a hotel licence and premises licensed under a restaurant licence. Consumers expect restaurants to be restaurants, i.e. a place where meals may be had.
958. Given the amendments proposed to section 41 by this Review and the fact that the hotel licence and other categories of licence have been retained, there is still a large public benefit in premises being licensed under appropriate licence types.
959. As such, it is considered that some restrictions are necessary and justifiable in the public interest to ensure that premises licensed under restaurant licences are in fact restaurants and do not become *de facto* hotels (or taverns).
960. However, it is apparent that the designated area of 20 per cent of the seating capacity for customers on the premises in section 50(1a) (b) is arbitrarily imposed on restaurateurs and cannot be justified on this basis. Alternatives to the current provisions are considered below.
961. Additionally, the provisions of section 50 currently operate in such a manner so as to preclude a consumer removing from the licensed premises any unconsumed portion of a bottle of liquor purchased at the restaurant for consumption with the meal, which has been a source of complaint from consumers for many years. It is considered that this restriction cannot be justified. Alternatives to the current provisions are also considered below.

Alternative Means of Achieving the Legislative Objectives

962. As already acknowledged, section 50(1a) (b), which imposes a restriction of 20 per cent of the seating capacity for premises for the purposes of an extended trading permit under section 60(4)(ca), is a restriction that cannot be justified.
963. If the legislative objective of the restriction is to ensure that a restaurant continues to operate as a *bona fide* restaurant, then that objective can be achieved more successfully through other sections of the Act (i.e. sections 52 and 53). As such, there appears to be no policy basis for continuation of the 20 per cent figure. Similarly, there is no need to specify a maximum figure for such an extended trading permit in the legislation, but rather to allow applicants to seek what ever area they deem suitable for their restaurant and allow the decision-maker to determine the appropriateness of the area sought on a case-by-case basis, in the public interest.
964. Similarly, in recognition of the fact that when a consumer purchases a bottle of liquor and ownership of that liquor properly changes from the licensee to the customer, the customer should not be penalised by the licensee's trading conditions and be prevented from removing the unconsumed portion of liquor from the premises.

Conclusion

965. The public benefit of retaining the category of restaurant licence is greater than the public benefit likely to be achieved by removing the licence category.
966. However, it is considered that some restrictions on a restaurant licence are necessary and justifiable in the public interest to ensure that premises licensed under restaurant licences are in fact restaurants and do not become *de facto* hotels (or taverns). Should a restaurateur wish to sell and supply liquor in a manner that is not authorised under a restaurant licence, then it is incumbent upon that licensee to seek an alternative licence type, such as a tavern or special facility licence.
967. It is also concluded that there is no basis for retaining the restriction —
- (a) that limits, to a maximum of 20 per cent of the seating capacity for customers, the area that the Director may approve for an extended trading permit to allow the consumption of liquor without a meal; and
 - (b) on patrons removing from a licensed restaurant the unconsumed portion of a bottle of liquor purchased for consumption with a meal that was eaten at the restaurant.

Recommendation

968. That section 50 be amended to —
- (a) provide in section (1a) that the licensee of a restaurant licence who holds an extended trading permit under section 60 (4) (ca) is authorised to sell liquor to a person, whether or not ancillary to a meal eaten by that person, in an area approved for that purpose by the Director, but without the prescription of a maximum area for such a permit; and
 - (b) permit a patron to remove from the premises the unconsumed portion of a bottle of wine purchased from the restaurant in the course of dining.

Producer's licences (sections 55, 56 and 57 and regulations 10 and 10A)

969. Section 55 of the Act provides that the holder of a producer's licence is, during permitted hours, authorized —
- (a) to sell on or from the licensed premises liquor produced by the licensee being —
 - (i) wine, or spirits made from grapes, for consumption on a part of the licensed premises approved for the purpose and for consumption off the premises;

- (ii) spirits not made from grapes, in sealed containers for consumption off the premises; or
 - (iii) beer, in sealed containers in an aggregate quantity per person of not less than 9 litres for consumption off the premises;
- and
- (b) to sell or supply that liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director.
970. Subsection (2) provides that a producer's licence shall not be granted other than in accordance with the provisions of the Act and any conditions prescribed.
971. Subsection (3) provides that where the licensee is a body corporate that produces wine or spirits, wine or spirits produced by a related body corporate shall be deemed to have been produced by the licensee.
972. Section 56 provides that a person shall be taken to have produced liquor —
- (a) being wine made from grapes —
 - (i) if it was fermented by, or under the control or direction of, that person; or
 - (ii) if, in the case of wine produced by blending, all the wine used was fermented from produce grown or produced in Australia; or
 - (b) being wine not made from grapes, if it was fermented or otherwise made from produce grown, produced or obtained by that person;
 - (c) being spirits, if it was distilled by that person; or
 - (d) being beer, if it was brewed by that person.
973. Subsection (2) provides that in determining any question as to the fermentation of wine, maturation of the wine after final bottling shall be disregarded.
974. Section 57 provides that an applicant for the grant of a producer's licence must satisfy the licensing authority —
- (a) that being a genuine producer of liquor, or a person who the Director is satisfied will become a genuine producer of liquor, the applicant produces or will produce liquor of the kind sought to be authorized for sale under the licence, in a manner to which section 56 applies;
 - (b) that the applicant carries on, or proposes to carry on, a genuine business of the sale of that liquor;

- (c) that the premises in relation to which the licence is sought are suitable for the purpose proposed; and
 - (d) that the applicant meets such requirements as are prescribed for the purposes of this paragraph.
975. Regulation 10 of the Liquor Licensing Regulations 1989 provides that for the purposes of section 57 (d) of the Act the following requirements are prescribed —
- (a) where the applicant does not have appropriate liquor producing facilities as the premises specified in the application, the applicant —
 - (i) has access to such facilities; and
 - (ii) is the occupier of a vineyard, orchard or apiary at the premises which yields, or has the potential to yield, sufficient produce to enable the applicant to be regarded as a genuine producer;
 - or
 - (b) where the applicant has appropriate liquor producing facilities at premises specified in the application, and is, or will be, a genuine producer of liquor, then —
 - (i) those premises; or
 - (ii) if those premises are not in a convenient location for the sale of the liquor produced, other premises in reasonable proximity to the premises where the liquor is, or is to be, produced,
- are suitable premises from which the applicant, as a producer of liquor, may sell the liquor produced.
976. Regulation 10A provides that if the holder of a producer's licence produces wine by blending, it is a condition of that licence under section 55 (2) of the Act that at least 50 per cent of the wine produced is fermented by or under the direction of that person, so that the wine is uniquely that person's own produce.

Potential Disadvantages of the Restriction

977. Licence types and conditions hinder the commercial outcomes of competition.
978. A producer's licence only authorizes the sale of one type of liquor produced i.e. —
- (a) wine or spirits made from grapes; or
 - (b) spirits not made of grapes; or
 - (c) beer.
979. In wine produced by blending, all the wine used was fermented from produce grown or produced in Australia.

980. The licensed premises have to be located at the vineyard, orchard or apiary or in reasonable proximity to the premises where the liquor is produced.
981. A producer's (beer) licence is restricted to selling beer in an aggregate quantity of not less than 9 litres and in sealed containers.

Potential Advantages of the Restriction

982. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.
983. Licence types and conditions contribute to the public's increased certainty about the types of products and services offered at licensed premises.
984. Licence types and conditions make it possible to determine the potential for harm that they present.
985. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.6.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licensees can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holders of producer's licences; Consumers
Public objectives impacted:	Economic/financial Distributinal
EFFECT 38.6.2	A producer's licence only authorizes the sale of one type of liquor produced
How:	Legislative requirement
Impact:	Producers require more than one producer's licence if they want to sell wine, sprits not made from grapes or beer that they have produced.
Impacts when:	On going
Impacts on whom:	Holders of producer's licences
Public objectives impacted:	Distributinal

EFFECT 38.6.3	In wine produced by blending, all the wine used was fermented from produce grown or produced in Australia
How:	Legislative requirement
Impact:	Producers who produce wine by blending cannot use imported grapes.
Impacts when:	On going
Impacts on whom:	Holders of producer's licences
Public objectives impacted:	Economic/financial
EFFECT 38.6.4	Producers of wine and beer are only authorized to sell their liquor at the premises where that liquor is produced
How:	Legislative requirement
Impact:	Producers are preventing from taking their produce to where the market and consumers are. The restriction acts as an impediment to commercial outcomes from competition.
Impacts when:	On going
Impacts on whom:	Holders of producer's licences; Other liquor merchants; Consumers
Public objectives impacted:	Distributional
EFFECT 38.6.5	A producer's (beer) licence is restricted to selling beer in an aggregate quantity of not less than 9 litres and in sealed containers
How:	Legislative requirement
Impact:	Producers of beer are preventing from determining what minimum amount of produce they are prepared to sell. Consumers are prevented from buying beer from the producer by the individual bottle. The restriction acts as an impediment to commercial outcomes from competition.
Impacts when:	On going
Impacts on whom:	Holders of producer's licences; Consumers
Public objectives impacted:	Distributional

Potential Advantages and Benefits

EFFECT 38.6.6	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type.
Impact:	The liquor industry is effectively regulated
Impacts when:	On going
Impacts on whom:	Licensees; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”
EFFECT 38.6.7	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk
EFFECT 38.6.8	Licence types and conditions make it possible to determine the potential for harm that they present.
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk

EFFECT 38.6.9	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry
Public objectives impacted:	Economic/financial Distributinal Uncertainty/risk

Assessment of Public Benefit

986. There is a generic public benefit associated with prescribed licence types and trading conditions, in that members of the public have an increased certainty about the range of services and products likely to be offered at premises licensed under a particular licence type.
987. Prescribed licence types also contribute towards more meaningful regulation of the liquor industry in Western Australia by assisting with the policing of licensing conditions.
988. However, some of the restrictions identified with producer's licences are difficult to justify in the public benefit.
989. For instance, if a producer wished to adopt innovative strategies and produce all three types of liquor in response to consumer demand, that producer would require three separate producer's licences (ie one for wine, one for spirits [not made from grapes] and one for beer). This restriction would appear to prevent producers from —
- (a) determining what mix of liquor production is commercially attractive or viable to maintain; and
 - (b) varying that mix to meet developing trends in the market.
990. Where a producer's licence has been granted, the producer should be able to determine what type or kind of liquor is subsequently produced under the licence, inclusive of the three different types of liquor provided for in section 55. The three sub-classes of producer's licence should be rationalised into one producer's licence.
991. In addition, the aggregate quantity of not less than 9 litres in respect of beer sold in sealed containers under a producer's licence should be discontinued. Consumer demand and economies of scale should be the determiner of the quantity of liquor

sold at any time. Consistent with National Competition Policy objectives, consumers should be free to determine how much or how little packaged beer they wish to purchase for consumption off the licensed premises.

992. Similar difficulties are found with the current provisions of Regulation 10 requiring a producer's licensed premises to be situated on the land where the produce is grown (ie where the vines, fruit trees or apiaries are located) or where liquor producing facilities are located. An exception is made in sub-regulation 10 (b) (ii) for producer's who owns liquor production facilities, who may seek approval to sell liquor in premises away from the where the production facilities are located if those premises are not in a convenient location for the sale of liquor, provided that the alternative premises are in reasonable proximity to where production takes place.

993. This requirement could be considered to discriminate against producers in that they are not free to establish their licensed premises in a location that may be more commercially viable than their rural premises.

994. The restrictions contained in —

- (a) regulation 10A contains a restriction in that where wine is produced by blending, at least 50 per cent of the wine so produced must have been fermented by or under the control of the licensee, so that the resultant wine is uniquely that person's own produce; and
- (b) section 56 (2), which provides that in determining evidence as to the production of liquor, in any question as to the fermentation of wine, maturation of the wine after final bottling shall be disregarded as production,

would appear to be justified on the basis that there must be some meaningful contribution to the production process by the eventual seller of liquor under a producer's licence.

Alternative Means of Achieving the Legislative Objectives

995. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

Conclusion

996. The public benefit of retaining an amended producer's licence is greater than the public benefit likely to be achieved by removing the licence category.

Recommendation

997. That section 55 be amended to —

- (a) specify that the three types of liquor production prescribed in section 55 (1), can be produced under one producer's licence;

- (b) repeal the provisions of section 55 (1) (a) (iii) that requires that the sale of beer in sealed containers under a producer's licence must be in an aggregate quantity of not less than 9 litres; and
- (c) make consequential amendments to regulation 10 to provide that producers can establish their licensed business at a location that may be more commercially viable than their vineyard, orchard or apiary.

Wholesaler's licences (section 58)

998. Section 58 of the Act provides that the licensee of a wholesaler's licence is, during permitted hours, authorized to sell packaged liquor on or from the licensed premises, in an aggregate quantity per person of not less than 9 litres, to any person for consumption off the premises.
999. Subsection (3) (b) provides that every wholesaler's licence is subject to the condition that the business conducted must consist, to at least 90 per cent of the licensee's gross turnover from the sale of liquor in each financial year, of selling liquor to liquor merchants or other persons authorized by law to sell liquor.

Potential Disadvantages of the Restriction

1000. Licence types and conditions hinder the commercial outcomes of competition.
1001. A wholesaler's licence authorizes the sale of liquor in an aggregate quantity per person of not less than 9 litres.
1002. At least 90 per cent of the licensee's gross turnover from the sale of liquor in each financial year must consist of sales to liquor merchants or other persons authorized to sell liquor.

Potential Advantages of the Restriction

1003. Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia.
1004. Licence types and conditions contribute to the public's increased certainty about the types of products and services offered at licensed premises.
1005. Licence types and conditions make it possible to determine the potential for harm that they present.
1006. Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 38.7.1	Licence types and conditions hinder the commercial outcomes of competition
How:	Competition is constrained by licence conditions
Impact:	Licencees can only trade in the manner authorized by their licence type
Impacts when:	On going
Impacts on whom:	Holderes of producer's licences; Consumers
Public objectives impacted:	Economic/financial Distributional
EFFECT 38.7.2	A wholesaler's licence authorizes the sale of liquor in an aggregate quantity per person of not less than 9 litres
How:	Legislative requirement
Impact:	Minimal
Impacts when:	On going
Impacts on whom:	Holderes of wholesaler's licences; Consumers
Public objectives impacted:	Distributional
EFFECT 38.7.3	At least 90% of the licensee's gross turnover from the sale of liquor in each financial year must consist of sales to liquor merchants or other persons authorized to sell liquor
How:	Legislative requirement
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Holderes of wholesaler's licences; Liquor merchants; Consumers
Public objectives impacted:	Economic/financial

Potential Advantages and Benefits

EFFECT 38.7.7	Licence types and conditions contribute towards the proper regulation of the liquor industry in Western Australia
How:	Breaches of licence conditions are more easily observed when a licence type is trading in a manner contrary to the authorization conferred on that licence type.
Impact:	The liquor industry is effectively regulated

Impacts when:	On going
Impacts on whom:	Licensees; Consumers; The Licensing Authority; Police Officers
Public objectives impacted:	Economic/financial; Distributional; Avoidance of public “bads”
EFFECT 38.7.8	Licence types and conditions contribute to the public’s increased certainty about the types of products and services offered at licensed premises
How:	Consumers can have a realistic expectation of the range of products and services provided by premises licensed under a prescribed licence type.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	Consumers
Public objectives impacted:	Uncertainty/risk
EFFECT 38.7.9	Licence types and conditions make it possible to determine the potential for harm that they present
How:	Prescribed licence conditions for licence types make it possible for people to estimate the potential for harm represented by a new licence application
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia
Public objectives impacted:	Uncertainty/risk
EFFECT 38.7.10	Licence types and conditions make it possible for the liquor industry in Western Australia to be analysed in a meaningful way
How:	The type and extent of liquor services throughout Western Australia can be ascertained by the types of licensed premises located in a given area.
Impact:	Significant
Impacts when:	On going
Impacts on whom:	The public of Western Australia; The Liquor Licensing Authority; The Western Australian Liquor Industry
Public objectives impacted:	Economic/financial Distributional Uncertainty/risk

Assessment of Public Benefit

1007. The fundamental principle underpinning the wholesaler's licence is recognition of the fact that a wholesaler supplies bulk quantities of goods to other merchants/retailers. As such, section 58 provides for a number of restrictions to be imposed on a wholesaler's licence to ensure that the licensee sells liquor in large (wholesale) quantities to be retailed by other liquor merchants.

1008. These restrictions do not constitute any inconsistency with national competition policy objectives.

Alternative Means of Achieving the Legislative Objectives

1009. It is not possible to identify any alternative non-regulatory means of fully achieving the aims of this restriction.

1010. However, the opportunity could be taken to amend the provisions of section 58 (2) to delete the requirement for the licensee of a wholesaler's licence to supply liquor by way of free sample, in order to provide consistency with other licence types that are permitted to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for that purpose by the Director.

Conclusion

1011. The public benefit of retaining the wholesaler's licence is greater than the public benefit likely to be achieved by removing the licence category.

Recommendation

1012. It is recommended that section 58 (2) be amended to provide that the licensee of a wholesaler's licence is authorized to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director or for consumption off the premises.

Summary of recommendations in respect of restriction 38

1013. It is recommended that —

- (a) the continued classification of licences into Category A and Category B licences cannot be justified because of the propensity for harm contained in all licence types;
- (b) amendments to section 41 should be made to increase the competitiveness of the licence type to enable licensees to easily respond to changes in consumer demand. This will allow licensees to determine the mix of services they will offer to the market. Accordingly, section 41 should be amended to provide for —

- (i) the three sub-classes of hotel licence to be rationalised into one ‘hotel’ licence type with appropriate trading conditions imposed on licences, and able to be varied upon application by the licensee so that the licence has effect as a hotel, tavern or hotel restricted licence and vice versa, with appropriate conditions being specified on the licence. (section 41 (1));
 - (ii) the deletion of the requirement for a licensee to sell liquor while the premises are open and insertion of a provision permitting a licensee to sell liquor while the premises are open during permitted hours (section 41 (2) (a));
 - (iii) the deletion of the requirement for hoteliers to provide residential accommodation or meals for lodgers (sections 41 (4)); and
 - (iv) the repeal of sections 41 (5), 41 (6) and 41 (7);
- (c) that section 42 be amended to —
- (i) delete the requirement for the licensee of a cabaret licence to only sell liquor ancillary to continuous entertainment provided live by one or more artists present in person performing there or by way of recorded music presented personally by a person employed or engaged by the licensee to do so;
 - (ii) repeal subsection (2); and
 - (iii) repeal subsection (3);
- (d) that section 43 should be repealed on the basis that where an applicant for the grant of a cabaret licence proposes to provide continuous live entertainment at the premises, the suitability of the proposed premises for that purpose is really a matter for consideration by the local planning authority;
- (e) that the cabaret licence be retitled as a “nightclub” licence;
- (f) that sections 44 and 45 be repealed and the current casino liquor licence be duplicated and re-issued as a special facility licence, subject to appropriate amendments being made to the Agreement scheduled to the Casino (Burswood Island) Agreement Act when and if that agreement is next renegotiated;
- (g) that section 46 should be amended to provide that all applications for the grant of a special facility licence are required to be subject to the “public interest” criteria as recommended by this Review in respect of section 38;

- (h) that section 47 (2) should be amended to provide that the licensee of a liquor store licence is authorized to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director or for consumption off the premises;
- (i) that section 48 (1) (b) (i) be amended to
 - (i) delete the requirement for a club restricted licence to purchase liquor from a list of suppliers approved by the Director and instead provide that a club restricted licence must purchase liquor from a liquor merchant; and
 - (ii) repeal section 48 (8);
- (j) that section 50 be amended to —
 - (i) provide in section (1a) that the licensee of a restaurant licence who holds an extended trading permit under section 60 (4) (ca) is authorised to sell liquor to a person, whether or not ancillary to a meal eaten by that person, in an area approved for that purpose by the Director, but without the prescription of a maximum area for such a permit; and
 - (ii) permit a patron to remove from the premises the unconsumed portion of a bottle of wine purchased from the restaurant in the course of dining;
- (k) that section 55 be amended so that —
 - (i) provision is made for the three types of liquor production specified in section 55 (1) to be produced by a person who holds a generic producer's licence;
 - (ii) the requirement in section 55 (1) (a) (iii) that the sale of beer in sealed containers under a producer's licence must be in an aggregate quantity of not less than 9 litres should be deleted;
 - (iii) that consequential amendments be made to regulation 10 to provide that producers are able to establish their licensed business at a location that may be more commercially viable than their vineyard, orchard or apiary; and
- (l) that section 58 (2) should be amended to provide that the licensee of a liquor store licence is authorized to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director or for consumption off the premises.

RESTRICTION 39: a casino liquor licence is not capable of being removed without the consent of the Gaming Commission (section 83 (1))

1014. This restriction is considered anti-competitive because it provides that a casino liquor licence is not capable of being removed without the additional consent of the Gaming Commission.

1015. The object addressed is most likely object 5 (2) (a), to regulate and contribute to the proper development of the liquor industry in the State.

Recommendation

1016. Following earlier recommendations in respect of the casino liquor licence becoming a special facility licence (see paragraph 886), it is recommended that the restriction on a casino liquor licence that prevents it from being removed cannot be justified and that section 83 (1) should be repealed.

RESTRICTION 40: a protection order is specifically prohibited from being granted to the owner, lessor or mortgagee of premises to which a liquor store applies, but not other types of premises (section 87 (1) (a))

1017. This restriction is considered anti-competitive because it discriminates against the grant of protection orders in respect of liquor stores.

1018. The restriction does not appear to address any particular object of the Act in any meaningful way.

1019. The restriction has apparently arisen out of the concerns that liquor store licensees were being disadvantaged by rapacious landlords who, under the repealed Liquor Act, would assume control of the licence after expiration of the lease without any payment to the licensee for consideration of goodwill.

1020. Therefore, in the drafting of the Liquor Licensing Act, the provisions of section 87 were apparently inserted in an attempt to effect some type of negotiation between the lessor and lessee of a liquor store, prior to the expiration of the lease, by preventing the grant of protection order to premises to which a liquor store licence applies, in situations where the licensee ceases to occupy, or to carry on business in the licensed premises.

1021. Soon after the enactment of the Liquor Licensing Act, this issue was considered in some depth in proceedings between Jericho Nominees Pty Ltd and Dileum Pty Ltd, lessor and lessee respectively, of premises licensed under a liquor store licence at 367 Canning Highway, Palmyra.

1022. This matter went to appeal at the Supreme Court in appeal No 53 of 1999 and the comments of Malcolm CJ have some relevance —

The policy of the legislation is simply that the lessor or his nominee do not get automatic re-entry and approval of a transfer in the case of Liquor Store Licences. This does reflect a policy which gives some measure of protection to liquor store licensee tenants in the absence of any agreement...

In my opinion, what the lessee of licensed premises obtains when he enters into a lease of them is the right, subject to the transfer to him of the licence, to conduct the business and earn the profits which are obtained on the turnover... The consideration for this right is the rental which he pays during the term of the lease.

1023. While this finding has obvious importance in respect to provisions relating to the transfer of licences, it also undermines the apparent reasons for precluding a liquor store from the grant of a protection order.

1024. On the face of it, there is nothing different about a liquor store licence to cause it to be treated any differently under section 87 than any other licence type.

1025. There is also a compelling argument to suggest that the restriction conflicts with the rest of the Act's policy of persons having reasonable access to licensed premises. Section 37 (5) provides that once the licensee ceases to occupy the licensed premises, the interest of the licensee in the licence terminates. Therefore, the suspension of a liquor store licence and closure of the premises following the departure of the licensee only because a protection order cannot be granted to the owner of a liquor store, appears to work against the public interest of licensed premises being open to meet the public need for liquor and related services in that area.

Conclusion

1026. The restriction preventing a protection order from being granted to the owner, lessor or mortgagee of premises to which a liquor store applies is not justifiable.

Recommendation

1027. It is recommended that section 87 of the Liquor Licensing Act be amended by deleting the words "other than premises to which a liquor store licence applies" in subsection (1) (a).

RESTRICTION 41: a protection order is specifically prohibited from being granted to a liquor store when the licence is suspended and a person satisfies the Director that loss is likely to result if an order is not granted, but not other types of premises (section 87 (1) (b))

1028. This restriction is considered anti-competitive because it discriminates liquor store licences where the operation of the licence is suspended.

1029. The restriction does not appear to address any particular object of the Act in any meaningful way.

1030. This restriction was inserted into the Act by the Liquor Licensing Amendment Act 1998 to ensure continuity between the provisions of subsection (a) and (b) of section 87.

1031. This restriction does not appear to be valid for the same reasons as those given in respect of Restriction 41.

Conclusion

1032. The restriction preventing a protection order form being granted to the owner, lessor or mortgagee of premises to which a liquor store applies is not justifiable.

Recommendation

1033. It is recommended that section 87 of the Liquor Licensing Act be amended by deleting the words “other than a liquor store licence” in subsection (1) (b).

RESTRICTION 42: different licence classes have different hours of permitted trade (section 97)

1034. This restriction is considered anti-competitive because it prevents licensees from choosing their hours of operation and differentiates between different licence holders.

1035. The objects addressed are object 5 (1) (b), to minimize harm or ill health to people or any group of people, due to the use of liquor; and object 5 (2) (d), to provide adequate controls over the sale, disposal and consumption of liquor.

1036. The hours in which licensees may trade are prescribed in section 97 of the Act, however the Licensing Authority may grant extended hours permits to most licence types.

1037. The prescribed trading hours, and the maximum hours trade permitted per day for each commercial licence type, without an extended trading permit, are summarised in the following table —

Licence type	Monday to Saturday (Existing)	Sunday (Existing)
<i>Hotel</i>	6.00 a.m. to 12.00 midnight (18 hours)	10.00 a.m. to 10.00 p.m. (12 hours)
<i>Liquor store</i>	8.00 a.m. to 10.00 p.m. (14 hours)	No trading permitted
<i>Cabaret</i>	6.00 p.m. to 6.00 a.m. (12 hours)	8.00 p.m. to 12.00 midnight (4 hours)
<i>Special facility</i>	As specified on the licence	As specified on the licence
<i>Restaurant</i>	At any time (up to 24 hours)	At any time (up to 24 hours)
<i>Producer’s</i>	At any time (up to 24 hours)	At any time (up to 24 hours)
<i>Wholesaler’s</i>	At any time (up to 24 hours)	At any time (up to 24 hours)

Potential Advantages and Benefits

EFFECT 42.3	Residents are able to enjoy the quiet amenity of the neighbourhood.
How:	Trading at licensed premises must cease at a certain time
Impact:	Disturbances from licensed premises cease soon after the prescribed closing time
Impacts when:	On going
Impacts on whom:	Residents and neighbours of licensed premises
Public objectives impacted:	Avoidance of public “bads”

Assessment of Public Benefit

1043. There were no submissions made to this Review to significantly change trading hours under the licence types, with the exception of Sunday trading for liquor stores, which is dealt with separately.
1044. Restrictions on trading hours are a useful means of protecting the amenity, quiet or good order of the locality in which the premises is situated. Although trading hours can be varied through the grant of extended trading permits, these permits require an additional application and the application procedure involves advising residents of the application and of their right to object.
1045. The impact of licensed premises on the amenity of the locality depends largely on the character of the area. In some localities, more liberalised trading hours than those regarded as ‘normal’ would have minimal impact on amenity. Where amenity is a risk, objections based on community interests (section 74 (1) (g)) may disallow an application, or cause conditions to be attached to minimise the impact on amenity.
1046. The trading hours prescribed in section 97 are not an absolute restriction, because extended trading permits may be applied for by all licensees.
1047. Similarly, there are no obligatory trading hours to require licensees to remain open for any specified periods.
1048. There is a strong case for competitive neutrality between hotels and liquor stores because of the similarity of their bottleshop/takeaway sales.
1049. There is also a strong case for competitive neutrality between licensees who are essentially undertaking the same activity (i.e. selling and supplying liquor) and, following the recommendations contained within this report to amend section 41 so as to remove many obligations from hoteliers, there is little reason in hotels being permitted to trade for longer hours than their competitors.

Alternative Means of Achieving the Legislative Objectives

1050. The alternatives to prescribed trading hours for each licence type are —

- (a) generic trading hours for all licence types;
- (b) unrestricted trading hours for licensed premises; or
- (c) setting of individual trading hours for each licensed premises.

1051. These alternatives are not considered appropriate because of public opposition to perceived significant changes to the trading hours of licensed premises.

1052. However, another alternative would be to repeal the prescribed trading hours and instead specify individual trading hours for each licence at application of the applicant or licensee concerned.

1053. This approach currently works well in regard to special facility licences, where section 97 (2) (h) provides that the permitted trading hours for a special facility licence are between such hours as may be specified in the particular special facility licence.

1054. As previously mentioned, there is also a strong case for competitive neutrality between licensees who are essentially undertaking the same activity (i.e. selling and supplying liquor) and it is difficult to argue that special facility licences should be treated differently to any other licence type in the prescribing or setting of trading hours.

1055. However, the Act's harm minimisation objective demands that there is some break in the continuity of the supply of liquor at any one premises and while continuity may not appear to impact on liquor store licences, in terms of over-all liquor consumption, competitive neutrality once again demands as level a playing field as possible for licensees undertaking essentially the same activity.

Conclusion

The question of trading hours was one of the most vigorously debated issues in the submissions received by the Committee. Industry submissions varied in their approach, each section seeking to improve its market share, but not wanting to give ground to others...¹⁹

1056. The 1994 Report of the Independent Review Committee on Liquor Licensing in Western Australia considered the matter of trading hours of licensed premises in depth and made a number of recommendations which, in the main, were implemented in the Liquor Licensing Amendment Act 1998, with the notable exception of Sunday trading for liquor store licences.

¹⁹ *Liquor Licensing in Western Australia*, Report of the Independent Review Committee (p. 110)

1057. Given the recent amendments to trading hours and the fact that, on the whole, existing trading hours have developed over many years and are the result of meaningful negotiation between all identified stake holders, it is considered that the benefits of the restriction on trading hours imposed by section 97 of the Act far outweigh its cost.

1058. However, notwithstanding the above, there is a strong case for competitive neutrality between hotels and liquor stores because of the similarity of their bottleshop/takeaway sales and for some amendment to trading hours to improve competition and achieve some parity between licensees.

Recommendation

1059. It is recommended that the restriction on trading hours for licensed premises be retained and different trading hours for each class of licence should be maintained, however the difference in the maximum permitted hours of trade per day should be minimised. Therefore, it is proposed to amend existing trading hours as follows —

Licence type	Monday to Saturday (Proposed)	Sunday (Proposed)
<i>Hotel</i>	Between 6.00 a.m. and 12.00 midnight (18 hours)	10.00 a.m. to 10.00 p.m. (12 hours)
<i>Liquor store</i>	Between 6.00 a.m. and 12.00 midnight. (18 hours)	[See discussion at Restriction 43]
<i>Cabaret</i>	Between 6.00 p.m. and 6.00 a.m. (12 hours)	6.00 p.m. to 12.00 midnight (6 hours)
<i>Special facility</i>	Between such hours as may be specified on the licence	Between such hours as may be specified on the licence
<i>Restaurant</i>	At any time where liquor is sold ancillary to the provision of a genuine meal provided by the licensee.	At any time where liquor is sold ancillary to the provision of a genuine meal provided by the licensee.
<i>Producer's</i>	At any time (up to 24 hours)	At any time (up to 24 hours)
<i>Wholesaler's</i>	At any time (up to 24 hours)	At any time (up to 24 hours)

RESTRICTION 43: liquor store licences are the only Category A licence not permitted to trade on Sundays (section 97 (3)).

1060. This restriction is considered anti-competitive because liquor stores are discriminated against in respect to Sunday trading.

1061. It is difficult to relate this restriction to the Act's objects in any meaningful way.

1062. Prima facie there would appear to be a discriminatory restriction in the differential trading hours prescribed for Sundays. Subsection (3) provides for Sunday trading under a hotel licence; club licence; cabaret licence, casino liquor licence, special facility licence and any other class of licence, provided that Sunday trading is specified on the individual licence. A singular exception, liquor store licences are not permitted to trade on Sundays.

1063. The imbalance in trading hours may be an important impediment to competition between licensed establishments, such as hotel bottle shops and liquor stores that are effectively competing for the packaged liquor market. On the other hand, when concern for the amenity of the local area is not an issue, the availability of extended trading permits may allow for greater equity between these licence types.
1064. The trading hours for liquor stores are clearly more restricted than those of hotels. As liquor stores are in competition with hotels, this differential treatment can only be seen as restricting one sector of the industry to the advantage of another competing sector.
1065. Arguments to support the continued monopoly on Sunday trading by hotels have centred on the importance of hotels as social centres in country towns and the fact that hoteliers can supplement the other services they can offer to patrons through the sales generated in takeaway liquor on Sundays. In their submission to this review, the Australian Hotels Association (WA Branch) argue that competition from liquor stores could result in reduced profit needed to subsidise their on-premises consumption operations —

Allowing liquor stores to trade on Sunday would have a detrimental effect on hotels and taverns across the State. Unlike liquor stores, hotels and taverns provide hospitality services, significant employment and economic benefit to the community.

The hotel industry is the backbone of Western Australia's tourism industry, providing food, accommodation and leisure facilities to people who visit Western Australia each year...

Many of the State's hotels and taverns are struggling to survive particularly in country regions. Often the bottleshop is the only profitable section of the hotel, supporting the rest of the business and the wide variety of services hotels offer the community.

The hotel industry employs over 15,000 people, plus thousands more from supporting industries. The average hotel employs 23 people. The average liquor store employs only three. The hotel industry also places special emphasis on training and the creation of career paths for employees – this is not the case with liquor stores.

For these reasons the Association believes Sunday trading for off premise liquor sales should be confined to hotel bottleshops.

1066. The argument that Sunday trading for liquor stores would erode the ability of hotels to continue cross-subsidising their other operations does not present a strong argument for continuation of such a restriction. In any event, cross-subsidisation is not something that is necessarily good to promote. It is only possible when competition is limited and its impact is detrimental to the efficiency of resource allocation.

1067. Alternatively, the Liquor Stores Association, in their submission to this review, argue for Sunday trading rights on the basis of economic business grounds and in accordance with the principles of fair trading —

The Liquor Stores Association believes that the public are being disadvantaged by the Liquor Licensing Act (1988) because they are being denied access to liquor stores on a Sunday.

As the law stands, Sunday trading is permitted for Hotels/Taverns and Clubs. Liquor stores are the only category “A” licence that cannot sell packaged liquor on a Sunday. We believe liquor stores are being denied equal rights in this area and that unfair trading exists to the detriment of competition and consumers rights.

1068. The submission of the Liquor Stores Association highlighted the results of its research into the issue, the results of which, in the Liquor Stores Association’s opinion, “clearly demonstrated that the needs of the consumer are not being met under the current legislation.”

1069. Presenting as proof the results of a telephone survey of 305 men and women in the Perth metropolitan area conducted for the Liquor Stores Association by Roy Morgan Research Centre on 6 October 1993 —

The results of the survey show that a significant majority of respondents (nearly three-quarters or 74%) have the opinion that liquor stores not attached to hotels should be able to trade on Sundays. Only one-fifth (25%) of those surveyed opposed such trading hours, and 6% could not say.

Of the people who purchased take away liquor, 58% preferred to purchase from liquor stores not attached to hotels, only 6% preferring bottle shops attached to hotels, 35% had no preference and 1% could not say.

The reasons for preferring to buy at a bottle shop attached to a hotel were drive-through convenience (3% of sample), close to home (2%), and better prices (1%). There was a wider variety of reasons given for preferring to purchase at a liquor store not attached to a hotel, including better prices (29%), close to home (18%) and a bigger range (12%).

The survey indicates that the majority of respondents surveyed who purchase take-away liquor prefer to stop at liquor stores not attached to hotels, and do believe that such stores be allowed to trade on Sundays.

1070. The submission of the Liquor Stores Association also highlighted that the Roy Morgan research revealed that “...an overwhelming 64% of women aged 22 to 44 years who have bought liquor to “take away” prefer to shop at a liquor store, while only 4% of women prefer a bottle shop attached to a hotel.” Based on these statistics, the Association draws a number of conclusions about women and personal safety and working women and Sunday trading.

1071. Similar claims are made about international and interstate tourists who expect liquor stores to trade on Sundays because they are used to shopping at liquor stores on Sundays in their home states or countries.

1072. However the most compelling argument presented by the Liquor Stores Association is for equity within the industry. As has previously been mentioned in this Report, there is a strong case for competitive neutrality between hotels and liquor stores because of the similarity of their bottleshop/takeaway sales and for amendment to trading hours to improve competition and achieve parity between proprietors who are essentially providing the same service (i.e. the sale of packaged liquor for consumption off the licensed premises).

Conclusion

1073. That the restriction preventing liquor stores from trading on Sundays cannot be justified.

Recommendation

1074. It is recommended that amendments be made to section 97 (3), to provide for permitted trading for liquor stores on Sundays during hours consistent with the permitted trading hours for a hotel on Sundays (i.e. from 10.00 a.m. to 10.00 p.m.)

RESTRICTION 44: the licensee of a hotel or special facility licence, where that licence so provides, is to provide certain services (section 108)

1075. This restriction is considered anti-competitive because hotel licensees and special facility licences, where the licence so provides, are discriminated against in that they are the only licence types required to —

- (a) receive persons on to the licensed premises and to sell liquor to any person, at the time the premises are open for business; and
- (b) to cause a price list to be exhibited, showing the charges made for meals and for the various types of liquor supplied ancillary to meals, in a place clearly visible to customers, at times the licensee is authorized to sell liquor only with or ancillary to a meal.

1076. It is difficult to relate these requirements to the objects of the Act in any meaningful way.

Conclusion

1077. Historically hotels were often the only places where the travelling public could obtain refreshment.

1078. Today, there are many alternative venues available for refreshment, licensed and unlicensed, including motels, restaurants, cafes, roadhouses, etc.

1079. Commercial outcomes of competition should permit hotel licensees to admit or deny persons access to the licensed premises, the same as other licensees are able to do under restaurant, cabaret and liquor store licences.
1080. Competition should be the driving force behind admitting persons to licensed premises, not compliance with a statutory obligation.
1081. The needs of the public for refreshment, both licensed and unlicensed, are able to be met by alternative premises, therefore, it is not in the public interest that the restriction continues.
1082. Logically, if the requirement to exhibit price lists is to apply, it should also apply to restaurant licences and any other licence that authorizes the sale of liquor ancillary to a meal. However, on balance, it is considered that this requirement is unreasonable and should be deleted altogether

Recommendation

1083. It is recommended that the requirement for the holder of a hotel or special facility licence to receive persons on to the licensed premises or to sell liquor to any person at any time the premises are open during the permitted hours cannot be justified and that 108 (1) should be deleted.
1084. Similarly it is further recommended that the requirement to exhibit price lists cannot be justified and that section 108 (5) should be repealed.

RESTRICTION 45: subsidies are payable to producers and wholesalers but not to any other class of licence (section 130).

1085. This restriction is considered anti-competitive because a commercial incentive (or subsidy) is offered to particular sections of the liquor industry and not to others.
1086. The object addressed is object 5 (2) (a), to contribute to the proper development of the liquor industry.
1087. The State has traditionally levied a franchise fee for the privilege of selling liquor under a liquor licence. However, the holder of a producer's licence was not required to pay the annual franchise fee. On 5 August 1997, the High Court of Australia held that business franchise fees on tobacco in New South Wales were invalid under section 90 of The Constitution. The franchise fees were held to be duties of excise, which only the Commonwealth could impose.
1088. As a consequence of this decision, States and Territories ceased collecting franchise fees on liquor, tobacco and fuel.

1089. Arrangements were instituted so that revenue previously collected by the States and Territories under business franchise fees could be collected by the Commonwealth through an increase in wholesale sales tax. Producers of wine in Western Australia, who did not pay a business franchise fee under the State system, were now required to pay the increase in wholesale sales tax to the Commonwealth. To offset this burden, the State Government approved the payment of a subsidy to producers that was equivalent to the amount of increased sales tax.

Potential Disadvantages of the Restriction

1090. The payment of the liquor subsidy to producers and wholesalers, who are competing with other retail sectors of the liquor industry, could present a potential competition policy inconsistency in that a commercial incentive (the liquor subsidy scheme) is paid to some licensees and not to others; thereby impeding commercial outcomes from competition.

Potential Advantages of the Restriction

1091. A local wine industry that is capable of competing on a national level.

1092. Regional growth.

1093. Reinforcement of the State's policy aimed at promoting responsible drinking of alcoholic products.

Assessment of Costs and Benefits

Potential Disadvantages and Costs

EFFECT 45.1	The payment of the liquor subsidy to producers and wholesalers, who are competing with other retail sectors of the liquor industry.
How:	Commercial incentive is paid to producers and not to other retail licensee.
Impact:	Impediment to commercial outcomes from competition.
Impacts when:	Continually
Impacts on whom:	Producers; and Other liquor merchants.
Public objectives impacted:	Economic/Financial

Potential Advantages and Benefits

EFFECT 45.2	Western Australian wine industry is capable of competing effectively on a national level.
How:	Other States and Territories make subsidy payments.
Impact:	Commercial outcomes from competition are not hindered.
Impacts when:	On going.
Impacts on whom:	Holders of producer's licences.
Public objectives impacted:	Economic/Financial
EFFECT 45.3	Regional growth.
How:	Wine production contributes to economic growth.
Impacts when:	Continually
Impacts on whom:	Wine producers; and regional centres where wine production occurs.
Public objectives impacted:	Regionalisation.
EFFECT 45.4	Reinforcement of the State's policy aimed at promoting responsible drinking of alcoholic products.
How:	Maintenance of a price differential in favour of low alcohol beer.
Impacts when:	Continually
Impacts on whom:	Beer producers and wholesalers; Consumers
Public objectives impacted:	Public health and well-being

Assessment of Public Benefit

1094. On 5 August 1997, the High Court of Australia held that business franchise fees on tobacco in New South Wales were invalid under section 90 of The Constitution. The franchise fees were held to be duties of excise, which only the Commonwealth could impose.

1095. Following the August 1997 High Court decision, State liquor franchise fees were replaced by a 15 per cent surcharge on Commonwealth wholesale sales tax (WST) on liquor, including cellar door and mail order sales. The State subsidy for the latter effectively maintains the franchise fee exemption that applied prior to the High Court decision.

1096. Under national tax reform, WST on wine (including the State surcharge component) will be replaced by the GST and a new Wine Equalisation Tax (set at 29 per cent of the wholesale value). The State will receive sufficient GST revenues and Commonwealth guarantee payments to continue funding the subsidies, which cost about \$2.5 million per annum in Western Australia.

1097. On the issue of competitive neutrality, the subsidy for cellar door sales is rarely passed on in lower prices to consumers. The rationale for the assistance is that extra profit margin allows additional investment by the producer, which is beneficial in terms of tourism and regional development.

Alternative Means of Achieving the Legislative Objectives

1098. No alternative means for achieving the objective of this restriction have been identified.

Conclusion

1099. That the subsidy payment for producers of wine, producers of low alcohol beer and wholesalers should be continued.

Recommendation

1100. That the Government continues with the payment of subsidies to producers of wine, producers of low alcohol beer and wholesalers.

**AMENDMENTS TO THE ACT'S EXISTING
DISCIPLINARY PROVISIONS**

1101. Given that a number of recommendations in this Legislation Review that combine to significantly reduce the existing restrictions on the liquor industry, it seems a natural corollary to also examine whether the Act's existing enforcement provisions are adequate to meet the changes proposed, which have been predicated on the view that the industry should not be regulated on the assumption that licensees will act unlawfully, but rather that they will genuinely observe the law and the licence conditions they are permitted to trade under.
1102. There are many provisions of the Act that assumes the basic honesty of a licensee and require a degree of self-regulation.
1103. As such, a person should be able to enter the liquor industry and properly conduct business as a licensed liquor merchant unmolested by gratuitous regulatory interference. However, where a licensee has been found to fail in the application of the necessary self-regulation or in the observation of the legislation or trading conditions attached to their liquor licence, the exercise of disciplinary action should be administratively expedient.
1104. In other words, under the liquor market envisioned by this Review, it should be easier to get a licence, provided the grant of the licence is in the public interest. Correspondingly, it should also be easier to lose that licence where the exercise of the licence has been shown to be contrary to the public interest.
1105. This is especially so given that one of the Act's two primary objects is "to regulate the sale, supply and consumption of liquor" and another is "to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal or consumption of liquor."
1106. Section 30 of the Act currently provides that the Court shall hear a complaint under section 95, which provides that there shall be proper cause for disciplinary action if —
- (a) the business conducted under the licence is not properly conducted in accordance with the licence;
 - (b) the licensed premises are not properly managed in accordance with this Act;
 - (c) the licensed premises —
 - (i) have fallen into disrepair;
 - (ii) are otherwise in an unsatisfactory condition;
 - (iii) have been altered without the prior approval of the Director; or

- (iv) contravene the requirements of a written law as to planning, building, health, or safety;
- (d) the owner or occupier of the licensed premises has failed to comply with a direction given under section 77 (2), or a requirement made under section 99;
- (e) the licensee has —
 - (i) contravened a requirement of the Act or a term or condition of the licence;
 - (ii) sold or supplied liquor otherwise than in accordance with the authorization conferred by the licence; or
 - (iii) failed to comply with a summons, direction or order under the Act;
- (f) the licensee has been convicted of —
 - (i) an offence under this Act;
 - (ii) an offence in any jurisdiction, that, in the opinion of the Director, may imply that the person is unfit to be the holder of a licence;
 - (iii) an offence under the *Health Act 1911* in relation to the licensed premises or liquor,

or at a material time employed or engaged, in relation to the business carried on under the licence, a person who in the course of that business committed any such offence of which that person was convicted;
- (g) the licensee has been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section;
- (h) the licensee otherwise is, or becomes, an unsuitable person to hold a licence under the Act;
- (i) a person holding a position of authority in a body corporate that holds the licence, or who is interested in the business or the profits and proceeds of the business, is or becomes not a fit and proper person to hold that position or to be so interested;
- (j) the continuation of the licence is not in the public interest or the licence has not been exercised in the public interest;
- (k) the safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee;

- (l) a person is convicted of unlawful gaming in respect of events that took place on the licensed premises;
- (m) a licence fee payable under this Act, or a penalty for failure to pay a fee when it becomes due or to comply with a requirement made under section 99, is not paid on or before the date fixed for payment under the Act; or
- (n) a determination previously made under section 96 has been contravened.

1107. Section 95 currently prescribes that a complaint must be made to the Liquor Licensing Court by the Director of Liquor Licensing, the Commissioner of Police or by the local government of the district in which the licensed premises are situated.

1108. Section 96 provides that where the Court is satisfied that a proper cause for disciplinary action exists, the Court may —

- (a) issue a reprimand;
- (b) impose a condition to which the licence is to be subject or otherwise limit the authority conferred by the licence, and vary the licence accordingly;
- (c) vary or cancel a condition to which the licence is subject;
- (d) suspend the operation of the licence —
 - (i) until further order; or
 - (ii) for a specified period;
- (e) cancel the licence;
- (f) disqualify, for such period as the Court thinks fit, the licensee from holding a licence;
- (g) disqualify, for such period as the Court thinks fit, a person against whom a ground of complaint has been made out from being —
 - (i) the holder of a position of authority in a body corporate that holds a licence; or
 - (ii) interested in, or in the profits or proceeds of, a business carried on under a licence;
- (h) require a licensee, or a person against whom a ground of complaint was made out, to enter into a bond or give security for future conduct;
- (i) give directions as to the conduct of the business of the licensee;

- (j) require specified action to be taken by the licensee within a specified period;
- (k) order the licensee or a person against whom a ground of complaint was made out to pay to the Crown a monetary penalty not exceeding \$30 000; or
- (l) make such other order as the Court thinks fit, in relation to the licensee or a person against whom a ground of complaint was made out,

or may take no action.

1109. In circumstances where —

- (a) a licensee;
- (b) a holder of a position of authority in a body corporate that holds a licence;
- (c) any person interested in, or in the profits or proceeds of, a business carried on under a licence; or
- (d) a natural person approved as manager or trustee;

has been convicted of an offence under the Liquor Licensing Act, or a person who while at any material time employed or engaged, in relation to a business carried on under the licence, has in the course of that business committed an offence under the Liquor Licensing Act of which that person was convicted, while the person has already been dealt with judicially in the Courts where the conviction was recorded, the question of disciplinary action under the Liquor Licensing Act should be able to proceed expeditiously, by the Director taking administrative action.

1110. Given that the convictions concerned relate to contraventions of the Liquor Licensing Act, the question for concern by the Director would relate to the continued status of that person's fitness and propriety to hold a liquor licence.

1111. The introduction of power for the Director to remove an unfit person from the liquor industry is not dissimilar to power already exercised by the Director. Section 33 provides power for the Licensing Authority (however constituted) to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that holds a licence, or to approve a natural person as a manager or trustee. For the Director to deny that approval effectively prevents that person from entering the liquor industry, which is not too dissimilar from removing a person from the industry, where that person becomes unfit.

1112. Amendments to section 96 of the Act could provide —

- (a) that where a person is convicted of an offence under the Liquor Licensing Act, the Licensing Authority may take disciplinary action;
- (b) that where the Director determines that a proper cause for disciplinary action exists on the conviction of a person for an offence under the Liquor Licensing Act, the Director may —
 - (i) issue a reprimand;
 - (ii) impose a condition on, or otherwise limit the authority conferred by, the licence or such an authorization;
 - (iii) vary or cancel any term or condition to which the licence is subject;
 - (iv) suspend the operation of the licence or such an authorization, or of any term or condition of the licence —
 - (1) until further order; or
 - (2) for a specified period;
 - (v) require the holder of the licence or the person concerned to enter into a bond or otherwise give security for future conduct; and
 - (vi) give directions as to the conduct of the business to which the licence relates.

1113. These amendments would enable an expedient and consistent approach to administrative disciplinary action, while still providing for judicial review of the Director's decision upon a question of law.

1114. In all other circumstances prescribed in section 95, where the substance of a complaint is an allegation, the Act's existing complaint and disciplinary proceedings should apply.

1115. Similarly, any proceedings seeking to cancel a licence should continue to be heard by the Court.

1116. These amendments would provide for administrative disciplinary action in those circumstances where the exercise of a licence has been shown to be contrary to the public interest.

1117. Accordingly, it is recommended that section 96 be amended to provide —

- (a) that where a person is convicted of an offence under the Liquor Licensing Act or has paid a modified penalty specified in an infringement notice, the Licensing Authority may take disciplinary action;
- (b) that where the Director determines that a proper cause for disciplinary action exists on the conviction of a person for an offence under the Liquor Licensing Act, the Director may —
 - (i) issue a reprimand;
 - (ii) impose a condition on, or otherwise limit the authority conferred by, the licence or such an authorization;
 - (iii) vary or cancel any term or condition to which the licence is subject;
 - (iv) suspend the operation of the licence or such an authorization, or of any term or condition of the licence —
 - (1) until further order; or
 - (2) for a specified period;
 - (v) require the holder of the licence or the person concerned to enter into a bond or otherwise give security for future conduct; and
 - (vi) give directions as to the conduct of the business to which the licence relates.

1118. It is further recommended that similar amendments be made to the provisions of sections 63, 64 and 117 (4) to likewise improve the ability of the Licensing Authority to respond, investigate and impose more restrictive conditions on a licence where it considers that to do so is in the public interest or otherwise desirable.

1119. Consequential amendments may also be required to sections 30 and 167 (7) of the Act.

SUMMARY OF RECOMMENDATIONS AND ASSOCIATED LEGISLATIVE CHANGES

1120. A variety of restrictions have been identified and evaluated in this report. In some cases, the recommendations require amendment to the Liquor Licensing Act. In others they do not.
1121. **Restriction 1:** It is recommended that the restriction on an applicant being found to be a “fit and proper” person (section 37 (1)) should be maintained. No legislative change is required.
1122. **Restriction 2:** It is recommended that the restriction associated with certain types of persons being statute-barred from participating in the liquor industry (section 34 (2)) should be maintained. No legislative change is required.
1123. **Restriction 3:** It is recommended that the restriction preventing a liquor licence from being made subject to, or used as security for, any charge or other adverse interest should be maintained (section 30A (2) (a)). No legislative change is required.
1124. **Restriction 4:** It is recommended that the restriction preventing a liquor licence from being vested in any other person, except in accordance with the Act should be maintained (section 30A (2) (b)). No legislative change is required.
1125. **Restriction 5:** It is recommended restriction associated with the ability of the Licensing Authority to impose more restrictive conditions on liquor licences of its own motion should be maintained (section 63). No legislative change is required.
1126. **Restriction 6:** It is recommended that restrictions on the ability of a licensee to sell or assign the right to carry on the business under the licence should be maintained, subject to the requirement for the condition precedent in every contract for the sale or assignment of a licensed business (section 84 (2) (a)) be deleted and substituted with a provision that ensures that all such contracts are impliedly subject to a condition that the contract does not take effect until the transfer application is approved by the Director of Liquor Licensing.
1127. **Restriction 7:** It is recommended that the restriction associated with every licence being subject to the condition that the licensee maintain the licensed premises to a standard that is reasonable, having regard to the class of licence, the locality and the expectations of the public; and to keep the premises and all fittings and fixtures in the premises thoroughly cleansed, in a hygienic condition and in good repair (section 99) should be amended by —
- (a) amendments to the *Health Act 1911* and *Local Government Act 1995* so that the provisions of those Acts relate to licensed premises;

- (b) dependent upon amendments being made to the Health Act and Local Government Act as recommended in paragraph (a) [above], section 99 (1) of the Liquor Licensing Act should be amended to provide for standards of licensed premises to be determined by Local Government authorities;
- (c) section 99 (2) being amended to provide for the Director to require that licensees take specified action, carry out specified works or provide specified things, if a Local Government authority advises the Director that a licensee has failed to comply with the standards required by that Local Government authority; and
- (d) section 99 (3) be subsequently relied upon to impose standards where market forces fail, due to licensed premises enjoying a degree of monopoly power in regional areas or country towns.

1128. **Restriction 8:** It is recommended that the restriction on competition contained within section 102 be maintained, provided that —

- (a) amendments are made to subsection 102 (1) (a) to provide that a person may not, without the approval of the Licensing Authority make any change in the corporate structure of a body corporate that holds a liquor licence; and
- (b) section 102 (1) (b) being repealed.

1129. **Restriction 9:** It is recommended that the restriction associated with requiring a person who becomes an owner of licensed premises to give notice in writing to the Director of the interest acquired within 7 days of acquiring it and an owner of licensed premises who changes from the address previously notified to the Director, shall within 7 days of the change, give notice of the change to the Director (section 103) should be maintained. No legislative change is required.

1130. **Restriction 10:** It is recommended that the restriction preventing a licensee from entering into partnership with another person in relation to the business carried on under the licence; entering into any agreement or arrangement under which another person may participate in the proceeds of the business carried on under the licence; or remunerating another person by reference to the quantity of liquor sold, without the approval of the Director (section 104) should be maintained. No legislative change is required.

1131. **Restriction 11:** It is recommended that the restriction associated with limiting the number of adult guests of a lodger to no more than 6 adults at any time liquor is consumed (section 106 (1) (b)) cannot be justified and that —

- (a) section 106 (1) (b) of the Act should be deleted; and
- (b) section 64 (3) of the Act be amended to provide power for the Director to impose a condition limiting the number of guests a lodger may supply with liquor outside of the permitted trading hours.

1132. **Restriction 12:** It is recommended that the restriction that prevents a person from, on licensed premises, selling or supplying liquor, or causing or permitting liquor to be sold or supplied to, a drunken person; or allowing or permitting a drunken person to consume liquor; or obtaining or attempting to obtain liquor for consumption by a drunken person; or aiding a drunken person in obtaining or consuming liquor (section 115 (2)) should be maintained. No legislative change is required.
1133. **Restriction 13:** It is recommended that the restriction preventing a person from carrying on business for which a licence is required under any name other than that of the licensee, unless the Director has approved the use of the name (section 116 (3)) should be maintained. No legislative change is required.
1134. **Restriction 14:** It is recommended that the restriction on licensees selling or supplying liquor to juveniles or permitting unaccompanied juveniles to enter or remain on licensed premises in section 121 of the Liquor Licensing Act should be maintained. No legislative change required.
1135. **Restriction 15:** It is recommended that the restriction on juveniles being employed in the sale and supply of liquor in licensed premises be maintained (section 121 (5) (d)) should be maintained. No legislative change required.
1136. **Restriction 16:** It is recommended that the restriction requiring prescribed persons to make a record (of liquor transactions) and retain the record on licensed premises, or in some other place in the State approved by the Director for the purpose, for 6 years after the date on which it was compiled, and make the record available for inspection by an authorized officer (section 145 (3)) should be maintained. No legislative change required.
1137. **Restriction 17:** It is recommended that the restriction on business embodied in the Licensing Authority's ability to exercise discretion to refuse an application, even if the applicant meets all the requirements of the Act or to grant an application, even if a valid ground of objection has been made out (section 33) should be maintained. No legislative change is required.
1138. **Restriction 18:** It is recommended that the restriction on business constituted by the Act's review process creating a two-tiered application process cannot be justified. Section 25 should be amended to —
- (a) provide that there are no grounds to seek a review of the Director's decision, except upon a question of law;
 - (b) limit any review to the evidence originally placed before the Director; and
 - (c) specifically provide that a review of a decision of the Director of Liquor Licensing is not to be in the manner of a re-hearing.

1139. **Restriction 19:** It is recommended that the restriction associated with the prohibition on the Licensing Authority approving two or more licences in respect of the same part of any premises (section 36) should be maintained. No legislative change is required.
1140. **Restriction 20:** It is recommended that continuation of the restriction whereby the Licensing Authority may require to be satisfied that any other approval, consent or exemption required under the law relating to planning to permit the use of the premises for the sale of liquor; and any written law, for the carrying out of building work that is to be carried out before the licence or permit sought has effect (section 37 (2)) should be maintained. No legislative change is required.
1141. **Restriction 21:** It is recommended that the restriction requiring licensees to retain a right to occupy the premises to the exclusion of others in section 37 (5) of the Liquor Licensing Act should be maintained. No legislative change is required.
1142. **Restriction 22:** It is recommended that the restrictions associated with the requirements for the grant or removal of a Category A licence (section 38) cannot be justified in their current format and should be amended as follows —
- (a) that subsection (1) should be repealed;
 - (b) that consequential amendments should be made to section 33 of the Act so that the grant or removal of any liquor licence is dependent upon the Licensing Authority being satisfied that the grant of the licence is in the public interest, with the prescription of public interest criteria that the Licensing Authority may consider at discretion; and
 - (c) that prescribed public interest criteria should include references, but not be limited to —
 - (i) the likely effect of an application on competition in the liquor market, or part of the market, i.e. on the retail liquor market or in a particular area, but not on individual competitors, to enable identification of important, but otherwise undisclosed public interest matters, i.e. outlet density and propensity for harm or ill-health;
 - (ii) new provisions similar to those already existing in section 64(3), directly related to harm minimisation; and
 - (iii) new provisions similar to those contained in the practice direction of the NSW Licensing Court relating to Harm Minimisation (see Appendix 2).
 - (d) that the provisions of subsection (2) should be repealed;
 - (e) that the provisions of subsection (2a) should be repealed;
 - (f) that the provisions of subsection (2b) should be repealed;

- (g) that the provisions of subsection (3) should be repealed;
- (h) that the provisions of subsection (4) should be deleted from section 38 and re-inserted in the definition of “licence,” at section 3 of the Act;
- (i) that section 38 (5) be amended —
 - (i) by deletion from section 38 and insertion into section 34 (Restrictions on certain applications); and
 - (ii) so that where an application is not granted by reason of a finding that the grant or removal of the licence was not in the public interest, no subsequent application may be made, unless the Director certifies that the application is of a kind sufficiently different from the application that was not granted to be distinguished and heard notwithstanding the previous finding.

1143. Additional recommendations arising out of consideration of restriction 22 are —

- (a) that a new provision relating to regulated premises be modelled on section 115 (2) to mirror the offence of serving a drunken person on licensed premises and providing an offence for a person to —
 - (i) supply liquor to a drunken persons;
 - (ii) allow or permit a drunken person to consume liquor;
 - (iii) obtain or attempt to obtain liquor for consumption by a drunken person; or
 - (iv) aid a drunken person in obtaining or consuming liquor, in regulated premises, with penalties applying to the proprietor of the regulated premises, any employee or agent of the proprietor or any other person.
- (b) that the Act should be retitled as the “Liquor Control Act”, given that the scope of the Act appears to have been shifted from a strict licensing focus to one of more general application, relative to both licensed and unlicensed premises and from the relatively narrow focus of liquor licensing *per se*, to one that recognises the wider role now played by the Licensing Authority in also minimizing harm.

1144. **Restriction 23:** It is recommended that the restriction associated with requiring the liquor to be sold under an occasional licence be purchased from a list of suppliers specified in the licence cannot be justified and that section 59 (4) of the Act should be repealed.

1145. **Restriction 24:** It is recommended that the restriction relating to the requirement to lodge plans of premises should be maintained (section 66), subject to repeal of the requirement for plans to be drawn by a duly qualified architect, surveyor, town planner, engineer, builder or draftsman as currently prescribed in regulation 11 (2) (a).
1146. **Restriction 25:** It is recommended that the restriction on applications being in the form and manner prescribed and accompanied by the prescribed application fee (section 68) should be maintained. No legislative change is required.
1147. **Restriction 26:** It is recommended that continuation of the restriction associated with the Director having to consider the nature and location of the places from which the prospective licensee may derive trade; or the existing or proposed licensed premises in the area in the specification of an affected area (section 71) cannot be justified and that —
- (a) section 71 should be repealed; and
 - (b) consequential amendments should be made to section 73 (2) and to regulation 14 to provide that where an application is required to be advertised, a right to object to the application is conferred on such persons, or classes of persons of such a class, as may be prescribed, or specified by the Licensing Authority and defined in the advertisement required to be made relating to the application, on such grounds permitted under section 74 as may be so prescribed or specified.
1148. **Restriction 27:** It is recommended that the restriction on business imposed by requiring that applications before the Licensing Authority be accompanied by consent of the owner, lessor, lessee or mortgagee cannot be justified and that section 72 should be repealed. Consequential amendments may also be required to delete any references throughout the Act to the interests of an owner being prejudicially affected by a lawful application or references to owner's consent, excepting those contained in section 77 (applications for alteration or redefinition of licensed premises).
1149. **Restriction 28:** It is recommended that the restriction constituted by conferring a right to object on any person holding a Category A licence in the affected area cannot be justified and that section 73 (2) (a) (ii) should be repealed.
1150. **Restriction 29:** It is recommended that the restriction on competition embodied in the prescribed ground of objection specifying that a licence is not necessary in order to provide for the requirements of the public is not justifiable and that section 74 (1) (d) should be repealed.
1151. **Restriction 30:** It is recommended that the restriction contained in section 75 (1) of the Liquor Licensing Act requiring an application for the grant of an occasional licence to be lodged no later than 14 days before the licence is to take effect should be maintained. No legislative change is required.

1152. **Restriction 31:** It is recommended that the restriction contained in section 76 (1) of the Liquor Licensing Act requiring an application for the grant of an extended trading permit to be lodged no later than 14 days before the permit is to take effect should be maintained. No legislative change is required.
1153. **Restriction 32:** It is recommended that the restriction associated with requiring approval for minor and decorative changes to licensed premises cannot be maintained and that section 77 (3) should be amended so that an alteration requiring the prior approval of the Director is restricted to only those alterations which will effect an increase or decrease in the licensed area of the premises.
1154. **Restriction 33:** It is recommended that the restriction embodied in the Director requiring an application for alteration or redefinition of licensed premises to be advertised on the basis of the application's effect on the actual or potential liquor sales of the licensee or any other holder of a Category A licence cannot be justified and that section 77 (6) should be repealed.
1155. **Restriction 34:** It is recommended that the restriction associated with requiring hotel licensees to maintain a register of lodgers (section 105) cannot be justified should be repealed. Replacement provisions could provide that the burden of establishing that the person was a lodger should lay with the persons charged with the offence.
1156. **Restriction 35:** It is recommended that the restriction associated with the licensing requirement for liquor merchants (section 109) should be maintained. However, the Act's exemption provisions (section 6) should be amended to exempt small social transactions of liquor from the Act's provisions.
1157. **Restriction 36:** It is recommended that the restriction on business contained in the Act's provisions in respect of licence fees (section 127) should be maintained. No legislative change is required.
1158. **Restriction 37:** It is recommended that the restriction on competition embodied in the defining of a sale of liquor which took place outside of the State to be concluded as having been concluded in the State where the delivery of liquor is to be effected in the State cannot be justified and that section 4 (8) should be repealed.
1159. **Restriction 38:** It is recommended that the restriction on businesses associated with different licence categories should be maintained (sections 41 to 58), subject to the following amendments to remove unnecessary restrictions and increase competition between the differing sectors of the liquor market —
- (a) the continued classification of licences into Category A and Category B licences cannot be justified because of the propensity for harm contained in all licence types;

- (b) amendments to section 41 should be made to increase the competitiveness of the licence type to enable licensees to easily respond to changes in consumer demand. This will allow licensees to determine the mix of services they will offer to the market. Accordingly, section 41 should be amended to provide for —
 - (i) the three sub-classes of hotel licence to be rationalised into one ‘hotel’ licence type with appropriate trading conditions imposed on licences, and able to be varied upon application by the licensee so that the licence has effect as a hotel, tavern or hotel restricted licence and vice versa, with appropriate conditions being specified on the licence (section 41 (1));
 - (ii) the deletion of the requirement for a licensee to sell liquor while the premises are open and insertion of a provision permitting a licensee to sell liquor while the premises are open during permitted hours (section 41 (2) (a));
 - (iii) the deletion of the requirement for hoteliers to provide residential accommodation or meals for lodgers (sections 41 (4)); and
 - (iv) the repeal of sections 41 (5), 41 (6) and 41 (7);
- (c) that section 42 be amended to —
 - (i) delete the requirement for the licensee of a cabaret licence to only sell liquor ancillary to continuous entertainment provided live by one or more artists present in person performing there or by way of recorded music presented personally or by a person employed or engaged by the licensee to do so;
 - (ii) repeal subsection (2); and
 - (iii) repeal subsection (3);
- (d) that section 43 should be repealed on the basis that where an applicant for the grant of a cabaret licence proposes to provide continuous live entertainment at the premises, the suitability of the proposed premises for that purpose is really a matter for consideration by the local planning authority;
- (e) that the cabaret licence be retitled as a “nightclub” licence;
- (f) that sections 44 and 45 be repealed and the current casino liquor licence be duplicated and re-issued as a special facility licence, subject to appropriate amendments being made to the Agreement scheduled to the Casino (Burswood Island) Agreement Act when and if that agreement is next renegotiated;

- (g) that section 46 should be amended to provide that all applications for the grant of a special facility licence are required to be subject to the “public interest” criteria as recommended by this Review in respect of section 38;
- (h) that section 47 (2) should be amended to provide that the licensee of a liquor store licence is authorized to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director or for consumption off the premises;
- (i) that section 48 (1) (b) (i) be amended to
 - (i) delete the requirement for a club restricted licence to purchase liquor from a list of suppliers approved by the Director and instead provide that a club restricted licence must purchase liquor from a liquor merchant; and
 - (ii) repeal section 48 (8);
- (j) that section 50 be amended to —
 - (i) provide in section (1a) that the licensee of a restaurant licence who holds an extended trading permit under section 60 (4) (ca) is authorised to sell liquor to a person, whether or not ancillary to a meal eaten by that person, in an area approved for that purpose by the Director, but without the prescription of a maximum area for such a permit; and
 - (ii) permit a patron to remove from the premises the unconsumed portion of a bottle of wine purchased from the restaurant in the course of dining;
- (k) that section 55 be amended so that —
 - (i) provision is made for the three types of liquor production specified in section 55 (1) to be produced by a person who holds a generic producer’s licence;
 - (ii) the requirement in section 55 (1) (a) (iii) that the sale of beer in sealed containers under a producer’s licence must be in an aggregate quantity of not less than 9 litres should be deleted;
 - (iii) that consequential amendments be made to regulation 10 to provide that producers are able to establish their licensed business at a location that may be more commercially viable than their vineyard, orchard or apiary; and
- (l) that section 58 (2) should be amended to provide that the licensee of a wholesaler’s licence is authorized to sell or supply liquor, by way of sample, for consumption on a part of the licensed premises approved for the purpose by the Director or for consumption off the premises.

1160. **Restriction 39:** Following earlier recommendations in respect of the casino liquor licence becoming a special facility licence, it is recommended that the restriction that prevents a casino liquor licence from being removed without the consent of the Gaming Commission (section 83 (1)) is no longer relevant and should be repealed, following the renegotiation of the Agreement scheduled to the Casino (Burswood Island) Agreement Act, when and if that agreement is next renegotiated.
1161. **Restriction 40:** It is recommended that the restriction contained within section 87 (1) (a) that prevents a protection order from being granted to premises to which a liquor store licence applies cannot be maintained. Section 87 (1) (a) should be amended by deleting the words “other than premises to which a liquor store licence applies”.
1162. **Restriction 41:** It is recommended that the restriction that prohibits a protection order from being granted to a liquor store licence under section 87 (1) (b) cannot be maintained. Section 87 (1) (b) should be amended by deleting the words “other than a liquor store licence”.
1163. **Restriction 42:** It is recommended that the restriction on trading hours for licensed premises be retained and different trading hours for each class of licence should be maintained (section 97), however the difference in the maximum permitted hours of trade per day should be minimised. Therefore, it is proposed to amend existing trading hours as follows —

Licence type	Monday to Saturday (Proposed)	Sunday (Proposed)
<i>Hotel</i>	Between 6.00 a.m. and 12.00 midnight (18 hours)	10.00 a.m. to 10.00 p.m. (12 hours)
<i>Liquor store</i>	Between 6.00 a.m. and 12.00 midnight. (18 hours)	[See discussion at Restriction 43]
<i>Cabaret</i>	Between 6.00 p.m. and 6.00 a.m. (12 hours)	6.00 p.m. to 12.00 midnight (6 hours)
<i>Special facility</i>	Between such hours as may be specified on the licence	Between such hours as may be specified on the licence
<i>Restaurant</i>	At any time where liquor is sold ancillary to the provision of a genuine meal provided by the licensee.	At any time where liquor is sold ancillary to the provision of a genuine meal provided by the licensee.
<i>Producer's</i>	At any time (up to 24 hours)	At any time (up to 24 hours)
<i>Wholesaler's</i>	At any time (up to 24 hours)	At any time (up to 24 hours)

1164. **Restriction 43:** It is recommended that restriction contained within section 97 (3) which prevents liquor stores from trading on a Sunday cannot be justified. Accordingly, it is recommended that amendments be made to section 97 (3), to provide that the permitted trading hours for a liquor store licence on Sunday are between 10 a.m. and 10 p.m., using the trading hours of a hotel as a bench mark.

1165. **Restriction 44:** It is recommended that the requirement for the holder of a hotel or special facility licence to receive persons on to the licensed premises or to sell liquor to any person at any time the premises are open during the permitted hours (section 108 (1) cannot be justified and should be repealed. Consequential amendments should also be made to —

- (a) section 108 (2) (a) should be amended to apply to any licensed premises, excepting club licences;
- (b) section 108 (2) (b) should be repealed following the recommendations made in respect of section 41; and
- (c) section 108 (5) should be repealed.

1166. **Restriction 45:** subsidies are payable to producers and wholesalers but not to any other class of licence (section 130). No legislative change is required.

1167. It is recommended that section 96 be amended to provide —

- (a) that where a person is convicted of an offence under the Liquor Licensing Act, the Licensing Authority may take disciplinary action;
- (b) that where the Director determines that a proper cause for disciplinary action exists on the conviction of a person for an offence under the Liquor Licensing Act, the Director may —
 - (i) issue a reprimand;
 - (ii) impose a condition on, or otherwise limit the authority conferred by, the licence or such an authorization;
 - (iii) vary or cancel any term or condition to which the licence is subject;
 - (iv) suspend the operation of the licence or such an authorization, or of any term or condition of the licence —
 - (1) until further order; or
 - (2) for a specified period;
 - (v) require the holder of the licence or the person concerned to enter into a bond or otherwise give security for future conduct; and
 - (vi) give directions as to the conduct of the business to which the licence relates.
- (c) it is also recommended that consequential amendments be made to section 30 of the Act.

APPENDIX 1 - NEWSPAPER ADVERTISEMENT

OFFICE OF RACING, GAMING AND LIQUOR
**REVIEW OF
LIQUOR LICENSING ACT 1988
AND LIQUOR LICENSING
REGULATIONS 1989**

As part of Western Australia's obligations under Competitions Principles Agreement 1995, the Minister for Racing and Gaming is required to conduct a review of the Liquor Licensing Act 1988 and Liquor Licensing Regulations 1989 to ensure that they comply with national competition policy. The review will focus on those parts of the legislation which restrict competition, or which impose costs or confer benefits on business, and will consider whether the restrictions provide net benefit to the community as a whole. The review will consider the appropriate arrangements for regulation of the liquor industry.

The terms of reference for the review are to:

- clarify the objectives of the legislation;
- identify the nature of any restrictions on competition;
- analyse and, as far as reasonably practical, quantify the likely effects of each of the restrictions;
- assess and balance the costs and benefits of each the restrictions; and
- consider alternative less restrictive means for achieving the same result including non-legislative approaches.

The review will be coordinated by the Office of Racing, Gaming and Liquor.

Submissions in writing are invited and should be forwarded by Friday, 24 April 1998 to:

**National Competition Policy Review
(Ref: A08/09/03)
Office of Racing, Gaming and Liquor
P.O. Box 6119, East Perth WA 6892
Telephone: (08) 9425 1819
Facsimile: (08) 9325 1636**

APPENDIX 2 — EXTRACT FROM NSW LICENSING COURT PRACTICE DIRECTION

“Harm minimisation is a primary object of the Act”

A primary object of this Act is harm minimisation, that is, the minimisation of harm associated - with misuse and abuse of liquor (such as harm arising from violence and other anti-social behaviour). The court, the Board, the Director, the Commissioner of Police and all other persons having functions under this Act are required to have due regard to the need for harm minimisation when exercising functions under this Act. In particular, due regard is to be had to “the need for harm minimisation when considering for the purposes of this Act what is or is not in the public interest.”

The Acts also provide that applications for licences and certificates of registration must not be granted unless responsible service of alcohol standards are in place. Section 47A of the LA provides:

“ The court is to refuse an application for a licence unless satisfied that practices will be in place at the licensed premises as soon as the licence is granted that ensure as far as reasonably practicable that liquor is sold, supplied and served responsibly on the premises and that all reasonable steps are taken to prevent intoxication on the premises, and that those practices will remain in place.”

Section 9(2B) of the RCA is in similar terms.

The Liquor Act further provides that variation of trading hours for hotels [s 25(1A)], off licences (retail) [s 27(2A)] on-licences (restaurant) [s 32(1A)]; on-licences (nightclub licence) [s 35D(5)] and on-licence (vessel) [s 35A(1A)] may not be granted unless similar requirements are met.

To provide guidance to those required to satisfy harm minimisation and responsible service of alcohol principles, the Licensing Court of New South Wales publishes this Practice Direction.

Issues relating to harm minimisation and responsible service of alcohol will invariably change with the passage of time. Accordingly, it is proposed to publish updates of this Practice Direction periodically to address those changes and in particular new issues that might arise that should be addressed.

Practice Direction

1. *The Licensing Magistrates have determined that every applicant to the Licensing Court of New South Wales must address harm minimisation principles and responsible service of alcohol principles if they wish their application to be granted. This Practice Direction covers a wider range of applications than those specifically referred to in the Introduction above but is appropriate in view of s 2A of the LA and s 3 of the RCA as harm minimisation principles clearly embrace responsible service of alcohol principles.*

This Practice direction does not require body corporate licensees to undertake a responsible service of alcohol module of a course.

2. *Every applicant to the Licensing Court of New South Wales must be able to satisfy the Court that practices will be in place or are in place and will remain in place at the licensed premises/registered club that ensure that as far as reasonably practicable that liquor is sold, supplied and served (where appropriate) responsibly on the premises and that all reasonable steps are taken to prevent intoxication on the premises.*

3. *Applicants in respect of existing licensed premises and clubs must lodge affidavit evidence addressing the undermentioned issues and those covered by the proposed conditions set out below, so far as they are relevant to the application.*

3.1 *Evidence as to any responsible service of alcohol courses undertaken by the licensee/secretary, managers under Div 8A (body corporate licences) and 8B (special areas) of Pt 3 of the LA and all staff involved in the sale and supply of liquor or proposals for the undertaking of courses by staff within 3 months.*

3.2 *Evidence of the existence of a register containing details of satisfactory completion of responsible service of alcohol courses and evidence of the existence of a written house policy detailing responsible service of alcohol practices that are in place, and will remain in place, at the premises. Such a house policy should as a minimum having regard to the size and nature of the premises, deal with the provision for training of staff, adoption of responsible liquor promotions, safe transport options for patrons and the availability of low alcohol and non-alcoholic beverages.*

3.3 *Evidence of the display of the appropriate four house policy posters (except for off-licences (retail) where three house policy posters are appropriate) developed by the Liquor Industry Consultative Council and available from the Department of Gaming and Racing and the positions in which they are displayed in the premises.*

3.4 *Evidence of display of the "Intoxication" sign and Proof of Age posters (available from the Department of Gaming and Racing) and their location in the premises.*

3.5 *Evidence of the adoption of the Liquor Industry Code of Practice for the responsible Promotion of Alcohol Products (available from the Department of Gaming and Racing), evidence of the locations in which it is displayed in the premises and evidence of its availability for staff to observe.*

3.6 Evidence of the availability of low alcohol beer and non-alcoholic beverages at all times that the premises are trading and the present costing of low alcohol beverages compared to full strength beverages and proposals to maintain appropriate price differentials in the future.

3.7 Evidence whether there is a Liquor Consultative Committee in the area in which the premises are located and whether the licensee/secretary is an active participant in meetings of the Committee and willingly adopts resolutions of that Committee relevant to harm minimisation and responsible service of alcohol issues.

3.8 Evidence of membership of any industry association and willingness to adopt policies of that association relevant to harm minimisation and responsible service of alcohol issues.

3.9 Evidence as to responsible liquor promotion or liquor discounting previously conducted or proposed.

3.10 Evidence of practices in place to ensure that minors do not gain access to liquor and, where appropriate, restricted access areas.

And, in addition, in respect of applications of any type for all categories of licence and certificates of registration, except on-licence (aircraft), on-licence (airport), on-licence (retail), off-licence (vigneron), off-licence (wholesale), off-licence (brewer) and off-licence (auction) the following affidavit evidence is required:

3.11 Evidence detailing licensed security personnel presently retained for the premises and their duties and evidence detailing proposals if the application is granted.

3.12 Evidence of practices in place to ensure that patrons arriving and departing from the premises do not disturb the quiet and good order of the neighbourhood.

3.13 Evidence detailing what announcements are made to patrons departing from the premises and what signs are erected on the premises requesting patrons to depart from the area quietly and not disturb the quiet and good order of the neighbourhood.

3.14 Evidence detailing what safe transport is available for patrons to depart from the premises.

3.15 Evidence of any controls to prevent removal of packaged liquor, if appropriate, from the premises.

3.16 Evidence of any policies relating to the non-admission of patrons after certain hours.

3.17 Evidence of any policies relating to cessation of sale of liquor prior to closing time.

3.18 Evidence of food being available whenever liquor is consumed on the licensed premises.

3.19 Evidence as to any use of non-standard measures for drinks.

4.

4.1 Applicants for grants of licences or certificates of registration must lodge affidavit evidence addressing each of the relevant issues in paragraph 3 above and setting out how the issues will be addressed if the application is granted.

4.2 In addition applicants for function licences must lodge affidavit evidence addressing the undermentioned issues:

4.2.1 Evidence that all liquor supplied at the function will be opened by staff (ie liquor cannot be supplied in unopened cans or bottles).

4.2.2 Evidence that the licensee will be in attendance for the duration of the function to supervise the sale and supply of liquor.

4.3 In addition hoteliers applying for an extension of their licence to sell liquor at a function (s 18(6) LA) must lodge affidavit evidence addressing the undermentioned issues:

4.3.1 Evidence that all liquor supplied at the function will be opened by staff (ie liquor cannot be supplied in unopened cans or bottles).

4.3.2 Evidence that the licensee or a manager who has completed a responsible service of alcohol course will be in attendance for the duration of the function to supervise the sale and supply of liquor.

5. To enable applicants and the industry generally to adapt to the new requirements of this Practice Direction and of the legislative amendments the following specific requirements will apply:

5.1 Except for off-licences (retail), applicants for grants of licences, for approval to act as a manager of a body corporate licence, for variation of trading hours for a hotel, on-licence (restaurant) and on-licence (nightclub licence), for approval to act as secretary of a registered dub or for the grant of a certificate of registration of a registered club, must complete the Responsible Service of Alcohol Module of the appropriate course prior to grant of the application. This requirement applies in addition to any other requirement to undertake courses which may be required by the Court, for example, a complete course or other modules of a course.

5.2 Except for off-licences (retail), applicants for provisional transfers of licences who have not undertaken a Responsible Service of Alcohol Module, but who otherwise possess such qualifications or experience as would justify the grant of the application, will be required to do so within one month of the grant of the provisional transfer of the licence and lodge evidence of satisfactory completion of that module with the Registry of the Court at which the provisional transfer was granted. In such circumstances, the Court will not follow its usual practice of provisionally granting the transfer for a period of three months but will provisionally grant the transfer for a period of one month, or such longer period as the Court may allow, and order that the applicant lodge evidence of satisfactory completion of the Responsible Service of Alcohol Module within that period. At the expiration of that one month period, or such longer period as the Court may allow, and upon satisfactory lodgment of the certificate, the applicant will be deemed to have made application for extension of the time for confirmation of the provisional grant (s 61(4) LA) and the time for confirmation of the provisional transfer shall be extended for a further period of two months. In the event that the certificate has not been lodged and in the absence of any other application for extension of time then the provisional transfer shall cease to have effect and the provisions of s 61 (5A) LA shall apply. The Court takes this opportunity to confirm that in respect of those applications which do not require the undertaking of a Responsible Service of Alcohol Module, or to meet any other requirement, the Court will continue its present practice of provisionally granting the transfer for a period of three months.

5.3 Except for off-licences (retail), in respect of conditional grants of licences or certificates of registration a condition will be imposed to the effect that a final grant order will not be made unless evidence is lodged of the satisfactory completion of the Responsible Service of Alcohol Module of the appropriate course by the licensee/secretary.

5.4 The Licensing Magistrates understand that at certain times courses will not be available by reason of many factors including excess numbers seeking to apply and non-availability of courses by reason of vacations. In these circumstances applicants should lodge evidence indicating what enquiries have been made by them to ascertain the next available course in which they may enrol and should enrol and notify the Court of the appropriate date. Orders will be made to reflect these circumstances.

5.5 The Licensing Court of New South Wales shall in due course publish requirements for off-licences (retail).

6. All applicants to the Licensing Court of New South Wales must be in a position to advise the Court by affidavit or orally whether they oppose the undermentioned conditions, or any of them, so far as relevant, being imposed on the licence/certificate of registration:

6.1 The licensee/secretary shall take all reasonable steps to prohibit or restrict activities (such as promotions or discounting) that could encourage misuse or abuse of liquor (such as binge drinking or excessive consumption).

6.2 Within three months of grant of the application, or within three months of commencement of employment, whichever Last occurs all staff involved in the sale and supply of liquor must have completed a Responsible Service of Alcohol course approved by the Liquor Administration Board.

6.3 *The licensee/secretary is to maintain a register which is to contain a copy of the certificate of the satisfactory completion of the Responsible Service of Alcohol course by the licensee/secretary and for the persons required by the forgoing condition to complete the course. The register is to be made available for inspection on request by a police officer or special inspector.*

6.4 *The licensee/secretary must as a minimum continually apply the house policies and practices on harm minimisation and responsible service of alcohol tendered to the Court at the time the application was granted. A copy of the house policy is to be maintained in the register in which the certificates of completion of the responsible service of alcohol course are filed. The house policy must be continually updated by additions that do not diminish from the issues approved by the Court and reflects legislative requirements, court, industry and departmental recommendation.*

6.5 *The four house policy posters developed by the Liquor Industry Consultative Council (available from the Department of Gaming and Racing) must be prominently displayed throughout the premises. [For off-licences (retail) the appropriate three posters shall be so displayed.]*

6.6 *In addition to any other notice required to be displayed there is to be prominently displayed in the premises, the "Intoxication" sign and at each public entrance way to the premises the "Proof of Age" poster (available from the Department of Gaming and Racing).*

6.7 *The Liquor Industry Code of Practice for the Responsible Promotion of Alcohol Products (available from the Department of Gaming and Racing) must be adopted in respect of the premises. A copy of the code must be displayed in a position in the premises where it will be readily available to and noticed by all staff involved in the sale and supply of liquor.*

6.8 *Low alcohol beer and non-alcoholic beverages must be available at all times when full strength liquor is available. The pricing structure of low alcohol beverages is to reflect pro-rata the lower wholesale cost of those beverages.*

7. *In appropriate cases the Court may impose such other conditions as it believes to be required to address the principles of harm minimisation and responsible service of alcohol relating to the manner of operation of the premises, their size and location and the nature of the premises. In particular conditions flowing from evidence given in response to items specified in paragraph 3 above may be imposed.*

8. *In respect of all categories of licence except off-licence (retail), off-licence (wholesale), off-licence (brewer) and off-licence (auction) the following condition shall be imposed:*

8.1 *food must be available whenever liquor is consumed on the licensed premises.*

9. *In respect of all function licences the following additional conditions shall be imposed.*

9.1 *All liquor supplied at the function must be opened by staff.*

9.2 *The licensee must be in attendance for the duration of the function to supervise the sale and supply of liquor.*

10. In respect of all approvals for the holder of a hoteliers licence to sell liquor at a function to be held on premises other than the premises to which the hotel licence relates the following additional conditions shall be imposed:

10.1 All liquor supplied at the function must be opened by staff.

10.2 The licensee or a manager who has completed the responsible service of alcohol course must be in attendance for the duration of the function to supervise the sale and supply of liquor.

11. In respect of provisional transfers of licence the following condition shall be imposed upon the licence whenever the transferee has not completed a Responsible Service of Alcohol Module of a course and may be imposed in addition to the requirement to undertake any other form of training:

11.1 The transferee shall complete a Responsible Service of Alcohol Module of the ★ (here insert name of appropriate course) course within one month (or other period fixed by the Court) and lodge evidence of satisfactory attendance and completion of that module with the Registry of the Court at which the provisional transfer was granted. The provisional transfer is granted for a period of one month (or other period fixed) subject to lodgment of the certificate of satisfactory attendance of the appropriate Responsible Service of Alcohol Module within the time specified and in the event of failure to lodge the certificate as specified then the provisional transfer shall cease to have effect. If the certificate is lodged within the time specified then the time for confirmation of the provisional transfer shall be extended for a period of a further two months.

12. In respect of conditional grants of licences and certificates of registration the following condition shall be imposed:

12.1 No final order shall be made until the proposed licensee/secretary has lodged evidence of attendance and completion of a Responsible Service of Alcohol Module of an appropriate course.

13. In respect of licensed premises in a special area (Div 8B of Pt 3 of the LA) persons should not be appointed managers of licensed premises unless they have completed a Responsible Service of Alcohol Module of an approved course.

APPENDIX 3 - LIQUOR, A UNIQUE SUBSTANCE

Alcohol is second only to tobacco as a preventable cause of death and hospitalisation for Australians... The misuse of alcohol — when manifest in impaired driving, spousal or child abuse, aggressive behaviour and/or crime — represents perhaps the most serious threat of any drug problem to public safety...²⁰

What is it that makes the “liquor” so specialised and different from other beverages? As far as the corner deli, the butcher shop and similar open food premises are concerned, meticulous cleanliness is of paramount importance. However, liquor outlets are given an added scope of responsibility, in that they sell and supply a drug that can have a significant effect on the behaviour of consumers, which in turn can also impact on the community.

In the preface to *Protecting the Community*, the 1995 report of the Task Force on Drug Abuse, the Premier of Western Australia said —

Drug abuse is one of our most serious and worrying problems. The problems caused by drugs affects not only those who abuse them, but also their families, their friends, and the community as a whole... The Government is implacably opposed to drug abuse. We will ensure that strong, determined and consistent action is taken by government agencies, and we will also seek to work closely with non-government agencies and the community.²¹

The consultation process undertaken by the Task Force on Drug Abuse included a number of activities, encompassing newspaper advertisement, letters to all State Government agencies and all relevant community organisations, to determine whether drug abuse is a problem in Western Australia.

At page 55 of Volume 1 of the report, it was noted that —

Almost everyone who spoke or wrote to the Task Force was concerned at the level of drug abuse in Western Australia. The Australian Institute on Alcohol and Addictions (Holyoake) believes that:

...problems related to alcohol and other drugs constitute one of the, if not the, major health and social issues affecting the community of Western Australia. The economic cost alone is enormous, the direct costs to health, justice and the welfare systems are all documented, and more attention is being given to the costs to business, more difficult to quantify, however, are the costs to families and individuals within them.²²

²⁰ *The National Drug Strategy: mapping the future*, Commonwealth of Australia (p. 53)

²¹ *Protecting the Community: the report of the Task Force on Drug Abuse*, Government of Western Australia (p i)

²² *ibid* (p 55)

Under the heading “Legal Drugs”, the Task Force reported that it was widely stated, both by professional organisations and the general public, that the biggest drug abuse problems arise from legal drugs, namely alcohol and tobacco —

Concerns about alcohol abuse were raised again and again at public hearings, both in Perth and in regional areas, as a major hazard for the whole community. The Alcohol Advisory Council of Western Australia submitted recent statistics on the number of deaths and hospitalisations caused by alcohol abuse and the financial costs incurred, but went on to say:

Of course, all of the statistics refer to people. It is people with families, jobs and commitments, who suffer the ill effects of alcohol. Family breakdown, loss of productivity due to death or incapacitation of a skilled member of the workforce, social security costs through compensation, sickness or employment benefits, are all economic costs to the community. There is no way to accurately measure the suffering and long-term addiction experienced by the drinker or the people close to them.

The Western Australian branch of the Australian Association of Social Workers agrees:

...(alcohol) pervades the whole of society to a larger or lesser degree and can be found under most “bads” — domestic violence, public violence, car accidents, poor work performance, financial problems, marital problems, divorce, homicide, mental illness. Certainly, alcohol is not the cause of every aspect of social disease, but is consistently underlies manifestations of many.

C P Brown, a police officer in Bunbury, summed up a common view:

Alcohol is responsible for so much misery in our society.

The Liquor Industry Council of Western Australia joined in condemning alcohol abuse, partly because it gives the industry a bad name and because of the costs it imposes on the industry...²³

The Executive Director of Public Health, in the Health Department of Western Australia’s formal submission to this review, commented —

Despite the evidence that per capita alcohol consumption has reduced over past decades, alcohol still kills many more people than do all the illicit drugs combined. Economists have estimated the total annual cost of alcohol misuse in Australia to be in the region of \$4.5 billion in 1992 terms or approximately \$264 per person per year... Based on an exhaustive review of the medical literature and analysis of health statistics, epidemiologists have estimated that in 1992 approximately 3,700 people died from the adverse effects of chronic or acute alcohol misuse and that approximately 731,169 hospital bed days were occupied for alcohol-related reasons... Re-analysis of these figures indicates that 47 per cent of alcohol-related reasons can be attributed to single episodes of excessive consumption, ie acute rather than chronic alcohol misuse.²⁴

²³ Taskforce on Drug Abuse, *op cit* (p 56)

²⁴ *Submission to the National Competition Policy Review of the 1988 Liquor Licensing Act and 1989 Liquor Licensing*

The Alcohol Advisory Council of Western Australia (Inc) suggests —

...owing to the special nature of alcohol, the application of competition principles to the Liquor Licensing Act of 1988 will not deliver a net public benefit...²⁵

At page three of the Alcohol Advisory Council's submission to this review, the following statistics were provided —

“Hazardous consumption of alcohol has been linked to adverse social and personal consequences. The social consequences are well documented ... alcohol accounts for 3 % of all deaths, 44 % of fire injuries; 34 % of falls and drownings; 30 % of car accidents; 50 % of assaults; 16 % of child abuse; 12 per cent of suicides and 10 % of machine accidents. In Western Australia, alcohol is responsible for 17 % of all drug related deaths... Excessive alcohol consumption has been linked to cirrhosis of the liver, brain damage (eg Korsakoff's Syndrome), premature death and an increased risk of car crashes and incidents at work...

An economic review of the costs associated with alcohol abuse indicated that in 1992, alcohol cost the Australian community \$4.5 billion or \$264 per person per year. Approximately \$3.5 billion were tangible costs through loss of production, health care, accidents and law enforcement. Intangible costs accounted for \$900 million... In Western Australia, the average annual cost for alcohol caused hospitalisation is approximately \$26 million per year or \$15 per person. The only other drug that exceeds this figure is tobacco. Over 60 per cent of the injuries which contribute to this cost were preventable...

Clearly alcohol has a deleterious impact on the health and wealth of Australia and any changes in legislation which may impact adversely on this need to be carefully considered.”

The National Drug Strategy (NDS), a cooperative venture between the Commonwealth and State/Territory governments, was established with the aim ‘to minimise the harmful effects of drugs and drug use in Australian society’. The forerunner to the NDS, the National Campaign Against Drug Abuse (NCADA), was launched in 1985 following a special Premiers' Conference on Drugs and was placed under the direction of a federal Ministerial Council on Drug Strategy.

When the NCADA was launched, the then Commonwealth Minister for Health, Dr Neal Blewett, made it clear that the intention was to develop a national approach and strong partnership between the Commonwealth, States and Territories. The strategy was to be comprehensive, involving an integrated approach to licit as well as illicit drugs. Perhaps most notably, the new drug strategy was to be based on the principle of harm minimisation.²⁶

Regulations, Health Department of Western Australia

²⁵ ACC Submission to the National Competition Policy Review of the Liquor Licensing Act, Alcohol Advisory Council of WA (p 1)

²⁶ see *The National Drug Strategy: Mapping the Future*, Commonwealth of Australia (p. 7)

As reported in *The National Drug Strategy: mapping the future*,

Australians have consistently defined the ‘drug problem’ as predominantly an illicit drug problem. Since the National Campaign Against Drug Abuse (NCADA/NDS) house hold surveys began in 1985, heroin has been identified as problematic by more respondents than any other drug... **When asked to shift their attention from their personal beliefs to what they thought caused most concern to the community, a third (33 per cent) nominated excessive drinking ...**²⁷ [emphasis added]

Under the heading “Alcohol”, the National Drug Strategy found —

Alcohol is the most widely used drug covered under the mandate of the NDS. With the possible exception of caffeine, alcohol is the drug most people in Australia are likely to have been offered, it is the drug they are most likely to have tried and it is the drug they are most likely to consume on a regular basis. “Its use is endemic in our society...” (Makkai & McAllister 1996:6).²⁸

*Public Opinion Towards Drug Policies in Australia 1985 – 1995*²⁹ also examines the Commonwealth government’s national opinion surveys, which commenced in 1985 and coincided with the introduction of the National Campaign Against Drug Abuse, with the object of monitoring changes in public opinion towards drug policies. The surveys were conducted at two to three year intervals, and in the ten years between 1985 and 1995, five surveys were carried out. As a result of those surveys, it has been suggested that opinions toward reducing alcohol use can be grouped into supply measures and demand measures. The authors of the study suggest there is more public support for policies which manipulate demand, though support for supply measures have increased, with the notable exception of changes in pricing.

In *Public Opinion Towards Drug Policies in Australia 1985 – 95*, the chapter entitled ‘Drugs as a Community Concern’, outlined the type of drugs use that are of most concern to the general community and identify the excessive use of alcohol as the most consistent and frequent of those concerns: in 1985, 33 per cent of the respondents identified this as the most serious problem, compared to 31 per cent in 1995. The two most recent surveys asked respondents what drugs they believed were most likely to cause drug related mortality and about **nine out of every ten respondents identified alcohol, tobacco or narcotics as major causes** [emphases added].³⁰

Similarly, *The National Drug Strategy: mapping the future* provides the following information in respect of alcohol related harm in Australia —

²⁷ *ibid* (p. 19)

²⁸ *The National Drug Strategy: mapping the future*, Commonwealth of Australia (p. 26)

²⁹ *Public Opinion Towards Drug Policies in Australia, 1985 – 95*, Toni Makkai and Ian McAllister

³⁰ see *ibid* (p 11)

- Most Australians consume alcohol without jeopardising their health or wellbeing. Yet alcohol consumed at harmful or hazardous levels or in a dangerous manner (such as binge drinking or drinking in combination with driving or operating machinery) can have far-reaching effects. Short term effects include headaches, nausea, sleeping difficulties and depression. Long term problems include severe impairment of almost all organs, including the brain, liver, intestines and pancreas. Alcohol is also a major contributor to road and other accidents, drownings and violence.
- It is estimated that 3,642 Australians died from alcohol related causes in 1995... Twice as many males (2,441) as females (1,202) died as a result of the use of alcohol. In the same year, there were 86, 137 hospitalisations due to conditions related to alcohol. More males (52,890) than females (33,246) received treatment in hospitals for alcohol related causes.
- In 1995, almost one third (30 %) of all fatally injured drivers or motorcyclists who had been tested registered a blood alcohol concentration (BAC) of 0.05 or more. Among those above this limit, 70 % had a BAC of 0.15 % or higher.
- Alcohol is implicated in violence and property loss or damage and lost productivity (NDS Household surveys). In 1995, almost one in ten (9 %) Australians suffered alcohol-related physical assaults. Males were much more likely than females (12 % vs 3 %) to have been victims of such assaults. Over a third of Australians (34 %) suffered an alcohol-related verbal assault and 15 % have suffered property loss or damage in alcohol-related incidents.
- Approximately three per cent of all respondents 14 and over missed at least one day's work or study in the three months prior to the 1995 NDS household survey due to alcohol.
- The economic cost of alcohol abuse was estimated to have been \$4.49 billion in 1992, which represents approximately a quarter (24 %) of all costs for all drug abuse.

There is clearly a community understanding that liquor is a 'unique' or 'special' product and there is a considerable body of research that supports this view. As a consequence, it is a reasonable expectation of the community that the sale of liquor should not be subject to the market forces of supply and demand. In other words, there is a common view that the sale of liquor ought to be controlled and this will, *ipso facto*, restrict competition. The focus of NCP, and this Review, has therefore been the removal of those restrictions that do not serve any identifiable community interest.