

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

**Applicant:** Chief Health Officer  
(Represented by Mr Zachary Clifford of the State Solicitor's Office)

**Respondent:** Walmah Enterprises Pty Ltd  
(Represented by Mr Phillip Cockman of Canford Hospitality Consultants Pty Ltd)

**Objectors:** Mr Grey Roughan (*no attendance*)  
Mr Ian Lunt and Mrs Judith Lunt (*no attendance*)

**Commission:** Ms Emma Power (Chairperson)  
Ms Alya Barnes (Member)  
Mr Tony Di Francesco (Member)

**Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* (WA) for review of the decision of the Director of Liquor Licensing to conditionally grant a Special Facility (Amusement Venue) licence for premises known as X-Golf Nedlands to be situated at Unit 5/158 Stirling Highway, Nedlands, and subject to 8 trading conditions (listed in paragraph 7 of the Background below). The Applicant asks the Commission to impose a further 5 trading conditions on that licence (listed in paragraph 13 of the Background below).

**Premises:** X-Golf Nedlands  
Unit 5/158 Stirling Highway, Nedlands, Western Australia, 6009

**Date of Lodgement of Application for review:** 21 December 2022

**Date of Hearing:** 20 July 2023

**Date of Determination:** 11 September 2023

**Determination:**

The Decision of the Director of Liquor Licensing is varied as follows:

On confirmation of the conditional grant, the following trading conditions are imposed on the issue of the licence:

- 1 The following permitted trading hours are specified for the purposes of s. 98C of the Act:
  - (a) Monday to Thursday, from 7am to 10pm;
  - (b) Friday and Saturday, from 7am to 12 midnight; and
  - (c) Sunday, from 7am to 10pm.
  - (d) Trading is not permitted on Christmas Day, Good Friday, or before noon on Anzac Day.

**2 TRADING CONDITIONS**

- (a) Pursuant to s. 46(3) of the Act and r. 9A(18) and r. 9A(19) of the regulations, this licence is granted for the prescribed purpose of an “amusement venue”, authorising the sale of liquor at an amusement venue to persons participating in or viewing electronic golf simulation and mini golf.
- (b) The predominant purpose of these premises must at all times remain on the playing of electronic golf simulation and mini golf. Therefore, the manner of trade and the layout of the premises must reflect this purpose.
- (c) The sale of packaged liquor for consumption off the licensed premises is prohibited.
- (d) Unaccompanied juveniles are not permitted to enter or remain on the licensed premises.
- (e) There is to be no advertising or promotion of liquor at the premises, with the exception of a price list at the point of sale or a description and price list as included in any food menu which may be located on tables with accompanying seating.
- (f) Any music played at the premises must be background in nature only, permitting normal levels of conversation to occur.
- (g) Food must be available during trading hours.
- (h) The maximum number of persons permitted to be on the licensed premises at any time is 200.

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

- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Chief Health Officer v Hoyts Multi-Plex Cinemas Pty Ltd* (LC 29/2022)
- *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356

## BACKGROUND

1. This matter concerns an application (“**Application**”) by Walmah Enterprises Pty Ltd (“**Respondent**”) lodged on 23 February 2022 for the conditional grant of a special facility licence - amusement venue category (“**SFL**”), pursuant to section 46 of the *Liquor Control Act 1988* (WA) (“**LC Act**”) and regulation 9A of the *Liquor Control Regulations 1989* (WA) (“**LC Regulations**”), for the proposed premises known as X-Golf Nedlands to be situated at Unit 5, 158 Stirling Highway, Nedlands, Western Australia 6009 (“**Premises**” or “**Venue**”) for the prescribed purpose of authorising the sale of liquor at the Premises to persons participating in or viewing electronic golf simulation and mini golf.
2. According to the Respondent:
  - (a) the proposed X-Golf Nedlands indoor golf simulator is a state of the art indoor golf simulator offering players unparalleled accuracy and realism through a combination of camera systems, infrared lasers, impact sensors and advanced gaming software;
  - (b) at the Venue there will also be mini golf and lounge facilities made available to all patrons of X-Golf;
  - (c) the Premises will be a low-key, low-impact Venue with the proposed intention of being an all-inclusive family friendly premises for golf enthusiasts of all levels of experience;
  - (d) service of alcoholic beverages is proposed to be ancillary to the main use of the Premises as a golf simulation venue with mini golf; and
  - (e) the proposed trading hours are Monday to Thursday 7.00am to 10.00pm, Friday and Saturday 7.00am to 12 midnight and Sunday 7.00am to 10.00pm.
3. In support of the Application, the Respondent lodged 118 witness surveys and 4 letters of support.
4. A Notice of Intervention dated 7 June 2022 under the provisions of section 69(8A) of the LC Act was lodged by the Chief Health Officer (in this review referred to as the “**CHO**” or “**Applicant**”) in the first instance (“**Intervention**”).
5. The CHO did not object to the grant of the Application but rather intervened to make submissions, particularly as to the prospect of harm to children and young people attending the Venue.
6. Objections under the provisions of section 74 of the LC Act were lodged by 9 objectors and 2 persons lodged notices of submissions of opposition.
7. On 17 November 2022, the Delegate of the Director of Liquor Licensing (“**Director**”) conditionally granted the Application for a conditional SFL (“**Decision**”), subject to, inter alia, 8 trading conditions being as follows:
  - (i) *Pursuant to s. 46(3) of the Act and r. 9A(18) and r. 9A(19) of the regulations this licence is granted for the prescribed purpose of an “amusement venue” authorising the sale of liquor at an amusement venue to persons participating in or viewing electronic golf simulation and mini golf.*

- (ii) *The predominant purpose of these premises must at all times remain on the playing of electronic golf simulation and mini golf. Therefore, the manner of trade and the layout of the premises must reflect this purpose.*
  - (iii) *The sale of packaged liquor for consumption off the licensed premises is prohibited.*
  - (iv) *Unaccompanied juveniles are not permitted to enter or remain on the licensed premises.*
  - (v) *There is to be no advertising or promotion of liquor at the premises, with the exception of a price list at the point of sale.*
  - (vi) *Any music played at the premises must be background in nature only, permitting normal levels of conversation to occur.*
  - (vii) *Food must be available during trading hours.*
  - (viii) *The maximum number of persons permitted to be on the licensed premises at any time is 200.*
8. The CHO in the Intervention in the first instance, sought 8 additional trading conditions (“**CHO’s Additional Trading Conditions**”) for the asserted purpose of minimising alcohol-related harm or ill-health.
  9. Two (2) of the CHO’s Additional Trading Conditions were granted in the Decision and being those trading conditions referred to in [7(iv)] and [7(v)] above.
  10. One (1) of the CHO’s Additional Trading Conditions was imposed by the Director in the Decision but in a modified form:
    - (a) the CHO’s Additional Trading Condition number 8 reads as follows: “*Food is to be available at all times*”.
    - (b) the Decision contains a Trading Condition that reads as follows: “*Food must be available during trading hours*”.
  11. The Commission notes the difference in wording between the Trading Condition proposed by the Applicant in the CHO’s Additional Trading Conditions and the Trading Condition that was imposed by the Decision.
  12. Notwithstanding that a reference to the CHO’s Additional Trading Condition number 8 was included by the Applicant in both Ground 1 and Ground 2 of this Review Application, no further submissions were made by the Applicant pressing the difference between what was sought by the Applicant as part of the CHO’s Additional Trading Conditions and what was ultimately included in the Decision. The CHO in its Outline of Submissions dated 13 April 2023, acknowledges at [5] that the Director (in the Decision) did impose a harm minimisation Trading Condition relating to food and being: “*Food must be available during trading hours*”. The Commission finds that there is no further dispute in respect to that specific Trading Condition relating to the availability and service of food.

13. The Applicant now seeks, by way of this Review Application, to secure the remaining 5 of the CHO's Additional Trading Conditions namely:
- (a) *The sale, supply and consumption of liquor on the licensed premises is prohibited at any time when the premises is being predominantly used for junior lessons/activities or any other junior event. On such occasions, alcohol products or promotions should not be visible at the venue (“**Junior Lessons/Activities TC**”);*
  - (b) *Liquor is to be stored for sale behind the point of sale counter only, and not to be displayed above bar height, so as to limit visibility to patrons (“**No Display of Liquor TC**”);*
  - (c) *With the exception of pre-booked adult function events, a dedicated consumption area that is visibly separate from the simulator kiosks is to be established. Liquor may only be consumed by patrons while seated at a table, or a fixed structure used as a table (“**Dedicated Consumption Area TC**”);*
  - (d) *Alcohol is not to be available any day before midday, with the exception of pre-booked adults-only events and functions (“**No Alcohol Before Midday TC**”); and*
  - (e) *There is to be no alcohol consumed in the mini golf area, with the exception of pre-booked adults-only events and functions (“**Mini Golf Area Exclusion TC**”);*
- (together the “**Extra Trading Conditions**”).

14. On 8 December 2022, the Director provided written reasons for the Decision in accordance with section 18AA of the LC Act.

## THE REVIEW

15. In support of the need for the Extra Trading Conditions, the CHO on 21 December 2022 applied pursuant to section 25 of the LC Act (and being this Review Application), for a review of the Decision with respect to the conditions on the SFL and not the grant of the SFL itself, based on the following 2 grounds<sup>1</sup>:

### Ground 1

- (a) The Director erred when granting the licence by failing to consider whether any further trading conditions should be imposed to minimise harm that may arise by virtue of the proposed manner of trade. In particular, the Director failed to consider the CHO's proposed harm minimisation conditions 2, 3, 5, 6, 7 and 8 on page 14 -15 of the Intervention.<sup>2</sup>

### Ground 2

- (b) Given the proposed manner of trade, being an “all-inclusive family friendly premises”, it was unreasonable to grant the licence without imposing further harm minimisation conditions (in particular, the CHO's proposed harm minimisation conditions 2, 3, 5, 6, 7 and 8 on page 14 -15 of the Intervention).<sup>3</sup>

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<sup>1</sup> Grounds set out in the CHO's s.25 Review Application.

<sup>2</sup> The Harm Minimisation Conditions are those referred to in this Review as the Extra Trading Conditions.

<sup>3</sup> The Harm Minimisation Conditions are those referred to in this Review as the Extra Trading Conditions.

16. The Applicant states that its primary concern is the detrimental effect that exposure to alcohol consumption in the context of leisure activities can have on juveniles.<sup>4</sup>

## **APPLICANT'S SUBMISSIONS**

### **Applicant's Submissions Generally**

17. At the review hearing, the Applicant sought to rely on:
- (a) the Intervention;
  - (b) the Applicant's submissions relating to unaccompanied juveniles dated 20 July 2022;
  - (c) the Applicant's submissions dated 18 October 2022 attaching a statement of Professor John Toumbourou;
  - (d) the Applicant's closing submissions dated 8 November 2002;
  - (e) the Applicant's Outline of Submissions dated 13 April 2023; and
  - (f) the Applicant's Outline of Responsive Submissions dated 20 April 2023.
18. The Applicant also relies on the research filed in support of the Applicant's Submissions.
19. The Applicant submits that the Director erred by concluding that a condition prohibiting unaccompanied juveniles from attending the venue addressed the concern raised by the Applicant in the Intervention.
20. The Applicant submits that:
- (a) the concerns raised by the Applicant remain even if unaccompanied juveniles are not permitted in the Venue; and
  - (b) the Extra Trading Conditions sought by the Applicant are an appropriate response to those concerns.
21. The Applicant contends that the evidence before the Commission:
- (a) establishes that the consumption of alcohol is an important aspect of the experience that the Respondent seeks to recreate at X-Golf (that is at the Venue);
  - (b) that as a general proposition, there is a link between risky drinking behaviours and sporting environments in Australia and one of the risks comes from the modelling of intoxication at sports clubs;
  - (c) that even if the sale of alcohol is merely ancillary to the proposed use of the Venue, the Extra Trading Conditions can still play an important role in minimising potential harm to juveniles; and

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<sup>4</sup> Chief Health Officer's Outline of Submissions dated 20 April 2023 [3].

- (d) that the sale, supply and consumption of alcohol in the context of leisure activities at which children will be present:
- (i) reinforces alcohol as normal in association with leisure and establishes expectations that it is a positive product; and
  - (ii) can impact on children's future attitudes and drinking behaviours.
22. The Applicant also submits that in addition to the harm caused by exposure to alcohol consumption, secondary supply is also a potential concern at the Venue. The Applicant submits that it is a notorious fact that certain adults provide liquor to their own older children and their friends, notwithstanding that it is unlawful to do so and that this risk is heightened if, in the absence of additional conditions, there is substantial promotion of alcohol consumption at the Venue.
23. The Applicant submits that this matter currently before the Commission, is analogous to the Hoyts<sup>5</sup> case and provides argument supporting that analogy.
24. The Applicant submits that the Respondent has not provided any evidence that contradicts, or casts doubt upon, the evidence relied upon by the Applicant and that the evidence compels the conclusion by the Commission, that the Extra Trading Conditions are required, or desirable, to minimise the harm that exposure to alcohol consumption can cause to juveniles.<sup>6</sup>

### **Applicant's Submissions Specifically to Extra Trading Conditions**

#### Junior Lessons/Activities TC

25. Specifically in respect to the Junior Lessons/Activities TC, the Applicant says:
- (a) that consumption of liquor on the licensed premises should be prohibited at any time when the Premises is being predominantly used for junior lessons/activities or any other junior event;
  - (b) that in those circumstances there would be more juveniles attending the Venue and due to the scheduling of junior lessons/activities there is an opportunity for parents to attend with their children in an alcohol free environment which may be attractive to some parents;
  - (c) that on such occasions alcohol products or promotions should not be visible at the Venue;
  - (d) that this condition is appropriate to minimise harm to juveniles;
  - (e) that the benefit of reducing the association between alcohol and leisure substantially outweighs any inconvenience to anyone that may have wished to consume alcohol during those events; and
  - (f) that the evidence before the Commission is clear in relation to the importance of not reinforcing an association between the consumption of alcohol and leisure activities.

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<sup>5</sup> *Chief Health Officer v Hoyts Multi-Plex Cinemas Pty Ltd* (LC 29/2022).

<sup>6</sup> Section 64(3)(cc) LC Act.



No Display of Liquor TC

26. Specifically in respect to the No Display of Liquor TC, the Applicant says:

- (a) that pursuant to this condition as liquor is stored for sale behind the point of sale counter only and not displayed above bar height, that storage position would limit visibility of the alcohol to patrons;
- (b) that the evidence shows that juveniles are vulnerable to alcohol advertising;
- (c) the prominent display of liquor within the Premises will reinforce an association between consumption of liquor and leisure activities and that such an association is detrimental to juveniles;
- (d) it is important to reduce the association between the consumption of alcohol and leisure activities in environments that are attractive to children and teenagers; and
- (e) that such a condition does not take away from the ability of the Premises to service any consumer demand that there is to consume liquor at the Premises.

Dedicated Consumption Area TC

27. Specifically in respect to the Dedicated Consumption Area TC, the Applicant says:

- (a) that with the exception of pre-booked adult function events, a dedicated consumption area that is visibly separate from the simulator kiosks, will assist in minimising an association between the consumption of alcohol and engagement in a leisure activity;
- (b) that the dedicated consumption area will also minimise the extent to which juveniles present in the Venue will be exposed to the consumption of alcohol by unrelated parties; and
- (c) that the evidence before the Commission shows that the design of licensed premises can be an important factor in minimising the harms from alcohol consumption.

No Alcohol Before Midday TC

28. Specifically in respect to the No Alcohol Before Midday TC, the Applicant says:

- (a) that this condition assists in reducing the exposure of juveniles to the consumption of alcohol;
- (b) that it will provide an option for families of attending the Venue with their children in an alcohol free environment; and
- (c) that the inconvenience to anyone who may have wished to consume alcohol before midday is outweighed by the benefit that juveniles attending receive by not viewing adults consuming alcohol and thereby reducing the association between alcohol and leisure activities.

29. The Commission notes that:

- (a) the trading hours for the Venue have been approved by the Director and are set in the SFL; and
- (b) in the Decision, the Director accepted the Applicant's submissions that liquor sales will not occur prior to 10.00am and that the Premises may open from 7.00am, primarily for golf lessons and are unlikely to involve liquor consumption. It is not unreasonable for the Commission to also accept that submission from the Respondent.

Mini Golf Area Exclusion TC

30. Specifically in respect to the Mini Golf Area Exclusion TC, the Applicant says:

- (a) that the mini golf area will be particularly attractive to juveniles; and
- (b) that it will also be more difficult to supervise; and
- (c) that the imposition of the Mini Golf Area Exclusion TC, will give families the option of attending a part of the Venue which is alcohol free.

General Submission

31. The general submission by the Applicant is that juveniles will be exposed to an unnecessary risk of harm without the imposition of the Extra Trading Conditions.

**What Does the Applicant Seek**

32. The Applicant asks that the Commission:

- (a) vary the Decision and impose each and all of the Extra Trading Conditions; and
- (b) otherwise affirm the Decision.

**RESPONDENT'S SUBMISSIONS**

**Respondent's Submissions Generally**

33. At the review hearing the Respondent sought to rely on:

- (a) the material and paperwork lodged with the Director including the Public Interest Assessment and the statements and letters of support lodged in support of the Application;
- (b) the Respondent's Further Submissions dated 13 April 2023 ("**Respondent's 13 April Submissions**"); and
- (c) the Respondent's Responsive Submissions dated 20 April 2023.

34. The Respondent relevantly submits, inter alia, the following:

- (a) this is a low-risk and low-impact licensed Venue;

- (b) that the quality of the fit out and the comfortable setting and furniture will encourage responsible drinking practices and will add to the low-risk potential for this licensed venue;
- (c) that the Respondent seeks to be the premier entertainment venue in their community and intends to uphold a high standard of hospitality service;
- (d) that the focus of the Venue is on golf, golf simulators and mini golf, not on the consumption of alcohol;
- (e) that the primary object of minimising (not eliminating) harm or ill-health does not take precedence over the other objects of the LC Act;
- (f) that identifying a potential for harm or ill-health is not enough to be determinative in an application for a liquor licence. A nexus must be clearly shown between the alleged harm and the proposed operations under the licence;
- (g) that the decision in *Carnegies*<sup>7</sup> clearly requires a nexus between the allegation of the potential for increased harm and what that harm will be, and by how much it is likely to increase;
- (h) that the Extra Trading Conditions are very strict and business damaging and are an unnecessary impost on the Respondent;
- (i) that the Extra Trading Conditions will restrict the capacity of the Respondent to cater to the needs of the consumer within the locality;
- (j) that the self-imposed policies and procedures of the Respondent in relation to harm minimisation along with the conditions set out in the SFL are sufficient to satisfy the primary objects of the LC Act;
- (k) that the Extra Trading Conditions are redundant and will not contribute significantly to reducing the potential for harm or ill-health;
- (l) an objection to the submission by the Applicant that the Director erred when granting the SFL by failing to consider whether any further trading conditions should be imposed and draws the Commission's attention to [30], [31] and [39] of the Decision to support the Respondent's rebuttal, and further contends that the Director made the correct decision in granting the SFL;
- (m) an invitation to the Commission to agree that the Trading Condition set out in the SFL that reads: "*There is to be no advertising or promotion of liquor at the premises, with the exception of a price list at the point of sale*" is not required (the Commission refers to this trading condition as the "**No Advertising or Promotion of Liquor TC**") and that:
  - (i) the Director does not provide any rationale in support of imposing the No Advertising or Promotion of Liquor TC;

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<sup>7</sup> *Carnegies Realty v Director of Liquor Licensing* [2015] WASC 208

- (ii) the Respondent's harm minimisation strategies are sufficient in minimising the impact on the amenity of the locality and harm and ill-health;
  - (iii) there is a long standing and established policy of the Director on the responsible promotion and advertising of liquor that all licensed premises must adhere to;
  - (iv) the Respondent lodged a robust harm minimisation plan, which has been approved by the licensing authority;
  - (v) existing X-Golf licensed venues in Western Australia trade without incident without such a trading condition as the No Advertising or Promotion of Liquor TC being imposed;
  - (vi) the general layout of the Premises allows for easy monitoring of patrons;
  - (vii) at other X-Golf licensed venues where No Advertising or Promotion of Liquor TC is not in place, there is very limited visible promotion material within each venue, showing once again how liquor is very much an ancillary service at these venues; and
- (n) that the intention of the Respondent is to provide a low-key, low-impact venue where patrons play golf on a simulator or mini golf course, whilst also being able to enjoy an alcoholic beverage and that the Venue will be a safe, controlled and quality amusement venue suitable for families, groups of friends and individuals from within the locality and wider Perth area.

### **What Does the Respondent Seek?**

35. In essence the Respondent asks that the Commission:
- (a) vary the Decision and remove as a trading condition, the No Advertising or Promotion of Liquor TC; and
  - (b) otherwise affirm the Decision.

### **LEGAL AND STATUTORY FRAMEWORK**

36. The Commission is not required to find error on the part of the Director when undertaking a review under section 25 of the LC Act, but the Commission instead undertakes a full review and makes a determination on the basis of the same materials that were before the Director when the decision was made.<sup>8</sup>
37. Section 25(4) of the LC Act states that on a review under section 25, the Commission may:
- (a) affirm, vary or quash the decision subject to the review; and
  - (b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and

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<sup>8</sup> *Hancock v Executive Director of Public Health* [2008] WASC 224

- (c) give directions:
    - (i) as to any question of law, reviewed; or
    - (ii) to the Director, to which effect shall be given; and
  - (d) make any incidental or ancillary order.
38. Section 16 of the LC Act prescribes that the Commission:
- (a) may make its determination on the balance of probabilities [section 16(1)]; and
  - (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the Regulations make them apply; [section 16(7)(a)]; and
  - (c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [section 16(7)(b)]; and
  - (d) is to act speedily and with as little formality and technicality as is practicable: [section 16(7)(c)].
39. In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the LC Act.<sup>9</sup>
40. The Director and the Commission also:
- (a) must take into account those matters relevant to the objects of the LC Act; and
  - (b) may take into account the matters set out in section 38(4) of the LC Act.

## **CONCLUSIONS**

### **Review of Evidence and Submissions**

41. The Commission has undertaken a full review of the evidence and submissions and the Commission now makes a determination on the basis of all the same materials that were before the Director when the Decision was made.<sup>10</sup>
42. The Commission has been provided with a large amount of material from the parties to assist in the determination. The fact that a particular piece of evidence has not been specifically referred to in these reasons, should not be construed as a failure by the Commission to consider that evidence or submission. The Commission assures the parties that all materials provided by the parties have been carefully considered in making the determination.
43. The Commission emphasises that it is required to have regard only to the material that was before the Delegate of the Director of Liquor Licensing when making the Decision.

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<sup>9</sup> *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356

<sup>10</sup> *Hancock v Executive Director of Public Health* [2008] WASC 224

44. The Commission draws no inference from the fact that the Commissioner of Police has not intervened and nor that the Director of Liquor Licensing has not been represented.

### **The Scope of Issues in Dispute**

45. There is no dispute between the parties as to whether a conditional Special Facility (Amusement Venue) licence (that is the SFL), should be granted for the Premises.
46. The matters in dispute in this Review Application are:
- (a) the application of the test in Carnegies assessing whether or not to impose additional trading conditions;
  - (b) whether or not to impose the Extra Trading Conditions that are sought by the Applicant to be imposed upon the Respondent and to be included as part of the Trading Conditions in the SFL; and
  - (c) whether or not the No Advertising or Promotion of Liquor TC should be removed from the Trading Conditions in the SFL.

### **Carnegies Application in the Current Case**

47. In the Decision, the Delegate did not specifically refer to the test in Carnegies. However, the Respondent refers to Carnegies in the Respondent's 13 April Submissions in support of its submissions that identifying a potential for harm or ill-health is not enough to be determinative in an application for a liquor licence and that a nexus must be clearly shown between the alleged harm and the proposed operations under the licence.
48. The Respondent in the Respondent's 13 April Submissions, then contends that the decision in Carnegies clearly requires a nexus between the allegation of the potential for increased harm and what that harm will be, and by how much it is likely to increase.
49. The Applicant submits that Carnegies can offer some guidance to the Commission as to the way the Commission makes findings as to risks of harm and in exercising its discretion to impose conditions.
50. Further the Applicant submits that the criteria set out at [42]-[43] of Carnegies is not directly applicable to this Review Application and submits that:
- (a) Carnegies concerned an application for the grant of an extended trading permit where this case concerns an application for a special facility licence; and
  - (b) among other differences, Carnegies is distinguishable because the assessment of harm was in the context of determining whether the application for the grant of a licence was in the public interest (under sections 33 and 38 of the LC Act) where in this case, the question for determination is whether the imposition of conditions on the SFL, pursuant to section 64 of the LC Act, is in the public interest or desirable.<sup>11</sup>

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<sup>11</sup> Section 64(3) LC Act

51. The Applicant contends that Carnegies retains relevance in that the licensing authority is always required to make findings necessary to carrying out the evaluative task it is faced with in a particular application.<sup>12</sup>
52. The Commission agrees with the Applicant's submissions regarding the application of Carnegies and notes that it is established that the relevant test has been applied subsequently in all manner of applications where health issues are to be considered.

### **Main Arguments in Support of the Extra Trading Conditions**

53. The Applicant submits that:
  - (a) there is a nexus between the proposed manner of trade and the risk of harm;
  - (b) that the Venue is attractive to juveniles and associates leisure activities with alcohol consumption and product sales; and
  - (c) this causes harm through, among other things, normalisation.
54. The Applicant submitted that the risks of harm to juveniles in a licensed setting are not limited to risks of secondary supply of alcohol or risks of physical harm from adults consuming alcohol but extend to risks of harm caused by alcohol consumption being highly visible and normalised.
55. The Applicant explains that the reference to normalisation refers to a process whereby exposure to alcohol consumption (and product placement and sales) establishes alcohol as a standard, normal or expected feature of a leisure setting. This in turn creates positive expectations around alcohol, and a greater likelihood of early use of alcohol (with all the harms that this entails).
56. The Respondent submits that the Director had due regard to risk of harm to juveniles and minimised that risk of harm or ill-health to juveniles by imposing the Trading Conditions.
57. Although the Commission agrees that the Carnegies case is distinguishable from the facts in the current case, the Commission also notes section 33(1) of the LC Act which says: "*[s]ubject to this Act, the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers in the public interest*" (emphasis added).
58. The Commission accepts that it must satisfy itself that the grant of the Application is in the public interest.
59. However, in this case the grant of the Application itself (and the grant of the SFL by the Director in the Decision), is not in dispute between the Applicant and the Respondent. The Applicant and the Respondent disagree on the Trading Conditions imposed under the SFL (refer [45]-[46] above). Consequently, the Commission does not believe it needs to satisfy itself that each of the Extra Trading Conditions are in the public interest before the Commission can impose those conditions.

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<sup>12</sup> Carnegies [44]; See also *Chief Health Officer v Hoyts Multi-Plex Cinemas Pty Ltd* (LC 29/2022) [57]-[59]

60. The Commission has the power under section 64(3) of the LC Act to “*impose conditions which it considers to be in the public interest or which it considers desirable in order to-...minimise harm or ill-health caused to people, or any group of people, due to the use of liquor;...*” (emphasis added).

### **Objects of the LC Act**

61. The Commission must consider the objects specified in section 5 of the LC Act and other relevant requirements of the LC Act before making a determination.
62. The Commission previously explained these competing objects in the Hoyts case, highlighting the inconsistencies between:
- (a) the primary object at section 5(1)(b) (in the context of this case, favours licence conditions that will protect juveniles from liquor related harm by limiting the sale and consumption of liquor to certain times when it can be served, to limit the advertising and promotion of alcohol and to limit where alcohol can be served) and the primary object at section 5(1)(c) of the LC Act (which in the context of this case, favours less restriction on the sale and consumption of liquor at the Venue so as to better cater to the “*requirements of consumers for liquor and related services*”); and
  - (b) the inconsistency between the secondary object at section 5(2)(a) (which, in the context of this case, favours less restriction on the sale and consumption of liquor at the Venue so as to better meet the “*requirements of consumers*” of liquor) and the secondary object at section 5(2)(f) (which in the context of this case, favours licence conditions that will “*encourage responsible practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community*” in preventing juveniles from consuming liquor at the Venue and in limiting the exposure of juveniles to the sale and consumption of liquor by others at the Venue).
63. The Commission gives precedence to the primary objectives in any occurrence of an inconsistency.

### **Task of the Commission**

64. The Applicant submits that it is relevant for the Commission to make findings on the following:
- (a) the likely types of liquor related harm that juveniles may be exposed to in the Venue as a result of the grant of the Application;
  - (b) the likely degree of that harm as a result of the grant of the Application;
  - (c) the likelihood of exposure to that harm as a result of the grant of the Application; and
  - (d) whether there are conditions that can minimise or eliminate that harm.
65. The Applicant then submits that the Commission should make the following findings:
- (a) that the likely types of liquor related harm that juveniles may be exposed to in the Venue as a result of the grant of the Application include normalisation of alcohol consumption in association with leisure activities;



- (b) that the likely degree of harm is substantial, because of the particular damage that exposure to alcohol products, promotion and consumption can cause to juveniles (which may cause not only immediate harm but harm that persists into adulthood);
  - (c) that there is a strong likelihood of exposure to various harms, in particular normalisation of alcohol consumption, as a result of the grant of the application (for example the bar is a central feature, visible throughout the Venue). In addition, alcohol consumption is permitted throughout the Venue; and
  - (d) that the Extra Trading Conditions minimise these harms.
66. The Commission agrees with the Applicant's submissions set out at [65].
67. The Applicant then further contends that upon weighing the risk of harm it is in the public interest or desirable to impose the Extra Trading Conditions on the SFL (and to retain the No Advertising or Promotion of Liquor TC now challenged by the Respondent).
68. The Applicant submits that the Trading Conditions are not sufficient to minimise the risk of harm or ill-health to juveniles.
69. The Respondent submits that:
- (a) the Trading Conditions in the SFL are sufficient to minimise the risk of harm or ill-health to juveniles and that the Extra Trading Conditions are unnecessary; and
  - (b) that the No Advertising or Promotion of Liquor TC should be removed because:
    - (i) the existing harm minimisation strategies are sufficient;
    - (ii) there is a long standing and established policy of the Director on the responsible promotion and advertising of liquor that all licensed premises must adhere to;
    - (iii) the Respondent lodged a robust harm minimisation plan which has been approved by the licensing authority; and
    - (iv) the general layout of the Premises allows for easy monitoring of patrons.
70. The Commission must now weigh up the risk of harm and determine whether:
- (a) it is desirable to impose the Extra Trading Conditions; and
  - (b) it is desirable to remove the No Advertising or Promotion of Liquor TC.

*Commission's View of: Proposed Junior Lessons/Activities TC AND Commission's View of: No Alcohol Before Midday TC*

71. The Commission very carefully considered the proposed condition as to limiting alcohol service during Junior Lessons/Activities.
72. However, the Commission considers that the Venue is predominantly aimed at adult patrons and that there was no real contemplation that junior tournaments or activities would be a significant part of the trading model of the Venue.

73. The Commission finds that on balance, and taking into account the arrangement of the Venue which has very little in the way of physical or visual separation between various areas, the benefit that may be achieved in favour of juveniles by reducing the association between alcohol and leisure activities by prohibiting sales and consumption of alcohol during Junior Lessons/Activities events or before Midday, is outweighed by:
- (a) the difficulty in “apportioning” what part of the Venue may be being used for a junior event/tournament and the remainder, which may legitimately be used by adult patrons;
  - (b) the inconvenience imposed upon the Respondent to organise staff to not serve alcohol during those times; and
  - (c) the inconvenience upon patrons who are attending with the juveniles (bearing in mind that unaccompanied juveniles are not permitted to enter or remain on the Premises due to the Trading Condition imposed in the SFL).
74. The Commission holds that it is not desirable to impose either the Proposed Junior Lessons/Activities TC or the No Alcohol Before Midday TC upon the Respondent and include those 2 conditions in the SFL as additional trading conditions.

Commission’s View of: No Display of Liquor TC

75. The Applicant submits that there is very little in favour of the Respondent being able to store liquor above bar height and a greater benefit to juveniles in storing the liquor below bar height to limit visibility of patrons. The Commission notes that no specific evidence was provided by the Applicant in support of this particular point.
76. It seems that the Commission is being asked to accept a proposition that if the liquor is stored below bar height juveniles who are not tall enough to see over the bar, would not be able to see that alcohol and therefore not be subject to any harm or ill-health arising from the purported advertising of that alcohol.
77. The practical outcome and success of the Applicant’s proposal is based on the height of the of the juvenile and if the juvenile is not as tall or taller than the bar height, the juvenile will not be able to see the alcohol either on the shelf/fridge behind the bar.
78. The Respondent argues that the storage of alcohol below bar height is both inconvenient for the patrons as they are not able to see what is on offer and what they can purchase, but also inconvenient for the wait staff serving those customers who would be continually asking what was on offer at the Premises without seeking to lean over the bar to visually inspect the shelves or the fridge. The Respondent submits that this can cause unnecessary delays in service delivery to patrons.
79. The Commission believes that the Respondent’s submissions on this issue should be accepted and further that the proposed design/arrangement of the Venue would not easily lend itself to sole underbar storage of liquor.
80. The Commission finds that on balance, the benefit that may be achieved in favour of juveniles by reducing the association between alcohol and leisure activities by storing liquor below bar height is outweighed by the inconvenience to patrons and wait staff.

81. The Commission holds that it is not desirable to impose the No Display of Liquor TC upon the Respondent and include that condition in the SFL as an additional trading condition.

Commission's View of: Dedicated Consumption Area TC

82. In respect to a separate dedicated consumption area, it is unclear to the Commission how this condition could practically be met for the following reasons:

- (a) the licensed area in total is a relatively small area and does not appear to permit a separation to any great extent (either physically or visually) of those areas where activities are undertaken or not undertaken;
- (b) it is unclear how areas could be separated into dedicated consumption and non-consumption areas when the Venue has been designed as an open plan area to allow patrons to walk freely between areas either as a participant or an observer;
- (c) the activity of simulated golf is undertaken at a designated booth because that is where the actual plant and equipment is located to enable the participant to participate in the simulated golf activity. Those who wish to observe that participant would need to be in the vicinity of that participant; and
- (d) the predominant purpose of the Venue as described in the SFL must at all times remain on the playing of electronic golf simulation and mini golf and the manner of trade and the layout of the Premises must reflect that purpose.

83. The Commission finds that on balance, the benefit that may be achieved in favour of juveniles by implementing dedicated consumption areas within the Venue, is outweighed by the inconvenience to the Respondent, the wait staff and to patrons, the difficulty in establishing and monitoring such a concept and the fact that the design is open plan and all areas are visible to patrons.

84. The Commission holds that it is not desirable to impose the Dedicated Consumption Area TC upon the Respondent and include that condition in the SFL as an additional trading condition.

Commission's View of: Mini Golf Area Exclusion TC

85. The Commission's view in respect to the condition sought by the Applicant which prohibits the consumption of liquor in the mini golf area of the Venue, is based on the same grounds that that Commission held in respect to the Dedicated Consumption Area TC.

86. It seems to the Commission that the mini golf area and the mini golf activity itself, is intended to form part of the adults' activity offering being provided by the Respondent at the Venue.

87. The Respondent is subject to a Trading Condition that prohibits unaccompanied juveniles from entering or remaining at the Venue – mini golf is not available for use by juveniles without an accompanying adult.

88. The mini golf course at the Venue is not a public mini golf course available for use by any and all juveniles at any time. The limitation is that if juveniles wish to attend and play they must be accompanied by an adult.

89. The Commission finds that on balance, the benefit that may be achieved in favour of juveniles by implementing a prohibition on alcohol being consumed by patrons in the mini golf area, is outweighed by the inconvenience to the Respondent, the wait staff and to patrons.
90. The Commission holds that it is not desirable to impose the Mini Golf Area exclusion TC upon the Respondent and include that condition in the SFL as an additional trading condition.

Commissions View of: No Advertising or Promotion of Liquor TC

91. The Commission's view in respect to the condition sought to be removed by the Respondent which says that there is to be no advertising or promotion of liquor at the Premises with the exception of a price list at the point of sale, is that the condition should be retained.
92. The Respondent is subject to the Director's Responsible Promotion and Advertising of Liquor Guidelines and the Respondent submits that those obligations in that Guideline should be sufficient and that the No Advertising or Promotion of Liquor TC adds nothing to the Respondent's advertising and promotion obligations under those Guidelines.
93. The Commission's view is:
  - (a) that the promotion of liquor by advertising at the Venue would create a clear association between alcohol consumption and the leisure activities being conducted at the Venue;
  - (b) that this association is detrimental to juveniles; and
  - (c) it is important to reduce the association between the consumption of alcohol and leisure activities in environments which may be attractive to, or include, juveniles.
94. The Respondent is given the opportunity to inform patrons of the alcohol offering at the Venue by including that information at the point of sale by providing a price list.
95. The Respondent submitted at the Hearing that the point of sale price list means that patrons only become aware of the alcohol offering and the pricing when the patron reaches the point of sale and if there is a line waiting to be served, there could be delays in service delivery responding to questions raised by the uninformed patron.
96. It seems to the Commission that this delay in service issue could be overcome by the Respondent being permitted to include the alcohol offering and the price list in the table food menu that is placed on the tables on the basis that the alcohol offering is merely included in the food menu.
97. The Respondent would not be permitted to place on tables separate alcohol Drinks Lists or separate flyers or paraphernalia advertising alcohol or alcoholic beverages for sale.
98. On balance, it is the Commission's view that it is desirable for the No Advertising or Promotion of Liquor TC to remain as a Trading Condition in the SFL with a variation that the Respondent be permitted to include the information available at the point of sale (being the description of the beverage and the price) as part of (and not separate to) the table food menu.

### **Secondary Supply**

99. The Commission considered the risk of adults supplying alcohol to juveniles by way of secondary supply. This issue of secondary supply was considered in the case of Hoyts.<sup>13</sup>

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<sup>13</sup> *Chief Health Officer v Hoyts Multi-Plex Cinemas Pty Ltd* (LC 29/2022)

100. It is the Commission's view that Hoyts can be distinguished from the current matter in that the licensed premises in Hoyts was a cinema and there was some risk of secondary supply based on the likelihood of juveniles to be unaccompanied at such type of premises, the darkness of the theatre room and the ease with which adults can supply liquor to juveniles in those circumstances.
101. As the Venue is designed in an open plan format with general visibility throughout and across the Venue, it is the Commission's view the risk of such secondary supply is relatively small. The Respondent is required to comply with the applicable responsible service of alcohol practice rules and regulations in any event.
102. In considering that matter of secondary supply, the Commission finds that the design of the Venue and the Trading Conditions satisfactorily addresses the relatively small level of risk of secondary supply.

### **Onus of proof on the Applicant intervenor**

103. The Applicant intervened in the proceedings in accordance with section 69(8a)(b) of the LC Act. The Applicant carries no burden of proof with respect to its intervention (see Greaves J's decision in *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98<sup>14</sup>).

### **DETERMINATION**

104. The Commission determines that:

- (a) The Applicant's application under section 25 seeking a variation of the SFL by imposing as part of the SFL Trading Conditions, the Extra Trading Conditions, is refused.
- (b) The Respondent's application seeking a variation of the SFL by removing from the SFL the No Advertising or Promotion of Liquor TC, is refused.
- (c) The No Advertising or Promotion of Liquor TC in the SFL which reads: "*There is to be no advertising or promotion of liquor at the premises, with the exception of a price list at the point of sale*" is varied to read as follows:

*"There is to be no advertising or promotion of liquor at the premises, with the exception of a price list at the point of sale or a description and price list as included in any food menu which may be located on tables with accompanying seating."*

- (d) The SFL is otherwise affirmed.

  
EMMA POWER  
CHAIRPERSON

  
ALYA BARNES  
MEMBER

  
TONY DI FRANCESCO  
MEMBER

<sup>14</sup> See page 5 of the *Gull Petroleum* decision: "*It will be observed that the onus is upon the objectors to establish their grounds of objection on the balance of probabilities, while the intervenors carry no burden of proof.*"