

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

**APPLICANT:** MAYLAND HOLDINGS PTY LTD

**PREMISES:** GOLF SIMULATORS ESP

**PREMISES ADDRESS:** 69 WINDICH STREET ESPERANCE WA 6450

**APPLICATION ID:** A000057227

**NATURE OF APPLICATION:** APPLICATION FOR CONDITIONAL GRANT OF A SPECIAL FACILITY LICENCE

**DATE OF DETERMINATION:** 17 March 2015

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### **Introduction**

1. This is an application by Mayland Holdings Pty Ltd (the applicant) for the conditional grant of a special facility licence for premises to be known as Golf Simulators ESP and situated at 69 Windich Street, Esperance.
2. The application is made in accordance with ss 46 and 62 of the *Liquor Control Act 1988* (the Act). The applicant seeks a licence of the type prescribed in accordance with r 9A(18) of the *Liquor Control Regulations 1989* (the regulations) specified as a special facility – amusement venue.
3. The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. There were two objections to the application by Vicky Morris and Jill Fitzpatrick on behalf of the Esperance Local Drug Action Group (ELDAG). A Notice of Intervention, pursuant to s 69 of the Act, was lodged by the Executive Director of Public Health (EDPH).
4. Pursuant to s 16 of the Act each party was given a reasonable opportunity to present its case by way of a document exchange process.
5. Pursuant to the provisions of ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which I have summarised below.

### **Submissions on behalf of the applicant**

6. The applicant seeks the grant of a special facility (amusement venue) licence in order to sell liquor to patrons booked to play or view a game of indoor virtual golf, snooker, darts or karaoke.

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7. The proposed amenities intended to be offered include four golf simulators that will be available for patrons who wish to experience a game of golf in any weather condition; three snooker tables; four dart boards and a conference room available for karaoke and team building activities and other associated events.
  8. The venue is to be situated in the main township of Esperance, which is located approximately 800 kilometres from Perth, with the primary purpose of providing a safe and comfortable environment for playing or viewing virtual indoor golf, snooker, darts or karaoke with family, friends or work colleagues.
  9. According to the applicant, Esperance has a limited range of outdoor sporting and recreational facilities and due to the nature of the weather in the town, outdoor sports are not always possible. It is intended that the premises will be a destination for some patrons seeking a unique and well managed venue that is not exposed to the weather.
  10. In the applicant's Public Interest Assessment (PIA) submission lodged with the application the applicant submitted the following:
    - the applicant seeks to be able to provide golfers the same experience they would get at their local golf course or club by playing a round of golf in any kind of weather all year round and the option to purchase food and beverages, including liquor, during or after their game. Moreover, patrons will have access to snooker tables and darts facilities;
    - the proposed venue is the only venue of its kind in the Esperance region and will be beneficial to both the tourism and recreation sectors in the locality as well as local patrons who can enjoy the facility all year round regardless of the weather;
    - the venue will contain kitchen facilities and the applicant proposes to make food available until 30 minutes before close;
    - the applicant intends on providing a range of alcoholic beverages including low alcohol beer and also non-alcoholic beverages; and
    - along with providing a venue for people to play or practice golf all year round, the venue will also be providing social and league nights to encourage friendly social competition.
  11. The applicant has also sought the following trading hours:
    - Monday to Saturday: 10am to 11pm; and
    - Sunday: 10am to 10pm.

7. The applicant's PIA addressed the matters set out in s 38(4) of the Act and submitted a number of strategies in order to reduce the harm or impact that may be caused to patrons or the surrounding businesses or residents.
8. To demonstrate that the grant of the application will cater to the requirements of consumers (objects 5(1)(c) and (2)(a) of the Act) the applicant submitted 235 consumer surveys and several letters of support from persons or businesses that would visit the venue and use its facilities.
9. In accordance with s 46 of the Act, the applicant further submitted that no other class of licence, whether on its own, varied or associated with a permit, would be suitable for the applicant to conduct the business as proposed.

#### **Submissions on behalf of the Executive Director of Public Health**

10. The EDPH lodged a Notice of Intervention in order to make representations regarding the potential for the application to cause harm or ill-health to people, or any group of people, due to the use of liquor, and the minimisation of that harm. The grounds for intervening are based on the following:
  - the venue design (predominately open plan), the proposed licensed area (whole premises), and the patron capacity (150 patrons) relative to the activities offered (only 4 golf simulators, 2/3 snooker tables and darts) are factors which support alcohol becoming a focus of the venue;
  - the open plan design of the licensed area means that alcohol consumption at the venue will be highly visible, and there will be no opportunity for children and young people to participate in sporting and other amusement activities at the venue without being exposed to alcohol consumption by others;
  - the harm and ill-health impact of fostering the link between sporting activity and alcohol, particularly in relation to children and young people;
  - children and young people are in at-risk group for alcohol-related harm; and
  - consumption and alcohol-related hospitalisation rates relating to the locality are currently above the State figures, indicating that the premises will be operating in a broader environment where alcohol-related harm already occurs.
11. The EDPH provided a number of statistics to support the representations made and to demonstrate that high-risk drinking behaviour of young people is influenced by how alcohol is made available in the community and by having alcohol consumption in the context of sporting related activities has the potential to impact on young people.

12. The EDPH submitted that if the application is approved the following conditions should be imposed on the licence:

- Alcohol is not permitted to be sold, supplied or consumed at the venue during school holiday times, or before 12 midday on Saturdays, Sundays and public holidays.
- Unaccompanied juveniles are prohibited when alcohol is sold, supplied or consumed at the venue.
- The consumption of alcohol when using the golf simulators is prohibited.
- Food to be available during opening hours until 30 minutes before close.

### **Submissions on behalf of the objectors**

#### Vicky Morris

13. Ms Morris lodged an objection on the grounds that if the application were granted undue offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity would occur. Ms Morris stated that her place of residence is located across the road from the proposed premises and there are existing parking related issues in the vicinity, which will worsen if the licence is granted. Moreover, according to Ms Morris, if the application was granted it would lessen the amenity, quiet or good order of the locality by drunken patrons leaving the venue and causing noise and disturbance.

#### Jill Fitzpatrick on behalf of Esperance Local Drug Action Group (ELDAG)

14. Ms Fitzpatrick lodged an objection on the grounds that the application would not be in the public interest and if the application were granted undue harm or ill-health due to the use of liquor may be caused and undue offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity or persons travelling to or from a place of public worship, hospital and school may occur. These grounds are based on the following:

- the culture of normalised alcohol use is a significant contributor to high levels of alcohol-related harm in the Esperance region with harm amongst young people of particular concern. Given the limited indoor entertainment options the venue will be very attractive to young people, which will expose them to normalised use of alcohol;
- based on statistical data submitted, more alcohol is consumed per capita in the Esperance region than the average for WA with Esperance already at a significant disadvantage due to its remoteness in respect of access to health, mental health and alcohol and drug treatment or rehabilitation services. A new liquor licence could only reinforce the trend of higher than State average levels of alcohol-related harm in its population;

- the proposed venue is located within a mixed use area central to the town of Esperance with nearby residents, including a number of retirement homes located within close proximity, likely to experience noise and disturbance from patrons leaving the venue; and
- the proposed venue is in close proximity to a school bus stop, Esperance Hospital, St Johns Ambulance Centre, Genpar Medical Centre, Esperance Uniting Church and Esperance Aged Care Facility, all located within 1 kilometre. The presence of alcohol-affected patrons and increased traffic in the precinct is likely to cause problems for children exiting the bus after school and for persons accessing the services, including elderly people. Moreover, parking in proximity to the proposed venue is limited and will increase pressure on parking facilities if the application were granted.

### **Responsive submissions on behalf of the applicant**

15. In response to the objection lodged by Ms Morris the applicant stated that the objection relates to parking matters that are planning related and were considered and approved by the local council with the issuing of a section 40 certificate of local planning authority.
16. With respect to the grounds of objection raised by Ms Fitzpatrick on behalf of the Esperance Local Drug Action Group, the applicant submitted the following:
  - the proposed venue would not function as a hotel/tavern and people had to be playing, booked to play or to watch others play to be permitted on the premises and be sold alcohol;
  - the target market for the venue is middle-age to older people that do not go to the existing hotels in Esperance;
  - juveniles will not be permitted to be on the premises unless with a parent or guardian; and
  - food will be available at all times until 30 minutes before close.
17. In response to the intervention by the EDPH the applicant submitted the following:
  - the venue has an open plan design to permit the RSA trained staff and approved manager to better monitor patron interaction and consumption; clear away food and beverage refuse and supervise patron behaviour. The limited exposure during a session of indoor golf will be unlikely to directly affect the attitude of children and young people, given their exposure to alcohol advertising on a daily basis in other advertising medium and be less harmful than a parent bringing a child to a local hotel and potentially being exposed to gambling and lewd acts;

- the following guidelines will apply to the venue should the application be granted:
    - no large, bright alcohol advertising within the premise, all alcohol related advertising material will be restricted to a simple product for price menu;
    - visual signage, warning of the risks of excessive alcohol consumption will be displayed at the premises;
    - the applicant will not promote the virtues of alcohol by using appealing graphics, music, animal or people characters, story and humour in their advertising that is appealing to young people;
    - juveniles will not be permitted on the premises without being accompanied by a responsible adult at any time;
  - up to 16 people can be playing golf at any one time, with an additional 16 people waiting to play next given the four simulators available; up to 12 people can be playing snooker at any one time, with up to 12 people waiting to play next given the three tables available; and up to 20 people can be playing darts at any one time, with an additional 20 people waiting to play next given the four boards available. Therefore, up to 96 people on the premises at any one time could be either actively playing games or waiting for their booked time to play, without any spectators; and
  - based on the information received to date the applicant has amended the proposed trading hours to the following:
    - Sunday to Thursday: 12 noon to 10pm; and
    - Friday and Saturday: 12 noon to 11pm.
18. The applicant submits that it has amended some of the self-imposed conditions and is also willing to accept the conditions generally set out by the EDPH, however, do not agree to liquor not being sold during school holidays given that unaccompanied juveniles will not be permitted on the premises.

### **Closing submissions on behalf of the applicant**

19. The applicant further submitted that:
- the venue can accommodate up to 400 patrons however, it will be limited to 150 patrons only so as to better monitor and manage patrons;
  - the venue design and fit-out is intended to attract mature age patrons rather than children and young people, however, the premises will be open from 10am daily and

would permit children and young people to attend the premise up until 12 noon without being exposed to alcohol consumption;

- the primary purpose of the premise will be the provision of virtual indoor golf, snooker, darts and conference/karaoke services to the public and reiterated that the open plan design of the venue will permit staff to better monitor patrons within the premise; and
- several other harm minimisation initiatives that will be implemented to support the low-risk nature of the business.

20. The applicant also provided several more letters of support from local businesses in the town that would like to use the proposed venue's facilities.

### **Responsive and closing submissions on behalf of the Executive Director of Public Health**

21. In response to the applicant's further and closing submissions the EDPH disputed some of the arguments put forward by the applicant and maintained its position in terms of the recommended conditions to be imposed on the licence if granted, which would be an important harm minimisation approach.

### **Determination**

22. The licensing authority is precluded from granting a special facility licence if granting or varying a licence of another class, or imposing, varying or cancelling a condition on a licence of another class, or issuing an extended trading permit in respect of another class of licence, would achieve the purposes for which the special facility licence is sought.

23. After considering the applicant's submissions, I am satisfied that pursuant to s 46 of the Act, no other licence category whether on its own, varied or associated with a permit, would be suitable for the applicant to conduct the business as proposed.

24. In addition, an application for the grant of a special facility licence must, pursuant to ss 38(1) and (2) of the Act, satisfy the licensing authority that the grant of the application is in the public interest. In determining whether the grant of an application is "in the public interest" I am required to exercise a discretionary value judgment confined only by the scope and purpose of Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).

25. In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:

*“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression. The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”*

26. The scope and purpose of the Act can be ascertained from its objects, which are set out in s 5. The primary objects of the Act are:

- to regulate the sale, supply and consumption of liquor;
- to minimise harm caused to people, or any group of people, due to the use of liquor; and
- to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

27. Pursuant to s 33 of the Act, the licensing authority must deal with each application on its merits but has an absolute discretion to grant or refuse an application for any reason that the licensing authority considers in the public interest (refer *Woolworths Ltd v Director of liquor Licensing* [2012] WASC; *Palace Securities v Director of liquor Licensing* (1992) 7 WAR).

28. In accordance with s 73(10) of the Act, the burden of establishing the validity of any objection lies on the objector. In my view, whilst I acknowledge the objection lodged by Ms Morris, she failed to provide any objective evidence to support her claims and as such her objection carries little weight. It is worth noting however, that parking matters would have been considered by the Shire of Esperance, who issued a Certificate of Local Planning Authority to the applicant.

29. The applicant seeks the conditional grant of a special facility (amusement venue) licence to be located in the main township of Esperance, providing liquor to those playing or viewing indoor golf, snooker, darts and karaoke facilities to the public.

30. The applicant has stated that the proposed venue is the only venue of its kind in the Esperance region and will be beneficial to both the tourism and recreation sectors in the locality as well as local patrons who can enjoy the facility all year round regardless of the weather with the option to purchase liquor.



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31. The applicant has submitted 235 completed customer surveys and a number of letters of support in order to demonstrate the requirements of consumers for liquor and related services. Having regard to the applicant's evidence as a whole, I am satisfied on the evidence submitted by the applicant that the grant of the application would be consistent with objects 5(1)(c) and 5(2)(a) of the Act.
  32. However, the EDPH and ELDAG have provided information relating to the existing level of alcohol-related harm in the area particularly the impacts on young people by having alcohol consumption in the context of sporting related activities.
  33. In carrying out its functions under the Act, the licensing authority is obligated to have regard to the primary and secondary objects of the Act (refer to *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227).
  34. Catering to the requirements of consumers for liquor and related services and facilitating the use and development of licensed facilities, reflecting the diversity of the requirements of consumers are amongst the objects of the Act. However, minimising alcohol-related harm in the community is also one of the primary objects of the Act.
  35. In my view, the evidence submitted establishes that there are competing interests in respect of the promotion of the objects of the Act and therefore, the licensing authority is required to weigh and balance those interests (refer *Executive Director Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258). In *Lily Creek Ipp J* stated that it is significant that the primary object in s 5(1)(b) is to 'minimise' harm or ill-health, not to prevent it absolutely. Although harm minimisation is a primary object of the Act it does not necessarily mean that where harm or ill-health may be caused to people by the grant of a licence, no licence should be granted. However, the potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, is a powerful public interest consideration.
  36. The weighing and balancing of the competing interests depends on the degree of importance to be attributed to each of the relevant factors in the proven circumstances of a particular application and involves an element of predicting the future (refer *Malec v JC Hutton Pty Ltd* (1990) 169 CLR). Therefore, it is necessary that I consider the level of alcohol-related harm which is likely to result from the grant of the application and whether the possibility of harm or ill-health is of such a serious nature for the application to be refused.
  37. The EDPH and ELDAG have both established that consumption and alcohol-related harm in the locality is above the State average and impacts on young people by having alcohol consumption in the context of sporting related activities.

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38. Therefore, I need to consider the level of alcohol-related harm which is likely to result from the grant of the application and weigh and balance this against the positive aspects of the application.
39. In weighing and balancing the competing matters raised in respect of this application, I am of the view that the benefits to the community over the long term outweigh the potential negative impact that may occur from the grant of the application. However, I am mindful of the issues raised in respect of exposure of alcohol to children and young people and the open-plan layout of the proposed premises.
40. In my view, the evidence of the applicant establishes that:
- the grant of the application is consistent with s 5(1)(c) of the Act (catering to the requirements of consumers for liquor and related services);
  - there is nothing to suggest that the grant of the application would result in an unacceptable level of alcohol-related harm in the community; and
  - the grant of the application will not negatively impact on the amenity of the area or cause offence, annoyance, disturbance or inconvenience to people that reside or work in the area.
41. Accordingly, I am satisfied on the evidence submitted by the applicant that the grant of the application is in the public interest as required under s 38(2) of the Act and that the applicant has complied with all the necessary statutory criteria, requirements and conditions precedent to the application being granted. However, being mindful of the issues raised in respect of the exposure of alcohol to children and young people and the open-plan layout of the proposed premises, I believe it necessary to impose conditions on the liquor licence restricting access to juveniles and the advertising and promotion of alcohol on the premises. These conditions have been agreed to by the applicant during the document exchange process.
42. Therefore, a special facility (amusement venue) licence is conditionally granted to the applicant subject to the following:
- a Certificate under section 39 of the Act being lodged before the operation of the licence;
  - compliance with the *Local Government Act 1960*, *Health Act 1911* and any written law relating to the sewerage and drainage of these premises;
  - all work being completed within twelve (12) months in accordance with the plans and specifications dated 7 October 2014;

- the recommendations of the Inspector of Licensed Premises on the schedule of requirements dated 29 December 2014 being satisfactorily completed and the Director of Liquor Licensing being notified in writing on completion of that work within 21 days before the day the licensee wishes to commence trading under the licence.
- a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed.
- the applicant seeking confirmation of the grant on or before **17 March 2016** pursuant to section 62(4)(c) of the Act;

43. When the licence commences operation it will be subject to the following conditions:

Trading hours and conditions

1. In accordance with s 46(3) of the Act and r 9A(18) and (19) of the regulations, this licence is granted for the prescribed purpose of allowing the sale of liquor at an amusement venue to persons in the venue for consumption on the premises only.
2. The primary purpose of the premises must consist of the provision of virtual indoor golf, snooker, darts and karaoke services to the public.
3. The permitted trading hours in accordance with s 98C of the Act are:
  - Sunday to Thursday: 12 noon to 10 p.m.; and
  - Friday and Saturday: 12 noon to 11 p.m.
4. No trading is permitted before noon on ANZAC day, Good Friday or Christmas Day.
5. The consumption of liquor when using the golf simulators is prohibited.
6. The maximum number of patrons that can be present on the licensed premises at any one time is 150.
7. Food must be made available during permitted hours until 30 minutes before close.
8. Unaccompanied juveniles are prohibited from entering or remaining on the licensed premises at any time.
9. Low alcohol liquor and non-alcoholic drinks must be available at all times.
10. Alcohol product advertising, promotion or marketing other than the provision of a price list is prohibited.

11. The sale of liquor in jugs is prohibited.
12. The sale and supply of beverages in such a way that would encourage rapid consumption of liquor (e.g. but not limited to; unadulterated spirits or liqueur in a shot glass); or drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', or 'bombs' or any other emotive title, is prohibited.
13. No energy drinks mixed with liquor may be sold. (For the purposes of this condition energy drinks has the same meaning as formulated caffeinated beverage within Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater).
14. The following dress standard applies during the permitted trading hours:
  - Jackets, or other clothing or accessory, bearing patches or insignia of any Outlaw Motor Cycle Gangs, not limited to but including the following listed Gangs, are not permitted to be worn on these premises at any time:  
  
Coffin Cheaters  
Comancheros  
Club Deroes  
Finks  
God's Garbage  
Gypsy jokers  
Outlaws  
Rebels  
Mongols  
Hell's Angels  
Rock Machine  
Bandidos  
Lone Wolf

#### Entertainment Condition

1. A person resorting to, or on the premises, including the licensee or manager, or an employee or agent of the licensee or manager, shall not –
  - (a) be immodestly or indecently dressed on the licensed premises, and/or
  - (b) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

2. The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from -

- (a) exhibiting or showing, or causing, suffering or permitting to be exhibited or shown, on the licensed premises any classified "R 18+", "X 18+" or "RC" classified publication, film or computer game or extract therefrom;
- (b) causing, suffering or permitting any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises, or
- (c) causing, suffering or permitting any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

3. In this condition "licensed premises" includes any premises, place or area:-

- (a) which is appurtenant to the licensed premises, or
- (b) in respect of which an extended trading permit granted to the licensee is for the time being in force, but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access.

#### Compliance with Harm Minimisation Policy

The licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any authorised officer if required.

#### Licence fees

44. Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the issue of the licence.

45. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor

Commission within one month after the date upon which the parties receive notice of this Decision.

Richard Gregor

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

17 March 2015