

LICENSING COURT OF SOUTH AUSTRALIA

AUSTRALIAN LEISURE AND HOSPITALITY GROUP PTY LTD
(FEDERAL HOTEL MOTEL)

v

LIQUOR AND GAMBLING COMMISSION

JURISDICTION: Appeal

FILE NO: 67 of 2021

HEARING DATE: 2 June 2021

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 7 September 2021

CATCHWORDS

*Appeal from the decision of the Commissioner for Liquor and Gambling that effectively refused an application made by the appellant to increase the number of gaming machines at its licensed hotel venue – The increase and the consequential increase in revenue is seen as necessary to support major renovations to the hotel – The Commissioner was concerned about the likely social effect on the local community and, in particular, the likely effect on problem gambling within the local community if the application was granted and therefore ordered that the applicant complete a social effect inquiry – The Commissioner found that the social effect inquiry that was undertaken by the appellant was adequate, that its engagement with the local community stakeholders was sufficient and none had objected – The Commissioner found that the appellant was an experienced licensee with strong policies and procedures and a good history of compliance with the law of South Australia – But having noted that problem gambling can cause significant harm he concluded that the net beneficial impacts to the relevant community stakeholders was not likely to offset the net detrimental impacts that would be experienced by them such that it was contrary to the public interest to grant the application and ruled against it – Nature of the appeal to this Court considered – **Held** that a decision as to whether the grant of application was or was not contrary to the public interest involves an evaluative judgment which, if incorrect, should be corrected on appeal – **Held** that this is a modest application by an experienced licensee, which has a demonstrated commitment to minimise*

*the risk of its gaming machines leading to problem gambling, which has drawn no objections from relevant stakeholders, is within a community which by State wide comparisons is not disadvantaged or especially vulnerable to problem gambling, and which is an essential part of a project that will benefit the local community through the re-development of an existing premises that will lead to some increased employment and which will enhance the attractiveness of the community as a tourist destination – **Held** that it would not be contrary to the public interest to permit the variation – **Held** that the appeal must be allowed and the application granted – Gaming Machines Act 1992.*

BWS - Mount Gambier [2013] SALC 82

Woolworths Ltd v Fassina Investments Pty Ltd and Ors [2015] SASCF 72

Australian Consumer Commission v CG Berbatis Holdings Pty Ltd

(2003) 214 CLR 51

Minister for Immigration and Citizenship v Stretton (2016) 237 FCR 1

REPRESENTATION:

Counsel:

Applicant: Mr B Doyle QC with Mr D Meegan

Respondent: Ms E Ferguson

Solicitors:

Applicant: DMAW Lawyers

Respondent: Crown Solicitor

- 1 This is an appeal from the decision of the Commissioner for Liquor and Gambling in respect of an application to vary the terms of a gaming machine licence to enable the provision of additional gaming machines at the Federal Hotel Motel at Mt Gambier (the hotel). The effect of his decision was that the application was refused.
- 2 The appeal is made pursuant to s 69 of the *Gaming Machines Act 1992* as it then was (the GM Act). It is an appeal by way of a rehearing. As such this Court must conduct a real review of the evidence and the Commissioner's findings and if it determines that there was error, it must correct it.
- 3 The application was made by the Australian Leisure and Hospitality Group Pty Ltd (AHL). It is the licensee of the hotel, which is situated in Commercial Street, Mount Gambier.
- 4 At the present time the hotel has a bistro area, that seats up to 150 people and which is open for lunch and dinner, 7 days a week; a public/sports bar which can have a maximum patronage of 90; a smoker's courtyard; a gaming room which for now has 14 gaming machines; and 13 rooms available for accommodation.
- 5 The AHL wishes to increase the number of gaming machines to 30. The increase is planned as part of a major refurbishment of the hotel to upgrade it accommodation, gaming room, sports bar and bistro and designated smoking area. In all, the AHL intends to invest \$1.7 million on the hotel. It contends that the enhanced gaming offer is an integral part of its plans, and that additional revenue is necessary to support the viability of the project.
- 6 The application to the Commissioner was made in February 2017 and it was determined in accordance with the GM Act. It stated that the modest increase in gaming machines would increase the variety, availability, and accessibility to the hotel's patrons. It said that Mount Gambier was a large enough regional centre to warrant an increase in the number of machines and that the AHL's standing and commitment to the responsible service of gambling would ensure that there would be little, if any, negative impact on the community because of the increase.
- 7 Pursuant to s 27AA(4) of the GM Act, the Commissioner could require an applicant who was seeking to vary a gaming machine licence to complete a social effect inquiry. This was necessary in cases where the Commissioner was of the opinion 'that the variation of the licence in respect of the premises may significantly alter the likely social effect on the local community and, in particular, the likely effect on problem gambling within the local community'.

8 Section 27AA(5) of the GM Act provided that when the Commissioner resolved to invoke s 27AA(4):

... the licence may not be varied unless the applicant satisfies the Commissioner, by such evidence as the Commissioner may require, that the variation of the licence in respect of the premises would not be contrary to the public interest on the ground of the likely social effect on the local community and, in particular, the likely effect on problem gambling within the local community.

9 On 30 January 2018, the Commissioner resolved to invoke s 27AA(4) of the GM Act.

10 It is common ground that members of the relevant local community are those who reside in the City of Mount Gambier, which is the largest rural city in South Australia. It is situated about 440 kilometres south-east of Adelaide, just west of the Victorian border. It is a regional centre with a population of around 30,000 that provides an array of services to its residents and to those who live in the smaller towns and rural areas that surround it.¹ At present there are 338 gaming machines operating at various licensed venues with the local community.

11 The AHL engaged Urbis Pty Ltd to assist it in undertaking the social effect inquiry.

12 Before discussing that report reference needs to be made to an important decision published by the Commissioner in 2016, wherein he refused an application for the transfer of gaming machines for use in a venue at the St Clair redevelopment on the former Cheltenham racecourse in the western suburbs of Adelaide. Amongst other things the Commissioner, in rejecting the application, acted upon the evidence of Dr Livingston, a senior lecturer at Monash University who had conducted research in connection with gambling. His evidence in that case was that the proposed venue was adjacent to two comparably disadvantaged council areas, being Charles Sturt and Port Adelaide Enfield. He said that the residents of those council areas would include a number experiencing severe stress, including 'mortgage stress' and that the introduction of additional gaming machines would likely be associated with significant harm. I think that it is fair to observe that Dr Livingston's evidence was a significant factor in the Commissioner reaching the conclusion that the application should be refused.

13 The Urbis report endeavoured to highlight the differences between the facts in this case and those in the Cheltenham case. The report stated that the household and per capita income in the local community was higher

¹ BWS - *Mount Gambier* [2013] SALC 82 at [6] and [36].

than the non-metropolitan State average; the proportion of mortgage stress was 3.7%, which was below the State average; the average net gambling revenue was \$47,018 per machine, compared to a State average of \$56,195, noting that the average in Charles Sturt and Port Adelaide Enfield was at the time of the Cheltenham application, substantially higher than the State average.

- 14 The report provided an estimate as to the additional revenue that the additional gaming machines would generate and where that increased revenue might come from. Mr Rhys Quick, the author of this part of the report, gave some brief oral evidence before me. Mr Quick has an economics degree, is a member of the Victorian Planning Environment Law Association and the Property Council of Australia Retail Committee. He has frequently given evidence to the Victorian Gambling regulator. He has studied literature relating to problem gambling and gaming machines. I find that he is qualified to give expert evidence about the likely increase in revenue that an increase in the number of gaming machines at an existing venue will generate and where that increase will come from and about gambling machines generally.
- 15 Mr Quick explained that problem gamblers were not limited to any particular group, and that it can be an issue for people from all walks of life. He said that if anything, it was more of a problem for middle-income earners than any other group. He said that the significance for people of lower incomes is that they are less able to cope with the adverse consequences of problem gambling.
- 16 Based upon his analysis he regarded Mount Gambier as typical of non-metropolitan South Australia.
- 17 Mr Quick projected that an increase from 14 to 30 gaming machines at the hotel would result in an increase of \$162,000 per year, being the equivalent of a 42% increase. He estimated that about 60% of that increase would be transferred from the revenue presently being generated at other venues that have gaming machines in the Mount Gambier area. He thought that the balance of 40% would come in part from local residents, being existing gamers increasing their spend and new gamers, and that the remainder would be from visitors to Mount Gambier, some of whom would be visitors to the hotel and others who would be lodging at the hotel. In his opinion, based upon his experience, the number of new users of gaming machines at the hotel was likely to be small.
- 18 Mr Quick accepted that the novelty of new gaming machines at the hotel could attract people, some of whom could be problem gamblers. But he also made the point that venues regularly upgrade their machines, such

that an increased number of gaming machines at the hotel would not necessarily be the only source of new gaming machines in the area.

- 19 The report also sought to contrast the failure of the applicant in the Cheltenham case to demonstrate an understanding of problem gambling with the extensive work that the AHL had undertaken in this area, which it submitted was above and beyond the base-line industry approach.
- 20 The AHL is a large organisation employing nearly 16,000 people across the hospitality sector. It is committed to being Australia's most responsible hotel and gambling operator. It has introduced a pre-commitment functionality to enable customers to set spend and/or time limits. It recognises that problem gambling is a serious community issue. It has in place extensive training for its staff and works in partnership with entities such as the Salvation Army and Gamblers Help (SA). It engaged the Responsible Gambling Council of Canada to conduct an independent assessment of its responsible gaming policies and initiatives to ensure that it was achieving industry best practice. That report concluded that the ALH had a strong commitment to responsible gambling but made recommendations as to how this could be improved. The ALH accepted these recommendations such as a uniform national policy precluding the service of complimentary alcohol in gaming rooms, responsible gaming and privacy training, and conducting annual reviews to evaluate the impact of its changes.
- 21 The Commissioner found that the social effect inquiry that was undertaken by the AHL was adequate. He found that the AHL's engagement with the local community stakeholders was sufficient. No stakeholders objected to the application.
- 22 The Commissioner accepted that the ALH had adopted harm mitigation measures that were superior to those considered in the Cheltenham application. He noted that it had implemented several the measures recommended by Dr Livingston in that case, such as self-exclusion programs and pre-commitment systems.
- 23 The Commissioner accepted that the relevant community was relatively less disadvantaged than most in this State. He accepted a submission put by the ALH that there was a markedly less pronounced risk of harm associated with this proposal than that under consideration in the Cheltenham application.
- 24 The Commissioner found that if granted, the application would result in employment opportunities in respect of the refurbishment and renovation of the hotel; the creation of new ongoing jobs at the hotel; an upgraded sports bar, bistro, and gaming room; upgraded accommodation; and

having noted that the hotel already supports a variety of community organisations, foundations, and charities, that this would increase.

- 25 The Commissioner identified the negative impacts of the proposed increase in the number of gaming machines. He found that more in the local community would gamble on gaming machines; more will suffer gambling related harm; and problem gamblers already in the community will be negatively impacted.
- 26 The Commissioner noted the significant harm that problem gambling can cause, that is, loss of self-worth, loss of livelihood, crime, negative health impacts, family violence, loss of family, and in some instances loss of life.
- 27 The Commissioner considered that the net beneficial impacts to the relevant community stakeholders was not likely to offset the net detrimental impacts that would be experienced by them.
- 28 The Commissioner concluded by stating that whilst the ALH was ‘an experienced licensee with strong policies and procedures and a good history of compliance with the law of South Australia’ he was not satisfied that the grant of the application was in the public interest.
- 29 On appeal, Mr Doyle QC, counsel for the ALH, submitted that the Commissioner failed to properly evaluate its case and that had he done so the application should have been granted.
- 30 He noted that a factor that must be considered in respect of any application such as this is that if granted it will result in a reduction of the overall number of gaming machines in this State and in this case, the reduction would be four or more machines. This is so because the GM Act does not allow for the provision of new gaming machine licences. An entity seeking a licence must trade for one from within the existing licences and in respect of that trade, a certain number must be surrendered. In this case, for the ALH to acquire 16 operational licences, it must purchase 20.5 licence entitlements.
- 31 Mr Doyle said that it was important that the relevant community was not particularly disadvantaged.
- 32 He said that much weight must be given to the fact that the ALH was an exemplary gambling operator that has gone above and beyond what might be expected to address problem gambling.
- 33 He noted that many of the existing licensed venues in Mount Gambier operate 30 or so machines, such that the grant of this application would not result in some super-sized gaming venue, but rather would bring the

number of gaming machines in line with what exists elsewhere in Mount Gambier.

- 34 He noted evidence that suggests that over half of the new trade at the hotel will come from existing trade at venues in Mount Gambier.
- 35 He said that much of the balance will come from visitors to Mount Gambier.
- 36 He accepted that the grant of the application would carry the risk of creating a new cohort of problem gamblers but said that if this was enough to defeat an application such as this, none would ever be granted. He said that in any event, the risk was small. I understood him to contend that the fact that the GM Act permits application such as this was a recognition that this might occur.
- 37 Mr Doyle submitted that these factors needed to be weighed with the positive aspects of the application. He said that the new patrons who would come from existing gaming venues within the locality would be gambling in a better managed gambling facility. He said that the additional gaming machines were part of an overall package that will provide employment opportunities whilst the project is being built and after it is completed. He said that the enhanced hotel will add to the attractiveness of Mount Gambier generally.
- 38 Finally, he submitted that in weighing the factors, for and against, it was important to note that there was no expressed opposition from any community groups.

Consideration

- 39 It must be accepted that the legalisation of gaming machines in this State is not free from controversy. Whilst there are some positives in that by regulating it, it enables it to occur in a controlled environment and it provides a significant source of revenue for the State, there is no getting away from negative attributes of gaming machines. It is well known that some people can become addicted to them. That addiction often afflicts people of modest means. The loss of income and savings that it can cause, can wreak havoc. It can drive otherwise law-abiding citizens to crime. It can destroy families and relationships. It can cause significant mental health issues that in some instances can ultimately prove fatal.
- 40 The legalisation of gaming machines reflects a policy choice made by the Parliament. It must be taken to have formed the judgment, that whilst it is inevitable that gaming machines will cause harm to some, on balance, that is a price worth paying to regulate their use and to derive from them income for the State.

- 41 The legislative permission granted to existing licensees to increase the number of gaming machines operating under a licence, viewed in the context of a regime that provides for a reduction in the overall number of gaming machines when gaming machine entitlements are traded, must be seen as reflecting Parliament's expectation that from time-to-time licensees will make such applications.
- 42 It is also notable that pursuant to s 16 of the GM Act, the Commissioner may approve no more than 40 gaming machines under a gaming machine licence. It must follow that Parliament has envisaged that in appropriate circumstances up to 40 gaming machines in a particular licensed venue is an acceptable number and that beyond that number is unacceptable.
- 43 These matters inform how the issue as to whether the grant of the application would be contrary to the public interest on the ground of the likely social effect on the local community and the likely effect on problem gambling within the local community is to be approached. The fact that the grant of an application such as this will result in some additional problem gambling, is not decisive. It is a matter of degree. The test requires the decision maker to make an evaluative judgment as to whether in all the circumstances, the adverse effect is sufficient to conclude that it would be contrary to the public interest to permit the variation.
- 44 That evaluative judgement is not a discretionary judgment that allows a range of possible conclusions. In connection with an application under the GM Act of the type under consideration here, it is either contrary to the public interest to grant the application or it is not. Whilst it must be accepted that this involves a normative judgment based upon contemporary values² that in turn involves a process of reasoning "that is partly analytical and partly intuitive"³, if in the opinion of this Court on appeal is that the conclusion reached by the Commissioner is erroneous, the Court is obliged to correct it.⁴
- 45 In this case, the relevant community is not particularly disadvantaged.
- 46 The average amount that members of the relevant community might be expected to spend on gaming machines is below the State average.
- 47 Looked at from the perspective of the number of gaming machines already operating in the relevant community, the increase is not great.
- 48 The evidence establishes the much of the money that will be spent on the proposed new gaming machines will be money either being presently

² *Woolworths Ltd v Fassina Investments Pty Ltd and Ors* [2015] SASCFC 72 at [47].

³ *Australian Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [82].

⁴ *Minister for Immigration and Citizenship v Stretton* (2016) 237 FCR 1 at [25] and [27].

spent at other venues in the relevant community or by persons who are visitors to that community.

- 49 The applicant is a very experienced and respected gaming machine operator that has taken significant measures to ameliorate the adverse effects of gambling. The diversion of existing gaming machine users from other venues in the relevant community will result in some members of that community benefitting for the grant of the application in the sense that they will now be gambling in a safer environment.
- 50 In summary, this is a modest application by an experienced licensee, which has a demonstrated commitment to minimise the risk of its gaming machines leading to problem gambling, which has drawn no objections from relevant stakeholders, is within a community which by State wide comparisons is not disadvantaged or especially vulnerable to problem gambling, and which is an essential part of a project that will benefit the local community through the re-development of an existing premises that will lead to some increased employment and which will enhance the attractiveness of the community as a tourist destination. Whilst it is inevitable that the grant of the application will increase the number of problem gamblers in the relevant community, it is likely that the increase will be small.
- 51 In the words of s 27AA (5) of the GM Act, the Commissioner should have been satisfied that the variation of the licence in respect of the premises would not be contrary to the public interest on the ground of the likely social effect on the local community and, in particular, the likely effect on problem gambling within the local community.
- 52 I would allow the appeal and grant the application. Counsel is to prepare and forward draft orders to reflect this outcome and the relief now sought as a result of it.