



**DECISION AND REASONS FOR DECISION**

In the matter of an application under section 3.4.17(1)(b) of the *Gambling Regulation Act 2003* by Jayeesar Pty Ltd to amend its venue operator's licence to vary the number of electronic gaming machines at the approved premises, the Robin Hood Hotel, located at 33 Peel Street North, Ballarat from twenty (20) to twenty-eight (28).

**Commission:**

Ms Deirdre O'Donnell PSM, Deputy Chair  
Mr Andrew Scott, Commissioner

**Appearances:**

Mr Daniel Robinson of Counsel for the Applicant, instructed by  
Bazzani Scully Priddle Lawyers  
Mr Cameron Warfe, Counsel Assisting the Commission

**Date of Hearing:**

25 June 2021

**Date of Decision:**

19 July 2021

**Date of Reasons:**

16 August 2021

**Decision:**

The Commission has determined to refuse the application.

**Signed:**

**Deirdre O'Donnell PSM**

Deputy Chair

## REASONS FOR DECISION

### INTRODUCTION

1. Jayeesar Pty Ltd (**Applicant**) owns (directly or indirectly) and operates the Robin Hood Hotel, located at 33 Peel Street North, Ballarat (**Premises**).
2. This is an application by the Applicant to the Victorian Commission for Gambling and Liquor Regulation (**Commission**) to amend its venue operator's licence to vary the number of electronic gaming machines (**EGMs**) operating at the approved Premises, from twenty (20) to twenty-eight (28) (**Application**).
3. The relevant municipal authority is the City of Ballarat (**Council**). By correspondence dated 22 March 2021, the Commission notified the Council of the Application and requested that it advise the Commission whether it wished to lodge a submission to address the social and economic impacts of the Application on the local community.
4. On the same date, the Commission notified the surrounding municipalities of Golden Plains Shire Council and Moorabool Shire Council of the Application. As surrounding municipalities, they are able to make comment or prepare a submission to be included in the Council's submission or provide an independent submission if their view differs.
5. The Council responded to the Commission on 29 April 2021, advising that it intended to make an economic and social impact submission in relation to the Application, and did so on 20 May 2021.
6. The Commission considered the Application at a public inquiry conducted on 25 June 2021 (the **Hearing**). The Applicant was represented by Mr Daniel Robinson of Counsel, instructed by Bazzani Scully Priddle Lawyers. The Council did not appear at the Hearing.

### THE LEGISLATION AND THE TASK BEFORE THE COMMISSION

7. Gaming on EGMs is a legal recreational and commercial activity in Victoria so long as it is done in accordance with the *Gambling Regulation Act 2003* (**GR Act**). The GR Act recognises that, notwithstanding individual rights of self-determination, gaming on EGMs causes harm to some communities, and some members of some communities. For this reason, the GR Act includes safeguards to ensure an appropriate balance is struck between a lawful and legitimate recreational activity for some, and a potentially harmful activity for others.



8. The objectives of the GR Act are set out at section 1.1, which provides:

...

(2) *The main objectives of this Act are—*

(a) *to foster responsible gambling in order to-*

(i) *minimise harm caused by problem gambling; and*

(ii) *accommodate those who gamble without harming themselves or others;*

(ab) *to ensure that minors are neither encouraged to gamble nor allowed to do so;*

(b) *to ensure that gaming on gaming machines is conducted honestly;*

(c) *to ensure that the management of gaming equipment and monitoring equipment is free from criminal influence and exploitation;*

(d) *to ensure that other forms of gambling permitted under this or any other Act are conducted honestly and that their management is free from criminal influence and exploitation;*

(e) *to ensure that-*

(i) *community and charitable gaming benefits the community or charitable organisation concerned;*

(ii) *practices that could undermine public confidence in community and charitable gaming are eliminated;*

(iii) *bingo centre operators do not act unfairly in providing commercial services to community or charitable organisations;*

(f) *to promote tourism, employment and economic development generally in the State.*

9. Chapter 3 of the GR Act deals with the regulation of gaming machines. Section 3.1.1 of the GR Act sets out the purpose of Chapter 3 as follows:

(1) *The purpose of this Chapter is to establish a system for the regulation, supervision and control of gaming equipment and monitoring equipment with the aims of—*

(a) *ensuring that gaming on gaming machines is conducted honestly; and*



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- (b) *ensuring that the management of gaming equipment and monitoring equipment is free from criminal influence or exploitation; and*
- (c) *regulating the use of gaming machines in casinos and other approved venues where liquor is sold; and*
- (d) *regulating the activities of persons in the gaming machine industry; and*
- (e) *promoting tourism, employment and economic development generally in the State; and*
- (f) *fostering responsible gambling in order to—*
  - (i) *minimise harm caused by problem gambling;*
  - (ii) *accommodate those who gamble without harming themselves or others.*

(2) *The purpose of this Chapter is also to—*

- (a) *provide for the allocation of gaming machine entitlements in order to maximise the financial and social benefits to the Victorian community within the regulatory framework applying to the allocation of entitlements;*
- (b) *promote a competitive gaming industry with the aim of providing financial and social benefits to the Victorian community.*

10. Section 9(3) of the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (**VCGLR Act**) provides, inter alia:

*The Commission must, when performing functions or duties or exercising its powers under the Gambling Regulation Act 2003 ... or any other Act, have regard to the objects of the Act conferring functions on the Commission.*

11. The relevant provision concerning the Application is section 3.4.17(1)(b) of the GR Act, which states that variation of the number of EGMs permitted in an approved venue may be amended in accordance with Division 2, Part 4 of Chapter 3 of the GR Act.

12. Sections 3.4.18 to 3.4.19 of the GR Act provide for the manner in which requests for amendments under section 3.4.17(1)(b) are to be made. Relevantly for the Application, section 3.4.18 provides, inter alia, that:

(1) *A request by a venue operator for an amendment of licence conditions—*

...



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- (c) *in the case of ... an amendment to increase the number of gaming machines permitted in an approved venue, must be accompanied by a submission—*
  - (i) *on the net economic and social benefit that will accrue to the community of the municipal district in which the approved venue is located as a result of the proposed amendment; and*
  - (ii) *taking into account the impact of the proposed amendment on surrounding municipal districts—*

*in the form approved by the Commission and including the information specified in the form.*

13. Further, section 3.4.19(1) of the GR Act provides:

- (1) *Subject to this section, after receiving a copy of a request for an amendment referred to in section 3.4.18(2), a municipal council may make a submission to the Commission—*
  - (a) *addressing the economic and social impact of the proposed amendment on the well-being of the community of the municipal district in which the approved venue is located; and*
  - (b) *taking into account the impact of the proposed amendment on surrounding municipal districts.*

14. Section 3.4.20 sets out matters that are required to be considered by the Commission with respect to such a proposed amendment, as follows:

- (1) *Without limiting the matters which the Commission may consider in deciding whether to make a proposed amendment the Commission must not amend a venue operator's licence unless—*
  - (a) *the Commission is satisfied that the amendment of the licence does not conflict with a direction, if any, given under section 3.2.3; and*
  - (b) *if the proposed amendment will result in an increase in the number of gaming machines permitted in an approved venue, the Commission is satisfied that the regional limit or municipal limit for gaming machines for the region or municipal district in which the approved venue is located will not be exceeded by the making of the amendment; and*
  - (c) *if the proposed amendment will result in an increase in the number of gaming machines permitted in an approved venue, the Commission is*



*satisfied that the net economic and social impact of the amendment will not be detrimental to the well-being of the community of the municipal district in which the approved venue is located; and*

- d) *if premises are proposed to be added to the licence as an approved venue and the premises are situated within 100 metres of an approved venue of which the applicant for the amendment, or an associate of the applicant, is the venue operator, the Commission is satisfied that the management and operation of the approved venue and the proposed approved venue are genuinely independent of each other.*

15. Pursuant to section 3.4.20(1)(a) of the GR Act, the Commission must be satisfied that the proposed amendment does not conflict with a Ministerial direction, if any, given under section 3.2.3 of the GR Act. There is no relevant direction issued pursuant to section 3.2.3 of the GR Act that relates specifically to this Application.
16. Section 3.4.20(1)(c) provides for what is now commonly described as the ‘*no net detriment*’ test. It requires the Commission to be satisfied that there is no net detriment arising from the approval through positively and objectively establishing that the net economic and social impact will not be detrimental to the well-being of the community<sup>1</sup>.
17. The GR Act does not specify the matters which the Commission must consider in deciding whether the ‘*no net detriment*’ test is satisfied. However, the statutory signposts are provided by the test itself. The Commission must consider:
- (a) the likely economic impacts of approval;
  - (b) the likely social impacts of approval; and
  - (c) the net effect of those impacts on the well-being of the relevant community<sup>2</sup>.
18. As such, the ‘*no net detriment*’ test is a composite test requiring consideration of a single net impact in economic and social terms on the well-being of the community<sup>3</sup>. The test will be satisfied if, following the weighing of any likely impacts, the Commission is satisfied that the net economic and social impacts of approval on the well-being of the relevant community will be

<sup>1</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101, [52] per Dwyer DP.

<sup>2</sup> *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422, [42]-[43] per Warren CJ, Maxwell P and Osborn AJA.

<sup>3</sup> *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation (Romsey #2)* [2009] VCAT 2275, [332], [348] per Bell J cited in *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101, [58] per Dwyer DP.

either neutral or positive.

19. The Commission recognises that the task of identifying likely benefits and disbenefits will not always be straightforward given the overlap of socio-economic issues and the quality and availability of relevant data and cogent evidence. Some economic outcomes may have social consequences, and vice versa<sup>4</sup>. On review, decisions in the Victorian Civil and Administrative Tribunal (**VCAT**) have held that for impacts that may be both economic and social – for example the benefits of gaming consumption – it does not matter whether the impact is considered on the economic side, or the social side, or both, so long as it is included and not double-counted in the ultimate composite test<sup>5</sup>.

20. The Commission also notes the position taken by VCAT that:

*A table of likely economic and social benefits and disbenefits, and with some comments relevant to the relative weight to be given to particular factors ... is a useful way of transparently dealing with the 'no net detriment' test, and might perhaps be considered for wider application.*<sup>6</sup>

The Commission has utilised this approach for the purpose of considering the 'no net detriment' test in this matter.

21. If the Commission is not satisfied that the 'no net detriment' test is met, that is clearly fatal to the application before it, as, given the opening words of section 3.4.20(1) of the GR Act, satisfaction of the test is a mandatory pre-condition to approval. However, although section 3.4.20(1) sets out certain mandatory considerations for the Commission, the provision is not exhaustive. If the Commission is satisfied that the 'no net detriment' test is met, it still has an ultimate discretion as to whether or not to grant the approval<sup>7</sup>. The Commission must decide whether to make the proposed amendment, with or without any changes from that proposed by the applicant, even where the applicant has satisfied the minimum threshold of the 'no net detriment' test<sup>8</sup>.

<sup>4</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101, [57] per Dwyer DP.

<sup>5</sup> See *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation (Romsey #2)* [2009] VCAT 2275, [352] per Bell J; *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101, [58] per Dwyer DP.

<sup>6</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101, [60] per Dwyer DP.

<sup>7</sup> See *Ocean Grove Bowling Club v Victorian Commission for Gaming Regulation* [2006] VCAT 1921, [32] and following per Morris J; *Bakers Arms Hotel Pty Ltd v Victorian Commission for Gambling and Liquor Regulation* [2014] VCAT 1192, [126] per Code PM and Nelthorpe M; see also *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101, [97] and following per Dwyer DP (with respect to section 3.3.7 GR Act).

<sup>8</sup> GR Act, section 3.4.20(2).

22. In considering the exercise of this discretion:
- (a) it must be exercised having regard to the purposes of the GR Act and, in particular, the specific purposes of Chapter 3 of the GR Act dealing with the regulation, supervision and control of gaming machines<sup>9</sup>; and
  - (b) it may also be influenced by other factors such as broad policy considerations drawn from the content and objectives of the GR Act as a whole<sup>10</sup>.
23. The Commission agrees with the comments of Deputy President Dwyer in *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors*<sup>11</sup> that, if all of the mandatory considerations under the GR Act favour the grant of an approval, one would expect that the ultimate discretion will commonly favour approval – other than in relatively rare or exceptional circumstances arising in a particular case. In such a case, any such circumstances should be separately and transparently identified.
24. Finally, pursuant to section 9(4) of the VCGLR Act, the Commission must have regard to Ministerial guidelines issued under section 5 of the VCGLR Act when performing functions under gambling legislation. The Commission did not identify any Ministerial guidelines directly relevant to its consideration of this Application.

## MATERIAL BEFORE THE COMMISSION

25. Before the Hearing, the Applicant provided the Commission with the following material in support of the Application:
- (a) application form – amendment to venue operator licence – vary gaming machines, received by the Commission on 15 March 2021 (**Application Form**);
  - (b) social and economic impact assessment prepared by Colleen Peterson of Ratio Consultants, dated March 2021 (**Ratio Report**);
  - (c) expenditure analysis prepared by Tim Stillwell of ShineWing Australia, dated 1 March 2021 (**Expenditure Report**);

<sup>9</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors*. [2013] VCAT 101, [98] per Dwyer DP.

<sup>10</sup> *Ocean Grove Bowling Club v Victorian Commission for Gaming Regulation* [2006] VCAT 1921, [32] per Morris J; *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors*. [2013] VCAT 101, [99] per Dwyer DP; *Bakers Arms Hotel Pty Ltd v Victorian Commission for Gambling and Liquor Regulation* [2014] VCAT 1192, [126] per Code PM and Nelthorpe M. As to policy principles identified for consideration, see the *Romsey* case (2008) 19 VR 422, [7] per Warren CJ, Maxwell P and Osborn AJA.

<sup>11</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors* [2013] VCAT 101, [98].





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- (d) witness statement of Leigh Barrett of Leigh Barrett and Associates, dated 26 February 2021;
  - (e) witness statement of Stephen John Beaumont, dated March 2021;
  - (f) witness statement of Kate Elizabeth Barron, dated March 2021; and
  - (g) a copy of the public notice appearing in *The Courier* on 19 March 2021.
26. The following material, prepared by Commission officers, was provided to the Applicant and Council and was considered by the Commission:
- (a) a report titled *Economic and Social Impact Report*, dated 10 July 2021 (**VCGLR Report**); and
  - (b) a report titled *Pre-Hearing Inspection and Compliance Report*, dated 15 June 2021 (**Inspection Report**).
27. The Council provided written economic and social impact submissions in opposition to the Application, dated 20 May 2021 (**Council Report**).
28. In addition, the Commission received correspondence in opposition to the Application from the following local community organisations:
- (a) a consultation report titled *Community Attitudes to Gambling Survey*, dated May/June 2019 from the Ballarat Interagency Taskforce on Gambling Harm;
  - (b) feedback from Central Highlands Primary Care Partnership (**CHPCP**); and
  - (c) correspondence from Ballarat Community Health, dated 14 May 2021.
29. The following witnesses gave oral evidence at the Hearing:
- (a) Mr Stephen Beaumont, Director of the Applicant;
  - (b) Ms Kate Barron, Venue Manager of the Applicant;
  - (c) Ms Colleen Peterson, CEO of Ratio;
  - (d) Ms Hayley Vinecombe, Associate of Ratio;
  - (e) Mr Tim Stillwell, Partner of ShineWing; and
  - (f) Mr Leigh Barrett, Founder/Executive Director and Principal Consultant of Leigh Barrett and Associates.

30. Prior to the Hearing Deputy Chair O'Donnell visited the Premises on 21 June.
31. The Applicant provided written submissions to the Commission, prepared by Mr Robinson, dated 25 July 2021.

## DECISION AND REASONS FOR DECISION

### Background

#### *Location*

32. The Premises is located in the City of Ballarat,<sup>12</sup> a regional LGA located approximately 110 kilometres west of Melbourne which covers an area of 739 square kilometres. Major centres in the City of Ballarat include Ballarat, Wendouree and Sebastopol. The LGA shares its borders with Hepburn Shire (to the north), Moorabool Shire (to the east), Golden Plains Shire (to the south) and Pyrenees Shire (to the west).
33. The Premises is located at 33 Peel Street North, Ballarat, and the site is located at the northern edge of the Ballarat CBD, away from the retail core which is centred along Bridge St Mall. The majority of surrounding land uses are commercial in nature with a mixture of offices and some small retail premises and bulky goods stores.
34. According to the VCGLR Report, the City of Ballarat has an adult population of 85,891 which ranks it at 3 of the 13 regional metropolitan municipalities (1 being the most populous in Victoria). The annual rate of population growth of 1.9% in 2020 was projected by the Department of Environment, Land, Water and Planning (**DELWP**) to be higher than the Victorian average of 1.3%. The City of Ballarat's percentage of population over the age of 50, being 34.1% in 2020, was projected by DELWP to be lower than the Victorian average of 37.9%.

#### *Current gaming in the City of Ballarat*

35. A regional cap of the permissible number of gaming entitlements (made under a Ministerial Order pursuant to sections 3.2.4 and 3.4A.5(3A) of the GR Act) applies to the City of Ballarat.<sup>13</sup> The maximum number of gaming machines permitted in the area covered by the LGA of the City of Ballarat is 663. Currently, there are 14 gaming venues operating within the City of Ballarat with approvals to operate a total of 639 EGMs. The success of this application would increase the number of operational EGMs in the City of Ballarat to 647.

<sup>12</sup> Where reference is made in these reasons to Ballarat, this is a reference to the local government area (**LGA**).

<sup>13</sup> Victorian Government Gazette S318, 20 September 2017.



36. The City of Ballarat has an EGM density of 7.4 EGMs per 1,000 adults, which is 4.7% more than the regional average (7.1) and 47.6% more than the State average (5.0). This ranks the City of Ballarat as the 7<sup>th</sup> of 13 regional LGAs in terms of EGM density per 1,000 adults.
37. The VCGLR Report notes that in the 2019/20 financial year, the City of Ballarat had an average gaming expenditure of \$508.94 per adult, which is 14.22% more than the regional LGA average (\$445.58) and 34.79% more than the State average (\$377.57). Applying the estimate of increased gaming expenditure as received from the Applicant in the first year of operation of the additional eight EGMs at the Premises, approval of this Application would result in an increase in average gaming expenditure per adult from \$508.94 to \$510.23. In the 2019/20 financial year, the expenditure on gaming for the City of Ballarat was \$43,713,216.26. Of that amount, the Applicant's 20 EGMs at the Premises had generated \$1,109,935.97 (i.e. a Net Machine Revenue (**NMR**) of \$55,496.80), representing 2.5% of the total for the City of Ballarat.

#### *Socio-economic profile of the City of Ballarat*

38. The City of Ballarat is characterised by a moderate socio-economic profile, in comparison to regional municipalities. It is ranked 8<sup>th</sup> of 13 regional LGAs and 28<sup>th</sup> of 79 LGAs in Victoria on the Socio-Economic Indexes for Areas (**SEIFA**) scale of disadvantage (**IRSD**),<sup>14</sup> indicating moderate disadvantage within the LGA (1st being the LGA with the greatest disadvantage).
39. In relation to the immediate surrounding area of the Premises (i.e. within 2.5 kilometres),<sup>15</sup> the SEIFA IRSD index is 0.10% higher than the SEIFA IRSD index for the City of Ballarat, and 2.91% lower than the SEIFA IRSD index for Victoria. On the SEIFA IRSD, a higher score indicates a lack of disadvantage, therefore the immediate surrounding area from the City of Ballarat indicates a slightly lower disadvantage than regional Victoria. 28.4% of SA1s<sup>16</sup> in the immediate surrounding area are in the 1st quintile<sup>17</sup> of SEIFA scores (below the regional average of 33.2%). This also suggests that the area immediately surrounding the Premises experiences slightly lower levels of disadvantage than the regional average.

<sup>14</sup> SEIFA is a product developed by the ABS to assist in the assessment of the welfare of Australian communities. The SEIFA Index allows the ranking of regions/areas, providing a method of determining the level of social and economic well-being in each region.

<sup>15</sup> The VCGLR Report adopts a 2.5km radius as the immediate surrounding area for applications to amend EGM venue operators' licences for venues within metropolitan LGAs.

<sup>16</sup> SA1s have been designed by the ABS as the smallest unit for the release of Census data, and generally have a population of 200 to 800 persons, with an average of 400 persons.

<sup>17</sup> SEIFA index of relative disadvantage is divided into five quintiles each comprising 20% of areas (Statistical Areas Level 1 (SA1s)) ranked by socioeconomic status from the most disadvantaged (lowest / 1st quintile) to least disadvantaged (highest / 5th quintile). High disadvantage is indicated by a low SEIFA score (and low disadvantage by a high score).

40. The VCGLR Report also indicates that:
- (a) the unemployment rate in the City of Ballarat is 6.38%. This is higher than the regional average of 5%, however lower than the State average of 6.6%. The unemployment rate for the immediate surrounding area is 12.6%, being 43.5% higher than the regional average;
  - (b) the equivalised household income in the City of Ballarat is \$895.79, which is slightly higher than the regional average of \$893.07, however lower than the State average of \$1,082.94. The equivalised household income in the immediate surrounding area is \$923.39, being 3.4% higher than the regional average;
  - (c) the homelessness rate in the City of Ballarat is 5.2%, which is higher than both the regional average of 4.5% and the State average of 5.1%;
  - (d) the crime rate in the City of Ballarat, with 12,302 reported crimes per 100,000 adults, is 7<sup>th</sup> highest of regional LGAs and 9.2% lower compared with the regional crime rate.

#### *Nature of the Premises*

41. The Premises is a part single storey, part double storey building originally constructed in the late 1800s. It has been extended several times, however, the hotel premises currently operates from the ground floor only.
42. The Premises currently comprises a range of facilities including:
- (a) Bistro and bar with seating for 300 patrons;
  - (b) TAB and large screen TVs (40 seats);
  - (c) Urban bar with seating for 120 patrons including alfresco dining area;
  - (d) Indoor children's play area;
  - (e) On-site car parking for 20 cars; and
  - (f) Gaming room with 20 EGMs.<sup>18</sup>

#### *Catchment area of Premises*

43. The 'no net detriment' test primarily applies to 'the community of the municipal district in which the approved venue is located.' In determining the impact of an application of this nature on a

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<sup>18</sup> The gaming room is open daily between 7am to 1am (Monday to Saturday), and 10am to 11pm (Sunday).

municipal district, previous Commission and VCAT decisions have had particular regard to the area serviced by the relevant premises, which is generally referred to as the 'catchment area'<sup>19</sup>. The determination of the likely catchment area in this instance is important in the Commission's consideration of the identity of those residents who will be most affected by the Application in terms of gambling-related benefits and harms.

44. The Applicant, under the guidance of Ratio Consultants, conducted a suburb survey of the patronage of the gaming room at the Premises during a 7-day period between 16 March 2020 and 22 March 2020 (inclusive). The Ratio Report notes that the full two-week survey period was unable to be completed due to restrictions on the trade of licensed premises as a result of the COVID-19 pandemic. Ratio Consultants nevertheless relied on the results of the survey, and the Commission considers that the patron survey (albeit less reliable than if it were conducted for the two-week period) is the best available evidence in relation to the residents of existing gaming patrons at the Premises.
45. The Ratio Report contains a table summarising data in relation to patron surveys. Table 5.1 in the Ratio Report indicates that for March 2020, the primary patron catchment of the venue came from the suburbs of Ballarat Central (16.8%) and Wendouree (11.9%), which together account for 28.7% of the patrons in the gaming room for the period of March 2020. The secondary patron catchment comprises patrons from the suburbs of Sebastopol (6.9%), Ballarat East (5.9%), Miners Rest (5.9%) and Delacombe (5.0%), which accounts for a further 23.8%.
46. In this instance, the Commission considers that the gaming room patron surveys provide some indication of the likely gaming patrons for the Premises, with the greatest proportion of patrons residing in the suburb of Ballarat Central. Having regard to the material and evidence put forward by the Applicant and the Council, and noting the VCGLR Report analysing the surrounding area as a radius of 2.5km around the Premises, the Commission considers that the appropriate primary catchment area of the Premises consists of the area within a 2.5km of the Premises while the secondary catchment area consists of the area within a 5km radius of the Premises.

### Issues for determination

47. As set out in paragraph 14 above, the Commission cannot grant the Application unless it is satisfied as to the four matters set out in section 3.4.20 of the GR Act. These matters are considered in parts A to D below.

<sup>19</sup> See for example, *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation & Anor (Occupational and Business Regulation)* [2009] VCAT 2275 (12 November 2009); *Whittlesea CC v George Adams Pty Ltd* [2011] VCAT 534 (7 April 2011).



48. If it determines that these matters have been satisfied, the Commission is then required to exercise its discretion under section 3.4.20 to determine whether or not the Application should be granted. That is, whether or not the proposed amendment to the venue operator's licence should be made.

**A. *Directions given under section 3.2.3***

49. Pursuant to section 3.4.20(1)(a) of the GR Act, the Commission must be satisfied that the proposed amendment does not conflict with a Ministerial direction, if any, given under section 3.2.3 of the GR Act. There is no relevant direction issued pursuant to section 3.2.3 of the GR Act that relates specifically to this Application.

50. On this basis, the Commission is satisfied that granting the Application would not conflict with a direction given under section 3.2.3 of the GR Act, and therefore considers that the mandatory pre-condition set out in section 3.4.20(1)(a) of the GR Act is satisfied.

**B. *Regional cap***

51. As noted in paragraph 35 above, the City of Ballarat is subject to a regional cap on the number of EGMs under a Ministerial Order under sections 3.2.4 and 3.4A.5 of the GR Act. The maximum permissible number of gaming machine entitlements in the area covered by the LGA is 663.

52. There are already 663 licensed EGMs over 14 gaming venues within the capped region, with 639 attached EGMs. The grant of this Application would result in the number of licensed EGMs within the LGA increasing to 647.

53. Overall, the Commission is satisfied that granting the Application would not cause the relevant regional cap for gaming machines for the City of Ballarat to be exceeded, and therefore considers that the mandatory pre-condition set out in section 3.4.20(1)(b) of the GR Act is satisfied.

**C. *'No net detriment' test***

54. The Commission must be satisfied that, if the Application is granted, the net economic and social impact of approval will not be detrimental to the well-being of the community of the municipal district in which the Premises is located. Set out below (and summarised in tabular form at Appendix A) is the Commission's assessment of the economic and social benefits and disbenefits associated with the Application, including the weighting given to each of these impacts.



55. As noted in paragraph 19 above, the Commission considers that it does not matter whether impacts are considered on the economic side, or the social side, or both, so long as such impacts are included and not double-counted in the ultimate composite test. In this Application, the Commission has adopted the approach it took in *Lynbrook Tavern Pty Ltd at Lynbrook Hotel premises (Gaming – EGM Increase) [2018] VCGLR 31 (Lynbrook Hotel)* and determined to consider the impacts associated with the proposed community contributions as a single impact under the ‘Social impacts’ section of its consideration. As noted in its discussion of this impact below, the Commission has taken into account both the economic and social benefits generally associated with community contributions forming part of EGM increase applications and given appropriate weight to that impact in its cumulative form.

### **Economic impacts**

56. The materials before the Commission and the evidence adduced at the Hearing provided the evidentiary basis for a range of economic benefits and disbenefits associated with this Application.

#### Expenditure on capital works

57. A potential key economic benefit associated with this Application is that arising from the expenditure on the proposed redevelopment of the Premises.
58. In relation to the proposed renovations of the Premises, the Applicant submitted that renovation works (**Works**) would occur at the Premises, including:
- “alterations to the Hotel’s entrance along Shepherd Street that will create a lobby-type entrance before patrons enter the new sports bar. Entry to the gaming room will be from the new sports bar area, ensuring that patrons will have to fully enter the venue before accessing the gaming room. This will also include the addition of a solid wall of at least 3 metres between the lobby entrance and the gaming room ensuring that there is no visibility from the street into the gaming room. The door into the gaming room is to be frosted and operated by a touch button.”
59. The proposed Works are expected by the Applicant to cost approximately \$600,000. The Applicant asserted that without approval of the Application, it would not be in a position to implement the proposed renovations. The Applicant indicated that the Works would take approximately 24 months to substantially complete.
60. Mr Beaumont, a director of the Applicant, gave evidence that the Applicant would seek to engage local contractors for the Works if the Application was approved. Mr Beaumont confirmed that the Applicant had access to its own building company, which is located outside the Ballarat

LGA. As such, it was estimated that approximately two thirds of the total cost of the Works would be through local contractors, with the remainder of the \$600,000 being paid to the Applicant's own building company.

61. Similarly, Ms Peterson also gave evidence that approximately \$400,000 of the \$600,000 of construction costs would be spent on local trades from the City of Ballarat.
62. The Commission accepts that the Applicant intends to undertake the Works if the Application is granted, and also accepts that, given the modest nature of the proposed Works, local contractors would likely be sourced within the City of Ballarat to the total value of approximately \$400,000. Therefore, the Commission considers this expenditure is an economic benefit and, in the circumstances, gives it marginal weight.
63. Further, the Commission is careful to ensure that benefits associated with the Works expenditure are not double counted, having regard to the social impact that may result from the improved facilities. This aspect is considered further below at paragraphs 100 to 102.

Supply contracts and complementary expenditure

64. At paragraph 4.3.1 of the Ratio Report, the Applicant estimated that the Works would result in increased patronage in the order of 280 patrons per week, and that it expected to generate approximately \$560,000 in complementary expenditure in its first year. Further, the value of additional supply contracts was estimated to be \$313,000 per annum. The Applicant also estimated that 41.5% (\$130,000) of additional supply contracts would be fulfilled by local suppliers within the City of Ballarat.
65. The Commission finds that there is likely to be an increase in patronage arising from the Works and such increased patronage could result in complementary expenditure. However, there is some uncertainty as to the extent to which the new patronage would generate increased economic activity within the local area, as opposed to transferred activity within the City of Ballarat.
66. For these reasons, the Commission finds that any benefit associated with supply contracts and complementary expenditure for the City of Ballarat is limited and consequently places marginal weight on this impact.

Additional employment

67. According to the Applicant, employment benefits associated with this Application would include the creation of five additional equivalent full time (**EFT**) positions at the Premises, consisting of:





- (a) an additional 1 EFT position in the gaming room;
- (b) an additional 2.5 EFT positions as food and beverage attendants; and
- (c) an additional 1.5 EFT positions as function co-ordinator/duty manager and function food and beverage staff.

68. In the Ratio Report, the Applicant submitted that the majority of these positions would be taken by residents within the local area. The Applicant also submitted that the high unemployment within the hospitality sector as a result of COVID-19 would place greater value on any new jobs.
69. Overall, the Commission finds that the additional employment is a minor positive impact; noting that the additional employment of 5 EFT is of limited significance to a municipality with an adult population of 85,891 and an unemployment rate that is ranked 3<sup>rd</sup> out of 13 regional municipalities. The Commission also notes the possibility of employment transfer resulting from the impact of this Application on other venues within Ballarat due to the anticipated increase in gaming and other complementary expenditure at the Premises. The Commission considers it is an economic benefit to the community to which it should attribute nil to marginal weight.

*Increased gaming competition in the City of Ballarat*

70. Increasing competition in gaming in the City of Ballarat is a factor to be considered by the Commission in light of the statutory purposes of the Act<sup>20</sup> and the consumer benefits that derive from competition.
71. In the ShineWing Report, Mr Stillwell indicated that the Premises has multiple gaming competitors in proximity to the venue.
72. Mr Stillwell used the utilisation survey method of estimating additional gaming expenditure to be derived at the Premises, as this method was considered to be most appropriate for comparatively low to mid performing venues with comparatively smaller gaming rooms, such as the Robin Hood Hotel. Accordingly, Mr Stillwell considered the range of estimated additional gaming expenditure for the Premises, if the Application is approved, to be between \$200,877 and \$222,022 per annum in the first 12 months of trade post installation of the additional eight EGMs.
73. Mr Stillwell estimated that the grant of the Application would result in a 0.18% increase in the average net gaming expenditure per adult in the LGA over the first 12 months of trade following

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<sup>20</sup> See GR Act, s 3.1.1(2).



the installation of the additional eight EGMs at the Premises. He also estimated that the amount of transferred expenditure within the City of Ballarat would be between \$100,438 and \$111,011.

74. Having regard to the estimated adult population of 85,891 in the City of Ballarat for 2019/20, the Commission notes that this Application, if approved, would:
- (a) increase the total number of attached licensed EGMs in the municipality to 647;
  - (b) increase EGM density in the municipality from 7.44 to 7.53 per 1,000 adults, as compared with the regional average of 7.1 and the State average of 5 EGMs per 1,000 adults; and
  - (c) on the basis of Mr Stillwell's figures, would result in an estimated increase between \$100,438 and \$111,011 of new gaming expenditure to the LGA in the first year of operation.
75. Considering the matters discussed above, while this impact would be a positive economic benefit, the Commission considers that eight additional EGMs is a small increase relative to the overall market in the City of Ballarat, being 639 EGMs across 14 venues. The Commission also acknowledges that the EGM density in the LGA is 4.7% greater than the regional average and 47.6% greater than the State average, which again lessens the impact on competition of a small increase in EGMs. Accordingly, the Commission considers it appropriate to attribute nil to marginal weight to this economic benefit.

*Gaming expenditure not associated with problem gambling*

76. To the extent that gaming expenditure is not associated with problem gambling, it has been recognised that such expenditure can be treated as an economic positive.<sup>21</sup> As Bell J notes in *Romsey No. 2*, this approach also brings to account the benefit obtained from pure consumption by the lone gambler who does not use EGMs for social reasons.<sup>22</sup>
77. In the ShineWing Report and at the Hearing, Mr Stillwell gave evidence regarding the likely increase in gaming expenditure should the Application be granted. Specifically, he gave evidence of the likely increased gaming expenditure in the first 12 months of operation of the additional eight EGMs at the Premises.
78. The ShineWing Report sets out the different methodologies used to estimate EGM expenditure and determined that the utilisation survey method was the most appropriate in the

<sup>21</sup> See *Romsey No. 2* [2009] VCAT 2275 [351] per Bell J.

<sup>22</sup> *Ibid.* Bell J further notes at [352] that the other approach is to say (as Morris J did in *Branbeau Pty Ltd v Victorian Commission for Gambling and Liquor Regulation* [2005] VCAT 2606 at 79) that gaming extends 'substantial economic and social benefits' to gaming machine users, which treats consumption as a benefit without saying whether it is economic or social. While Bell J states both approaches are correct, for the purposes of this Application, this benefit is treated as an economic benefit.

circumstances of the Application. On this basis and compared with an analysis of historical and recent trends in gaming expenditure, Mr Stillwell estimated that (as noted in paragraphs 72 and 73 above):

- (a) the level of additional gaming expenditure generated from the Application would be between \$200,877 and \$222,022 in the first 12 months of trade;
- (b) due to the location of the Premises and the LGA being within a regional area of Victoria, the expenditure would most likely be transferred expenditure from existing venues within the City of Ballarat at the rate of 50%; and
- (c) adopting the estimated level of 50% transferred expenditure, new gaming expenditure was estimated to be between \$100,438 and \$111,011 in the first 12 months of trade.

79. The Commission notes from the VCGLR Report that the average net EGM expenditure per adult in the City of Ballarat (\$508.94, based on spending in the 2019/20 financial year) is significantly more than the average for both the State average (\$377.57) and the regional average (\$445.58).
80. The Ratio Report submitted that the Applicant's EGM utilisation records for the fortnight from 7 March 2020 to 20 March 2020 (inclusive) indicated that the Premises' gaming room did not operate at peak utilisation (i.e. greater than 70% or 14 EGMs) at any time during the survey period, which was indicative of low demand for gaming at the Premises. Further, the highest utilisation recorded was 10 EGMs (50% utilisation) which was recorded on three occasions throughout the day on Monday 16 March 2020. The Applicant submitted the low level of utilization combined with the modest NMR at the venue (\$208) was an indication that problem gambling was not a significant issue at this venue.
81. The Council Report did not provide any contrary evidence to Mr Stillwell's gaming expenditure figures for the Premises relating to the additional eight EGMs at the Premises. An alternate calculation for new gaming expenditure suggested by one of the local community organisations (based on a linear calculation of existing expenditure and proposed new EGMs) was put to Mr Stillwell for comment at the Hearing. Mr Stillwell gave evidence that, based on his experience over approximately 60 EGM applications, the alternate calculation would only be possible in high performing venues and accompanied with significant multi-million dollar renovations. Noting the above, the Commission accepts Mr Stillwell's analysis as more appropriate and reliable in this matter.
82. In assessing the extent of the benefit associated with this increased gaming expenditure, the

Commission notes the following in respect to the Premises:

- (a) within the primary trade area of the Premises, there are already 639 EGMs across 14 venues (including the existing 20 accessible at the Premises);
- (b) the gaming room operates between 9am and 1am each day (10am to 12am on Sundays), creating a mandatory break in operation of between 8 and 9 hours every day;
- (c) the median weekly household income for residents living within the primary catchment area of the Premises sits well below the State average, however income levels in the primary catchment area are higher relative to the rest of the City of Ballarat and the regional average;
- (d) housing stress in the City of Ballarat is ranked second highest by regional LGAs, and the housing stress in the immediate surrounding area of the Premises (66.67%) is much higher than housing stress for the City of Ballarat (54.7%);
- (e) unemployment in the city of Ballarat is 7.2% (ranked 3<sup>rd</sup> of 13 regional LGAs), compared with the State unemployment rate of 6.6%;
- (f) the City of Ballarat has the 7<sup>th</sup> highest crime rate for regional LGAs;
- (g) the City of Ballarat is ranked 9<sup>th</sup> by regional LGAs for pensions and allowances per 1,000 adults;
- (h) in the 2019/20 financial year, the City of Ballarat had an average gaming expenditure which is 14.22% more than the regional LGA average and 34.79% more than the State average; and
- (i) approximately 28.4% of residents within the 2.5km radius from the Premises are in the lowest two State SEIFA deciles.

83. Generally, the Commission considers that the portion of new expenditure not attributable to problem gambling is an economic benefit. Having regard to the matters discussed in paragraphs 76 to 82 above regarding the Premises and in the section below related to problem gambling, the Commission considers that the level of anticipated new expenditure is not particularly high. It is also likely that there would be portions of new expenditure at the Premises associated with a risk of problem gambling (and therefore not forming part of this economic benefit). Overall, the Commission attributes this benefit nil to marginal weight.

Gaming expenditure associated with problem gambling and gambling related harm

84. To the extent that a portion of the new expenditure is attributable to problem gambling, this represents an economic disbenefit.<sup>23</sup> In assessing this impact (and other effects of problem gambling), the Commission recognises that harms associated with problem gambling may be experienced directly and indirectly as a consequence of gambling undertaken by those who may be defined as 'problem gamblers', as well as those who may be otherwise regarded as 'low-risk' or 'moderate-risk' gamblers.
85. In assessing the extent of this disbenefit, the Commission has had regard to the expenditure evidence set out in paragraph 82 above and the findings in relation to the risk of problem gambling at the Premises discussed further below. In considering this aspect of the '*no net detriment*' test, the Commission does not include consideration of transferred expenditure because such expenditure cannot be said to exacerbate problem gambling.<sup>24</sup>
86. The extent to which new gaming expenditure will be associated with problem gambling, and hence may be regarded as a disbenefit associated with the Application, will be influenced by the socio-economic status and vulnerability of the community of Ballarat, and in particular those living in the immediate surrounding area of the Premises. This is because communities characterised by relative socio-economic disadvantage are considered more vulnerable to the harms arising from problem gambling.
87. In the Ratio Report, the Applicant submitted that:
- (a) The SEIFA Index for the Ballarat LGA (980) sits above the median for regional Victorian LGAs (977) and below the median for all Victorian LGAs (994).
  - (b) The suburb where the venue is located (Ballarat Central) and where the majority of patrons resides sits within the 35th percentile, a percentile which indicates that it does not experience significant disadvantage.
  - (c) The suburbs that comprise the patron catchment of the venue (based on the patron surveys) generally have SEIFA scores well below the median SEIFA score for Victorian

<sup>23</sup> The Commission recognises that, on review, the key likely disbenefit of 'problem gambling' has, for convenience, been treated under the heading of 'social impacts' in various instances: see *Mount Dandenong Tourist Hotel Pty v Greater Shepparton CC* [2012] VCAT 1899, [121] and following; *Melbourne CC v Kingfish Victoria Pty Ltd & Anor* [2013] VCAT 1130, [47] per Martin PM and Naylor M. However, this is not an approach that has been uniformly adopted; see, for example, *Mount Alexander Shire Council* [2013] VCAT 101 at [178] and following per Dwyer DP. For completeness, the Commission considers both the economic and social impacts of problem gambling in assessing this Application.

<sup>24</sup> See *Bakers Arms Hotel Pty Ltd v Victorian Commission for Gambling and Liquor Regulation* [2014] VCAT 1192 at [11] per Code PM and Nelthorpe M; *Kilsyth and Mountain District Basketball Association Inc v Victorian Commission for Gambling Regulation* [2007] VCAT 2, [40] per Morris J.

suburbs. The exception is Miners Rest which sits well above the median SEIFA score.

- (d) The venue is located within an SA1 that sits in the first (most relatively disadvantaged) decile.
- (e) There are pockets of SA1s located in the 5km radius that sit within the first two deciles of SEIFA scores and these correlate to the suburbs with a low SEIFA score such as Redan, Sebastopol and Wendouree.
- (f) This indicates that the patron catchment does show significant signs of disadvantage.

88. In summary, the Applicant submitted that the socio-economic profile of the Premises' catchment generally reflects that of Ballarat as a whole – being mixed, and moderate on average.

89. Similarly, the Council Submission stated that many patrons of the Premises come from Ballarat's most disadvantaged areas of Wendouree, Sebastopol, Ballarat East and Delcombe (being four of the most disadvantaged suburbs in the LGA). The Council also noted the existing high levels of unemployment and housing stress within these areas.

90. However other factors raised on behalf of the Applicant to suggest there is lower risk of increased incidence and economic impact of problem gambling at the Premises should this Application be granted, include:

- (a) It draws patrons from an area which effectively covers most of Ballarat, with an overall moderate socio-economic profile.
- (b) It is a 'destination venue' and it is not located within the more disadvantaged outer northwest and northeast suburbs of Ballarat.
- (c) It has a broad 'full service' venue offer, with physical and functional separation of the gaming room (which would be further improved by the Works).
- (d) There is a minimum eight hour closure of the gaming room each day, and other facilities also operating whenever the gaming room is open.
- (e) It is a modest sized venue with a very modest gaming room, increasing the level of social and staff interaction and lacking the sense of anonymity which problem gamblers are known to seek out.
- (f) It has a venue operator with a strong commitment to responsible gambling practices, assisted by the engagement of experts in RSG compliance to implement best practice

initiatives.

91. Overall, notwithstanding the Council's submission, the Commission considers that with the mitigating factors (including, importantly, the relatively small size of the gaming room, the relatively short hours of operation and the existing commendable RSG commitment at the Premises) the potential expenditure associated with problem gambling is a marginal to low disbenefit. Issues relating to the negative social impacts associated with problem gambling are considered further in paragraphs 112 to 116 below.

*Diversion of trade from other gaming venues*

92. As stated above, Mr Stillwell estimated that at least 50% of gaming expenditure would be transferred from existing venues within the City of Ballarat. Mr Stillwell also submitted that due to the location of the Premises and the LGA being within a regional area of Victoria, the gaming expenditure would most likely be transferred expenditure from existing venues within the City of Ballarat.
93. The Commission accepts the Applicant's evidence that at least 50% of anticipated increased expenditure would be derived from other venues located within the City of Ballarat. The Commission considers that a transfer rate of this size is not insignificant, however in light of the competitive market and relative stability of the affected venues, the Commission finds that the diversion of trade will have a negligible detrimental economic impact on other venue operators. Having regard to these factors, the Commission assigns marginal weight to this impact.

*Diversion of trade from non-gaming venues*

94. The Commission recognises that the impact that could be felt by local non-gaming businesses is the value of the new expenditure from this Application, being approximately \$100,438 in the first year of operation, and a portion of the complementary expenditure that may be transferred from other venues within Ballarat. However, the Commission notes that it is difficult to determine if, and to what extent, that expenditure would necessarily have been spent elsewhere in the regional LGA. The Commission finds that there is an economic disbenefit associated with any diversion of trade from retail facilities or other businesses in the City of Ballarat as a result of this Application and considers it appropriate to attribute marginal weight to this impact.

*Conclusion on economic impacts*

95. After considering the economic benefits of the Application and balanced against the detriments, the Commission considers that there is likely to be a neutral to slightly positive economic impact

if the Application is granted.

### **Social Impacts**

96. The materials before the Commission and the evidence adduced at the Hearing detailed a range of social benefits and disbenefits associated with the Application.

#### *Increased gaming opportunities for those who enjoy gaming*

97. Increased gaming opportunities is a positive impact if the Application will better serve the needs of gaming patrons through providing additional opportunities and choice for those who play EGMs responsibly.
98. Mr Stillwell submitted that while the Premises does not necessarily reach peak utilisation, the data indicates that the Premises has attracted greater market share continually, and therefore there is a need for additional EGMs at this venue.<sup>25</sup>
99. While the Commission considers that the approval of the Application would have a positive effect of increasing gaming opportunities for those who enjoy gaming, the addition of a low number of EGMs to an existing venue with utilisation rates that indicate “not a heavy demand” is unlikely to have a significant impact.<sup>26</sup> The Commission therefore attributes marginal weight to this factor.

#### *Improved services and facilities at the Premises*

100. Separate from the economic benefit that may be associated with expenditure involved in capital works at the Premises, there are also potential social benefits to the community that may arise having regard to the nature of the renovations that are intended to take place.
101. Of significance, the Commission notes that the Works include aspects that will improve the RSG arrangements at the Premises, in particular with regard to lower accessibility to, and visibility of, the gaming room. Further, as noted at paragraph 58 above, the Works include introduction of an improved sports bar offering and alterations to the Premises’ entrance. Accordingly, the Applicant submits that the proposed renovations to the Premises are not solely associated with gaming.
102. The Commission considers that the community’s access to, and use of, the proposed improved facilities at the Premises will provide a social benefit to the community of the City of Ballarat.

<sup>25</sup> Expenditure Report, Appendix 2; Transcript, Mr Stillwell, p 11.

<sup>26</sup> Transcript, Mr Stillwell, p 10.



The Commission recognises that the Works predominantly only improve existing facilities at the Premises, however notes the improvement to RSG that the Works will offer at the Premises. Therefore, the Commission considers it is appropriate to attribute low weight to this factor.

### Community contributions

103. In determining the net economic and social impact of applications of this nature, both the Commission<sup>27</sup> and VCAT<sup>28</sup> have regularly treated community contributions proposed by an Applicant as a positive benefit. However, for such contributions to be regarded as a benefit associated with the Application, it is necessary that they are properly regarded as community contributions and that they will result as a consequence of the Application being granted.
104. The Commission has taken into account in this section both the economic (financial benefit enjoyed by recipients) and the social (improvement to the social fabric of the community) benefits associated with the proposed community contributions forming part of the Application, and given appropriate weight to that impact in its cumulative form.
105. The Commission notes that in 2012, an application to approve the Premises as suitable for gaming with twenty EGMs was approved and an undertaking was provided by the Applicant to make cash community contributions annually to the value of \$50,000 (indexed to CPI). In his statement and at the Hearing, Mr Beaumont stated that due to profitability over the years since 2012 which failed to achieve the originally projected levels, the Applicant had been unable to comply fully with the community contribution undertaking.
106. The Applicant's proposed conditions, if the Application were granted, included a condition to:
- (a) Make cash contributions annually to the value, as originally promised in 2012, of \$50,000 for as long as the 2012 EGMs are in operation at the Premises (**Existing Contributions**); and
  - (b) Make additional cash contributions annually in the sum of \$10,000 for as long as any of the additional eight EGMs are in operation at the Premises (**Additional Contributions**) (together, **Combined Contributions**).
107. The Applicant proposed that the Combined Contributions would be allocated each year to not-for-profit community groups and sporting organisations providing services and facilities to

<sup>27</sup> See e.g., *Application by Richmond Football Club* [2015] VCGLR (24 July 2015) (Commissioners Cohen and Owen).

<sup>28</sup> See e.g., *Melbourne CC v Kingfish Victoria Pty Ltd & Anor* [2013] VCAT 1130; *Bakers Arms Hotel Pty Ltd v Victorian Commission for Gambling and Liquor Regulation* [2014] VCAT 1192.

residents in the City of Ballarat.<sup>29</sup>

108. Ms Peterson considered the proposed community contributions and the flow-on benefits that could arise from the Combined Contributions to be a negligible benefit.<sup>30</sup>
109. The Council submitted that it would like to see the Combined Contributions allocated to address the harms caused by EGMs and community health issues which have a strong correlation to family violence, mental health, and harmful consumption within the community. At the Hearing, the Applicant agreed to a condition to this effect as part of any approval of the Application. Further, Council submitted that greater accountability is needed to ensure the Combined Contributions are made given the history of the Applicant in meeting its community contributions undertaking.
110. Overall, the Commission considers that, by way of the wording of the proposed conditions, the Applicant is committing to community contributions totalling \$60,000 to organisations providing services or facilities to residents of the City of Ballarat. However, the Commission finds that, in light of the Applicant's undertaking to the Commission during the 2012 Application to pay the Existing Contributions, the effective additional benefit associated with this Application is limited to community contributions in the amount of \$10,000 per annum.
111. Accordingly, the Commission considers that the Applicant's commitment to the Combined Contributions (particularly to organisations providing community health services and facilities to residents in the City of Ballarat) would be a positive economic and social benefit and considers it appropriate to attribute marginal to low weight to this impact.

*Possibility of increased incidence and the potential impact of problem gambling on the community*

112. Wherever accessibility to EGMs is increased, there is a risk of an increase in problem gambling, which leads to other costs such as adverse health outcomes, family breakdowns and other social costs. Accordingly, the Commission accepts that there is potential for a negative social impact through possible increased problem gambling expenditure.
113. The Commission refers to and relies upon the evidence set out in paragraphs 83 and 84 with respect to the economic impact of problem gambling on the community, which similarly apply to the social impact of problem gambling. As is concluded there, the Commission considers that there is potential for an increased risk in gambling-related harms as a result of this Application. This gives rise to a negative social impact. The Commission accepts that harms associated with

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<sup>29</sup> Proposed Conditions.

<sup>30</sup> Ratio Report, Table 16.1

gambling are wide-ranging and attributable to all categories of gamblers ('low-risk', 'moderate-risk' and 'problem gamblers') and across the community more broadly.

114. Mr Barrett submitted at the Hearing that the Applicant's compliance with responsible service of gaming was strong. Mr Barrett noted that the Premises was a small venue, that the staff of the Applicant knew its regular patrons well and that the hours of operation were modest in comparison with other venues. He further noted that the size of a venue, its operating hours, its broad venue offer and its layout were all protective factors against problem gambling. Overall, Mr Barret submitted that the increase in EGMs would have a negligible effect on problem gambling in the LGA.
115. In the Council Report, the Council submitted that it is concerned by the prevalence and accessibility of EGMs in the Ballarat area and the increased likelihood of harm this brings to the community, especially given the expenditure per adult on EGMs being 34.8% more than the State average and the City of Ballarat having 47.6% more gaming machines per 1,000 adults than the State average. Further, Council is also concerned by the fact that the suburbs where a large proportion of patrons are coming from (46.8%) have a number of vulnerabilities likely to make them more susceptible to gambling harm.
116. Having regard to all of the evidence and circumstances, for the reasons discussed in relation to the economic impact of problem gambling, particularly given both the location of the Premises within the City of Ballarat and the socio-economic disadvantage of residents within the LGA, the Commission considers it appropriate to attribute low weight to this negative social impact.

### Community attitude

117. As was determined in *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd and Anor*,<sup>31</sup> the Commission recognises that while community apprehension is not an over-riding factor (in the sense that the Application is not a referendum on gaming), it is certainly a relevant factor in the consideration of the particular social impact within, and as part of, the '*no net detriment*' test.
118. The evidence before the Commission indicates that the community attitude towards this Application is somewhat negative. As detailed in paragraph 28 above, the Commission received correspondence from local community organisations within the City of Ballarat in opposition to the Application. In summary, these submissions against the granting of the Application were directed towards the impact of gambling in the community at large and the concern that this

<sup>31</sup> The *Romsey* case (2008) 19 VR 422, [44] per Warren CJ, Maxwell P and Osborn AJA. See also *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors*. [2013] VCAT 101, [73] per Dwyer DP.



Application might increase the risk of problem gambling and a range of gambling-related harms. However, the Commission notes that the survey submitted, and relied on, by the Ballarat Interagency Taskforce on Gambling Harm was conducted in 2019. Therefore, it can only reflect a community attitude of general opposition towards EGMs, rather than specific opposition to the Application, after having taken into account the associated benefits and disbenefits.

119. Similarly, the Applicant submitted that the community opposition to the Application cannot be said to be a significant factor in this case given there is no directly referable evidence before the Commission that would support such a finding.<sup>32</sup>
120. Overall, the Commission is satisfied that the submissions referred to in paragraph 28 suggest that there is some limited negative attitude within the City of Ballarat regarding the Application.
121. In all of these circumstances and taking into account the Council's position and evidence in relation to the Application, the Commission considers it appropriate to attribute nil to marginal weight to this negative social impact.

#### Conclusion on social impacts

122. After considering the social benefits of the Application balanced against the social disbenefits, the Commission considers that there is likely to be a slightly positive social impact if the Application is granted.

#### **Net economic and social impact**

123. The '*no net detriment*' test in section 3.4.20(1)(c) of the GR Act requires the Commission to weigh the likely positive social and economic impacts of an application against the likely negative social and economic impacts. As stated in paragraph 18 above, this test will be satisfied if, following the weighing of any likely impacts, the Commission is satisfied that the net economic and social impact of approval on the well-being of a relevant community will be either neutral or positive<sup>33</sup>.
124. After consideration of the material before it, including the evidence provided at the Hearing (and weighted as outlined above and summarised in tabular form at Appendix A of these Reasons for Decision), the Commission is satisfied that the social and economic impact on the well-being of the community of the municipal district in which the Premises is located will not be detrimental to the well-being of the community of the LGA. Accordingly, the pre-condition set out in

<sup>32</sup> Applicant's Closing Submission, paragraph 7.1 to 7.3.

<sup>33</sup> *Mount Alexander Shire Council v Victorian Commission for Gambling and Liquor Regulation & Ors.* [2013] VCAT 101 at [52] per Dwyer DP.

section 3.4.20(1)(c) of the GR Act is satisfied.

**D. Independence from other gaming venues**

125. Section 3.4.20(1)(d) of the GR Act requires the Commission to be satisfied that, if the Premises is proposed to be added to the Applicant's licence as an approved venue and the Applicant (or an associate of the Applicant) operated an approved venue within 100 metres of the Premises, the management and operation of the Premises and other approved venues are genuinely independent of each other.
126. The Commission notes that the Application is not proposing to add the Premises to the Applicant's venue operator's licence (as it already exists on the licence), nor does the Applicant (or an associate) operate an approved venue within 100 metres of the Premises.
127. On this basis, the Commission considers that the mandatory pre-condition set out in section 3.4.20(1)(d) is not applicable to this Application.

**General discretion of the Commission**

128. As noted in paragraphs 21 to 23 above, the Commission retains an ultimate discretion whether to grant or refuse the Application, once the mandatory preconditions set out in section 3.4.20(1) have been found to be satisfied.
129. In exercising its discretion whether or not to approve the Application, the Commission may take into account relevant matters.<sup>34</sup> These include broader policy considerations, drawn from the content and objectives of the GR Act as a whole.<sup>35</sup>
130. The Commission notes that the 'policy context' of the GR Act, is referenced through some, if not all, of the following six principles set out in the second reading speech for the Bill:<sup>36</sup>

“developing and reinforcing the government's commitment to responsible gambling through measures that assist and protect problem gamblers and those at risk of becoming problem gamblers, their families and the wider community;

developing and maintaining the state's commitment to the highest standards of probity for gambling service providers;

accepting gambling is a valid activity for many Victorians who are entitled to expect ongoing high standards of service, transparency and accountability from the gambling sector;

ensuring that the legitimate financial benefits of gambling (both private and public) are transparent, appropriately recognisable and fairly distributed to the Victorian community;

that to the extent possible consistent with the other principles, gaming service providers operate in a competitive environment; and

<sup>34</sup> Section 3.4.20(1)

<sup>35</sup> *Ocean Grove Bowling Club v Victorian Commission for Gambling Regulation* [2006] VCAT 1921.

<sup>36</sup> Hansard, Legislative Assembly, 6 November 2003 at p 1595 (Hon. John Pandazopoulos, Minister for Gaming).



establishing 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 widest extent possible, the broader Victorian community.”

131. In deciding whether to exercise its discretion to refuse to grant its approval to the Application, the Commission not only may, but should, give appropriate weight to relevant events in the past and to stated intentions for the future. Specific to this Application, the Commission refers to the undertaking made by the Applicant as part of its 2012 Application to pay community contributions in the amount of \$50,000 per year. In the Commission’s reasons for decision for the 2012 Application, the Commission referred to Mr Peter Cook, a director of the Applicant at that time, and noted that:

“27. Mr Cook was questioned by the Commission as to whether he would be prepared to accept a condition on the venue operator’s licence that would require the applicant to make good on its promise to provide the cash contributions to the community. Mr Cook told the Commission that he would accept such a condition. Mr Cook then made an express undertaking to the Commission, on behalf of the Applicant, that the cash contribution would be provided and would be distributed in cooperation with the Council.

...

49. The Commission considers that the significant economic benefit of the proposal is the Applicant’s commitment to provide \$50,000 annually and indexed to CPI for the life of the EGM entitlements. The contribution is to be used in consultation with Council to benefit community groups. The Commission encourages both the Applicant and the Council to use this contribution to support community organisations that assist with problem gambling and associated social issues.

50. The Commission notes the Applicant’s commitment to make good on its promise to provide the cash contributions and accepts the undertaking proffered by Mr Cook. The Commission has determined that, in light of Mr Cook’s undertaking, a condition requiring the cash contributions to be made will not be imposed in this particular case.” [Footnotes omitted]

132. In the Ratio Report, it was submitted that the Applicant had attempted, with varying degrees of success, to fulfill its obligations to the Existing Contributions despite operating at a significant loss. Since 2012/13, the Applicant has made community contributions in the aggregate amount of \$118,913, which represents an underpayment of the promised community contributions in the amount of \$281,087.
133. In his statement, Mr Beaumont acknowledged the underpayment of the Existing Contributions and noted the difference between the anticipated and actual gaming expenditure at the Premises, increased costs of renovations undertaken at the Premises and the overall

unprofitability of the Premises across the past six years.

134. As part of this Application, the Applicant confirmed that it was willing to accept a condition to ensure the continued provision of \$50,000 per annum being the Existing Contributions, to the local community, plus an additional \$10,000 being the Additional Contributions, for the life of the relevant entitlements.
135. At the Hearing, the issue of this underpayment was raised with Mr Beaumont. Mr Beaumont gave evidence that he was “very embarrassed about it” and “it’s not something that [he’s] proud of”. He also stated that the Applicant has “put a lot of money into food and beverage over the years” and “continued to try and improve the business there, so it was sustainable and we have spent a lot of money”.
136. Mr Beaumont was asked whether there was any offer by the Applicant to pay the approximately \$280,000 in arrears. Mr Beaumont’s response to that question was somewhat equivocal.<sup>37</sup> Overall, and in considering the Applicant’s evidence as a whole, the Commission finds that the Applicant has not made any commitment to pay the outstanding amounts of community contributions as part of this Application.
137. It is the Commission’s position that it cannot (for public policy reasons) enforce the full repayment of arrears as a condition of this Application, unless the Applicant proffers that as a commitment. As outlined above, the Applicant has only committed to make payments of the Existing Contribution on a prospective, rather than retrospective, basis.
138. The Commission refers to the above excerpts of its reasons in relation to the 2012 Application and considers that the proffered community contributions formed a significant part of the reasons of that approval. The Commission also refers to the evidence of Mr Beaumont that the Applicant has spent “a lot of money” in improving the Premises’ offering, and finds that this has been a conscious decision of the Applicant to direct funds in this way, as opposed to meeting its undertaking to the Commission to make Existing Contributions of \$50,000. It is likely that the Applicant’s decision to invest in the business had a potential benefit for it in the form of reducing losses or increasing profits. This decision, perhaps understandably, put the Applicant’s commercial needs ahead of the community benefit it had undertaken to provide. The Commission notes that the underpayment of the promised Existing Contributions occurred in separate years over the period leading up to the Application in 2021. These were recurring events rather than a single isolated incident.

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<sup>37</sup> Transcript, Mr Beaumont, p 51.

139. The Commission refers to the purposes of Chapter 3 of the GR Act (outlined in section 3.1.1(2)), which include to “promote a competitive gaming industry with the aim of providing financial and social benefits to the Victorian community”. While it accepts that investing revenue back into a gaming business may contribute to promoting a competitive gaming industry, the Commission considers that this purpose could also have been contributed to by a venue operator meeting its commitments to the local community through the payment of community contributions, which formed part of the promised benefits which carried significant weight in securing an approval for a premises to operate EGMs.
140. Further, the Commission considers that those who operate in the gambling sector do so pursuant to a social, as well as a regulatory, licence. This failure to meet its social, if not legal, obligations to pay the Existing Contributions, together with a non-commitment to rectify such a failure as part of this Application, is found, on balance, to be contrary to the broad policy principles of the GR Act outlined in the second reading speech mentioned in paragraph 130 above. References to “the highest standards of probity” and “accountability from the gambling sector” may or may not have had in mind the adherence by licensees to promises made to the Commission in the course of applications pursuant to the GR Act. However, in the present circumstances the Commission has come to the view that the level of accountability Victorians are entitled to expect of a licensee in the position of the Applicant is greater than has been demonstrated. Accordingly, the Commission considers that the exercise of its discretion to refuse to approve the Application is consistent with furthering the objects of the GR Act and the broader policy principles underpinning it.
141. Having regard to these above considerations, the Commission considers that this is one of those relatively rare or exceptional cases where the ultimate discretion militates against an approval despite the ‘*no net detriment*’ test having been satisfied.

## CONCLUSION

142. On the material that has been put before it, the Commission has determined that, despite the mandatory pre-conditions for approval set out in section 3.4.20(1) having been satisfied, it is appropriate for the Commission to exercise its discretion in this matter and refuse the Application.
143. The Application is therefore refused.

***The preceding 143 paragraphs and the following Appendix A are a true copy of the Reasons for Decision of Ms Deirdre O’Donnell, Deputy Chair, and Mr Andrew Scott, Commissioner.***



## **Appendix A**

### Summary of economic and social impacts

*The following table is a summation of the economic and social benefits and disbenefits considered by the Commission in reaching its decision. The table is to be read in conjunction with the main body of the Reasons for Decision, as the weight attributed to each factor is determined in light of the particular circumstances of the Application and the evidence presented.*

### ***Economic impacts***

	<b>Impact</b>	<b>Paragraph numbers</b>	<b>Comment relevant to weight</b>
<b>Benefits</b>	<i>Expenditure on capital works</i>	57-63	<p>The proposed Works are expected by the Applicant to cost approximately \$600,000.</p> <p>Approximately \$400,000 of the \$600,000 of construction costs would be spent on local trades from the City of Ballarat.</p> <p>Marginal weight.</p>



	<b>Impact</b>	<b>Paragraph numbers</b>	<b>Comment relevant to weight</b>
	<i>Supply contracts and complementary expenditure</i>	64-66	<p>The Applicant anticipated increased patronage of 280 patrons per week, accompanied by \$560,000 increase in complementary expenditure.</p> <p>Additional supply contracts totalling \$313,000 per year, with approximately \$130,000 being fulfilled by suppliers within the City of Ballarat.</p> <p>There is some uncertainty as to the extent to which the new patronage would generate increased economic activity within the local area, as opposed to transferred activity within the City of Ballarat.</p> <p>Marginal weight.</p>
	<i>Additional employment</i>	67-69	<p>Creation of five additional equivalent full time (<b>EFT</b>) positions at the Premises, including an additional 1 EFT position in the gaming room.</p> <p>Minor increase, and possibility of employment transfer resulting from the impact of this Application on other venues within Ballarat due to the anticipated increase in gaming and other complementary expenditure at the Premises.</p> <p>Nil to marginal weight.</p>
	<i>Increased gaming competition in the City of Ballarat</i>	70-75	<p>Overall market in the City of Ballarat is 639 EGMs across 14 venues.</p> <p>Eight additional EGMs is a small increase relative to the current market. EGM density in the LGA is 4.7% greater than the regional average and 47.6% greater than the State average, which again lessens the impact on competition of a small increase in EGMs.</p> <p>Nil to marginal weight.</p>



	Impact	Paragraph numbers	Comment relevant to weight
	<i>Gaming expenditure not associated with problem gambling</i>	76-83	<p>Additional gaming expenditure generated from the Application would be between \$200,877 and \$222,022 in the first 12 months of trade.</p> <p>Likely transfer rate of 50%, resulting in new gaming expenditure estimated to be between \$100,438 and \$111,011 in the first 12 months of trade.</p> <p>Level of anticipated new expenditure is not particularly high, and it is likely that there would be portions of new expenditure at the Premises associated with a risk of problem gambling (and therefore not forming part of this economic benefit).</p> <p>Nil to marginal weight.</p>
<b>Disbenefits</b>	<i>Gaming expenditure associated with problem gambling and gambling related harm</i>	84-91	<p>New gaming expenditure estimated to be between \$100,438 and \$111,011 in the first 12 months of trade.</p> <p>Catchment area demonstrates mixed levels of socio-economic disadvantage, with pockets of more significant disadvantage in the areas of Wendouree, Sebastopol, Ballarat East and Delcombe. This includes high levels of unemployment and housing stress.</p> <p>Mitigating factors include the relatively small size of the gaming room, the relatively short hours of operation and the existing commendable RSG commitment at the Premises.</p> <p>Marginal to low weight.</p>



	<b>Impact</b>	<b>Paragraph numbers</b>	<b>Comment relevant to weight</b>
	<i>Diversion of trade from other gaming</i>	92-93	<p>50% of anticipated increased expenditure would be derived from other venues located within the City of Ballarat.</p> <p>Transfer rate of this size is not insignificant, however in light of the competitive market and relative stability of the affected venues, the diversion of trade will have a negligible detrimental economic impact on other venue operators.</p> <p>Marginal weight.</p>
	<i>Diversion of trade from non-gaming</i>	94	<p>Value of the new expenditure from this Application and a portion of the complementary expenditure may be transferred from other venues within Ballarat.</p> <p>Difficult to determine if, and to what extent, that expenditure would necessarily have been spent elsewhere in the regional LGA.</p> <p>Marginal weight.</p>



**Social impacts**

	<b>Impact</b>	<b>Paragraph numbers</b>	<b>Comment relevant to weight</b>
<b>Benefits</b>	<i>Increased gaming opportunities for those who enjoy gaming</i>	97-99	<p>While the Premises does not necessarily reach peak utilisation, the data indicates that the Premises has attracted greater market share continually, and therefore there is a need for additional EGMs at this venue.</p> <p>Addition of a low number of EGMs to an existing venue with utilisation rates that indicate “not a heavy demand” is unlikely to have a significant impact.</p> <p>Marginal weight.</p>
	<i>Improved facilities enabling a greater range of services</i>	100-102	<p>The Works include introduction of an improved sports bar offering and alterations to the Premises’ entrance.</p> <p>The Works also include aspects that will improve the RSG arrangements at the Premises, in particular with regard to lower accessibility to, and visibility of, the gaming room.</p> <p>The Works predominantly only improve existing facilities at the Premises, however the Commission notes the improvement to RSG that the Works will offer at the Premises.</p> <p>Low weight.</p>
	<i>Community contributions</i>	103-111	<p>The Applicant is committing to community contributions totalling \$60,000 to organisations providing services or facilities to residents of the City of Ballarat.</p> <p>In light of the Applicant’s undertaking to the Commission during the 2012 Application to pay \$50,000 per year, the effective additional benefit associated with this Application is limited to community contributions in the amount of \$10,000 per annum.</p> <p>Marginal to low weight.</p>



	<b>Impact</b>	<b>Paragraph numbers</b>	<b>Comment relevant to weight</b>
<b>Disbenefits</b>	<i>Possibility of increased incidence and the potential impact of problem gambling on the community</i>	112-116	<p>There is potential for an increased risk in gambling-related harms as a result of this Application.</p> <p>The Commission refers to and relies on the reasons discussed in relation to the economic impact of problem gambling, particularly given both the location of the Premises within the City of Ballarat and the socio-economic disadvantage of residents within the LGA.</p> <p>Low weight.</p>
	<i>Community attitude</i>	117-121	<p>The Council and local community organisations within the City of Ballarat were in opposition to the Application.</p> <p>This opposition was directed towards the impact of gambling in the community at large rather than specifically to the concern that this Application might increase the risk of problem gambling and a range of gambling-related harms.</p> <p>Nil to marginal weight.</p>