



# Victorian Commission for Gambling and Liquor Regulation

## 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 WGH Pty Ltd for amendment of its venue operator's licence to vary the number gaming machines at the approved premises at Watergardens Hotel, 431 Kings Road, Taylors Lakes, from seventy (70) to seventy-six (76) gaming machines.

**Commission:**

Mr Mark Brennan, Chair  
Mr Robert Kerr, Commissioner

**Appearances:**

Ms Susan Brennan of Counsel for the Applicant  
(instructed by Bazzani Scully Brand)

Mr John Rantino, Solicitor for the Council  
(instructed by Maddocks Lawyers)

Mr Liam Brown of Counsel as Counsel Assisting the  
Commission

**Date of Hearing:**

19 September 2012

**Date of Decision:**

5 November 2012

**Decision:**

That the application be granted.

**Signed:**

A handwritten signature in blue ink that reads "Mark Brennan".

**Mark Brennan**

Chair



## REASONS FOR DECISION

### INTRODUCTION

1. This is an application by WGH Pty Ltd (the **Applicant**) for amendment of its venue operator's licence to vary the number of electronic gaming machines (**egms**) operating at the Watergardens Hotel, 431 Kings Road, Taylors Lakes (the **Hotel**), from 70 to 76 egms. The Applicant purchased 76 entitlements to operate egms at the auction of entitlements held in 2010 and now seeks to have its venue operator's licence varied to allow the operation of the additional 6 egms.
2. Taylors Lakes is in the City of Brimbank, a relatively disadvantaged municipality with above average egm density and expenditure. Further, the Hotel is located in the "Brimbank A" market for the operation of egms, which is subject to a regional limit of 903 egms.<sup>1</sup>
3. The Hotel is ultimately owned and operated by the Robertson Group, established and controlled by the Robertson family. Other than the Hotel, the Robertson Group currently operates successful hotel ventures that include egms at Lower Plenty, Epping and two venues in the Melbourne CBD.
4. The relevant municipal authority is the Brimbank City Council (the **Council**). The Council opposed the application, in summary, on the basis that it involved the installation and operation of egms in a relatively disadvantaged municipality where the risk that any additional expenditure on the egms would compound that disadvantage was not outweighed by any of the benefits identified by the Applicant.

### THE LEGISLATION AND THE TASK BEFORE THE COMMISSION

5. Gambling 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* (the **Act**). The Act recognises that, notwithstanding individual rights of self-determination, gaming on egms causes harm to some communities and some members of some communities.<sup>2</sup> It is for this reason that the Act includes safeguards to ensure that an appropriate balance is struck between a lawful and legitimate recreational activity for some and harm for others. In particular, the balance is

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1 The region known as "Brimbank A" is the area covered by that part of postcodes 3012, 3020, 3021, 3022, 3023 and 3038 included in the local government area of the City of Brimbank as at 12 October 2006.

2 See: s 1.1(2) of the Act.





maintained by requiring an applicant who wishes to increase the number of gaming machines at a venue to satisfy the Commission of the “no net detriment test” and the other matters set out in section 3.4.20(1) of the Act:<sup>3</sup>

“(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

...”

6. The Commission is given discretion to grant or refuse an application, even where it is satisfied of the matters in section 3.4.20(1). However, the Act provides no specific guidance as to the matters that the Commission should take into account when exercising its discretion. Accordingly, it is a matter for the Commission to determine the relevant considerations in light of the subject matter, scope and purpose of the Act.<sup>4</sup>
7. The no net detriment test requires the Commission to weigh the likely positive economic and social impacts of an application against the likely negative economic and social impacts. The test will be satisfied if, following the weighing of any likely impacts, the Commission is satisfied

<sup>3</sup> See: *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation* [2009] VCAT 2275, [247] (Bell J).

<sup>4</sup> *Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40 (Mason J).



that the net economic and social impacts of approval on the well-being of the relevant community will be either neutral or positive.<sup>5</sup>

8. Further, section 3.4.19 of the Act allows the Council to make a submission addressing the economic and social impact of the proposal on the well-being of the community and taking into account the impact of the proposal on surrounding municipal districts. The Commission is bound to take this submission into consideration when applying the no net detriment test: section 3.4.19(5) of the Act. This recognises the special role of local government in representing the people of a community.<sup>6</sup>

### THE CITY OF BRIMBANK AND THE WATERGARDENS HOTEL

9. The City of Brimbank is approximately 14 kilometres west of the Melbourne CBD. Major centres include Sunshine, St Albans and Keilor.
10. There are 15 venues in Brimbank that offer a total of 953 egms (6.87 machines per 1000 adults compared to the metropolitan average of 6.08 machines per 1000 adults). In 2010-11 these machines generated a total of \$139,385,098 in revenue or \$1,004 per adult resident of the municipality. That figure is 54% higher than the average across metropolitan Melbourne.
11. It was undisputed before the Commission that the City of Brimbank demonstrated significant social and economic disadvantage. For example, Brimbank is ranked third of all municipalities in Victoria on the SEIFA Index.<sup>7</sup> The municipality occupies two statistical local areas<sup>8</sup> (SLAs) and of these the SLA where the Hotel is located (Brimbank-Keilor) is less disadvantaged (50th out of 204 Victorian SLAs on the SEIFA) than the other (Brimbank-Sunshine) (3<sup>rd</sup> out of 204 on the SEIFA index).
12. The Hotel sits to the east of (but adjacent to) the Watergardens Shopping Centre. The Hotel was opened in February 2002 with 70 egms, bar facilities and a bistro. A patron survey conducted by the Applicant showed that 54% of patrons came from the Brimbank-Keilor SLA,

5 *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422, 435 ("Romsey").

6 *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation* [2009] VCAT 2275, [247] - [249].

7 Socio-Economic Indexes for Areas (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.





26% from the neighbouring Melton Local Government Area (**LGA**) and 14% from the Brimbank-Sunshine SLA.

## **THE MATERIAL BEFORE THE COMMISSION**

13. The Applicant gave the Commission extensive materials to establish the economic and social benefits that approval of the application would bring to the municipality. That material is summarised below.

### ***Mr Alexander Robertson***

14. Mr Alexander Robertson is the founder of the Robertson Group and provided a witness statement and was cross-examined. The Robertson Group has been involved in the ownership and operation of licensed premises for approximately 24 years and the operation of egms at licensed premises since 1993.
15. Mr Robertson gave evidence about the Group's considerable community involvement and contributions. This includes a central role in the Australian Hotels Association's HotelCare program. Under this program, the Group introduced a voluntary \$22 per egm annual contribution from AHA members to further the charitable aims of HotelCare. Since 1999, HotelCare has distributed over \$2 million to charitable organisations in Victoria. Part of HotelCare involves the establishment and funding of the self-exclusion program for problem gamblers developed and maintained by the AHA.
16. The Group also makes cash and in kind donations to a number of worthwhile community projects and charitable organisations such as the Royal Children's Hospital, the Royal Women's Hospital and the Northern Hospital.
17. In terms of the community benefits that would follow this application, Mr Robertson indicated this would be in the order of \$350,000 of capital works to the venue to improve its comfort and appeal to its patrons together with cash donations of \$10,000 to local community groups and \$10,000 to the Council to be spent on programs to reduce problem gambling in the municipality.

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8 An SLA is a general purpose spatial unit. It is the base spatial unit used to collect and disseminate statistics by the Australian Bureau of Statistics.



***Mr Michael Robertson***

18. Mr Michael Robertson (who is no relation of Mr Alexander Robertson) is the Operations Manager of Hospitality & Leisure Management Pty Ltd (**HLM**), the vehicle through which the Robertson Group pursues its egm interests. Mr Robertson gave a witness statement and was cross-examined.
19. Mr Robertson has been involved in the Group's egm business since the Group first undertook the provision of egms. Mr Robertson gave evidence that parts of the Hotel need reinvigorating and if the revenue projections received by the Applicant from the operation of the egms were achieved, the Applicant would be in the position to undertake a \$350,000 capital works program for this purpose. That is, Mr Robertson said that the Applicant being a rational commercial operator would only undertake the capital works if, as a result of the operation of the additional machines, its revenue increased in line with the projections that it had received.

***William Parsons***

20. Mr Parsons is the Gaming Co-ordinator for HLM and he gave a witness statement and was cross-examined. Mr Parsons gave evidence about the Applicant's approach to the responsible service of gaming (**RSG**). The Hotel has an RSG code of conduct that was approved by the Commission on 17 March 2009 and has adopted the AHA self-exclusion program. Further, the Applicant engages the services of Mr Leigh Barrett to provide training about RSG to the gaming staff at the venue. Mr Barrett also conducts four spot audits each year at the venue to assess its compliance with RSG measures.

***Leigh Barrett***

21. Mr Barrett runs an independent consultancy specialising in assisting venues to comply with the regulatory requirements surrounding gaming and alcohol. Mr Barrett sent the Commission a letter and gave evidence. Mr Barrett noted that from his involvement with the Robertson Group the Group's compliance with RSG measures is of a very high standard that exceeds any legislative requirements.





### ***Evidence of likely egm expenditure***

22. The Applicant provided the Commission with an expenditure report prepared by Mr Richard Whitehouse, a director of Progressive Venue Services Australia Pty Ltd. Mr Whitehouse appeared before the Commission to give evidence and be cross-examined.
  
23. In Mr Whitehouse's opinion, the expected expenditure on the 6 additional egms the subject of this application will be approximately \$895,000 of which 75% would be transferred from other venues in the LGA. Accordingly, the new expenditure in the LGA on the six egms will be approximately \$225,000. This is an increase in egm expenditure for the LGA of approximately 0.15%. However, Mr Whitehouse stated that due to the movement of machines necessitated by the new regulatory regime applying from August 2012,<sup>9</sup> the actual result following the introduction of these egms would be a 0.75% decline in expenditure for the LGA. However, the Commission notes that it is required to determine the net impact of the application before it. If expenditure is going to decline for external reasons (such as a changed regulatory environment) it cannot influence the Commission's weighing of the impact of the machines that are the subject of the application. With that in mind, the Commission accepts as reasonable Mr Whitehouse's prediction of a small increase in gaming expenditure for the LGA.
  
24. Mr Whitehouse also gave evidence about what he described as "backfilling" by prominent venue operator, the Australian Leisure and Hospitality Group (**ALH**). That is, as a result of the ownership restrictions under the licensing regime that applied from August 2012, ALH needed to shed a significant number of machines from its network State-wide. This meant that ALH did not purchase the number of egm entitlements for which it had premises approval in its venues in Brimbank (in essence, six of these are the entitlements that underlie the current Application).
  
25. Brimbank is a very profitable LGA for the operation of gaming machines so in Mr Whitehouse's opinion if the current Application is not approved ALH, acting as a rational commercial operator, will seek to transfer entitlements that it purchased in another LGA into Brimbank. Mr Whitehouse identified the commercial attraction for the ALH in terms of revenue and taxation considerations.

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<sup>9</sup> That is, under s 3.2A.7 of the Act, individual entities and certain related parties are prohibited from purchasing more than 35% of the total number of entitlements to operate egms. In effect, on Mr Whitehouse's analysis, that meant that the Australian Leisure and Hospitality Group (**ALH**) could not buy approximately 1000 entitlements to operate machines that they operated before the auction.



### ***Economic and Social Impact***

26. The Applicant engaged Mr Rhys Quick, a director of Urbis Pty Ltd to prepare a social and economic impact statement to accompany the application. Mr Quick gave evidence and was cross-examined.
27. In Mr Quick's opinion the likely impact of the approval of this application on problem gambling in the City of Brimbank will be minimal. This is because the people of Brimbank already have a high level of access to egms and the number of egms in Brimbank will not change as a result of this application due to the operation of the regional cap. Further, the Applicant is an experienced operator with a well-developed approach to RSG and harm minimisation measures. The Commission accepts Mr Quick's opinion in this respect.
28. Mr Quick conducted a two-week survey of the gaming room for the Applicant. That survey showed that on 7 occasions the egms at the Hotel were occupied at greater than 70%. This figure is considered by the industry to be the occupancy rate beyond which allocation of machines is inefficient and choice for patrons is impaired.
29. Mr Quick's report stated the principal economic and social benefits of the application as being:
  - increased access to egms at peak times for those patrons of the Hotel who seek to use the machines during those times;
  - approximately \$350,000 in capital works which will provide improved leisure and entertainment facilities for the community;
  - \$10,000 in financial contributions for local community groups;
  - \$10,000 to be provided to the Council to be spent on programs to reduce problem gambling in the municipality; and
  - a redistribution of egms from an SLA of relatively higher disadvantage to relatively lower disadvantage. This benefit is predicated on the Application preventing the ALH backfilling strategy identified by Mr Whitehouse.





30. Mr Quick's report stated that the principal economic and social disbenefit of the application was, as with any new egms and increased expenditure on egms, the potential to exacerbate the effects of problem gambling. Mr Quick noted that this disbenefit was unlikely to occur, or should be given low weight by the Commission, because:

- The RSG and harm minimisation measures implemented by the Applicant will minimise the likelihood of problem gambling increasing;
- The location of the Premises meant it was not likely that there would be significant potential for convenience gambling; and
- Problem gamblers in the area already had ready access to egms at other venues that were nearby.

***The Council's economic and social impact submission***

31. The Council filed a social and economic impact submission with the Commission. The Council noted the link between a high density of egms, high egm player expenditure and socio-economic disadvantage and incidence and impact of problem gambling on disadvantaged communities. Further, the Council has developed an egm policy that seeks to minimise the harm to public health and well being due to the use of egms and reduce the density of egms within the municipality to the metropolitan average. With those principles in mind, whilst not directly stated, it seems that the Council considers the redistribution of egms by the 2010 auction of entitlements to be an opportunity to reduce the number of egms in operation in Brimbank. That is, if the Commission refuses this application and other applications that have been foreshadowed concerning entitlements purchased at the Auction that did not have prior premises approval, then the effect will be a reduction of egms in the municipality consistent with the Council's egm policy objectives.

32. The author of the Council's statement was not made available for cross-examination at the inquiry. For this reason, whilst the Commission accepts that the document provided by the Council is of considerable academic and intellectual merit, it must reduce the weight it places on it, as the Applicant and Counsel Assisting the Commission were unable to test its contents.



### **Community surveys**

33. The Commission notes that neither the Applicant nor Council provided any evidence of community attitude to the proposal. This is regrettable in light of the weight that should properly be attached to such evidence.

### **THE COUNCIL'S SUBMISSIONS**

34. Mr John Rantino represented the Council at the inquiry. Mr Rantino urged the Commission to reject the application because, even considering the track record of the Applicant and modest benefits posited by the Applicant, the risk that some or all of the estimated \$225,000 increased expenditure would come from problem gamblers should be given considerable weight by the Commission. This was particularly so given the significant relative social and economic disadvantage of the relevant LGA and SLA meaning the effects of problem gambling would be experienced to a disproportionate level.
35. The Commission accepts that in circumstances where the demographic data demonstrates both high egm density and high social and economic disadvantage it must proceed very carefully when considering a proposal that will likely increase the expenditure on egms in the municipality.

### **LIKELY ECONOMIC IMPACT OF APPROVAL**

36. There is frequently a large degree of overlap between economic and social impacts of applications to operate egms. Be that as it may, the Commission considers that it is useful for the purpose of the balancing exercise that it must undertake to identify and analyse economic and social impacts as separate categories to arrive at a net position for each before undertaking the final analysis.<sup>10</sup>
37. The Commission accepts that the economic benefits of the proposal will likely materialise. That is, the revenue prediction made by Mr Whitehouse is reasonable and, on that basis the Applicant will likely undertake the suggested capital works, there will be greater access to

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<sup>10</sup> This is consistent with the approach taken by Justice Bell in *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation* [2009] VCAT 2275.





egms in a better environment for those who enjoy gaming at the Hotel and the \$20,000 cash donations to community organisations will be made.

38. The Applicant indicated that it was willing to accept a condition on its licence that required the donations and capital works to be undertaken. This might be appropriate if significant weight were to be placed on these matters and there was some doubt about the *bona fides* of the Applicant. That is not the case in this Application. Representatives of a respected and successful venue operator gave sworn evidence of the Applicant's present intention about these matters. It would be a very serious matter if that evidence were to be false. For those reasons, the Commission does not consider a condition of the nature indicated is necessary or appropriate.
39. The Commission accepts that there will be increased gaming expenditure of approximately \$225,000 in net terms within the LGA. On the one hand, this is an economic benefit because it leads to most of the other anticipated benefits. On the other hand, there is the potential for some of this revenue to come from problem gamblers leading to other economic costs such as lost productivity, increased health and social service requirements and other social costs. The Commission accepts that in the context of this application the prospect of increased problem gambling is low. Nonetheless, there are two sides to the coin and not all new revenue generated from new egms will be an economic benefit to the community. Further, some of this revenue is lost to the local economy through State taxes and other costs associated with the provision of egms. This impact is hard to estimate, as even if the monies were spent elsewhere in the local economy there would be costs that would see some leakage of revenue.
40. The Commission was troubled by the extent to which weight may be given to the fact that the effect of approving the application would be to prevent ALH "backfilling" into an area of greater disadvantage. It was said by the Council that this was a matter of mere speculation that ought not be considered by the Commission. However, it appears to the Commission that it is likely that ALH would seek to move machines into the LGA to its venues that have the capacity to accommodate additional machines if this application were to be unsuccessful.
41. The Commission is not a Court applying a curial standard of proof to determine the existence of facts in dispute between adversarial parties. The Commission is an administrative decision maker that is required to consider the likely future impact of its decision on a municipality. The Commission considers that it stands to reason that a rational commercial operator that can





take advantage of the refusal of this application will, in all likelihood, do so. Accordingly, to the extent that the effect of this application is likely to lead to an effective redistribution of egms from an area of high relative disadvantage to one of lower relative disadvantage, the Commission considers that it ought to give some weight to that fact. However, in circumstances where both SLAs in the Brimbank LGA are significantly disadvantaged the weight to be given is less substantial. However, it does diminish any weight that the Commission might have given to the Council's submission that refusing this application will positively effect problem gambling in the LGA by reducing the number of egms in the municipality because that is, in the circumstances, not likely to occur.

42. Overall, the Commission accepts that there is a small potential for some economic downsides of the application through possible increased problem gambling expenditure. This potentiality is limited to some extent by the policies and processes that the Applicant has in place to identify and assist problem gamblers. Accordingly, the Commission considers that there will be a neutral economic impact on the community if the application were to be approved.

#### **LIKELY SOCIAL IMPACT OF APPROVAL**

43. The provision of additional egms at a successful venue that sometimes operates at capacity will have social benefits for those consumers who cannot use machines of their choice when the venue is fully occupied. Likewise, the planned capital works at the venue will benefit those members of the community who choose to go to the Hotel.
44. The approval of any new egms has the potential to increase problem gambling and the effects of problem gambling, especially when that venue is located in a community that demonstrates relative social and economic disadvantage. In this case, the Commission is satisfied that that potential is low due to the high prevalence of egms in the relevant community. This risk is also minimised, so far as is reasonable, by the Applicant's well-developed responsible gambling policy and procedures.
45. In the end, the social benefits of the proposal need to be weighed against the detriments to arrive at the net social impact. These are difficult matters to weigh and compare. However, on balance, the Commission considers that the likely social impact of the proposal will be neutral.





## CONCLUSION

46. The no net detriment test in section 3.4.20(1)(c) of the Act requires the Commission to weigh the likely positive economic and social impacts of an application against the likely negative economic and social impacts. 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 either neutral or positive.<sup>11</sup>
47. The Commission has considered the likely economic and social impacts of the proposal and considered that those impacts are likely to be neutral. Accordingly, the likely net impact of the application should it be approved, will be neutral.
48. Further, on the material that has been put before it, the Commission is satisfied of the other matters in section 3.4.20(1). The Commission is also satisfied that the Applicant understands and will continue to act on its obligations to, so far as is reasonable, take measures to prevent problem gambling. Accordingly, the Commission is satisfied that it should exercise its discretion to approve the application.

**The preceding paragraphs are a true copy of the reasons for decision herein of –**

**Mr Mark Brennan, Chair**

**Mr Robert Kerr, Commissioner**

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11 *Romsey* (2008) 19 VR 422, 435.