

LICENSING COURT OF SOUTH AUSTRALIA

DUXTON OLD NOARLUNGA CUSTODIAN PTY LTD (t/as OLD NOARLUNGA HOTEL)

JURISDICTION: Application for Review of or an appeal from a decision of the Commissioner

CASE NO/S: LC-22-00013

HEARING DATE: 18 August 2022

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 26 August 2022

CATCHWORDS:

*Application for review of a determination made by the Commissioner to deem an application to vary the hours of trading of a gaming machine licence to be a designated application – The Commissioner made the determination without indicating that he was contemplating making it or giving the applicant the opportunity to comment – Whether the Commissioner denied the applicant procedural fairness in a way that vitiates his order – If so, whether remittal would be appropriate or whether this Court should make the determination that it considers should have been made – If the latter, should the determination be made – **Held** that the only power through which the Commissioner could have designated the application that is the subject of this review was through s 17A(4)(b) of the Act, and that in turn meant that in determining whether this application should be deemed to be a designated application he was required to consider the matters alluded to in the guidelines – **Held** that because the guidelines oblige the Commissioner to consider any information submitted by the applicant in support of why its application should not be deemed a designated application the Commissioner must inform an applicant that he or she is contemplating deeming the application to be a designated application – **Held** that in any event because the determination that an application is a designated application has the potential to cause significant detriment to an applicant on general principles of natural justice the applicant was entitled to know that deeming the application to be a designated application was being contemplated and it should have been given the opportunity to be heard in connection with this – **Held** that having regard to the history of this matter, the parties or the public might entertain a reasonable apprehension that the Commissioner might not bring an impartial and unprejudiced mind to the*

*resolution of the issue such that remittal is inappropriate – **Held** that this as a modest application to change the trading hours of an established gaming venue attached to a hotel that has a significantly lower loss per gaming machine relative to other venues in the relevant council area and is well below the State average, which if granted will result in gaming trading hours that are broadly consistent with many other gaming venues in the general vicinity – **Held** that if the Commissioner has legitimate concerns that there might be a trend that could lead to an unacceptable risk of harm he has ample powers to address this, such as granting applications on an interim basis in lieu of determining the application to be a designated application – **Held** that the Commissioner’s determination is revoked and he is directed to deal with the applicant’s application as a routine application and not as a designated application – Gaming Machines Act 1992, Gambling Administration Act 2019, Liquor Licensing Act 1997.*

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Nathanson v Minister for Home Affairs [2022] HCA 26

McAdam v Robertson [1999] SASC 169; (1999) 73 SASR 360

British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2; (2011) 242 CLR 283

John v Rees [1970] Ch 345

Livesey v New South Wales Bar Association [1983] HCA 17; (1983) 151 CLR 288

Liquorland (Australia) Pty Ltd and Ors v Lindsey Cove Pty Ltd [2002] SASC 17; (2002) 81 SASR 337

REPRESENTATION:

Counsel:

Applicant: Mr M Roder QC

Solicitors:

Applicant: Piper Alderman Lawyers

- 1 This is an application seeking the review of a determination made by the Commissioner for Liquor and Gambling made in connection with an application made by the applicant, Duxton Old Noarlunga Custodian Pty Ltd, trading as the Old Noarlunga Hotel (the old Noarlunga Hotel) to vary the trading hours of its gaming machine licence to allow it to commence trading and finish trading two hours later than is presently the case.
- 2 In connection with that application the Commissioner determined that it was to be a designated application for the purposes of the *Gaming Machines Act 1992* (the GM Act).
- 3 The application for review is authorised by s 54(4) of the *Gambling Administration Act 2019* (the GA Act), which provides:

A party to proceedings before the Commissioner under the *Gaming Machines Act 1992* who is dissatisfied with a decision or order made or given in the proceedings may apply to the Court for a review of the decision or order.
- 4 Pursuant to s 54(6) of the GA Act, on review, this Court may:
 - (a) affirm, vary or quash the decision subject to the review;
 - (b) make any decision that should, in the opinion of the Court, have been made in the first instance;
 - (c) refer a matter back to the decision-maker for rehearing or reconsideration;
 - (d) make any incidental or ancillary order.
- 5 The applicant raises three issues on review.
- 6 The first is that the Commissioner's determination cannot stand because in making it, the Commissioner denied the applicant procedural fairness in a way that vitiates his order.
- 7 The second is that although upon such a finding this Court could refer the matter back to the Commissioner to reconsider the determination, in all the circumstances, remittal would not be appropriate, and this Court should make the determination that it considers should have been made.
- 8 The third is that this Court should conclude that the application should not be determined to be a designated application.

A designated application

- 9 A designated application is a special species of application under the GM Act that is much more onerous than an application that is not a designated application.
- 10 A designated application must comply with the community impact assessment guidelines,¹ as well as the requirements of the guidelines and any additional requirements imposed by the Commissioner.² Amongst other things, an applicant is required to show, as part of the application, that there has been engagement with the relevant community and any relevant stakeholders that may include petitions, survey results and letters of support. The applicant needs to identify whether there are at risk groups or sub-communities within the relevant locality, which is loosely defined as being within a two-kilometre radius of the gaming venue. The applicant is expected to give particular focus on how the applicant will seek to minimise the adverse effects of gambling on the wellbeing of members of those groups/communities that have been identified. The applicant is required to demonstrate the policies and procedures that it has or intends to implement to minimise the harm that might be caused by gambling whether to a community as a whole or to a group within the community. These may include things such as making arrangements to identify possible problem gamblers using the venue, informing customers and their families of, and facilitating access to, informal voluntary self-exclusion and formal barring (including licensee involuntary barring), enforcement and compliance arrangements for informal voluntary self-exclusion and formal barring and designing and locating the gaming area so it would not be likely to be a special attraction to minors.
- 11 The bar to secure the grant of a designated application is set higher than any other application in the sense that pursuant to s 17A(1) of the GM Act the Commissioner can only grant a designated application if satisfied that it is in the community interest to do so.
- 12 In determining whether it is in the community interest the Commissioner is obliged to have regard to a series of matters prescribed by s 17A(2)(a) being:
 - (i) the harm that might be caused by gambling, whether to a community as a whole or a group within a community; and
 - (ii) the cultural, recreational, employment or tourism impacts; and

¹ Section 17A(2)(b).

² Section 17A(3).

- (iii) the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
- (iv) any other prescribed matter

13 Section 17A(4) 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.

14 The guidelines provide that in determining whether an application is deemed to be a designated application for the purposes of s 17A(4)(b) of the GM Act, the Commissioner may have regard to (but is not limited to only having regard to):

- Net Gambling Revenue data for the responsible local council for the preceding financial year (where responsible local council means the council under the Local Government Act 1999 for the area in which the relevant premises are situated);
- Social profile information, such as the Socio-Economic Indexes for Areas (SEIFA) scores at the Statistical Area Level 2 (SA2) and the LGA and the location of existing licensed premises within the locality.
- SEIFA (Socio-Economic Indexes for Areas) data published by the Australian Bureau of Statistics at the SA2 and LGA for the statistical area where the proposed premises are to be located.
- The scale of the proposed gaming operations relative to the other business to be conducted at, or in connection with, the premises;
- The length of time the premises has been licensed to operate gaming machines;
- Overall capacity of the licensed premises;
- Whether the applicant has an approved responsible gambling agreement with an industry body; and
- Any information submitted by the applicant in support of why/why not its application should be deemed a designated application.

15 There are other provisions within the GM Act that deal with designated application.

16 Section 27AA(4) of the GM Act provides:

The Commissioner may, after receiving an application for variation of a gaming machine licence, determine that the application is to be a designated application for the purposes of section 17A.

17 Section 27G authorises the Commissioner to designate a removal of a gaming machine licence to be a designated application.

18 Section 27J authorises the Commissioner to designate an application to amalgamate clubs holding gaming machine licences and an application to transfer gaming machine entitlements between clubs to be designated applications.

19 It will be apparent that there appears to be some tension between s 17A(4)(b) and these other provisions.

20 The criteria for determining that an application is to be deemed a designated application under 17A(4)(b) of the GM Act are quite prescriptive. In contrast to this, there are no identified criteria prescribed in connection determining under ss 27AA(4), 27G and 27J of the GM Act that an application is to be a designated application.

21 This is important, because it begs the question as to whether in this case, the apparent power to determine an application to vary the conditions of a licence to be a designated application under s 27AA(4) of the GM Act is a separate means of determining an application to be a designated application that is independent of s 17A(4)(b) of the GM Act or whether it is subordinate to that provision.

22 In resolving this issue consideration needs to be given to the established principles of statutory construction.

23 It is well settled that an Act be read as a whole and that apparently conflicting provisions, if possible, should be construed to achieve harmonious goals. As McHugh, Gummow, Kirby and Hayne JJ explained in *Project Blue Sky Inc v Australian Broadcasting Authority*:

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to achieve harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court “to determine which is the leading provision and which the subordinate provision, and which must give way to the other”. Only by determining the hierarchy of the provisions will it be possible in

many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.³

- 24 These provisions can be reconciled so that the Act functions in a harmonious and coherent fashion by recognising the that the function of ss 27AA(4), 27G and 27J is to identify the types of applications that the Commissioner might deem to be designated applications and that one of the functions of s 17A(4)(b) is to provide how the Commissioner might determine an application to be a designated application.
- 25 It follows that the Commissioner could only have determined that the application that is the subject of this review was to be a designated application by reference to the criteria prescribed through s 17A(4)(b) of the Act. That in turn meant that he was required to consider the matters alluded to in the guidelines. Of particular significance in this case, the guidelines contemplate consideration of any information submitted by the applicant in support of why its application should be deemed a designated application.

Background

- 26 To put the applicant's complaints into context, it is necessary for me to set out what transpired before the Commissioner.
- 27 The applicant filed an application on 8 June 2022 seeking a variation of conditions to enable it to change the authorised gaming hours of its gaming machines licence to 8.00 am to 2.00 am. Under its existing authorisation, it is permitted to operate its machines from 6.00 am to 12 midnight. The application was supported by a planning approval from the City of Onkaparinga.
- 28 By email dated 22 June 2022, the Commissioner corresponded with the applicant. Included in the email was the following:

Pursuant to section 27AA(4) of the Gaming Machines Act 1992 (the Act), **the Liquor and Gambling Commissioner (the Commissioner) has determined that this application is to be a designated application for the purposes of section 17A of the Act on the basis that the variation of gaming trading hours proposed is significant** and therefore consideration of this application necessitates a consideration of the potential impact on the community.

A designated application will not be granted unless the Commissioner is satisfied that the application is in the community interest. In making this determination, the Commissioner will take

³ [1998] HCA 28 at [70]; (1998) 194 CLR 355 at 381-2.

into account the unique circumstances of the application and consider the evidence provided by you in your community impact submission. (Emphasis mine)

- 29 The email then went on stipulate what the applicant then needed to do in light of this determination.
- 30 The applicant, through its solicitors responded to the Commissioner's email by letter dated 14 July 2022. The letter noted that the reason given for deeming the application to be a designated application was that the change to authorise hours was "significant", and that no other reasons were provided. It then went on to state:

Our client is surprised at this approach. We note that:

1. Applications of this type have not been controversial in the recent past;
2. Our client was not afforded any opportunity to make submissions as to whether the application should be treated as a designated application; and
3. The trading hours sought would effectively reduce the total gaming hours for venues in the local area (using a radius of approximately 4.7 km. We enclose a table setting out the permitted trading hours of those venues for your reference.

- 31 The letter then offered to compromise by proposing a later start time to reduce the trading hours in exchange for a reconsideration of the determination that the application to vary was to be a designated application.
- 32 By email dated 21 July 2022, the Commissioner rejected the revised proposal. Included in the email was the following:

The Commissioner has determined your client's application to vary trading hours of the gaming licence is to be designated as your client is seeking to vary its hours to trade in gaming later into the early hours of the morning. The Commissioner's position is that he will need to be satisfied that is in the community interest.

- 33 On the same day, the applicant lodged the within application for review. The applicant then forwarded a copy of the application to the Commissioner and enquired as to whether the Commissioner wished to intervene in the proceedings before this Court. By letter dated 9 August 2022, the Commissioner responded. Included in the response was the following:

The Commissioner does not have the power to intervene on the application currently before the Court. However, as the reasons for

decision provided at the time were insufficient, for the benefit of your client and the Court, the Commissioner wishes to provide more detailed reasons as to why the application was determined to be a designated application under section 27AA(4) of the Gaming Machines Act 1992 (the Act).

...

In determining whether the application should be a designated application, the Commissioner considered the following information.

1. The Commissioner has noted a recent increase in gaming venues varying trading hours to trade later in the night and is concerned this trend may result in increased gaming activity across the State.
2. The suburb of Old Noarlunga, where the premises is located, is considered to be more disadvantaged than the State average in accordance with the SEIFA data obtained through the Australian Bureau of Statistics.
 - a. The 2016 Index of Relative Socio-economic Advantage and Disadvantage shows that Old Noarlunga is at the 26th percentile within the State of South Australia.
 - b. Similarly, the 2016 the 2016 Index of Relative Socio-economic Disadvantage shows that Old Noarlunga is at the 34th percentile within the State of South Australia.
3. The Net Gambling Revenue for the City of Onkaparinga, where the premises is located, is higher than the State average.
 - a. Data from the 2021-22 period shows the State average revenue per machine was \$71,537.06. The average revenue per machine in the City of Onkaparinga during this same period was \$97,607.87.

Based on this information, the Commissioner was of the opinion that this application held the potential to increase gambling related harm in the area, which is inconsistent with the objects of the Act. The Commissioner chose to exercise his discretion to designate the application so that your client could address certain requirements and have an opportunity to demonstrate that granting this application would not contribute to gambling harm and that it would be in the community interest to vary the authorised trading hours.

- 34 On review, the applicant tendered an affidavit of Ms Donna Baker, who amongst other things, assists in the management of gaming operations of several venues, including the Old Noarlunga Hotel. She stated that she had been involved in a number of applications to the Commissioner to vary

trading hours following the introduction of amendments to the Act that made provision for an application to be a designated application. She said that none were deemed to be designated applications. She said that two of them involved extending trading hours to 3.00 am. She said that had she been made aware that the Commissioner was contemplating determining this application to be a designated application, she would have sought advice as to how to respond.

- 35 Ms Baker noted that the community impact assessment guidelines suggest as a guide that the relevant locality is within a two-kilometre radius of the premises and stated that within that area, the Old Noarlunga Hotel was the only gaming venue. She noted that the Commissioner had stated average revenue per machine in the City of Onkaparinga during 2021-22 period was \$97,607.87, compared with a State average of \$71,537.06. She produced figures for the average revenue per machine at the Old Noarlunga Hotel for the same period, which showed that the revenue was about \$57,000 per machine.
- 36 Ms Baker's affidavit included a map of the City of Onkaparinga area which demonstrated that it is a large council area and that the area within a two-kilometre radius of the Old Noarlunga Hotel is relatively small when compared to the overall council area.

Denial of procedural fairness?

- 37 In light of my conclusion that the Commissioner could only have made the determination to deem this a designated application through s 17A(4)(b) of the Act, his determination must be set aside. The guidelines promulgated under that provision oblige the Commissioner to consider of any information submitted by the applicant in support of why its application should not be deemed a designated application. It follows that the Commissioner must inform an applicant that he or she is contemplating deeming the application to be a designated application, because if it were otherwise, the applicant would not be able to provide the Commissioner with information relevant to this issue.
- 38 Even if this was not so, on general principles of natural justice the applicant was entitled to procedural fairness and that in turn meant that it was entitled to know that deeming the application to be a designated application was being contemplated, and that it should have been given the opportunity to be heard in connection with this.
- 39 This is so because a determination that an application is a designated application has the potential to cause significant detriment to an applicant. Quite apart from the trouble and potential expense associated with undertaking the community impact assessment, it potentially raises the bar

in terms of whether the application will be granted. If the determination should not have been made, it could cause the applicant a real injustice.

- 40 In the very recent decision of the High Court in *Nathanson v Minister for Home Affairs*⁴ the Court re-affirmed the need for even an administrative body to afford a party adversely affected by a ruling, to be given procedural fairness. Eldeman J described the right of a party to have a reasonable opportunity to respond to adverse allegations as ‘[o]ne of the innate, or natural, elements of justice’.⁵ He spoke of it in terms of it being basic and fundamental.
- 41 The applicant’s complaint that the Commissioner denied it procedural fairness in a way that vitiates his order has been made good.

Remittal?

- 42 The powers given to this Court on review contemplate that notwithstanding the identification of error, it may be entirely appropriate for the Court to remit the matter back to the Commissioner to reconsider the matter. This accords with what occurs in other jurisdictions. In *McAdam v Robertson*⁶ Doyle CJ observed:

It is quite common for a matter to be remitted by this Court to a judge at first instance for further hearing, after this Court has decided that the judge erred on matters of fact that undermine the decision reached. It is equally common for the High Court to remit matters for further consideration by the Full Court, after errors have been found by the High Court in the reasoning of the Full Court. Such orders are made on the premise that, the error having been identified, the court below will further consider the matter fairly and with an open mind. On applications for judicial review, it is common for matters to be returned to tribunals and other administrative decision makers for further consideration, after a finding that they did not take into account all relevant matters, or that they took into account irrelevant matters. In other words, the truth of the matter is that **the administration of justice rests on the premise that judges, true to the judicial oath, and other decision makers, are capable of properly and fairly dealing with a matter in the course of which they are found to have made errors of fact or of law.**⁷ (Emphasis mine)

- 43 But there is another equally important principle that must be considered in a case such as this, and that is, the appearance of impartiality. As Heydon,

⁴ [2022] HCA 26.

⁵ Ibid at [88].

⁶ [1999] SASC 169;(1999) 73 SASR 360.

⁷ Ibid at [57].

Kiefel and Bell JJ observed in *British American Tobacco Australia Services Ltd v Laurie*:⁸

It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. **It is the public's perception of neutrality** with which the rule is concerned. In *Livesey* it was recognised that the lay observer might *reasonably* apprehend that **a judge who has found a state of affairs to exist**, or who has come to a clear view about the credit of a witness, **may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.**⁹ (Emphasis mine)

- 44 In this matter, through the letter from the applicant's solicitors of 14 July 2022, the Commissioner was asked to reconsider his decision. The letter alluded to the Commissioner's failure to provide the applicant with any opportunity to make submissions as to whether the application should be treated as a designated application. At that point, the Commissioner was on notice about a complaint of a denial of procedural fairness. In light of it, he could have revoked his determination to deem the application to be a designated application, identified the reasons why he made the determination, and then given the applicant an opportunity to make submissions as to why the determination should not be made. Instead, he simply confirmed his determination and did not provide reasons until after the application for review was lodged in this Court.
- 45 The applicant's sense of grievance at not being afforded procedural fairness would have been further heightened upon receipt of the Commissioner's letter of 9 August 2022. At that point, it would have become apparent to it that the Commissioner had based his decision on factual matters that potentially painted an inaccurate picture. The applicant would have been entitled to think: If only I had been given the opportunity to argue that the relative disadvantage of the suburb of Old Noarlunga was not reflective of those likely to gamble at the Old Noarlunga Hotel and that the average losses at the hotel were well below the State average.
- 46 It seems to me that there are only two explanations as to why the Commissioner did not act upon the complaint of a want of procedural fairness. Either he did not consider that this was a matter that warranted giving the affected party procedural fairness, or he considered that there was nothing that the applicant could say and no evidence that the applicant could adduce, that would cause him to change his mind.

⁸ [2011] HCA 2; (2011) 242 CLR 283.

⁹ *Ibid* at [139].

- 47 In the context of this case, the following observations of Megarry J in *John v Rees*¹⁰ are particularly relevant. He said:

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. ‘When something is obvious,’ they may say, ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think, do themselves justice. **As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.**¹¹ (Emphasis mine)

- 48 I stress that at issue here is not actual bias. It is the perception of bias that is of concern. Having regard to the history of this matter, in my opinion, ‘in all the circumstances the parties or the public might entertain a reasonable apprehension that [the Commissioner] might not bring an impartial and unprejudiced mind to the resolution of the question involved in it’.¹²
- 49 Accordingly, the applicant’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.

Should an order be made that the application is a designated application?

- 50 In conformity with the requirements of the guidelines I must consider the information submitted by the applicant in support of why its application should not be deemed a designated application.
- 51 In addition to the matters that I have already referred to, the applicant adduced evidence that within a five-kilometre distance of the Old Noarlunga Hotel there are seven venues that hold gaming machine licences, and it produced the gaming licences for each venue. They reveal that most have gaming licences that permit them to trade as late, or later, than the revised trading conditions sought by the applicant.

¹⁰ [1970] Ch 345.

¹¹ *Ibid* at 402.

¹² *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at 293-294.

- 52 The Beach Hotel Seaford is situated on the corner of Commercial Road and Griffiths Drive, Seaford Rise, 2.36 kilometres from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 34 machines from 6.00 am to midnight, Monday to Saturday and from 8.00 am to midnight on Sundays.
- 53 Mick O'Shea's Irish Pub is situated on Main South Road, Hackham, 3.36 kilometres from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 40 machines from 8.00 am to 2.00 am, Monday to Wednesday, 8.00 am to 3.00 am on Thursdays, 9.00 am to 3.00 am on Fridays and Saturdays, and 9.00 am to 2.00 am on Sundays.
- 54 Aussie Inn is on Main Road, Hackham, 4.03 kilometres from the from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 22 machines from 10.00 am to 4.00 am, Monday to Saturday and from 10.00 am to midnight on Sundays.
- 55 The South Adelaide Footballer's Club is situated in Lovelock Drive, Noarlunga Downs, 4.20 kilometres from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 40 machines from 7.00 am to 2.00 am, Monday to Saturday and from 8.00 am to midnight on Sundays.
- 56 The Port Noarlunga Hotel is situated in Gawler Street, Port Noarlunga, 4.67 kilometres from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 40 machines from 8.00 am to 2.00 am, Monday to Sunday.
- 57 The Hotel McLaren is on Main Road, McLaren Vale, 4.71 kilometres from the from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 22 machines from 9.00 am to 2.00 am, Monday to Saturday and from 8.00 am to midnight on Sundays.
- 58 The Colonnades Tavern in within the Colonnades Shopping Centre on Beach Road, Noarlunga Centre, 4.77 kilometres from the Old Noarlunga Hotel. Its gaming machine licence enables it to operate 40 machines from 8.00 am to 2.00 am, Monday to Friday, 9.0 am to 3.00 am on Saturdays and from 9.00 am to 2.00 am on Sundays.
- 59 The applicant tendered its general and hotel licence. It reveals that it can trade for on and off licence consumption from 5.00 am to midnight Monday to Saturday and from 8.00 am to midnight on Sundays and that it has a crowd capacity of 400.
- 60 Assuming that the information contained in the Commissioner's letter of 9 August 2022 is correct, it must be accepted that in accordance with the SEIFA data obtained through the Australian Bureau of Statistics, the suburb of Old Noarlunga is more disadvantaged than the State average. It

must also be accepted that the net gambling revenue for the City of Onkaparinga is higher than the State average.

- 61 But these matters must be evaluated in light of the trading figures of the machine losses at the Old Noarlunga Hotel which are well below the State average. This leads to the inference that the relative disadvantage of those living in the suburb of Old Noarlunga is not reflective of excessive harm to those likely to gamble at the Old Noarlunga Hotel.
- 62 Looked at in this light, there is nothing about the social profile of those likely to take advantage of the later trading hours, which appears to be of concern.
- 63 The overall capacity of the hotel of 400 suggests that it is a medium sized hotel. It is reasonable to infer that it is a typical suburban hotel, and that gaming is but a component of the applicant's business and is not the sole focus.
- 64 I was told the gaming machines licence has been in force for these premises since 7 November 1995 and this hotel has had a hotel licence since 1850. There is no information suggesting that the applicant has any adverse issues in respect of its conduct of a gaming machine venue or that it lacks an approved responsible gambling agreement with an industry body.
- 65 The guidelines do not confine the Commissioner to only having regard to the matters specified in them. Although this suggests that the power to consider other matters is unfettered, the power cannot be exercised arbitrarily or without good reason. Although the following observations of Doyle CJ in *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd*¹³ were made in respect of the discretion conferred upon licencing authorities in connection with applications under the *Liquor Licensing Act 1997*, in my opinion similar principles apply in connection with the discretion to go beyond the matters stipulated in the guidelines. He said:
- ...the discretion must be exercised for a purpose consistent with the Act, and to advance or to maintain principles and policies found in the Act, or which the Court in its experience finds appropriate or necessary in the proper application of the Act. On the other hand, the Court must be careful not to use the discretion as a basis for imposing views about what is desirable, unless those views are firmly linked to the principles on which the Act operates or is administered.¹⁴
- 66 The objects, principles and policies found in the GM Act and the GA Act are focused on matters such as harm minimisation, ensuring that gaming

¹³ [2002] SASC 17; (2002) 81 SASR 337.

¹⁴ *Ibid* at [28].

is fair and free from interference and criminal influence and exploitation, ensuring that minors do not gamble or be encouraged to gamble, meeting the needs and aspirations of the community, and protecting the interest of the State, having regard to the financial benefit it derives from gambling.

- 67 The only one of these matters that seems potentially relevant in this case is harm minimisation.
- 68 Indeed, one of the reasons advanced by the Commissioner that he said influenced his decision to determine this to be a designated application was his notation of a recent increase in applications seeking to vary gaming trading hours to trade later in the night. The Commissioner was concerned that this trend may result in increased gaming activity across the State.
- 69 Given that the focus of a designated application is directed towards the local community, I struggle to see how this wider consideration would be relevant to this application.
- 70 But in any event, even if this is a matter of genuine concern, the Commissioner is given ample powers to allay that concern, short of deeming an application to vary trading hours to be a designated application. For example, s 9 of the GA Act grants the Commissioner extensive powers in connection with applications that includes the power to grant an application on an interim basis and to grant an application on the condition that the applicant satisfies the Commissioner as to a particular matter within a period determined by the Commissioner.
- 71 In summary, this appears to be a modest application to change the trading hours of an established gaming venue attached to a hotel that has a significantly lower loss per gaming machine relative to other venues in the relevant council area and well below the State average. If the application is granted, it will result in gaming trading hours that are broadly consistent with many other gaming venues in the general vicinity of the venue.
- 72 Any concerns that the Commissioner may have as to adverse consequences matters that might arise from the grant of the application could be addressed by measures, such as granting the variation on an interim basis.
- 73 In the circumstances, in my opinion, it is not appropriate to determine this application to be a designated application. I therefore revoke the Commissioner's determination and direct him to deal with the applicant's application as a routine application and not as a designated application.