

LICENSING COURT OF SOUTH AUSTRALIA

MANSFIELD PARK HOTEL (SA) PTY LTD

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

CASE NO: LC-23-00034

HEARING DATE: 3 May 2023

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 28 August 2023

CATCHWORDS:

Application for review of a decision by the Commissioner to treat an application to vary the trading hours of gaming machines at a hotel in Mansfield Park as a designated application – The Commissioner made that determination without informing the applicant of his intention to do so – Following the decision of this Court in Duxton Old Noarlunga Custodian Pty Ltd (t/as Old Noarlunga Hotel) in which it held that the Commissioner could only designate an application to be a designated application for the purposes of the GM Act after considering “any information submitted by the applicant in support of why/why not its application should be deemed a designated application” the Commissioner invited submissions from the applicant and explained his reasons why he intended to designate the application – The Commissioner referred to the fact that Mansfield Park had a low SEIFA data ranking and reasoned that the suburb was more disadvantaged than the State average – The Commissioner referred to the fact that NGR at the Hotel was significantly higher than the State average – The Commissioner made a finding that many more gaming machines are operated between 2.00 am and 3.00 am at the Hotel than between 9.00 am and 10.00 am – The applicant’s submissions challenged the utility of the SEIFA data, noting that it could reveal a low score for any one of a number of reasons which did not necessarily indicate potential harm from gaming. They noted that the applicant’s records revealed that many of those using the gaming machines at the Hotel came from outside of the suburb of Mansfield Park. They challenged the significance of the comparative NGR at the Hotel, pointing out that it was not clear whether the State average was based on the number of gaming machines as opposed to those actually in use. They noted that there was no comparative measure of the NGR of other gaming venues in the locality.

*They added that in any event, NGR did not establish vulnerability or harm. They challenged the suggested evidence that many more gaming machines are operated between 2.00 am and 3.00 am than between 9.00 am and 10.00 am. They contended that the NGR per machine was in fact slightly higher in the 9.00 am and 10.00 am time slot. They provided data regarding the average gaming machine figures over the course of the day at the Hotel on selected dates on various days of the week in July and August 2022 – The evidence adduced by the applicant reveals that there is consistent, solid use of gaming machines at the Hotel between midday and midnight. It reveals that the amount being gambled and the number of machines used in the periods prior to midday and after midnight are noticeable lower to the midday-midnight period, with similarities in the two separate periods – On review, the applicant submitted that the Commissioner provided insufficient reasons in explaining how he arrived at his February 2023 decision; that their brevity, when looked at from the perspective of a fair-minded observer, would not have allayed the sense of pre-judgment arising from the fact of the earlier decision; and that in any event, the decision was wrong – **Held** that the Commissioner’s failure to address the matters raised by the applicant, meant that his reasons were for legal purposes inadequate – Whether or not they allayed the sense of pre-judgment arising from the fact of the earlier decision to designate the application is a matter that does not require determination – **Held** that the provision of inadequate reasons is an error of law. It follows that the Commissioner’s decision that the application should be treated as a designated application cannot stand and this Court must determine the issue for itself – **Held** that the test for determining whether an application should be designated is whether the grant of the application carries with it a palpable risk of harm, even if proof of that risk falls short of proof on the balance of probabilities – **Held** locality’s low SEIFA provided some evidence of an enhanced risk of problem gambling in that area – **Held** that the venue’s high NGR figure is striking – **Held** that based on the evidence, there is a real prospect that the grant of this application could result in a significant increase in the use of gaming machines at the Hotel, with the real possibility that some will be patrons who do not presently use gaming machines at that time and that some of these patrons will reside in the locality. When these matters are looked at from the perspective of a near 75% differential to the State average in gaming losses at the Hotel, this is an appropriate case to require the consultation and additional information that a designated application entails – **Held** that the Commissioner’s determination is confirmed and the application for review is dismissed – Gaming Machines Act 1992, Gambling Administration Act 2019, Gaming Machines Regulations 2020, Liquor Licensing Act 1997.*

Duxton Old Noarlunga Custodian Pty Ltd (t/as Old Noarlunga Hotel) [2022]
SALC 69

Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR
430

R v Maxwell (1998) 217 ALR 452

Pettitt v Dunkley (1971) 1 NSWLR 376

Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000]
WASCA 258; (2000) 22 WAR 510

Craig v Boren [1976] USSC 213; 429 US 190

Iris Hotels Casula Property Pty Ltd v Liverpool City Council [2022] NSWLEC
1520

*Mount Alexander SC v Victorian Commission for Gambling and Liquor
Regulation & Ors (includes Summary) (Red Dot)* [2013] VCAT 101

Glenroy RSL Sub Branch Inc v Moreland CC [2019] VCAT 583

Nardi v Director of Liquor Licensing (Occupational & Business Regulations)
[2005] VCAT 323

REPRESENTATION:

Counsel:

Applicant: Mr B Doyle KC

Solicitors:

Applicant: Piper Alderman Lawyers

- 1 This is an application seeking the review of a determination made by the Commissioner for Liquor and Gambling (the Commissioner) made in connection with an application made by the applicant, Mansfield Park Hotel Pty Ltd, trading as the Mansfield Hotel (the 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 In *Duxton Old Noarlunga Custodian Pty Ltd (t/as Old Noarlunga Hotel)* this Court described a designated application for the purposes of the GM Act as “a special species of application under the GM Act that is much more onerous than an application that is not a designated application”.¹
- 4 It described what is required as follows:

A designated application must comply with the community impact assessment guidelines, as well as the requirements of the guidelines and any additional requirements imposed by the Commissioner. 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.²

- 5 The applicant contends that its application amounts to no more than a modest variation to its trading hours to bring them into line with nearby venues and that the Commissioner erred in designating it.

¹ [2022] SALC 69 at [9].

² *Ibid* at [10].

- 6 The application for review comes before this Court through s 54(4) of the *Gambling Administration Act 2019* (the GA Act). 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.
- 7 The applicant contends that this Court should exercise the powers conferred by s 54(6)(b) and conclude that the application should not be determined to be a designated application.

Background facts

- 8 The Hotel is a moderately sized, full service hotel, located on Grand Junction Road, Mansfield Park.
- 9 Mansfield Park is within the City of Port Adelaide Enfield council area.
- 10 Grand Junction Road is a major thoroughfare in metropolitan Adelaide that runs from east to west, about eight kilometres north of the Adelaide CBD, connecting the north eastern suburbs to those in the west. It carries a high volume of traffic including many heavy vehicles. The Hotel has an overall capacity of 500 patrons. A significant component of its business is focussed on accommodation and it typically has an 80% occupancy rate. It also has a gaming section and has an authorisation permitting it to operate its gaming machines between 9.00 am to 3.00 am the following day.
- 11 On 14 June 2022, the applicant made application to the Commissioner to vary its authorisation to permit it to operate its gaming machines between 11.00 am to 5.00 am the following day. It also made an application to vary the Hotel's trading hours for liquor licensing purposes and by determination of the Commissioner dated 15 November 2022, these have since been extended to allow on premises consumption until 4.00 am.
- 12 By e-mail dated 22 June 2022, the Commissioner advised the applicant that the application was determined by him to be a designated application for the purposes of the GM Act. The Commissioner did so without giving any notice to the applicant of his intention to do so. The only explanation that the Commissioner provided as to why he decided to treat the application as a designated application was: "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.”

13 In *Duxton Old Noarlunga Custodian Pty Ltd*³ this Court observed that the Commissioner could only designate an application to be a designated application for the purposes of the GM Act after considering “any information submitted by the applicant in support of why/why not its application should be deemed a designated application.”⁴

14 Following delivery of that decision, the Commissioner seems to have accepted that in light of it, his earlier decision to designate the applicant’s application could not stand and by letter dated 16 September 2022, he wrote to the applicant to address this. The letter made reference to the decision in *Duxton Old Noarlunga Custodian Pty Ltd* and stated:

... the Commissioner seeks to remedy the procedural fairness error in respect of this matter in failing to provide detailed reasons, by reference to the Guidelines, as to why the Commissioner considered the application should be designated and affording the applicant an opportunity to be heard in response.

Accordingly, the Commissioner advises the applicant of his intention to designate the application for the reasons outlined below and invites the applicant to make written submissions in response.

15 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.

16 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 (NGR) 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 (SEIFA) scores at the Statistical Area Level 2 (SA2) and the LGA and the location of existing licensed premises within the locality;

³ Ibid.

⁴ Ibid at [14].

- 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, in relation to—
 - Index of Relative Socio-economic Advantage and Disadvantage;
 - Index of Relative Socio-economic Disadvantage;
 - Index of Economic Resources; and
 - Index of Education and Occupation.
- The extent of increase in the number of approved gaming machines sought on premises (for instance, the % increase in the number of approved gaming machines proposed for the venue);
- 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.

17 The letter then went on to explain why the Commissioner had formed “his preliminary view” as to why the application should be a designated application.

18 In the letter the Commissioner noted that based on the Socio-Economic Indexes for Areas (the SEIFA index)⁵ for the suburb of Mansfield Park was more disadvantaged than the State average.

19 He noted that the net gambling revenue for the City of Port Adelaide Enfield council area was slightly higher than the State average based on data for the 2021-2022 period, being \$75,405 per machine, compared to a State average of \$71,537. The NGR is a measure of the difference between the amount of money inserted into each gaming machine less the amount returned to the gamer calculated over a 12 month period.

⁵ The SEIFA index is published by the Australian Bureau of Statistics data that purports to indicate how relatively advantaged or disadvantaged an area is compared with other areas. It is based on statistics that measure income, education, employment, occupation, housing and family structure.

- 20 He noted that the NGR at the Hotel was significantly higher than the State average, being \$124,445 per machine.
- 21 He noted evidence that indicated that many more gaming machines are operated between 2.00 am and 3.00 am than between 9.00 am and 10.00 am.
- 22 He noted that within a two kilometre radius of the Hotel, being the suggested locality identified in the guidelines issued under the GM Act, there were two other gaming venues, both of which were authorised to allow gaming until 5.00 am.
- 23 He noted that there were currently 267 people barred from the Hotel, of which 19 were involuntary, and the remainder voluntary. He expressed concern that the applicant had not facilitated any additional barrings in the preceding nine months. He then expressed the opinion that the “application has the potential to increase gambling related harm in the area, which is inconsistent with the objects of the Act.”
- 24 The letter then invited submissions in response.
- 25 Following requests made by the applicant’s solicitors seeking copies of information concerning the issue of barring, by email dated 17 October 2022, the Commissioner, through his delegate, advised that he no longer relied upon any issues regarding barrings at the Hotel as a ground relevant in determining whether the application should be treated as designated.
- 26 By letter dated 13 December 2022, the applicant, through its solicitors, made submissions to the Commissioner.
- 27 The submissions challenged the utility of the SEIFA data, noting that it could reveal a low score for any one of a number of reasons which did not necessarily indicate potential harm from gaming. They noted that the applicant’s records revealed that many of those using the gaming machines at the Hotel came from outside of the suburb of Mansfield Park, coming from as far away as Semaphore, Ingle Farm, the Adelaide CBD, and Sefton Park, with the majority coming from Alberton, Woodville and Port Adelaide.
- 28 They challenged the significance of the slightly higher NGR for the City of Port Adelaide Enfield council area, noting that that it is a large council area that takes up a significant portion of Adelaide’s western and northern suburbs. They went on to add that by council area, the NGR for the City of Port Adelaide Enfield council area was ranked 11th in the State. They noted that it is significantly lower, by a margin of more than 40%, when compared to the neighbouring councils of Playford, Salisbury, Campbelltown, and Tea Tree Gully.

- 29 They challenged the significance of the comparative NGR at the Hotel, pointing out that it was not clear whether the State average was based on the number of gaming machines as opposed to those actually in use. They noted that there was no comparative measure of the NGR of other gaming venues in the locality. They added that in any event, NGR did not establish vulnerability or harm.
- 30 They challenged the suggested evidence that many more gaming machines are operated between 2.00 am and 3.00 am than between 9.00 am and 10.00 am. They contended that the NGR per machine was in fact slightly higher in the 9.00 am and 10.00 am time slot.
- 31 They provided data regarding the average gaming machine figures over the course of the day at the Hotel on selected dates on various days of the week in July and August 2022. The data included the following:

Monday:

- 10.00 am: 6.33 machines used for a turnover of \$1,221⁶ and a NGR of \$207
- 11.00 am: 14.44 machines used for a turnover of \$4,415 and a NGR of \$460
- 12.00 pm: 25.56 machines used for a turnover of \$6,613 and a NGR of \$471
- 1.00 pm: 28.56 machines used for a turnover of \$7,631 and a NGR of \$395
- 2.00 pm: 31.67 machines used for a turnover of \$9,712 and a NGR of \$1,773
- 3.00 pm: 29.44 machines used for a turnover of \$9,419 and a NGR of \$44
- 4.00 pm: 30.78 machines used for a turnover of \$10,597 and a NGR of \$484
- 5.00 pm: 29.78 machines used for a turnover of \$12,606 and a NGR of \$182
- 6.00 pm: 28.78 machines used for a turnover of \$12,259 and a NGR of \$1,469
- 7.00 pm: 27.22 machines used for a turnover of \$10,304 and a NGR of -\$57

⁶ In recording the data I have omitted the cent figure as it is immaterial.

8.00 pm:	31.44 machines used for a turnover of \$11,858 and a NGR of \$765
9.00 pm:	31 machines used for a turnover of \$13,504 and a NGR of \$1,986
10.00 pm:	29.67 machines used for a turnover of \$15,407 and a NGR of \$233
11.00 pm:	29.89 machines used for a turnover of \$15,435 and a NGR of -\$199
12.00 am:	26.11 machines used for a turnover of \$13,246 and a NGR of \$2,266
1.00 am:	24.11 machines used for a turnover of \$9,874 and a NGR of \$966
2.00 am:	17.22 machines used for a turnover of \$5,442 and a NGR of \$1,407
3.00 am:	14.44 machines used for a turnover of \$4,494 and a NGR of -\$733

32 It can be seen that for the first two hours machine use and turnover is relatively low, before steadily climbing to a turnover level of \$10,000 or more per hour through around 30 machines until midnight, before declining, with the 2.00 am to 3.00 am figures being comparable to the 11.00 am to midday figures.

33 With some minor variations, this pattern is replicated for all other days of the week that were provided. Based on this data, the peak period of machine use and turnover is consistently during the 12 hour period from midday to midnight with a progressive increase in the hours before midday and a progressive decline in the hours after midnight. In respect of the use of gaming machines before midday and after midnight, the data for the other days of the week provided by the applicant was as follows:

Tuesday

Pre-midday

10.00 am:	8.11 machines used for a turnover of \$1,738 and a NGR of \$139
11.00 am:	18.44 machines used for a turnover of \$5,063 and a NGR of \$1,093

Post-midnight

- 1.00 am: 21.11 machines used for a turnover of \$11,198 and a NGR of \$1,161
- 2.00 am: 16.33 machines used for a turnover of \$5,854 and a NGR of \$527
- 3.00 am: 11.32 machines used for a turnover of \$3,882 and a NGR of \$422

Wednesday

Pre-midday

- 10.00 am: 8.25 machines used for a turnover of \$1,220 and a NGR of -\$5
- 11.00 am: 20.5 machines used for a turnover of \$5,783 and a NGR of \$336

Post-midnight

- 1.00 am: 22.88 machines used for a turnover of \$10,813 and a NGR of \$172
- 2.00 am: 17 machines used for a turnover of \$6,978 and a NGR of \$441
- 3.00 am: 13.88 machines used for a turnover of \$5,652 and a NGR of \$248

Thursday

Pre-midday

- 10.00 am: 6.88 machines used for a turnover of \$1,497 and a NGR of \$72
- 11.00 am: 17.88 machines used for a turnover of \$5,458 and a NGR of \$639

Post-midnight

- 1.00 am: 24.88 machines used for a turnover of \$9,831 and a NGR of \$750
- 2.00 am: 19 machines used for a turnover of \$6,390 and a NGR of -\$1,932
- 3.00 am: 15.88 machines used for a turnover of \$5,201 and a NGR of \$297

Friday

Pre-midday

10.00 am: 12.22 machines used for a turnover of \$2,771 and a NGR of \$513

11.00 am: 20.44 machines used for a turnover of \$6,155 and a NGR of \$277

Post midnight

1.00 am: 25.56 machines used for a turnover of \$9,772 and a NGR of -\$79

2.00 am: 20.33 machines used for a turnover of \$7,696 and a NGR of \$673

3.00 am: 16.22 machines used for a turnover of \$4,742 and a NGR of \$655

Saturday

Pre-midday

10.00 am: 6.89 machines used for a turnover of \$1,887 and a NGR of \$507

11.00 am: 18 machines used for a turnover of \$4,800 and a NGR of \$501

Post midnight

1.00 am: 27.56 machines used for a turnover of \$14,199 and a NGR of \$1,640

2.00 am: 22.33 machines used for a turnover of \$9,212 and a NGR of \$667

3.00 am: 16.33 machines used for a turnover of \$6,008 and a NGR of \$228

Sunday

Pre-midday

10.00 am: 4 machines used for a turnover of \$1,000 and a NGR of \$90

11.00 am: 12 machines used for a turnover of \$3,039 and a NGR of \$376

Post midnight

- 1.00 am: 20.89 machines used for a turnover of \$9,689 and a NGR of \$982
- 2.00 am: 12.44 machines used for a turnover of \$4,097 and a NGR of \$176
- 3.00 am: 10.11 machines used for a turnover of \$2,877 and a NGR of \$228

- 34 The submissions noted that within the locality there are already two other gaming venues that have the full measure of the permitted 40 gaming machines, and they are authorised to operate until 5.00 am. They submitted that people who wish to use gaming machines in the locality in the early hours of the morning can already do so, and there is no reason to think that by permitting the applicant to trade for the same hours as these venues, that there would be any increase in gaming trade. They submitted that the purpose of the application was simply to draw custom from its competitors.
- 35 The submissions concluded by pointing out to the Commissioner that any concerns could be allayed by granting its application on an interim basis, and advised that the applicant would take no issue with an interim grant of six months.

The Commissioner's decision

- 36 By letter dated 14 February 2023, the Commissioner confirmed his earlier decision to treat the application as a designated application. Relevantly the letter stated as follows:

The Commissioner has considered the points raised in relation to the materials the Commissioner relied on, however is of the view that the data relied on is the most relevant data available for determining the potential for an increase in gambling related harm in relation to the application.

Further, whilst there may be other venues just outside the locality that trade in gaming later than what is sought, the circumstances of this particular Hotel cannot be ignored. The data shows that the Hotel is located in an area that is significantly disadvantaged compared to the State average (5th percentile), and already significantly higher than NGR per machine than the State average (73% higher).

Given the potential increase to harm that may be caused, it follows that the application ought to be designated to require the applicant to address this potential harm by completing a community impact submission to demonstrate how the granting of this application would be in the community interest.

Submissions on review

- 37 On review, the applicant submitted that the Commissioner provided insufficient reasons in explaining how he arrived at his February 2023 decision; that their brevity, when looked at from the perspective of a fair-minded observer, would not have allayed the sense of pre-judgment arising from the fact of the earlier decision; and that in any event, the decision was wrong.
- 38 In support of its application for review, the applicant tendered three affidavits. The first was from its solicitor, Mr Jonathon Dodd. It sets out the procedural history giving rise to the review. The second was from Ms Donna Baker, who is involved in the management of the Hotel's gaming operations as well as the gaming operations of other venues. Ms Baker stated that she was not aware of the Commissioner designating any applications to vary trading hours as designated applications prior to 22 June 2022. She stated that the purpose of the application to vary the gaming hours was to bring the hours in line with other venues within the locality and surrounding suburbs so as to enable the Hotel to cater for its customer base, a large proportion of which are shift workers. The third was from Ms Patricia Laverack, who is employed by the Hotel as its Gaming Manager. Ms Laverack stated that she had worked for the Hotel for nine years and in its gaming area for three years. She stated that after finishing work at the Hotel at 3.00 am she and some workmates would attend at other licensed premises in the area for a drink after work. She spoke of an occasion in October 2022 when after finishing work at the Hotel at 3.00 am she went with work colleagues to the Grand Junction Tavern for a drink, and at about 3.45 am she saw a patron there who had previously been at the Hotel. She had a conversation with the patron who said that he had left the Hotel because it closed at 3.00 am. She said that on other occasions when she was at the Grand Junction Tavern after 3.00 am she had seen patrons in its gaming area who she had previously seen at the Hotel.
- 39 The applicant submitted that the Commissioner's reasons failed to engage in important components of its case.
- 40 It identified these as:
- Its submission regarding the existence of two other gaming venues that have the full measure of the permitted 40 gaming machines and are authorised to operate until 5.00 am. It submitted that this information suggested that there was no reason to think that by permitting it to trade for the same hours as these venues would be any increase in gaming trade.

- Its submission regarding the evidence that many of those using the gaming machines at the Hotel came from outside of the suggested locality.
 - Its submission that any concern that the Commissioner might have in connection with its proposed change of hours could be allayed by the grant of the variation on an interim basis.
- 41 It submitted that the Commissioner's failure to refer to these matters creates the impression that he did not take them into account.
- 42 Next it submitted that the matters that the Commissioner did address and rely upon, were of little, if any relevance. It noted that the average NGR for the City of Port Adelaide Enfield council area was not significantly different to the State average. It submitted that the fact that the Hotel has a high average NGR merely demonstrates that it is a successful venue and provides no evidence upon which to conclude that the change in hours will increase the risk associated with the problem gambling.
- 43 The applicant noted that in the Commissioner's September 2022 decision he spoke of evidence that indicated that many more gaming machines are operated between 2.00 am and 3.00 am than between 9.00 am and 10.00 am. It submitted that based upon its analysis, that data does no more than identify that the average number of machines in use between 9.00 am and 10.00 am and between 2.00 am and 3.00 am was well less than half of a 40 machines available at the Hotel. It then made the point that there is little difference between the NGR being generated between 9.00 am and 10.00 am in the morning than there is between 2.00 am and 3.00 am. Thus it contended that the statement that there is a significantly higher NGR from gaming machines in the early hours of the morning is wrong.
- 44 It submitted that because the pull of its premises was more than a two-kilometre radius, consideration needed to be given to adjacent areas, and these were not as disadvantaged as the primary area, Next, it said, that there is no reason to infer that trade after 3.00 am is necessarily associated with greater problem gambling. It submitted that there was no evidence that established that those using gaming machines after 3.00 am were likely to be people glued to a machine for an extended period of time. It noted evidence that emerged from the data it provided that indicated diminished use of gaming machines after midnight. It submitted that it is likely that the cohort of machine users in the early hours of the morning would be shift workers.
- 45 It stressed that gaming machines operate in a highly regulated environment that requires gaming machine licence holders to comply with numerous measures aimed at addressing the issue of gambling harm.

46 It referred to various provisions of the GM Act, noting that a gaming machine licence holder must satisfy the Commissioner of the suitability of the proposed gaming areas, security arrangements, and that the gaming area would not represent a special attraction to minors;⁷ that venues may not be located under the same roof as shops or within shopping complexes;⁸ that the number of gaming machines able to be operated within a venue is fixed by reference to a finite number of gaming machine entitlements;⁹ and that during any 24-hour period a gaming operator is precluded from allowing gaming machine operations for at least six hours.¹⁰ It noted that gaming licences are subject to compulsory conditions set out in Schedule 1 of the GM Act which include:

- (a) that only approved games, gaming machines, etc. be operated;
- (b) that the licensee must be subject to a responsible gaming agreement;
- (c) that there be a system in place for identifying barred persons including by way of facial recognition (where 30 or more machines are operated any one of which may receive a banknote);
- (d) that there be a nominated gaming manager and a record of employees;
- (e) that gaming managers and employees have undertaken approved training courses under relevant codes of practice; and
- (f) that when gaming occurs between 2 am and 8 am there not be operational note to coin converters;

47 It noted that these are enforced by significant penalties for the breach of licence conditions.¹¹

48 It referred to the prohibitions on gaming machine licence holders on the offering of cash, EFTPOS or credit facilities within gaming areas.¹² Gaming machines cannot be operated otherwise than in accordance with an approved automated risk monitoring system.¹³ Gaming machines must be configured so as to comply with a \$5.00 maximum bet, to not accept bank notes of a denomination greater than \$50.00, to return winnings of at least 87.5%, to comply with a pre-commitment system described in

⁷ Section 15(5).

⁸ Section 15A.

⁹ Section 16 and Division 3A.

¹⁰ Section 27(7).

¹¹ Section 46.

¹² Section 51A and 52.

¹³ Section 40A and 53A(2).

Schedule 3 of the *Gaming Machines Regulations 2020*, and to not permit playing of successive games by an automatic process.¹⁴

- 49 It referred to Part 8 of the GM Act noting that it creates a regime to which revenue received from gaming tax is contributed, that includes the Charitable and Social Welfare Fund and the Gamblers Rehabilitation Fund.
- 50 It submitted that this was a modest application by a reputable operator seeking to vary its hours to compete, and probably take business from, nearby competitors, that did not warrant being treated as a designated application and that this Court should correct the error that it contends the Commissioner made.

Consideration

- 51 For Commissioner's reasons to be legally adequate, they must disclose material findings of fact and conclusions of fact.¹⁵ If he rejects or finds immaterial evidence that has been adduced, he must explain why he formed that view.¹⁶ In respect of submissions and arguments put, the reasons must reveal that they have "been understood and, either accepted, or, if rejected, that the rejection was based on a clear and rational process of reasoning."¹⁷
- 52 In this case the Commissioner did not engage with data regarding the actual trading figures for the Hotel, nor with the applicant's submission that many of those using the gaming machines at the Hotel came from outside of the suggested locality, nor with its suggestion that any concerns about the consequences of the variation of trading hours could be allayed by granting the application on an interim basis. With respect, the Commissioner's failure to do this meant that his reasons were, for legal purposes, inadequate. Whether or not his reasons allayed the sense of pre-judgment arising from the fact of the earlier decision to designate the application is a matter that does not require determination and I take that issue no further.
- 53 The provision of inadequate reasons is an error of law.¹⁸ It follows that the Commissioner's decision that the application should be treated as a designated application cannot stand and this Court must determine the issue for itself. I now turn to undertake that task.
- 54 The objects of the GM Act include ensuring "gaming machine gambling is conducted responsibly, fairly and honestly, with regard to minimising

¹⁴ Section 53A.

¹⁵ *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 at 443.

¹⁶ *Ibid* at 443.

¹⁷ *R v Maxwell* (1998) 217 ALR 452 at 473.

¹⁸ *Pettitt v Dunkley* (1971) 1 NSWLR 376 at 382 per Asprey J.

the harm caused by gambling”;¹⁹ and ensuring “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.”²⁰

- 55 The objects of the GA Act include reducing “the prevalence and severity of harm associated with the misuse and abuse of gambling activities”,²¹ and “to ensure, as far as practicable, that the conduct of gambling is consistent with the expectations and aspirations of the public.”²²
- 56 In the context of the *Liquor Licensing Act 1997*, in connection with the potential harmful consequences of drinking, this Court has adopted what was said in another jurisdiction, namely that “the potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, would be a powerful public interest consideration”.²³
- 57 In light of the objects of the GM Act and the GA Act, I think it is appropriate for the Commissioner and this Court in dealing with the issue of harm minimisation related to gaming machines, to adopt the same approach. In my opinion, if in connection with an application there is a palpable risk of harm, even if proof of that risk falls short of proof on the balance of probabilities, it may be appropriate for the Commissioner and this Court to act upon that risk.
- 58 I accept that a SEIFA score is a relatively blunt instrument in identifying the characteristics of a particular locality. I also accept that “proving broad sociological propositions by statistics is a dubious business”²⁴ and that care must be taken in drawing conclusions about behaviours based upon statistical evidence. In connection with such matters, there is a real risk that what intuitively appears to be correct, is, upon closer analysis, revealed to be fraught with uncertainty and based upon stereotypical views of what particular data indicates, or how particular people might behave, that is not founded in fact.
- 59 But that does not mean that the SEIFA data identified by the Commissioner can be ignored. After all, the guidelines specifically direct that the SEIFA score for the locality in which the licensed premises is located is to be taken into account. Moreover, it has been repeatedly relied upon across a range of jurisdictions in Australia as a reliable measure of

¹⁹ Section 2(a).

²⁰ Section 2(e).

²¹ Section 3(2)(a).

²² Section 3(2)(e).

²³ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258; (2000)

22 WAR 510, at [29] per Ipp J.

²⁴ *Craig v Boren* [1976] USSC 213; 429 US 190.

social disadvantage.²⁵ I therefore cannot ignore the fact that Mansfield Park has a lower than average SEIFA score and that this provides some evidence that it is an area of socio-economic disadvantage. I also must accept that this provides some evidence of an enhanced risk of problem gambling in that area.²⁶ This is evidence that must be given some weight.

60 But what is actually transpiring at the Hotel is of much more probative value. In my opinion, the fact that the Hotel has a high average NGR demonstrates more than it is a successful venue. The acronym NGR could just as easily be described as NGL, that is, net gambling losses. Based on the 2021-2022 financial year figures, on average, every gaming machine in this State led to losses of \$71,537 per annum. On average, over that period, each of the gaming machines at the Hotel led to losses of \$124,445 per annum. The comparison between the Hotel's NGR and the State average NGR provides cogent evidence that the amount that patrons of the Hotel lose on using its gaming machines is nearly 75% higher than the State average.

61 I accept that people gamble in all sorts of ways. Gambling can involve things like instant or scratch tickets, X Lotto, lotteries, raffles, bingo, betting on horse racing and greyhound racing, sports betting, gambling on cards with friends and family, internet gambling, speculative investments and going to the casino. I accept that in contrast to the position in respect of gaming machines, most of this gambling is conducted in environments with limited or no protective measures. I accept that the gaming taking place at the Hotel might be to the expense of other forms of gambling and a case can be made that it is better for people to gamble in a highly regulated environment than one with little or no oversight. But the near 75% differential to the State average in gaming losses is striking. In my opinion, it leads to the inference that the Hotel has more than its fair share of problem gamblers. I accept that many of these might come from areas outside of the immediate locality of the Hotel. But when I marry this evidence with Mansfield Park's lower than average SEIFA, the fact that this provides some evidence that it is an area of socio-economic disadvantage, which in turn provides some evidence of an enhanced risk of problem gambling in that area, I think it is reasonable to infer that there might be a relatively higher number of problem gamblers residing in Mansfield Park using the gaming machines at the Hotel, than is the norm.

62 The applicant is right to contend that the core peak period of gaming machine use at the Hotel is between midday and midnight and that in the periods before midday and after midnight, the usage is noticeably lower. It is also right to contend that overall, the patterns of increasing gaming up

²⁵ See, for example: *Iris Hotels Casula Property Pty Ltd v Liverpool City Council* [2022] NSWLEC 1520 and *Mount Alexander SC v Victorian Commission for Gambling and Liquor Regulation & Ors (includes Summary) (Red Dot)* [2013] VCAT 101 at [86].

²⁶ *Glenroy RSL Sub Branch Inc v Moreland CC* [2019] VCAT 583 at [141].

until midday and diminishing gaming after midnight, are not substantially different. But when the periods between 9.00 am and 10.00 am and between 2.00 am and 3.00 am are compared, they tell a different story. Based on the seven days of data provided, the aggregate number of machines used for the earlier period is about 52, with an aggregate turnover of about \$113,000. The aggregate number for the later period is about 97, with an aggregate turnover of about \$328,000. It follows that the average number of machines used in the earlier period is about 7.5 with a turnover of about \$1,600 and the average number of machines used in the later period is about 14 with a turnover of about \$4,400. This difference is substantial.

- 63 The applicant is a commercial entity. It can be assumed that it is seeking to vary its trading hours in the expectation of increased use of its gaming machines. Whilst there is a discernible pattern of progressive diminishing use of gaming machines after midnight, it is reasonable to infer that the applicant does not anticipate that if it can trade later, that progressive diminution will continue at the same rate. In my opinion, there is a real prospect that usage in the period between 3.00 am and 5.00 am will be consistent with the level of gaming currently being experienced in the period between 2.00 am and 3.00 am. I think that there is a real prospect that the grant of this application could lead to a significant increase in the use of gaming machines at the Hotel. It must be accepted that some of this additional gaming will be by patrons who presently visit the nearby venues. But in my opinion, there is a real possibility that some will be patrons who, for now, leave the Hotel at around 3.00 am and do not go elsewhere to use gaming machines who, if this application is granted, will remain at the Hotel to continue to use the Hotel's gaming machines and that some of these patrons will reside in Mansfield Park.
- 64 I accept that a matter to be considered in whether to designate an application is the possibility that the Commissioner may allay concerns that might arise from the grant of the application by granting the variation on an interim basis.
- 65 But as with liquor licensing, in connection with gambling, if the circumstances give the decision-maker pause, or ring alarm bells, a conservative approach is compelled.²⁷ In this case there is a real prospect that the grant of this application could result in a significant increase in the use of gaming machines at the Hotel. There is a real possibility that some of the patrons responsible for that increase will be residents of Mansfield Park, who would not otherwise have used gaming machines after 3.00 am. When I look at this from the perspective of a near 75% differential to the State average in gaming losses at the Hotel, in my opinion, a trial period,

²⁷ *Nardi v Director of Liquor Licensing (Occupational & Business Regulations)* [2005] VCAT 323 at [44].

through the grant of an interim approval, is too risky a course to take. In my judgment, the more prudent course is to await the outcome of the consultation and additional information that a designated application entails. In my respectful opinion, the Commissioner's decision was correct and his decision should be confirmed.

Conclusion and order

66 The application for review is dismissed.