

LICENSING COURT OF SOUTH AUSTRALIA

CAVAN TRADING PTY LTD T/AS CAVAN HOTEL

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

CASE NO/S: LC-23-00070

HEARING DATE: 14 June 2023

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 21 September 2023

CATCHWORDS:

*Application for review of the Liquor and Gambling Commissioner's rejection of an application to vary a designated gaming area and redefine licensed premises – The applicant is the Cavan Hotel which is in a sparsely populated industrial area on the fringe of Adelaide – The hotel has a kitchen area which has not be used since 2016 and an adjacent dining area and wishes to expand its gaming room into these areas – The Commissioner's delegate refused the applications because to grant them would take away from the undertaking carried on at the premises; it would sanction the hotel turning into a gaming venue; and it would set an undesirable precedent that could lead to the collapse of traditional hotels – **Held** that the delegate erred in finding that the activities at the hotel would change as the kitchen has been closed for many years – **Held** that a general and hotel licence enables the holder of such a licence to trade in ways that are different to how entities previously traded under a hotel licence and the delegate's personal disapproval of the proposed business model was not a matter that she could take into consideration – **Held** that the Commissioner has means available to deal with applications that raise a concern around harm cause by gaming and in any event this is a unique case such that an undesirable precedent would not be established by granting the applications – **Held** that on the evidence the applications should have been granted – Gaming Machines Act 1992, Liquor Licensing Act 1997, Liquor Licensing Act (Liquor Review) Amendment Act 2017.*

Peninsula Providore (Decision of the Liquor and Gambling Commissioner dated 13 April 2021)

Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police
[2020] WASCA 157

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

Parafield Plaza Supermarket [2023] SALC 73

Mansfield Park Hotel (SA) Pty Ltd [2023] SALC 83

REPRESENTATION:

Applicant: Mr G Coppola on behalf of the Australian Hotels Association

- 1 This is an application seeking a review of a decision of a delegate of the Liquor and Gambling Commissioner rejecting an application to vary a designated gaming area under the *Gaming Machines Act 1992* (the GM Act) and redefine licensed premises under the *Liquor Licensing Act 1997* (the Liquor Act).
- 2 The applicant, Cavan Trading Pty Ltd, is the proprietor of the Cavan Hotel, which is situated on the western side of Port Wakefield Road, just north of Gepps Cross, about ten kilometres or so north of the Adelaide CBD.
- 3 The Cavan Hotel has a gaming area that presently houses 36 gaming machines.¹ It wishes to expand the area in which they are housed, doubtless to make it a more attractive space.
- 4 The application was supported by a report prepared by Commercial Licensing Specialists dated 9 March 2023. The report noted that the Cavan Hotel had existed for many years and was due for renovation. It stated that the purpose of the application was to enable an upgrade to occur that would visually enhance the experience for customers and increase the value of the amenity.
- 5 The report noted that the net gaming revenue (NGR) of the 36 gaming machines at the Cavan Hotel for 2021-22 was \$44,236, compared to the State average NGR of \$71,503 and the Port Adelaide Enfield Council area² average NGR of \$75,405. The report stated that in light of these figures, gaming cannot be regarded as the Cavan Hotel's main activity. It submitted that the redevelopment should be regarded as reflecting "the main vision of the site being that of a family atmosphere of gatherings and socialising within the local community." It submitted that the main activity of the Cavan Hotel should be seen as to sale of liquor for on premises and off premises consumption.
- 6 The Cavan Hotel has a kitchen area and dining area, although the kitchen area is not used as such and has not been functioning as a hotel kitchen since 2016.
- 7 Although not part of the licensed premises, the Cavan Hotel is identified with the Cavan Hotel Steak Van, which sells steak sandwiches, hamburgers and the like from 9.00 am to 6.00 pm, seven days a week. The applicant intends to also establish a pizzeria. Patrons of the Cavan Hotel can presently order meals from the Steak Van and it is intended that they will be able to order from the pizzeria, for delivery to them so that the meals can be consumed in the hotel. It is not within the applicant's present plans for the hotel's kitchen to be re-established.

¹ The Cavan Hotel has 40 gaming machine entitlements.

² The Cavan Hotel is within the Port Adelaide Enfield Council area.

Hence its proposal to use the existing kitchen and dining areas as the site of its renovated and extended gaming area.

- 8 The applicant submitted that it sought to increase the size of its gaming room to meet the current demand for gaming services and that patrons now seek more personal space and privacy as well as a space that gives an illusion of an open plan environment without the stigma that can be associated with smaller gaming rooms.
- 9 The delegate reasoned that because the proposed gaming area is larger than the current area, this would take away from the undertaking carried out at the premises.
- 10 The delegate stated that if she approved the application she would be sanctioning turning the Cavan Hotel primarily into a gaming venue. She noted that the Cavan Hotel was first issued with a liquor licence in 1856. She then made reference to a decision of another delegate that had included a discussion about the role that hotels have played and their significant provision of hospitality and facilitating a focal point for the community.
- 11 The delegate stated that to allow the application would be inconsistent with s 2(e) of the GM Act, which provides that an object of that Act is:

to ensure that the club and hotel gaming machine industry develops in a manner consistent with the needs and aspirations of the community and is in the community interest.
- 12 The delegate then stated that the grant of the application would create an undesirable precedent. She said:

...other GML holders could follow suit by reducing the size of their bar and dining to a minimal ‘footprint’ and maximize gaming which could ultimately lead to the collapse of traditional Hotels that have played such a vital role in the history and social fabric of the State, which would negatively impact on the community and would be contrary to the aspirations of the public.

...I am also mindful of the potential impact it could have on country Hotels, arguably the lifeblood of the outback. The temptation for licensees to reduce overheads by reducing their bar and dining and rely largely on gaming for revenue could have a disastrous impact on country towns and tourism.
- 13 On review, the applicant submitted that the delegate appeared to reason that to allow that application would result in a change to what was on offer at the Cavan Hotel. It submitted that this was mistaken because the hotel’s kitchen had already been closed and had remained closed at least since 2016. It added that the proposed new pizzeria meant that there

would be an increase in the food offerings of the hotel. It submitted that the Steak Van and pizzeria will provide typical “pub” food in accordance with the demands and requirements of the hotel’s patrons. It added that in any event the delegate gave too much weight to the issue of meals. It submitted that the effect of the delegate’s decision is to require hotels with gaming machines not only to keep their kitchens, but to operate them. It noted that the requirement for hotels to provide meals was removed by *Liquor Licensing Act (Liquor Review) Amendment Act 2017*.

- 14 It submitted that the delegate’s focus on preserving the so called “traditional” attributes of a hotel was misplaced because such a concept no longer exists. It added that the Commissioner had accepted this as evidenced by the decision in *Peninsula Providore*³ in which a general and hotel licence was granted. It contended that the licensed premises in that case was effectively an olive processing shed in a paddock with limited liquor offerings, limited food offerings, and limited trading hours.
- 15 It submitted that the delegate’s decision sets a dangerous precedent because its effect is tantamount to the Commissioner exercising the power to supervise and overrule business decisions of hotel operators.
- 16 It submitted that this is a modest application that does no more than seek to improve the gaming experience for gaming patrons in circumstances where there will remain plenty of room for non-gaming patrons and continued food offerings and no evidence of any negative community impact. It submitted that the types of factors that were relevant were those that pertain to the application for a gaming machine licence under s 15(5) of the GM Act. By reference to these it contended that the gaming area was suitable for that purpose; the arrangements proposed for the security of the premises, each gaming area and the gaming machines, and of the gaming operations generally, were adequate; the conduct of the proposed gaming operations on the premises 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; and the conduct of the proposed gaming operations on the premises would not detract unduly from the character of the premises, the nature of the undertaking carried out on the premises or the enjoyment of persons ordinarily using the premises (apart for the purpose of gaming); and that no proposed gaming area is so designed or situated that it would be likely to be a special attraction to minors.
- 17 The application for review was supported by a statement by the director of the Cavan Hotel, Terry Board, as well as his oral evidence.

³ Decision of the Liquor and Gambling Commissioner dated 13 April 2021.

- 18 Mr Board stated that when he took over the Cavan Hotel in 2021 the hotel was in a poor condition. He said that comprised of an old unused kitchen adjacent to a small dining area that was used for adult entertainment advertised as XXX explicit entertainment, a front bar with only male amenities, a walk in bottle shop, and a separate saloon bar. He said:

It had an explicit sex licence, and it was pretty much where the kitchen and dining room was, it pretty much had two security on every day, seven days a week, and they had just sex acts, pretty much.

- 19 He said that the Cavan Hotel is in a big industrial area with few if any residents living within probably a kilometre and a half. He said that the patronage was mainly male truck drivers and labourers, with some limited numbers of women occasionally using the gaming room. He said that a lot of people on lunchbreaks come down and ordering from the Steak Van. He said that because they deliver into the hotel it has a menu for the Steak Van, and they will bring that across to people in the bar for them to eat.

- 20 He said the gaming area was average and had a very old fleet of machines, in a very small, tight room. He explained:

The reason we bought it was probably because we thought that obviously the sex acts would have detracted from the possibility of including gaming, plus the old fleet of machines, plus the room was already tight with the 32, and they didn't have their own, they shared toilets with the people that were there for the sex acts, and the people from the Steak Van. So part of our increasing the size it was also to give them their own amenities, to the gaming room, give them their own toilets and facilities, so they didn't have to share.

- 21 Mr Board spoke of the change of clientele since he took over. He said that whilst it remains an industrial area, it has attracted more women.

- 22 He said that he had spent \$500,000 upgrading 20 of the hotel's gaming machines and that the current gaming room is greatly inadequate because of the increased size of the machines and patron expectation who had become accustomed to wider space following distancing measures implemented at gaming venues generally during the Covid-19 pandemic.

Consideration

- 23 With respect, in my opinion there are a number of difficulties with the delegate's reasoning.

- 24 First, was her concern that to allow that application would result in a change to the activities being conducted at the Cavan Hotel. There was no evidence to support this. The kitchen has been closed for many years. The effect of the grant of the application will have no negative impact upon the range of activities on offer. Indeed, given that the proposal includes the creation of a pizzeria, the range of food offerings at the hotel will increase.
- 25 Second, was the delegate's concern that the business to be conducted at the hotel strayed impermissibly away from the conventional notions of a hotel. My impression is that she regarded the notion of a licensed entity trading under a general and hotel licence whose business model was focussed on the sale of liquor and providing gaming machines as generally undesirable and that this was particularly so here, involving as it does one of the oldest hotel licences in this State.
- 26 The Commissioner's power to determine the application is conferred by s 24 of the GM Act and s 53 of the Liquor Act. Both Acts confer upon the Commissioner an unqualified discretion to refuse an application on any ground. They both require the Commissioner not to grant an application as a matter of course without a proper inquiry into its merits, and direct that the application cannot be granted unless the Commissioner is satisfied that to grant the application would not be contrary to the public interest.
- 27 But despite the breadth of these provisions, the discretion is not at large, and it must be exercised with the objects of both Acts firmly in mind.⁴ The Commissioner and this Court must also heed the caution expressed by Doyle CJ in *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd*⁵ of being "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."⁶
- 28 Whilst it must be accepted that the Liquor Act contemplates discrete categories of licence and for there to be some correlation between the licence and the business model under which the licence operates, the position is much more fluid than was previously the case. This was explored in *Parafield Plaza Supermarket*.⁷ In that case the Court noted that prior to the recent amendments to the Liquor Act that changed many of the categories of licence, a hotel licence authorised the licensee to trade as a hotel as that concept would be generally understood. It observed that the Liquor Act provided that the licensed premises would

⁴ See, for example: *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2020] WASCA 157 at [161]-[166].

⁵ [2002] SASC 17; (2002) 81 SAST 337.

⁶ *Ibid* at [28].

⁷ [2023] SALC 73.

be open for certain minimum hours, it would offer for sale liquor for on and off premises consumption, with an expectation that meals would be available at certain times. It then made the point that a hotel “licence could only be granted if the licensing authority was satisfied, having regard to the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are or are to be situated, that the licence was necessary in order to provide for the needs of the public in that locality. Those needs could be expected to apply to the full suite of services that a hotel might be expected to provide.”⁸ The Court then made the point that “if it were otherwise, the public demand would already be adequately catered for”⁹ such that the hotel licence would not have been granted.

- 29 The Court then made the following observations about the licence category that has replaced the hotel licence:

It is instructive that the hotel licence has now been replaced by the licence now described as a general and hotel licence. The holder of such a licence can sell liquor for consumption on premises at any time and sell for consumption off premises between 8 am and 10 pm subject to the qualification that it can only do so for up to 13 hours a day. There is no longer an expectation that meals will be provided. There is no longer a requirement that the premises be open for certain minimum hours. The licence can be granted even though it is not necessary to meet the needs of the public. It is sufficient that it is in the interests of the relevant community to grant the licence. Collectively these changes suggest to me that an entity trading under a general and hotel licence may now trade in a way that might not resemble how entities that previously traded under a hotel licence were expected to trade.¹⁰ (Emphasis added mine)

- 30 In this case, the Cavan Hotel will sell liquor for on and off premises consumption. It will provide opportunities for those, so inclined, to use gaming machines. It will also make available a range, albeit limited, of food options. In my respectful opinion, the delegate’s concern that it does not seem to fit within the notion of how a general and hotel licence might trade was misplaced, and her personal disapproval of the applicant’s business model was not a matter that she could take into consideration.

- 31 The delegate was right to be concerned that changes to licensed premises involving gaming machines can have detrimental effects on local

⁸ Ibid at [70].

⁹ Ibid.

¹⁰ Ibid at [71].

communities. As this Court recently observed in *Mansfield Park Hotel (SA) Pty Ltd*:¹¹

In connection with gambling, if the circumstances give the decision-maker pause, or ring alarm bells, a conservative approach is compelled.¹²

- 32 But the Commissioner has options available to deal with this that do not necessarily require the refusal to grant an application out of concern that an undesirable precedent might be created. If, in connection with a country hotel, the Commissioner has concerns that changes to the hotel's layout and business model might have negative consequences, the option of designating the application pursuant to s 17A(4)(b) of the GM Act so as to await the outcome of the consultation and additional information that a designated application entails, could be considered.
- 33 Moreover, this case is unique. It involves a locality that is on the fringe of metropolitan Adelaide that is largely devoid of residents. It concerns an application calculated to facilitate the change of a tired looking hotel with a male focused business model into a modern hotel, that is attempting to appeal to a wider demographic. With respect, the delegate's concern that to grant the application would create a negative precedent was misplaced.
- 34 I think it is reasonable to draw the inference that every venue that has gaming machines is likely to attract some problem gamblers. It is also reasonable to infer that there is likely to be a relationship between the NGR at a particular facility, and the number of problem gamblers. In *Mansfield Park Hotel (SA) Pty Ltd*¹³ this Court drew the inference that a relatively high NGR suggests that there might be a relatively higher number of problem gamblers residing in the relevant locality using the gaming machines at the venue, than is the norm. I think it is reasonable to also draw an inference the other way in respect of a relatively low NGR. This might suggest a lesser number of problem gamblers using the gaming machines at that venue, than is the norm.
- 35 In *Mansfield Park Hotel (SA) Pty Ltd*¹⁴ this Court thought it significant that the venue had a NGR that was nearly 80% above the State average NGR. In this case, I think it is significant that the NGR at the Cavan Hotel in the 2021-22 financial year was nearly 40% below the State average NGR. Whilst it is to be expected that the upgrading of the Cavan Hotel will make it more attractive and that more gaming might take place as a result, because it starts from such a relatively low base, the granting

¹¹ [2023] SALC 83.

¹² *Ibid* at [65].

¹³ *Ibid*.

¹⁴ *Ibid*.

of this application ought not give the decision-maker pause, or ring alarm bells.

Conclusion

- 36 In my respectful opinion, the delegate erred in not granting the applications. The application for review is therefore allowed and in lieu of the delegate's decision, the applications to vary the designated gaming area and redefine the licensed premises are granted. The AHA is directed to forward draft orders to the Clerk of the Court reflecting these conclusions.