

**LICENSING COURT OF SOUTH AUSTRALIA**

KNIGHTON PTY LTD T/AS WALLIS TAVERN / AUCHENDARROCH HOUSE

**JURISDICTION:** Application for Review of a decision of the Commissioner

**CASE NO/S:** LC-24-00108

**HEARING DATE:** 29 July 2024

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 1 August 2024

**CATCHWORDS:**

*Application for review in connection with an application to vary gaming hours – The Liquor and Gambling Commissioner has declared that an application to vary gaming hours to allow the conduct of gaming at later hours after midnight is a designated application which in the ordinary course requires the lodgement of a Community Impact Submission – The Commissioner may, in prescribed circumstances, waive that requirement – The applicant contended that its application to vary hours did not propose a significant change to the licensed premises or the nature or extent of the business carried on from the licensed premises such that the waiver should be granted – The applicant provided the Commissioner with extensive submissions in support of that contention – In refusing the application for waiver the Commissioner’s delegate stated that she was not comfortable waiving the Community Impact Submission requirements, given that the variation sought would result in an increase to gaming trade on a majority of the nights in the week, which is a substantial increase to the late-night gaming hours of this venue – On review it was contended that the delegate’s reasons were inadequate and that the factual basis relied upon was incorrect – The duty to give adequate reasons considered – **Held** that in this case the delegate’s reasons were inadequate in that they did not engage with and deal with the various submissions that the applicant had put in support of its application and this vitiated her decision – **Held** that in the circumstances, the appropriate course is for the Court to determine the application for waiver – **Held** that the application to vary gaming hours is atypical and, if granted, it is unlikely to result in a significant increase in gambling related harm – **Held** that the application will not result in a significant change to the licensed*

*premises or the nature or extent of the business carried on from the licensed premises – **Held** that the application for review is allowed and the Commissioner is directed to waive the requirement for the provision of a Community Impact Submission – Gaming Machines Act 1992.*

*Soulemezis v Dudley(Holdings) Pty Ltd (1987) 10 NSWLR 247*  
*Public Service Board of New South Wales v Osmond (1986) 159 CLR 656*  
*Police Association of South Australia [2022] SALC 72*  
*Mansfield Park Hotel (SA) Pty Ltd [2023] SALC 83*  
*Mifsud v Campbell (1991) 21 NSWLR 725*  
*Livesey v New South Wales Bar Association [1983] HCA 17; (1983) 151 CLR 288*

**REPRESENTATION:**

Advocate:

Applicant: Mr G Coppola

Representative:

Applicant: Australian Hotels Association – SA Branch

- 1 This is an application for review made in connection with an application to the Liquor and Gambling Commissioner to change the authorised hours of operation of gaming machines at the applicant's premises at Adelaide Road, Mount Barker.
- 2 The applicant, Knighton Pty Ltd, is the proprietor of licenced premises trading as Wallis Tavern/Auchendarroch House (the Wallis Tavern). It operates 32 gaming machines at the premises, and it is authorised to operate its gaming machines until midnight Monday to Thursday, and until 2.00 a.m. on Friday to Sunday. It is licensed to sell liquor for on premises consumption until 2.00 a.m., seven days a week. It wishes to vary its gaming authorisation to align the closing time with that of its liquor licence, that is, until 2.00 a.m., seven days a week.
- 3 Authorisations in connection with gaming machines are, at first instance, determined by the Commissioner, following the lodgement of an application pursuant to the *Gaming Machines Act 1992* (the GM Act).
- 4 Broadly speaking, there are two types of such applications, being designated applications and non-designated applications. The former is much more onerous than an application that is not a designated application. It must comply with the community impact assessment guidelines (the guidelines) as well as any additional requirements imposed by the Commissioner.
- 5 Section 17A(4) of the GM Act provides that an application for a gaming machine licence is a designated application. It then goes on to authorise the Commissioner to determine "either in accordance with the community impact assessment guidelines or another provision of this Act," that an application is to be a designated application.
- 6 On 24 January 2024, the Commissioner issued amended guidelines, which amongst other things, provide that the following type of application is a designated application:
  - ... an application to vary the trading hours of a gaming machine licence
    - to authorise the conduct of gaming at any time between midnight and 8am on any day, or
    - if the licence already authorises gaming between midnight and 8am, to allow the conduct of gaming at later hours (being between midnight and 8am), on any day, than those previously fixed in relation to the licence.
- 7 In this case, Knighton accepted that its application was a designated application. (I note that the Australian Hotels Associations, (AHA), which

represents Knighton's interest in this matter, reserves the right to assert in future cases that this application might not have been by force of the guidelines, a designated application).

- 8 The guidelines provide that a designated application must, at the time of lodgement, be accompanied by a Community Impact Submission.
- 9 The guidelines set out what is entailed by a Community Impact Submission as follows:

### 3.1. General Guidance

Designated applications, at the time of lodgement, must be accompanied by a Community Impact Submission unless a waiver is provided (see below).

The Commissioner has developed a form to help guide applicants as to the type of information they need to provide in support of their application. Applicants may complete this form, or instead choose to prepare their own submission in support of the application addressing the matters outlined in these Guidelines. This form is available at [www.cbs.sa.gov.au/ciportal](http://www.cbs.sa.gov.au/ciportal).

There is no requirement for a Community Impact Submission to be prepared by legal counsel or industry consultants. Applicants can complete their own Community Impact Submission after consulting with the relevant key stakeholders and interest groups in the community, obtaining all other required information and providing a map showing the locality of their premises. A tool to assist applicants with the provision of a suitable map is available at [www.cbs.sa.gov.au/ciportal](http://www.cbs.sa.gov.au/ciportal).

**When providing information to support their application, applicants should keep in mind that Community Impact Submissions will be made public. Any information that an applicant does not wish to be made public should be redacted or omitted from the Community Impact Submission.**

As each application is different, the level of detail required in a Community Impact Submission may differ depending on the nature and complexity of the application and the impact the premises (including a variation to licence conditions) or the proposed premises will have on the surrounding community. If a Community Impact Submission does not adequately address each of these considerations, the Commissioner may require additional information to be provided.

Where a Community Impact Submission is being prepared in conjunction with a designated application under the *Liquor*

*Licensing Act 1997*, information that is required under both Acts can be provided once to avoid duplication in the application process.

### 3.2. Other information that may be relevant to the application

Applicants should be aware that in determining whether the application is in the community interest, the Commissioner may, depending on the nature of the application, have regard to other relevant information or data, including (but not limited to):

- (a) if the application seeks to authorise the applicant to conduct gaming at any time between midnight and 8am, or seeks an authorisation to extend gaming hours beyond those previously fixed in relation to the licence (being an extension between midnight and 8am on any day), the intra-day gaming figures for the premises (if applicable), which can be accessed by contacting the Independent Gaming Corporation (contact details can be found at [www.cbs.sa.gov.au/ciportal](http://www.cbs.sa.gov.au/ciportal))
- (b) the length of time the licensee has held a gaming machine licence at the relevant premises and elsewhere
- (c) the population of the locality (for example, this may be relevant to an application relating to a premises located in a country town) Page 9 of 16
- (d) barring data relevant to the premises
- (e) the licensee's Self-Assessment Compliance Audit Checklist (if completed within the previous 12 months), and any evidence demonstrating the identification, monitoring and responses taken in relation to people displaying indicators of gambling harm (excluding Automated Risk Monitoring System alerts) during the previous 12 months
- (f) the licensee's compliance history, including with regard to responsible gambling requirements
- (g) whether approved facial recognition technology is either in place or is proposed to be installed and operated at the premises.

Applicants are encouraged to address any of the above factors (as relevant), in their Community Impact Submission.

### 3.3. Community Consultation

**Applicants are required** to address as part of a Community Impact Submission, whether the community of the locality of the

premises/proposed premises have concerns about the application. The applicant should consider the following options for community consultation and should address any identified concerns:

- (a) Consultation with persons who reside within the locality of the premises/proposed premises and who may be affected by the grant of the application.
- (b) Petitions, customer surveys or letters of support from existing or potential customers.
- (c) Letters of support or evidence of consultation with local businesses.
- (d) Evidence of consultation with relevant authorities and community organisations such as:
  - the local community;
  - the local council;
  - gambling help groups (non-government) and community service organisations; and
  - local community cultural and residential groups.

Where appropriate, the applicant is required to demonstrate what measures will be implemented to address or mitigate concerns raised through this consultation process. Contact details for selected organisations is available at [www.cbs.sa.gov.au/ciportal](http://www.cbs.sa.gov.au/ciportal).

#### 3.4. Other Considerations

As part of a Community Impact Submission, **applicants are required** to demonstrate the measures that have been implemented, or that they will implement, to ensure that the grant of the application would be unlikely to result in undue offence, annoyance, disturbance or inconvenience to those who reside, work or worship in the vicinity of the premises.

- 10 The guidelines then go on to provide that the Commissioner may waive that requirement. Clause 3.5 of the guidelines provides:

The Commissioner may vary or waive the requirement for a Community Impact Submission if:

- (a) the application does not propose a significant change to the licensed premises or the nature or extent of the business carried on from the licensed premises

- (b) the purpose of the Community Impact Submission can be achieved by other means, or
- (c) other special circumstances exist.

Applicants seeking a waiver from the requirement to provide a Community Impact Submission with their application must, at the time of lodging their application, provide a submission to the Commissioner outlining the reasons that a waiver ought to be granted. The submission should set out, at a minimum, the Data Relevant to Locality set out under clause 2.3 of these Guidelines, as it relates to the premises and locality, and the exceptional circumstances that would justify the waiving of the requirement to provide a Community Impact Submission.

In the event that the Commissioner decides to vary or waive the requirement for a Community Impact Submission, the application will remain a designated application for the purposes of determination under the Act.

- 11 That then brings us to the circumstances underpinning the within review.
- 12 By letter dated 31 May 2024, the AHA made a submission to the Commissioner on behalf of Knighton, contending that a waiver ought to be granted.
- 13 The submission noted that the Wallis Tavern is already authorised to conduct gaming operations until 2.00 am on Friday, Saturday, and Sunday nights and that the purpose of the application was merely to standardise its trading hours.
- 14 The submission contained details of the Wallis Tavern's Net Gaming Revenue (NGR). This revealed a NGR of \$48,160 compared to the State average of \$78,481. It added that on the days when the Wallis Tavern can conduct gaming operations until 2.00 am, the average NGR after midnight is significantly lower than for the hours before midnight.
- 15 The submission noted that with 5 km of the Wallis Tavern, there are four licensed venues that conduct gaming operations, being Gray's Inn, 487 metres away with 34 entitlements permitted to operate until 2.00 a.m. seven days a week, Barker Hotel, 272 metres away with 34 entitlements permitted to operate until 2.00 a.m. Monday to Saturday and to midnight on Sunday, Richies Tavern, 402 metres away with 37 entitlements permitted to operate until midnight on Monday to Wednesday, to 1.00 a.m. on Thursday and to 1.30 a.m. on Friday and Saturday and the Great Eastern Hotel, 2.3 kilometres away with 9 entitlements permitted to operate until midnight on Sunday to Thursday and until 1.00 a.m. on Friday and Saturday. It submitted that given the close proximity to

Gray's Inn and Richies Tavern it was reasonable to suggest that those seeking access to late night gaming seven days a week can already do so and that the inference to be drawn is that the addition of this venue to join the other late night gaming cohort was unlikely to make any real difference to the level of gaming related harm in the relevant community.

- 16 The submission noted that Mount Barker has a median household income that is 11.6 % higher than the State average, 65.4 employment compared to a State average of 60% and 53.4% having completed higher education compared to a State average of 48.0%. It submitted that the social profile of Mount Barker was such that the grant of the application was unlikely to result in an increase in gambling related harm.
- 17 The submission noted that the primary focus of the business at the Wallis Tavern was food, beverage, functions and events and that gaming was ancillary to this as evidenced by the relatively small area that it operates in comparison to the overall size of the premises.
- 18 The submission concluded by asserting to the effect that Knighton is a responsible gaming machine operator.
- 19 By email dated 6 June 2024, the Commissioner, through his delegate, advised as follows:

I have considered your request for a waiver from the Community Impact Submission requirements for the proposed variation to gaming trading hours.

I am not comfortable waiving the CI requirements for this application, given the variation sought would result in an increase to gaming trade to 2am on a majority of the nights in the week - which is a substantial increase to the late-night gaming hours of this venue.

The onus is on your member to demonstrate that their application is in the community interest.

- 20 On review, Knighton contended that the delegate erred in not proving adequate reasons for refusing the application for waiver. It submitted that the ruling as to whether to grant or refuse the waiver was not merely procedural but rather was a matter of some substance. It submitted that because the refusal to grant the waiver meant that it had to provide a Community Impact Submission, it would be put at considerable inconvenience and expense. It submitted that as such, as a matter of procedural fairness, it was entitled to be provided with reasons that revealed that its submissions had been considered and understood, and it was entitled to know why they had been rejected. It submitted that in this case, because of the lack of detail in the delegate's reasons, it is left to guess about these matters.



- 21 It submitted that the reason proffered, namely that the application would result in a substantial increase to the late-night gaming hours of this venue, was factually wrong, and that the submissions that it made pointed to the opposite conclusion.
- 22 Next, it contended that in the circumstances this Court should determine for itself whether the waiver should have been granted and if it so concludes it should direct the Commissioner to grant the waiver and further consider the application.
- 23 As to the merits of the application for waiver, it submitted that this is a modest application in connection with a community whose social profile sets off no alarm bells as far as potential for gambling related harm associated with the use of gaming machines. It submitted that the application comes from a low NGR base, in circumstances that indicate the actual NGR at the premises after midnight is low. It submitted that considering the very close proximity to venues that allow gaming after midnight, the reasonable inference to draw is that if the application ultimately succeeds the majority of persons using the gaming machines after midnight will be those who do so at nearby venues and will not be persons who would otherwise not use gaming machines at that time. It submitted that this seems to be the very sort of application to which the exemption ought to apply, and rhetorically asks: that if not this application, what application would the waiver apply to?

### Consideration

- 24 In determining whether to waive the requirement to provide a Community Impact Submission, the Commissioner is performing an adjudicatory function. It goes without saying that that in doing so, the Commissioner will not act arbitrarily, but will endeavour to do so fairly and rationally.
- 25 In *Soulemezis v Dudley(Holdings) Pty Ltd*,<sup>1</sup> McHugh JA said that “without the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision.” He went on to observe that the provision of reasons serves multiple purposes. These include enabling the parties to see that justice has been seen to be done by illustrating to them that their cases have been acknowledged and understood, and by making the decision maker accountable through the exposition of the reasoning that led to a particular conclusion.<sup>2</sup> It also ensures that where a right of review or appeal has been provided, the case is properly and sufficiently laid before the appeal court.<sup>3</sup> All of these are apposite to many of the decisions and rulings made by the Commissioner under the GM Act.

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<sup>1</sup> (1987) 10 NSWLR 247 at 279.

<sup>2</sup> Ibid at 279 per McHugh JA.

<sup>3</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666 per Gibbs CJ.

- 26 That said, it must be accepted that not every order or ruling made by the Commissioner, requires the provisions of reasons. Some are so uncontroversial or inconsequential that it would impose an unreasonable and unnecessary burden on the Commissioner to expect reasons to be provided in respect of such matters.<sup>4</sup> But in respect of matters of substance that can have an adverse impact upon a party, reasons, and by that, I mean adequate reasons,<sup>5</sup> should be provided.
- 27 It can be seen that a Community Impact Submission is a reasonably formidable document that amongst other things requires consultation with the relevant key stakeholders and interest groups in the community, the provision of advice regarding the outcome of that consultation, and the provision of all other required information. It follows that a decision to refuse to waive the requirement to provide a Community Impact Submission has the potential to cause significant detriment to an applicant because it will put the applicant to some trouble and potential expense. Such a decision cannot be described as uncontroversial or inconsequential. As such, reasons should be provided and when an applicant has made detailed submissions as to why the waiver should be granted, that applicant is entitled to know why its submissions have been rejected. A failure to do this:
- ... may promote a sense of grievance in the adversary and create a litigant who is not only “disappointed” but “disturbed” - to use the words which appear in the New Zealand case of *Connell v Auckland City Council* [1977] 1 NZLR 630 at 634.<sup>6</sup>
- 28 With respect, the delegate’s reasons did not adequately explain to Knighton why its submissions were rejected. The absence of that explanation vitiates the delegate’s decision.
- 29 Whilst remittal to the Commissioner is an option, looked at through the eyes of the hypothetical bystander, which is the touchstone by which these matters must be determined, there would be a “reasonable apprehension that [the Commissioner] might not bring an impartial and unprejudiced mind to the resolution of the question involved”.<sup>7</sup>
- 30 Accordingly, Knighton’s submission that remittal would not be appropriate, and this Court should make the determination that it considers should have been made, must be accepted.

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<sup>4</sup> *Police Association of South Australia* [2022] SALC 72 at [95].

<sup>5</sup> *Mansfield Park Hotel (SA) Pty Ltd* [2023] SALC 83 at [51].

<sup>6</sup> *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728.

<sup>7</sup> *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at 293-294.

### **Should the waiver be granted?**

- 31 The guidelines require the articulation of the exceptional circumstances that would justify the waiving of the requirement to provide a Community Impact Submission.
- 32 Whilst the word “exceptional” is usually associated with meaning outstanding or unusually good, it can otherwise mean simply forming an exception or not typical. It is clear enough that where the guidelines talk of “the exceptional circumstances,” it means circumstances that are said to characterise the application that are atypical and warrant the departure from the default position of requiring a Community Impact Submission because of this, and because they fall within one of the nominated categories. They being: (a) the application does not propose a significant change to the licensed premises or the nature or extent of the business carried on from the licensed premises; (b) the purpose of the Community Impact Submission can be achieved by other means, or (c) other special circumstances exist.
- 33 Given that a primary purpose of a Community Impact Submission is to address the potential for an application to result in gambling related harm, although not expressly stated, issues around gambling related harm must be taken into account in determining whether to grant the waiver and doubtless this informs what is meant by “the exceptional circumstances.”
- 34 Knighton contends that its application falls within the first of the nominated categories. It submitted that the business that it conducts at the Wallis Tavern is primarily focussed upon food, beverage, functions, and events and that the minor change to the operating hours of its gaming machines will not result in a significant change to the licensed premises or the nature or extent of the business carried on from the licensed premises.
- 35 Knighton’s submission reveals that the venue’s NGR is nearly 40% below the State average. From this it would be reasonable to infer that gaming is not a major focus of the Wallis Tavern’s business and that gaming is, as contended, merely ancillary to the primary focus of its business, being food, beverage, functions, and events.
- 36 There is no reason to doubt the accuracy of Knighton’s submission that on the days when the Wallis Tavern can conduct gaming operations until 2.00 a.m., the average NGR after midnight is significantly lower than for the hours before midnight. This supports the contention that the minor change to the operating hours of the gaming machines at the Wallis Tavern will not result in a significant change to its business model.
- 37 In respect of the issue of gambling related harm, I do not place much weight on Knighton’s submission based on the close proximity to

Gray's Inn and Richies Tavern. The fact that these premises are authorised to trade in the early hours of the morning says very little. There is no evidence that they are exercising that right and if so, how many machines are actually used at each venue and what amounts are gambled. Without that evidence, I would not draw the inference that if the application ultimately succeeds, the majority of persons using the gaming machines after midnight will be those who presently do so at nearby venues and will not be persons who would otherwise not use gaming machines at that time.

- 38 But the fact that the NGR at the Wallis Tavern is nearly 40% below the State average is significant. From this, it is reasonable to infer that the Wallis Tavern attracts a relatively low number of problem gamblers.
- 39 The submission regarding the limited use of gaming machines after midnight at the Wallis Tavern suggests that the grant of the application is unlikely to result in a significant increase in the number of problem gamblers using the venue.
- 40 Knighton's submission about the statistical evidence is also important. It paints a social profile of Mount Barker that fortifies the view that the grant of the application is unlikely to result in a significant increase in gambling related harm.
- 41 All of this suggests to me that the application is atypical and, if granted, it is unlikely to result in a significant increase in gambling related harm. The grant of the application will not result in a significant change to the licensed premises, or the nature or extent of the business carried on from the licensed premises.
- 42 In my opinion, it warrants the departure from the default position of requiring a Community Impact Submission. I therefore revoke the Commissioner's determination and in connection with Knighton's application to vary the trading hours of its gaming machine licence in respect of the Wallis Tavern, I direct him to waive the requirement for the provision of a Community Impact Submission.