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Against the Odds - Pokies Prevail in Victoria Despite Community Concerns¹

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Overview

In what has been portrayed in the local media as a brazen move, a tribunal in the State of Victoria, Australia, has delivered two judgments in favour of the installation of poker machines (slot machines) at venues in two centres in the face of fierce opposition from communities, local councils and the Victorian Government's own gaming regulator, the Victorian Commission for Gambling Regulation ("VCGR").

These are of relevance globally since they highlight the difficulties that exist in confronting local problem gambling concerns where applications are made under the existing licensing regime to open new gaming venues or extend gaming facilities in an existing venue. They are of particular interest because they recognise that problem gambling concerns are not sufficient in themselves to cause an application to be rejected: other factors must also be taken into account. In these cases, the Tribunal considered that the countervailing factors in favour of granting the applications should be given greater weight and the applications were approved.

Justice Stuart Morris, president of the Victorian Civil and Administrative Tribunal ("VCAT") in *Romsey Hotel Pty Ltd v VCGR* [2007] VCAT 1 ("**Romsey** ") gave approval for 30 poker machines to be installed at the only pub in the semi-rural town of Romsey that currently has no poker machines.

Justice Morris also approved an application to install 75 machines for the proposed Ringwood Club in *Kilsyth and Mountain District Basketball Association Inc v VCGR* [2007] VCAT 2 ("**Ringwood**"), notwithstanding community and council concerns that the proposal would increase the concentration of poker machines well above the state average and contribute to problem gambling in the area.

The decisions have been contentious, to say the least, and follow in the wake of two other VCAT determinations by Justice Morris in favour of the gaming industry.² Victoria's

¹ Article published in *Casino Lawyer*, Vol 3 No 1 Winter Issue 2007

² *Branbeau Pty Ltd v VCGR* [2003] VCAT 2606; *Ocean Grove Bowling Club Inc v VCGR* [2006] VCAT 1921

Shadow Minister of Gaming, Michael O'Brien, has said that the decisions make a mockery of Victoria's gaming laws and show that the Government "is happy for the legitimate concerns of local communities to be ignored".

We consider in this article the Romsey and Ringwood decisions, decisions which have been taken to be at odds with the Government's - and hence VCGR's - commitment to developing and reinforcing "responsible gambling through measures that assist and protect problem gamblers and those at risk of becoming problem gamblers, their families and the wider community".³

Regulatory background - VCGR and VCAT

The current regulator of the Victorian gambling industry, the VCGR, came into operation on 1 July 2004 following the proclamation of the Victorian Gambling Regulation Act 2003 ("**the Act**").

As part of its role, the VCGR is responsible for assessing both applications for new gaming premises and applications to allow an increase in gaming machine numbers at existing premises. In accordance with the Act, all applications for new premises approvals and applications for increased gaming machine numbers are subject to economic and social impact assessments. Local government authorities have the right to make a submission on the impact of applications. Moreover, all applications for new premises approvals and increases in electronic gaming machine numbers must be determined by VCGR at public inquiries – this reflects the Government's commitment to maintaining "proper consultative processes to ensure that appropriate information is given to, and input is received from, the wide variety of persons interested in gambling including stakeholders, affected parties and, to the wider extent possible, the broader Victorian community".⁴

Appeal of VCGR decisions to VCAT

Sections 3.3.17 and 3.4.21 of the Act allow an applicant for approval of premises or for an increase in gaming machines at an approved venue, or a municipal council which has made a submission in relation to the application, to apply to VCAT for review on the merits of any decision by VCGR.⁵

VCAT does not sit as an appellate tribunal in respect of the decision of the original decision maker. Its role is to reconsider the issues and apply the law as it stands at the time of the relevant VCAT decision and - significantly, in view of the Romsey case in particular – having regard to the facts as they exist at the time of the VCAT hearing.

Section 51 of the Victorian Civil and Administrative Tribunal Act 1998 provides that, in exercising its review jurisdiction in respect of a decision, VCAT has all the functions of the

³ From the principles identified by the Victorian Government by which gambling is to be regulated - see VCGR's website: www.vcgr.vic.gov.au

⁴ *ibid.*

⁵ Previously, the only avenue of appeal was to the Supreme Court, on a question of law

decision maker. Accordingly, in exercising its review jurisdiction, VCAT "stands in the shoes" of the primary decision maker. Section 51 further provides that, in reviewing a decision, VCAT may, by order, affirm, vary, or set aside the decision under review and, in the last case, it may either make another decision in substitution for the decision under review or it may remit the matter for reconsideration by the decision maker. Section 51(3) then provides that any decision made by VCAT in substitution for the decision of a decision maker shall be deemed to be a decision of that decision maker.

The Romsey case

The Romsey case reviews the decision of the VCGR made on 21 April 2006 to refuse an application for approval of premises at the Romsey Hotel as suitable for gaming.⁶ The local council had objected to the application to install 30 gaming machines by the proprietor and was a party at the VCGR inquiry at which the application was refused.

In the VCAT proceedings, the council was joined as a party, having opposed the approval of the premises as suitable for gaming given its concern with the extent and impact of problem gambling within its municipal district.

Justice Morris set aside VCGR's decision and, in place of VCGR's decision, approved the Romsey premises as one suitable for gaming with 30 gaming machines.

Reasons for the decision

Before giving his reasons for setting aside VCGR's decision and approving the application, Justice Morris cited his earlier decision of *Branbeau Pty Ltd v VCGR* [2003] VCAT 2606 ("**Branbeau**") as being the decision that "set out an overview of Victoria's gaming machine industry", providing an "important backdrop in the making of decisions about gaming machines."⁷

Branbeau, like *Romsey*, concerned an application for review of VCGR's decision of 9 February 2005 to refuse an application by *Branbeau Pty Ltd* for approval of premises at the township of *Drouin* as suitable for gaming. The local council had objected to the proposal and was a party at the VCGR inquiry at which the application was refused. The council, as a person affected by VCGR's decision, applied to be joined, and was joined, as a party to the VCAT proceedings. The matter was heard in July 2005 by Justice Morris, who, in December 2005, handed down his decision, ordering that the decision of VCGR be set aside and, in lieu of that decision, approving the application.

Branbeau set out the relevant test to be applied in determining applications for gaming machines or gaming venues under the Act, namely: on balance, will the economic and social impact of approval be detrimental to the wellbeing of the community of the municipal district in which the premises are located? In *Branbeau*, Justice Morris noted:

⁶ In the matter of *Romsey Hotel Pty Ltd*, VCGR matter 2005/18

⁷ *Romsey* at paragraph 3

"49 The test does not require the Commission (or, on review, the tribunal) to be satisfied that there will be a net positive economic and social impact of approval; it is sufficient that the Commission (or, on review, the tribunal) be satisfied that the net economic and social impact of approval will be either neutral or positive."

Justice Morris accepted that the VCGR applied this test, balancing the positive and negative features of the application by reference to the evidence then before it. His Honour noted that what tipped the balance for the VCGR in favour of refusing the application was the compelling evidence of a comprehensive plebiscite, showing that members of the local community were opposed to the introduction of gaming machines into their community.

So why the back-flip on appeal? The crux of VCAT's decision to approve the application lies in the fact that evidence crucial to the outcome of the VCGR determination, in particular the community survey, was not led on appeal. Although VCAT is entitled to consider the reasons of the VCGR, Justice Morris considered it "highly significant" that the council did not seek to lead evidence of this community survey before him.

The outcome of the VCAT proceedings, then, is not altogether surprising. But the outcome must be seen in context. Underlying his Honour's decision is a motivation to disassociate VCAT from a "moralistic" position - namely, assuming that gambling should be altogether prohibited or very tightly controlled. Justice Morris articulated his view in the following terms (at paragraph 5):

"5 It is also important to stress that statutory decision making takes place in a context. Not only are particular provisions laid down by the Parliament which must be taken into account, but also decisions must be made in the context that the Parliament has made the installation and use of gaming machines in Victoria a lawful activity. Thus it is not lawful for the tribunal to reject gaming applications on the basis that it believes gaming to be immoral or socially harmful in all circumstances. Rather the tribunal is required to make its decisions in the context that gaming is lawful in Victoria."

In this context, his Honour accepted that many positive outcomes would result in approving the application. For example, the provision of a gaming venue at Romsey will significantly improve the accessibility of gambling opportunities for those living in the Romsey district, taking the view that "to the extent that it provides a better opportunity for recreational gamblers to exercise their own free choice to gamble, I would regard this as a benefit: an objective of the Act is to accommodate those without harming themselves or others".

Moreover, having regard to the socio-economic circumstances of persons in the Romsey district, Justice Morris was satisfied that the "net" economic and social impact of the approval of the Romsey Hotel as suitable for gaming would not be detrimental to the wellbeing of the community of the municipal district. His Honour found that the extent of any increased propensity of problem gambling was "amorphous" - and in any event, he found the socio-economic circumstances of the Romsey area are likely to mitigate the problem to some extent (given that the area was found to be relatively affluent).

The Ringwood case

The Ringwood case reviewed the decision of the VCGR made on 5 July 2006 to refuse an application for approval of the premises proposed to be developed in Ringwood (namely, the Ringwood Club) as suitable for gaming. The Ringwood application proposed the installation of 75 gaming machines, however, significantly, the machines were to be relocated from existing gaming venues within the City of Maroondah (the municipal district of which Ringwood is part).

Although the proposal did not involve any net increase in the number of gaming machines in the municipal district (in contrast to the facts in Romsey), the council made submissions to VCGR to object to the approval of the premises as suitable for gaming as it was concerned about the extent and impact of problem gambling within its municipal district. It was also concerned that the approval of the premises for gaming would have a detrimental impact on the social and economic wellbeing of the community of its municipality. Accordingly, the council was joined as a party in the VCAT proceedings.

Justice Morris set aside VCGR's decision refusing the application and, in lieu of VCGR's decision, approved the Ringwood premises as one suitable for gaming with 75 gaming machines.

Reasons for the decision

Notwithstanding various positive community benefits which would arise from the approval of the venue (such as the development of a bistro, the lounge and function and meeting facilities), the VCGR decided to refuse the application on the basis that (among other things):

- the "gaming indicia" for the municipality (namely, both the gross sum spent on gaming machines in the City of Maroondah and the number of gaming machines per 1,000 adults in Maroondah) were significantly higher than average; and
- there was more than adequate gaming facilities in existing clubs and hotels in the area.

The outcome of VCGR's inquiry into Ringwood (as with Romsey) was principally driven by a concern about problem gambling. While in the Romsey case the concern was motivated by the fact that there had not been any pre-existing gaming machines, the concern in Ringwood was influenced by the comparatively high number of gaming machines in the municipality per 1,000 adults. On this basis, the council contended that the introduction of the proposed venue would result in a net social and economic detriment to the wellbeing of the residents of the City of Maroondah.

Justice Morris, in finding in favour of the applicant, was satisfied that, without gaming, the proposed development of the club would not proceed and accepted that the Ringwood Club will be a high quality facility likely to be attractive to persons living in the Ringwood and surrounding suburbs. Significantly, it was found that the attractions offered by the club

would extend beyond gaming: due to the provision of a bistro, lounge and function and meeting facilities.

Justice Morris considered the correlation between problem gambling and availability of gaming machines, by referring to the "Regional Electronic Gaming Machine Caps Review Panel Final Report" (dated November 2005). This report, prepared by three members of the Victorian Parliament, discusses the link between accessibility and problem gambling and refers to an earlier finding of the Productivity Commission to the effect that there is a connection between accessibility to gaming machines and the prevalence of problem gambling. However, this correlation has not widely been accepted: Justice Morris highlights the panel's concern about the apparent lack of any certainty about the specific link between accessibility and problem gambling.

Justice Morris considered that the case of problem gambling is not so straightforward, and has more to do with socio-economic factors. In paragraph 54 of the Ringwood decision, his Honour referred to comments concerning problem gambling made in his earlier decision of Branbeau:

"In Branbeau I postulated a theory, which seems to have widespread acceptance, that problem gambling is more likely to emerge if gaming machines are located in poorer communities compared with richer communities. I also postulated the theory, which I also believe is broadly accepted, that it is desirable to avoid concentrating gaming machines in poorer areas. Hence, in considering the impact of the proposed venue on problem gambling, it is necessary to give closer consideration to the socio-economic characteristics of the Maroondah municipality and to the existing density of gaming machines within the municipality."

Given a finding that the Maroondah municipality is an area of comparative advantage, his Honour concluded (as he did in Romsey) that the Ringwood community would be "relatively robust in its capacity to absorb gaming expenditure". He concluded that the approval of Club Ringwood as suitable for gaming, with 75 machines, would therefore not be detrimental to the wellbeing of the community of the municipal district of Maroondah.

Conclusion

In essence, despite the factual differences, the underlying principles in the Romsey case and the Ringwood case are the same.

Ultimately, VCAT's approach to balancing the desire, on the one hand, to ensure the minimisation of harm caused by problem gambling and the need, on the other hand, to accommodate those who gamble without harming themselves or others, is summarised by Justice Morris in Ringwood (at paragraph 41):

"41 There are some in the community who would adopt a libertarian position and argue that people should be free to gamble when and how they wish. There are others who adopt a paternalistic or moralistic position and argue that gambling should be banned or

severely restricted. It is not the tribunal's task to adopt a position in this regard. The tribunal must accept the position adopted by the Parliament and encapsulated in section 1.1(2)(a) of the Act: namely to foster responsible gambling in order to minimise harm caused by problem gambling and to accommodate those who gamble without harming themselves or others. The rights of those who gamble without harming themselves or others can too easily be overlooked in making an assessment of the social and economic impact of a new gaming venue. Insofar as this class of person is concerned, it is an undoubted benefit to them to have good access to gaming opportunities. It is also a benefit to this class of persons for there to be competition between gaming venues, with the consequence that service standards are improved. Further, the existence of a range of opportunities to engage in gambling provides additional choice: which is an undoubted benefit to the recreational gambler."

However, it is clear that this approach has done little to salve the affected communities, and calls have been made for the decisions to be appealed in the Supreme Court in Victoria.

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