



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 Moonee Valley Hospitality Pty Ltd for amendment of its venue operator's licence to vary the number gaming machines at the approved premises the Templestowe Hotel, 22-29 Parker Street, Lower Templestowe from fifty (50) to (60) sixty gaming machines.

Commission:

Mr Bruce Thompson, Deputy Chair
Mr Robert Kerr, Commissioner

Appearances:

Ms Susan Brennan of Counsel for the Applicant
(instructed by Williams Winter Lawyers)

No Appearance - Manningham City Council

Mr Ben Jellis as Counsel Assisting the Commission

Date of Decision:

21 December 2012

Date of Reasons:

21 December 2012

Decision:

That the application be granted.

Signed:

A handwritten signature in blue ink, appearing to read 'Bruce Thompson'.

Bruce Thompson
Deputy Chair



REASONS FOR DECISION

INTRODUCTION

1. This is an application by Moonee Valley Hospitality Pty Ltd (**'the Applicant'**) for amendment of its venue operator's licence to vary the number of electronic gaming machines (**'EGMs'**) permitted at the approved premises, being the Templestowe Hotel (**'the Hotel'**) situated at 23-29 Parker Street, Lower Templestowe, from 50 to 60.
2. The Hotel is situated within the City of Manningham. The responsible authority is the Manningham City Council (**'the Council'**). The Council submitted to the Commission an *Economic and Social Impact Submission* expressing its opposition to the application.
3. On 12 December 2012, the Commission held a public inquiry to consider the application.¹
4. For the reasons that follow, the Commission has determined that the application should be granted.

APPLICABLE LAW

5. The **Gambling Regulation Act 2003** (**'The Act'**) establishes a system for the regulation, supervision and control of EGMs in Victoria.² The conduct of gaming is only lawful when it is conducted in an approved venue or casino in accordance with the Act.³
6. An application to permit an increase in the number of EGMs in an approved venue may be made under s 3.4.17(1)(b) of the Act. Section 3.4.19 provides the municipal council in which the approved venue is located with the right to make a submission to the Commission addressing the economic and social impact of a proposed amendment on the well-being of the community. The Commission is bound to take such a submission into consideration. This recognises the special role of local government in representing the people of a community.⁴

¹ Pursuant to s 28(2)(g)(ii) of the *Victorian Commission for Gambling and Liquor Regulation Act 2011*.

² See Chapter 3 *Gambling Regulation Act 2003*.

³ Section 3.2.1 *Gambling Regulation Act 2003*.

⁴ *Romsey Hotel Pty Ltd v VCGR* [2009] VCAT 2275, [247]-[249] (**'Romsey'**).



7. Section 3.4.20(1) provides that the Commission must not grant an application to amend a venue operator's licence to increase the number of EGMs permitted in an approved venue unless satisfied:
- Amendment of the licence does not conflict with a direction given under section 3.2.3 of the Act.
 - The regional limit or municipal limit for EGMs in the region or municipal district in which the venue is located will not be exceeded by the making of the amendment; and
 - 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 ('the **no net detriment test**').
8. The no net detriment test requires the Commission to weigh the likely positive economic and social impacts of the amendment against the likely negative economic and social impacts. The test will be met if 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.⁵ The test is to be administered in the context that responsible gambling is legal and enjoyable for those who wish to gamble. The focus must be on the marginal impact of the application, not with existing or average impacts.⁶

THE MATERIAL BEFORE THE COMMISSION

9. The Applicant filed the following documents in support of its application:
- *Socio and Economic Impact Report*, prepared by NBA Group Pty Ltd dated 6 September 2012.
 - *Socio and Economic Impact Report- Census 2011- Addendum Report*, prepared by NBA Group Pty Ltd dated 6 September 2012.
 - *Witness Statement of Mr Craig Barnett*, Area Manager for the Dominion Hotel Group dated 21 September 2012.

⁵ *Branbeau Pty Ltd v VCGR* (2005) 22 VPR 262 (Morris J). *Whittlesea CC v George Adams Pty Ltd* [2011] VCAT 534 at [107] (Hampel J and Liston SM).

⁶ *Romsey* at [274] (Bell J).



- *Witness Statement of Mr Antony Jackson*, Director of Moonee Valley Hospitality Pty Ltd [the Applicant] dated 19 September 2012.
- *Gambling Expenditure Estimate*, prepared by Mr Michael Clyne dated August 2012.

10. The Council has submitted an *Economic and Social Impact Submission* dated 30 April 2012.
11. The Commission also had before it a statistical report titled the *Economic and Social Impact Report* dated December 2012 (the **Commission Report**) and a *Pre-hearing Inspection and Compliance Report* both of which were prepared by Commission officers.

THE HOTEL AND THE SHIRE OF MANNINGHAM

12. Based on the material before the Commission:
 - The Hotel is located within the Metropolitan LGA of the City of Manningham.
 - The LGA is approximately 12 kilometres east of Melbourne and covers an area of 113km.
 - The LGA is subject to a municipal limit of 928 EGMs. Currently there are 617 EGMs approved for premises within the LGA. There are currently 509 EGMs operating in the LGA.
 - There are 6.4 EGMs per adult currently approved in the LGA.
 - The estimated annual rate of population growth in the LGA over the period 2011-2016, is 0.6%.
 - The expenditure on gaming machines in the LGA for the 2011-2012 financial year was \$65,318,584.28.
 - Overall both the municipality and the area surrounding the Hotel are not socially or economically disadvantaged when compared to other Statistical Local Areas (SLAs). On the SEIFA Index of Disadvantage the SLA ranks 17th lowest of 79 (with the 79th being the most disadvantaged).



Social and Economic Impact Statement - NBA Group Pty Ltd

13. The Applicant engaged NBA Group Pty Ltd to prepare a social and economic impact statement (together with an Addendum Report). Mr Nick Anderson, the Managing Director of NBA Group Pty Ltd was the author of the report and gave oral evidence at the inquiry.
14. Mr Anderson informed the Commission that the Hotel has a long history in the community being established in 1868. It was purchased, with 9 other hotels, by the Dominion Group from the Castello Group in November 2010.
15. Mr Anderson's report identified a positive impact of the application being an increased community contribution by the Applicant, including the allocation of \$40,000 per annum by establishment of a community chest. It noted, further, that the Applicant would commit an additional \$35,000 per annum to be donated to the charity 'Windermere'.⁷ The community contribution could be said to be approaching 1 percent of additional EGM revenue if measured on an after tax basis.
16. Mr Anderson presented the findings of a utilisation study that suggested that the Hotel experiences above average peak period utilisation of EGMs, typically occurring after meal service at lunch times and early evenings.⁸ He found that there was an average of 27.5 hours of peak utilisation per week.
17. A positive impact identified by Mr Anderson was that the 10 additional EGMs would offer additional choice and availability to patrons during peak periods of operation.
18. Both the Report and the Addendum Report made reference to the *Manningham Gaming Policy 2012* ('the **Policy**'). Mr Anderson expressed the view that the application is generally consistent with this Policy, but noted that in part the Policy states:

"Council will discourage any gaming application that has the potential to increase the ratio of EGMs per adult population, number of gambling venues or the gaming expenditure in Manningham"
19. In respect of the issue of increased problem gambling, Mr Anderson noted:
 - The venue is a 'destination' venue in that it is located in way that it minimises the risk of opportunistic gambling.



- The Applicant has a proven commitment to responsible gambling practices and has introduced a range of harm minimisation measures.⁹
- The local community is comparatively advantaged based on assessment of all relevant socio-economic indicia.

20. In the Addendum report, Mr Anderson noted the large proportion of culturally and linguistically diverse residents ('**CALD**') in the Manningham LGA. His report made reference to research considering the potential susceptibility of such groups to problem gambling. Mr Anderson suggested that it is potentially misleading to generalise about the likelihood of risk to such groups, and suggested that such analysis needed to be undertaken in light of the social and economic profile of the relevant area, in this case one of relative affluence. He expressed the view that the risk of problem gambling to such groups caused by this application was low, pointing to the communal nature of gaming in the Hotel, particularly during periods of peak utilisation. He confirmed that the responsible gambling initiatives of the Applicant included the provision of multi-lingual materials.¹⁰

21. Mr Anderson's ultimate opinion was that the introduction of 10 additional EGMs at the venue will not have a detrimental social and economic impact on the well-being of the community of the municipal district of Manningham.

EVIDENCE OF LIKELY EXPENDITURE

22. A report titled *Gaming Expenditure Estimate* was prepared by Mr Michael Clyne. Mr Clyne attended the inquiry and gave evidence.

23. The report concluded:

- Total increased gaming expenditure at the Hotel at the conclusion of the first twelve months of trade following the introduction of an additional 10 EGMs will be approximately \$728,950.
- Transferred expenditure (being EGM expenditure transferred from other venues within the LGA) will account for approximately \$656,055 (90%) of the total increased expenditure.

⁷ However the Commission notes that the community contribution will not necessarily benefit the LGA.

⁸ Peak utilization identified as 70% or greater.

⁹ NBA Group Report, collected at 59.

¹⁰ NBA Group Report. P 59.



- The total net impact on gaming expenditure within the Manningham SLA is estimated to be an increase in total expenditure as at the end of the first twelve months of trade of \$72,895, being an increase in the LGA of approximately 0.1116%.

24. In his oral evidence Mr Clyne accepted that that his estimate of transferred expenditure of 90% was 'on the higher side' but explained that it was based, in part, on a broader reduction in EGM numbers at up to six venues within the Manningham SLA. This has been the result of the industry restructure and the EGM entitlement auction in May 2010.¹¹

EVIDENCE FROM THE APPLICANT

Craig Barnett

25. Mr Craig Barnett is the area manager of the Dominion Group. His role includes the oversight of 6 venues including the Hotel. He gave evidence that he attends the Hotel, generally once a week, and speaks with the manager three to four times per week. He has significant experience in the gaming industry.
26. He described the business of the Hotel as focussing on dining as well as gaming. In particular, he explained, the Hotel offers a 400 seat bistro that serves approximately 3,000 meals per week.
27. The Hotel also offers a significant range of social events. In particular, attention was drawn to social bus trips organised by the Hotel. Mr Barnett gave evidence that these bus trips are paid for by the Hotel, and involve multicultural and senior citizen groups from around suburban Melbourne. He noted that in peak season, the Hotel services 30-40 bus trips per month. He said that during such bus trips the Hotel sometimes experiences peak utilisation of EGMs.
28. In respect of the community contribution that will result from the application, Mr Barnett identified two potential benefits.
29. First, a 'community chest' to be established by the Hotel that will donate to community groups an amount equivalent to \$40,000 per annum. Under questioning, Mr Barnett confirmed that this was a minimum amount to be provided per year and that the contributions would commence following the installation of the new EGMs. He confirmed that a representative of the Council would be invited to play a role on the committee to be formed to administer this

¹¹ Gaming Expenditure Estimate, p 10.



fund. He also confirmed that this amount was in addition to those amounts (including some in-kind) currently provided to the community by the Applicant.

30. Second, he noted that the Dominion Group has agreed to a commitment over ten years to Windermere, which is a charity that assists vulnerable and underprivileged families and individuals.
31. In respect of the responsible service of gaming, Mr Barnett said that the Hotel adopts and enforces the Australian Hotel Association (**AHA**) Code of Conduct and the AHA Victoria Self-Exclusion Program. The Hotel has a close working relationship with Gambler's Help Eastern.

Antony Jackson

32. The Commission received a witness statement from Mr Antony Jackson, a director of the Applicant. Mr Jackson also gave oral evidence at the inquiry.
33. Mr Jackson explained that the Hotel is one of twelve hotels operated by Dominion and is one of its best performing venues.
34. He said that the Hotel experiences consistently high patronage through the week due to its hosting of a large number of events and activities, including a buffet offering in the bistro. This gives rise to 'high demand' for EGMs, and he expressed the view that it is not uncommon for a queue to form in the gaming room. As a result of an overall reduction of EGMs in the LGA, Mr Jackson stated that there would be further potential for demand in the gaming room.
35. In respect of community contributions, Mr Jackson confirmed that the Hotel will, if the application is granted, allocate the amount of \$40,000 per annum for donations to local community groups and organisations. He explained that within the Dominion group a policy for community support is currently being prepared. He conceded that it was possible that the Hotel may increase its community contribution even in the event that the application was not granted, but identified the benefit to the community as being the certainty that such a commitment would be made if the application was granted. He further confirmed that the figure of \$40,000 did not include any amounts currently provided to the community on behalf of the Hotel.
36. Mr Jackson further explained that Dominion has entered into an arrangement whereby it will support a suicide prevention program to be run by Windermere. The program would provide assistance to wide areas of Melbourne, but would not be specifically focused in this LGA. He



explained that Dominion has committed \$100,000 per annum to this program for three years. He said that in the event the application was granted the Hotel would contribute \$35,000 to this sum. He conceded, however, that in the event that the application was refused then Dominion would make the full contribution to Windermere regardless. It was, therefore, not the case that the net amount donated would change in any way as a consequence of the outcome of the application.

THE COUNCIL

The Council's economic and social impact submission

37. The Council has provided an *Economic and Social Impact Statement*. Attached to the statement, as annexure one, the Council has provided a document of submissions for consideration by the Commission. No one from the Council appeared at the inquiry to give evidence in relation to this material.

A preliminary comment on the Council's submission

38. In its submission the Council observed that the addition of ten further EGMs at the Hotel would result in an additional gaming expenditure of \$728,950 in the first twelve months of operation. That figure is consistent with the additional expenditure figure calculated by Mr Clyne in his expenditure report. The Council then submitted that:

"this outcome is contrary to Objective 1 of Council's Gaming Policy *and in particular of Action 1.1.2 'Council will discourage any gaming application that has the potential to increase...gaming expenditure in Manningham'*".

39. This submission fails to acknowledge the opinion of Mr Clyne that 90% of the projected expenditure would be made of up transferred expenditure within the municipality. If this estimate is correct, the increased expenditure in the municipality as a consequence of the application is the significantly lower figure of \$72,895.
40. It is relevant, at this point, for the Commission to make a few general comments about the failure of the Council to play an active role in the inquiry. While the submission from the Council was a potentially useful contribution, the inability to test its contents was a drawback. The consequence of this left the Commission in a position where it is unable to explore the implications of the potential increase in expenditure with the author of the Council's Report. Further, the Commission was left in a position where it was unable to consider properly the



implications of the Council's *Gaming Policy*. For example, the present application has been made in the context of falling EGM expenditure in the municipality, and falling numbers of EGM's depending on the period of comparison. Additionally, the failure of the Council to participate in the inquiry has prevented any investigation as to whether the Council engaged in a process of consultation with the Applicant prior to its decision to oppose the application. The Applicant claimed, through Mr Anderson, that there was such an opportunity which was not taken up. The Commission acknowledges the valuable contribution that municipal authorities have played in previous hearings and the special status afforded to such bodies under the Act. The failure of the Council to appear at the inquiry is, in this context, disappointing.

The Council's Position

41. The Council submitted that the application should be refused on the basis that the no net detriment test had not been met. In particular, the Council submitted that if the application was granted it would lead to an increase in problem gambling, with negative social and economic impacts.
42. The Council accepted that the relevant SLA was the fifth least disadvantaged in Victoria (out of 79), but contended that within the catchment area there are two SEIFA pockets of disadvantage. It further provided letters from three community groups *Doncare*, *Manningham Interfaith Network* and *Manningham YMCA*, each of which highlighted a concern that the application would lead to an increase in problem gambling. In particular, *Doncare* drew attention to a particular risk in respect of vulnerable groups (including CALD groups) within the municipality. The Council's submission was also supported by a letter provided on behalf of *Banyule City Council*.
43. Although opposed to the application, the Council submitted that in the event that the application was granted, the Commission should impose a condition on the applicant's licence requiring that it pay the promised community contribution. It further submitted that the community contribution should be enhanced, specifically that the community contribution constitute 1% of the annual gaming expenditure at the venue.

FINDINGS BY THE COMMISSION

44. Having regard to the statutory criteria in s 3.4.20 of the Act the Commission finds:
 - The granting of this application will not conflict with a Ministerial Direction made pursuant to s 3.2.3.



- The granting of this application will not exceed the municipal limit for EGMs in the relevant LGA.¹²

45. 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.
46. In considering this test, there is frequently a large degree of overlap between economic and social impacts. However the Commission considers that it is useful for the purpose of the balancing exercise to identify and analyse the economic and social impacts separately to arrive at a net position for each before reaching the final determination.¹³

Social Impact of Approval

47. The Commission accepts that in many cases a potential increase of EGM expenditure within a community brings with it an inherent risk of an increase in problem gambling,
48. In the present case, the Commission is of the view that this risk is relatively low. It notes that a relatively high amount of the increased expenditure is predicted to be transferred expenditure within the municipality. Currently, there are 617 EGMs approved within the City of Manningham, however as a result of the entitlement auction only 509 were purchased by venue operators. This has resulted in a reduction of EGMs in the LGA since August 2012 when the changes to the industry were implemented, and it is highly likely it will lead to a decrease in expenditure on EGMs within the LGA over the coming years.
49. The Commission notes the Applicant's commitment to responsible gambling initiatives and noted the strong corporate oversight between the broader Dominion Group and the Hotel, as explained in the evidence of Mr Jackson and Mr Barnett.
50. It finds that the impact of the application will be most significant during peak periods of use when additional machines will be available to meet demand. The evidence before the Commission established that these periods were likely to fall around meal times and during the social bus trips organised by the Hotel. The Commission accepts the evidence of Mr Anderson that these are unlikely to be times of high risk for problem gambling.
51. The Commission is satisfied that the increased availability of EGMs at peak times provides the social benefit of increased choice and opportunity for citizens to gamble at those times.

¹² See paragraph 14 above.

¹³ *Romsey* (2008) 19 VR 422, 435.



52. Finally, the Commission regards the \$40,000 community contribution as a social benefit of the application. The Commission has not, however, taken into account as a community benefit the further \$35,000 to be provided annually to Windermere, as it was noted on behalf of the Applicant that the total amount of donations by the Dominion Group to Windermere will not depend simply on the grant of the application. The application will affect only the source of those moneys. Only in a very broad sense, therefore, could that donation be considered an 'impact' of the grant of the application for the purposes of the no net detriment test. Further, the Commission accepts the view expressed on behalf of the Council that the work of Windermere has no specific connection to the relevant municipality.
53. Overall, the Commission is satisfied that the net social impact outcome of the grant of the application on the City of Manningham to be slightly positive.

ECONOMIC IMPACT

54. The Commission accepts that this proposal will result in an increase of gaming expenditure in the City of Manningham of 0.1116%. The Commission notes that this new gaming expenditure is minimal and will have little, if any, economic impact on the municipality.
55. The additional employment arising from the grant of the application is modest, being equivalent to .5 to 1 full time equivalent employees over time.
56. The Commission considers that there will be a neutral economic impact on the relevant community.

CONCLUSION

57. The Commission is satisfied that a variation of the venue operator's licence to permit an additional 10 EGMs to be operated at the Hotel will not result in a net economic and social detriment to the relevant community.
58. As is set out above, the Council made various submissions as to whether a condition ought to be placed on the grant of the application. In response to these submissions, the Commission makes two observations.
59. First, it may be that the imposition of such a condition would be appropriate if there was some doubt about the *bona fides* of the Applicant as to their intention to deliver the promised



community contribution. This is not the case on this application. Both Mr Barnett and Mr Jackson gave sworn evidence of the Applicant's present intention in respect of these matters. It would, suffice to say, be a serious matter if that evidence were to be false. Having so found as to the desirability of imposing such a condition, it is not necessary for the Commission to express a view as to the existence (or otherwise) of a power to impose a licence condition that requires the payment of a community contribution.¹⁴

60. Second, the submission that the Commission ought to impose a condition that compels the applicant to pay a *higher* community contribution than that promised is a submission that will rarely be one that is appropriately made to the Commission. The Commission's role on an application such as the present is to apply the statutory test that requires it to determine the net economic and social impact of the application before it. The relevance of a community contribution promised on behalf of an applicant will be the effect, if any, that the promised contribution has as a social or economic impact of the grant of the application. A community contribution is not an additional tax that the Commission may impose 'at large' upon an applicant. The Commission did not understand the Council to submit that the imposition of a higher community contribution would have the effect of producing the consequence that, from the Council's perspective, the no net detriment test would then be satisfied. It appears, therefore, as simply an attempt to use the statutory inquiry process to extract a higher community contribution from the applicant.
61. To conclude, the Commission is satisfied that it should exercise its discretion to approve the application.
62. The administrative process of amending the licence will take place at a time subsequent to this decision, as provided by section 3.4.20 of the Act.

The preceding document is a true copy of the reasons for decision herein of Mr Bruce Thompson, Deputy Chair and Mr Robert Kerr, Commissioner

¹⁴ See *Romsey* at [345]-[346]. See also *Bright Newbay Pty Ltd v Bayside CC* [2010] VCAT 134.