

Decisions about Licensed Premises by the Victorian Civil and Administrative

Tribunal:

A review of selected findings



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A review of recent decisions about

EGM gambling applications

by the Victorian Civil and Administrative Tribunal



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Review of Recent Gaming Decisions

by the Victorian Civil and Administrative Tribunal (VCAT)

NATURE OF EVIDENCE WEIGHED BY THE TRIBUNAL

**Weight given to VCGLR decisions**

VCAT considers prior findings of the VCGLR in relation to a case, when relevant evidence and conditions presented to the Tribunal are the same as those previously assessed by the Victorian Commission for Gambling and Liquor Regulation (VCGLR). However, when the facts of a case are different – as for example, where an applicant changes their application before appearing at the Victorian Civil and Administrative Tribunal (VCAT) – then the Tribunal ascribes less importance to a previous decision by the Commission.

The Tribunal places “considerable but not overriding” weight upon the VCGLR decision (para. 19)(Glenroy RSL v Moreland CC 2017).

An applicant may alter the number of EGMs sought in a hearing before the Tribunal from the number considered by the VCGLR (paras. 13-22) (Bakers Arms Hotel v VCGLR 2014).

While allowing that a previous decision of Commission should be given weight, the Tribunal cautions that this would apply to a lesser extent if a current hearing involved different issues and evidence than that heard by the Commission (para. 21)(L’Unico v Monash CC 2013*).*

The Court of appeal has acknowledged the requirement of VCAT to give prior Commission decisions ‘considerable weight’ – which it has done, especially because witnesses and evidence are similar to the Commission hearing. However, in light of the fact that the evidence (including the expenditure estimate) and application (number of EGMs sought) are different, VCAT has difficulty giving much weight to the Commission decision (paras. 29-31) (Bakers Arms Hotel v VCGLR 2014).

While the Tribunal accords “considerable weight” of the findings of the VCGLR, differences in applications between the VCGLR hearing and VCAT are taken into account. (para. 11)(Molwin v Mornington Peninsula SC 2015).

**Scope of decisions**

A VCAT hearing may relate to planning decisions, VCGLR decisions or both (para. 9) (Benmara v Whittlesea CC 2015).

Where a VCAT hearing is convened to review a decision taken on planning grounds – usually by a council and based on clause 28.28 of the planning scheme - then the Tribunal focuses upon planning issues, such as the location and suitability of the premises for gambling.

*Review of decisions based on planning considerations*

“…the planning control is concerned with the appropriateness of the proposed location of the gaming machines and premises where they are to be installed rather than with gaming itself as a land use.” (para. 9)(Elfah v Darebin CC 2017).

The role of VCAT in a planning application is under the Planning and Environment Act, to review “to what extent the proposal can be supported when assessed by Clause 28.28 of the planning scheme of any relevant planning issues and whether…the proposal…deserves planning approval” (para. 16) (Benmara v Whittlesea CC 2015)*.*

Clause 52.28 requires a permit for installation of an EGM to ensure EGMs are situated in appropriate locations and premises, with consideration of the social/economic impact of their location and prohibits EGMs in specified shopping centres. The clause requires consideration of state and local planning frameworks, impact of the proposal on nearby land uses, compatibility of the proposal with the site, whether the venue provides a full range of services to patrons. (para. 10)(Elfah v Darebin CC 2017).

Unlike VCGLR hearings, planning cases are largely determined by reference to the relevant planning schemes (para. 17) with “…emphasis upon social and economic impacts narrower in planning cases than in gaming cases” (para. 18)(Pakenham Racing Club v Cardinia SC 2017).

The issue is the planning scheme, not “social/demographic implications of the proposal, as they have already been considered by the gambling commission” (para. 28). The Tribunal therefore concludes that VCAT could not refuse proposal due to the impact of gambling on the whole municipality as this issue had already been decided and “…is beyond the scope of the tribunal.” (para. 30) (1) It is however, the role of VCAT to determine the “extent to which the proposal can be supported when assessed against Clause 52.28 of the planning scheme” (para. 30) which is a planning review of the proposed addition of EGMs “with a narrower focus upon locational aspects of the proposal” (para. 27) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016)

Many social impacts of EGMs must be considered under the Gambling Regulation Act, whereas, “The issues that will be relevant in the context of considering a permit under clause 52.28 for use of the land for a hotel which will include gaming will be different.” (para. 18)(T C Rice v Cardinia SD 2018)

While the role of VCGLR under the Gambling Regulation Act is to consider the impact of the application upon a municipality [yet elsewhere notes that the VCAT Decision was focused upon an area within 2.5 km. of the venue] (para. 18) Council planning decisions and VCAT decisions have “a more narrow focus” which is to consider the impacts “…of the location of gaming machines” (para. 15)(Glenroy RSL v Moreland CC 2017).

*Review of decisions based on planning and gambling considerations*

If VCAT is reviewing a decision by the VCGLR, then it takes into consideration the Gambling Regulation Act, which places emphasis upon the social and economic impacts of a gambling application in the municipality where the venue is situated.

If however, VCAT is reviewing both a planning and VCGLR decision, then both planning and socioeconomic implications of the application are considered.

In a case where planning and gaming approval are being decided, the Tribunal considers approval requirements of both the Gambling Regulation Act and planning considerations (para. 37)(Kingfish Victoria v Melbourne CC)

“The application regime under the Gambling Regulation Act and Planning and Environment Act are separate and distinct – though linked” (para. 12)(Glenroy RSL v Moreland CC 2017).

*No net detriment test may not apply*

No net detriment test [featured in the Gambling Regulation Act] does not determine the decision of VCAT. “The tribunal retains discretion in determining the matter regardless of the outcome” of this test (para. 9)(Molwin v Mornington Peninsula SC 2015).

*Matters given prior consideration by Commission*

Since the VCGLR has approved the addition of EGMs and in the process considered the high expenditure on EGMs in the municipality, then the Tribunal gives no weight to council’s argument that the proposal should be refused due to excessive expenditure on EGMs in the municipality, adding that “this issue has already been resolved and is beyond the scope of this tribunal” (para. 16) (Benmara v Whittlesea CC 2015).

**Marginal impact of applications is the key consideration**

Changes that would result from the application – as distinct from alterations to the venue that would occur regardless of the outcome – are the sole focus of VCAT decisions. It is sometimes a matter of judgement though, whether a proposed change to the conduct or characteristics of a gaming venue is dependent upon the approval of the application, or not.

Assessment of the application must look at marginal impact of the proposal – but not at all EGM expenditure (Bakers Arms Hotel v VCGLR 2014).

The case involves the impact of additional EGMs, refurbishments and other parts of the application – but it does not concern the impact of the existing EGMs (para. 45). (Bakers Arms Hotel v VCGLR 2014).

The benefit of protective measures, proposed under the application, apply to existing machines – but this does not factor into assessment of new machines (para. 102) (Bakers Arms Hotel v VCGLR 2014).

Council evidence about problem gambling expenditure was not accepted by the Tribunal because it related to *all* gaming expenditure rather than the marginal impact of this application and it assumed the level of expenditure on new machines could be equal to that of existing EGMs (Bakers Arms Hotel v VCGLR 2014).

Offer of venue to give grants to community was accorded little weight as it seemed likely that it would make such grants, regardless of the outcome of the application (para. 37)(Sporting Legends Club v Wellington SC 2016)

The Tribunal accepted that new “protective” factors proposed by the venue would only occur if the application was successful, making these measures a part of the application to be assessed and a prospective benefit (para. 83) (Bakers Arms Hotel v VCGLR 2014).

If the applicant states that it needs a certain amount of revenue – [requiring more EGMs in this case] – to fund refurbishments, then so long as it has a reasonable basis for this conclusion the Tribunal lacks the means and precedent to reach a contrary conclusion. Otherwise it would become “…difficult, time-consuming and inherently problematic…” [This means that the refurbishments, which the applicant maintains are dependent upon the revenue from further EGMs, must be regarded as a marginal benefit of the application] (para. 29)(L’Unico v Monash CC 2013).

**Quality and presentation of evidence**

The Tribunal has repeatedly stressed the need for evidence to corroborate claims made by parties to hearings. Curiously though – as in assessing the relationship between socio-economic conditions and gambling problems – it has exhibited an imprudent propensity to reach firm conclusions without the support of evidence. Evidence, VCAT holds, should relate to the specific characteristics of the application and its likely impact upon the community, rather than depending upon general propositions about the effect of gambling.

*Requirement for Evidence to Support Assertions made before the Tribunal*

"Any party that asserts a relevant fact or contention must provide sufficient probative material, legal authority or logical reasoning to support the fact or contention” (para. 44). (Bakers Arms Hotel v VCGLR 2014).

Council did not substantiate its concerns about problem gambling – but made “bare assertions” (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016)

Parties must provide sound evidence to support assertions brought before VCAT (para. 12)(Molwin v Mornington Peninsula SC 2015).

Any council claiming “an increased risk of problem gambling” should provide evidence and sufficient probative materials [that is, proof or evidence] and not “mere assertions” (para. 143) – cited Kingfish Victoria Pty Ltd 2013 and Mt Alexander SC vs VCGLR and Ors 2013 (Benmara v Whittlesea CC 2015).

*Evidence should relate to the particular features of the application*

Testimony of a council witness was criticised for not dealing with conditions local to the venue – that is, for not “…relating to this particular proposal and the particular demographics of this…location” (para. 88)(Kingfish Victoria v Melbourne CC 2013).

*A Preference for a tabular summary of evidence to accompany any submission*

The Tribunal contends that it favours presentation of summary information about benefits and detriments of an application in table form (para. 11) (L’Unico v Monash CC 2013).

**The value of witnesses**

VCAT accords more weight to evidence presented by a council if it presents witnesses at a hearing to give their testimony and submit to cross-examination. The credibility accorded to such witnesses may, in turn, depend upon their level of expertise in matters which fall within the scope of their testimony.

The Tribunal argues that council compromised its case by not calling expert witnesses and leaving its counsel to “advocate singly, making submissions from the bar table” (para. 32) (Benmara v Whittlesea CC 2015).

Since the council did not present a witness for cross-examination, counsel for the Commission cross-examined witnesses (para. 57, 52). Adds that it relied upon a written submission presented by Council to the VCGLR (para. 52)(Molwin v Mornington Peninsula SC 2015).

VCAT can give only limited weight to the testimony of council witnesses who appeared at an earlier VCGLR hearing as they did not appear before the Tribunal, affording “…no proper chance to test that evidence”, adding that the “…council had the opportunity to call these witnesses at the Tribunal and chose not to do so” (para. 10)(Sporting Legends Club v Wellington SC 2016).

*Expert witnesses*

The Tribunal cites with approval the extensive experience of witnesses presented by the applicant, noting that they were “…highly experienced witnesses in their field, and we find the strong credibility of their expert evidence was not materially undermined by cross-examination” (para. 31) (Benmara v Whittlesea CC 2015).

The Tribunal did not accept an estimate presented by the council’s expert witness because he conceded that he held no expertise in the field of expenditure estimation (Bakers Arms Hotel v VCGLR 2014).

The Tribunal argues that council compromised its case by not calling expert witnesses (para. 32) (Benmara v Whittlesea CC 2015).

**Locality of relevance – including socioeconomic conditions**

In reviewing decisions on either planning grounds or gambling considerations, the area local to the venue – rather than the entire municipality – is generally considered most relevant.

*Local areas, rather than whole municipalities may be of relevance*

“While Clause 52.28 of the Planning Scheme still requires consideration of the social and economic impacts of the proposal, there is a narrower spotlight shone on whether the social and economic impacts of the particular location would be acceptable” (para. .41)(Kingfish Victoria v Melbourne CC 2013).

The “no net detriment” test has as its “starting point” the whole municipality, but “…there is case authority that it is appropriate to carry out a more focused analysis of the applicable area of the municipality…” (para. 20)(L’Unico v Monash CC 2013).

While the Gambling Regulation act requires consideration of the impact of an application upon the relevant community “it is appropriate in the gaming assessment to carry out a more focused analysis on the applicable area of the municipality, rather than literally benchmarking the proposal against the whole of the municipality (para. 40)(Kingfish Victoria v Melbourne CC 2013).

While it is fitting to consider the effect of the application upon a municipality, it is “…appropriate to consider the impact on particularly relevant parts of the shire as well”(Molwin v Mornington Peninsula SC 2015).

While the Gambling Regulation Act prescribes consideration of the well-being of the community in the municipality where premises are located, “logic and common sense” require consideration of the particular locality, with the result that the local community – rather than overall municipality – forms the main consideration in many cases before VCAT (para. 37) *(ALH Group v Whittlesea CC 2017).*

*Yet elsewhere, the whole municipality forms the point of reference for assessing the impact of an application…*

The level of transferred expenditure is not a key issue, as the application is for a top-up only, and the likely level of new expenditure is "…less than 1% increase in the existing level of overall annual gaming expenditure in this municipality.” (para. 41) *(*L’Unico v Monash CC 2013).

**Conditions in venue catchment more relevant than those within a narrower, or wider, scope**

When assessing the prospective social and economic impact of an application, VCAT may regard a reasonable approximation of the venue catchment as most relevant – rather than merely those residents in close proximity, or social conditions in the wider region where the venue is situated.

The Tribunal notes that the area of disadvantage is about 1.5 km. from the hotel, which accounts for just 8% of gaming room patrons (para. 50) *(Molwin v Mornington Peninsula SC 2015).*

The area in close proximity to the venue is not of critical importance, as Council policy calls for consideration of an area 5 km. from venue, which is relatively affluent *(Pakenham Racing Club v Cardinia SC 2017).*

The Tribunal considers an area of about 5 km around venue, rather than 2.5 km, finding less evidence of disadvantage in this larger region. (para. 136) *(ALH Group v Whittlesea CC 2017).*

The fact that the venue is situated in western Melbourne does not constitute risk in itself, since that region features areas of varying disadvantage (para. 79) [i.e.: the region is too large to permit conclusions to be drawn about the catchment of the venue] *(Bakers Arms Hotel v VCGLR 2014).*

BENEFITS & LIABILITIES ATTRIBUTED TO APPLICATIONS

**Proximity to shopping centres and sensitive locations**

Applications relating to venues near shopping centres or sensitive land uses may not be favoured. Points of issue though, include their level of patronage, proximity to the venue, buffering by local infrastructure and the extent to which a nearby activity centre functions as a shopping centre.

*Shopping centres*

The Tribunal notes that venue is a few hundred metres from parts of a shopping precinct where people congregate for daily activities (para. 55) *(Glenroy RSL v Moreland CC 2017).*

Among favourable features of the proposed location of EGMs in this case are that the venue is removed from shopping and other convenience activities *(Pakenham Racing Club v Cardinia SC 2017).*

Nearby shopping consisted of buildings which were not currently being used, or constructed for use, as shops. The Tribunal therefore concluded that it was not, and was unlikely to ever be, a shopping centre and was therefore not inappropriate for a gaming venue. *(Glenroy RSL v Moreland CC 2017).*

Proximity of the venue to a shopping area does not make it very accessible, since the shopping area is small, has few convenience shops and features a low pedestrian volume (para. 79) *(Bakers Arms Hotel v VCGLR 2014).*

*Sensitive land uses*

The Tribunal notes tension in some cases “between the potential social and economic negative impacts of the proposed EGMs and the close proximity of a vulnerable family or community”. It cites the example of such tension in another case, where the venue was located opposite a significant social housing facility (para. 27) [Indicating that social housing is an issue relating to vulnerability to problem gambling] *(Benmara v Whittlesea CC 2015).*

The Tribunal comments with favour that the venue is not near social housing (para. 52) *(Pakenham Racing Club v Cardinia SC 2017).*

Proximity of the venue to a home for vulnerable older people is held against the proposal (para. 74), though the Tribunal states that this must be balanced against the interests of thousands of visitors to the city who may gain a social benefit from the proposal (para. 95) *(Kingfish Victoria v Melbourne CC 2013)*

*Distance and Buffering by other infrastructure may reduce impact on local sensitive land uses*

Several welfare agencies were located within 800 m. of the venue - a condition discouraged by council planning policy. But the Tribunal discounts the significance of this because 800 m. was considered an unreasonable distance, there was no evidence of gaming at the venue by clients of these services, and only one of these agencies opposed that application – and not on these grounds in any case (para. 66) *(Glenroy RSL v Moreland CC 2017).*

The Tribunal observes that the venue is buffered from nearby active uses by a car park, roads etc. (para. 26) *(Benmara v Whittlesea CC 2015).*

**Convenience and destination venues**

VCAT recognises that gaming venues are distributed across a broad spectrum, from destination to convenience, depending upon proximity to activity centres and transport routes.

Venues fall in a spectrum, ranging from destination to convenience venues *(Glenroy RSL v Moreland CC 2017).*

Convenience venues are higher risk (para. 48) *(L’Unico v Monash CC 2013).*

The Tribunal favours the fact that the venue seems more of a destination venue (para. 39) *(Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).*

The venue is largely a destination venue, as it is situated well outside the core of the activity centre and set back from the main road. (Glenroy RSL v Moreland CC 2017).

**Refurbishments**

Refurbishments are commended by VCAT as a social and economic benefit to the community, though the magnitude of this benefit depends upon their prospective impact relative to the volume of comparable services already available in the community.

*General Favour*

The Tribunal remarks that improvements in facilities for recreational gamblers, and in entertainment and accommodation for patrons, is a benefit, adding that the proposed refurbishmentswould improve the amenity of the venue and strengthen the application(Molwin v Mornington Peninsula SC 2015).

Tribunal favours the proposed renovation of the premises (para. 37) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

*Economic Benefit*

A beneficial feature of application is that additional EGMs will fund refurbishment of a local business “…on a landmark site...” (para. 63)(L’Unico v Monash CC 2013).

Positive features of the application include refurbishment as a benefit that will stimulate the local economy – especially important in an area of disadvantage such as Braybrook (para. 48) (Bakers Arms Hotel v VCGLR 2014).

*Benefit to Problem Gamblers*

Attributes of the application include refurbishments which will “dilute the emphasis upon gaming” at the venue (para. 106) and improve facilities, which will be appealing to non-problem gamblers and provide an opportunity for a break from gambling (para. 88). The Tribunal dismisses the council’s assertion that refurbishment would make the venue more attractive to problem gamblers (para. 82) (Bakers Arms Hotel v VCGLR 2014).

*Scale of Refurbishments Relative to Existing, Local Services*

Expenditure on refurbishment is of less impact in an area where there are already many major projects [central Melbourne, in this instance] (para. 44)(Kingfish Victoria v Melbourne CC 2013)*.*

Substantial refurbishments represent a small increase in level of hospitality services already available to the community, and so accords them marginal weight (para. 127) (ALH Group v Whittlesea CC 2017).

*Other Issues*

The Tribunal disagrees with the Commission’s conclusion that refurbishment would only benefit hotel patrons, maintaining instead that “any Braybrook residents can enter the hotel or use its premises” (para. 108) (Bakers Arms Hotel v VCGLR 2014).

If the applicant states that it needs a certain amount of revenue – [requiring more EGMs in this case] – to fund refurbishments, then so long as it has a reasonable basis for this conclusion, the Tribunal lacks the means and precedent to reach a contrary conclusion. Otherwise it would become “…difficult, time-consuming and inherently problematic…” (para. 29)(L’Unico v Monash CC 2013).

The refurbishment of the hotel will benefit only the town of Seaspray where it is situated, and not Sale. Accordingly, the membership of the club itself – who will benefit – is actually quite small (para. 45)(Sporting Legends Club v Wellington SC 2016).

**Other venue characteristics**

Other characteristics of applications or venues which are favoured, include:

* Reduced opening hours
* Anonymity
* Staff training and intervention
* Screening of the gaming room/obscuring the gaming area
* Staff surveillance of the gaming room
* Well-presented venues
* Non-gaming activities at the venue

*Reduced opening hours*

Benefits of the application include reduced hours of operating in the early morning, which is a time when a higher proportion of patrons may be at risk of problem gambling (para. 91)

Favourable features of the application include proposed reduction in trading hours (para. 37) (Bakers Arms Hotel v VCGLR 2014).

Venue agreement to a condition that it closes a 1 pm, will mitigate problem gambling and so is a benefit, as it means that the applicant cannot rescind this decision (para. 75)(Molwin v Mornington Peninsula SC 2015).

Venue has fewer opening hours than those nearby – which is a positive aspect of the proposal (para. 142)(ALH Group v Whittlesea CC 2017).

*Anonymity*

Hotels “…are typically seen as higher risk than clubs, because no sign-in is needed and people can attend anonymously.” (para. 48)(L’Unico v Monash CC 2013).

Staff interactions with patrons give less anonymity – a benefit (para. 72)(Molwin v Mornington Peninsula SC 2015).

Attributes of the application include gamblers being less anonymous in a venue with more non-gamblers (para. 88) (Bakers Arms Hotel v VCGLR 2014).

A virtue of the application includes the construction of a new entry requiring gaming patrons to enter the venue with others [presumably making it obvious that they are gaming if they enter the gaming room] (para. 92) (Bakers Arms Hotel v VCGLR 2014).

*Staff training and intervention*

Responsible gaming practises of venue will alleviate gambling problems arising from the proposal (para. 90)(Kingfish Victoria v Melbourne CC 2013).

The Tribunal favours the proposal because of improved responsible gambling procedures and increased staff training (Molwin v Mornington Peninsula SC 2015).

The Tribunal comments approvingly that venue had commenced staff training with Gambler’s Help(Molwin v Mornington Peninsula SC 2015).

Venue management has contacted Gambler’s Help to obtain advice and arrange training, as suggested by the VCGLR (para. 70) thereby achieving “good compliance and knowledge among staff” (para. 71)

The prospect of problem gambling arising from addition of EGMs would be reduced by responsible gambling practises of venue, well-trained staff and favourable track record of venue (para. 63)(L’Unico v Monash CC 2013*).*

Interaction between trained staff and gaming patrons is a protective factor (para. 98) (Bakers Arms Hotel v VCGLR 2014).

The Tribunal comments that the prospect of increased problem gambling is reduced by responsible gambling practises of the applicant (74)

But…

The Tribunal accepts that the venue’s responsible gaming practises are sincere but references with approval a decision by Dwyer on Castlemaine as “ authority for the proposition that the appropriate application of ‘responsible gambling management practises’ only goes so far, given the inherent difficulties of identifying and characterising what constitutes a problem gambler” (para. 55)(Sporting Legends Club v Wellington SC 2016).

In relation to responsible gambling practices, “…the most effective measures involve direct contact…between gamblers and the staff…In practice this is difficult to achieve.” And “…if a gambler is losing money they cannot afford to, but does not engage with staff, there is little you can do.” (para. 134)(ALH Group v Whittlesea CC 2017).

“We are unsatisfied that there is any reliable evidence that this risk is acceptably mitigated by the applicant’s management and ‘responsible gaming’ practices’.” (para. 37)(Sporting Legends Club v Wellington SC 2016).

Adherence to responsible gambling measures is “a given” and is not counted as a benefit of this application (para. 87). (Bakers Arms Hotel v VCGLR 2014).

*Screening of the gaming room/obscuring the gaming area*

The Tribunal notes with approval that the venue had installed an opaque door to the gaming room to reduce visibility(Molwin v Mornington Peninsula SC 2015).

Favourable features of the application include screening of the gaming from the venue entrance in amended refurbishment plans (para. 36) (Bakers Arms Hotel v VCGLR 2014).

The Tribunal expresses support for the installation of visual screening between main entrance and shopping centre (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

Screening of gaming is beneficial (para. 69)(Molwin v Mornington Peninsula SC 2015).

Placement of the gaming room at the rear of hotel is an attribute (para. 89)(Kingfish Victoria v Melbourne CC 2013).

*Staff surveillance of the gaming room*

The Tribunal remarks with endorsement that the venue had relocated CCTV screens to increase surveillance(Molwin v Mornington Peninsula SC 2015).

The Tribunal commends the fact that staff supervising the gaming area are mindful of the welfare of patrons, (para. 29) (Benmara v Whittlesea CC 2015).

Benefits of the application include a modified layout which provides the bar and cashier staff with improved surveillance of the gaming room (para. 94) (Bakers Arms Hotel v VCGLR 2014).

The Tribunal accepts testimony that various new features (reduced opening hours, increased surveillance, better smoking areas etc.) will reduce risk of problem gambling, resulting in “materially less new expenditure coming from problem gamblers” (para. 100) (Bakers Arms Hotel v VCGLR 2014).

*‘Well-presented’ venues*

The Tribunal relates with endorsement, that the hotel was “well presented” (para. 29) and operated to a “good standard” (para. 30) (Benmara v Whittlesea CC 2015).

The Tribunal notes with approval that the venue is of good quality, provides a range of facilities and performs an important entertainment function in the community (Benmara v Whittlesea CC 2015).

*Non-gaming alternatives at venue*

Various non-gambling features of the venue reduce “venue patrons’ focus on gambling as their purpose for attending the hotel” – citing an expert witness (para. 69)(Molwin v Mornington Peninsula SC 2015).

Among attributes of the proposed location of EGMs in this case is that the area has much non-gambling entertainment (Pakenham Racing Club v Cardinia SC 2017).

Benefits of the application include an improved smoking area which may encourage gamblers to take a break from gambling while concealing the gaming area (Bakers Arms Hotel v VCGLR 2014).

Benefits of the application include a new soft lounge, which adjoins, but is external to, the gaming room (para. 93) (Bakers Arms Hotel v VCGLR 2014).

The Tribunal commends the variety of non-gambling activities offered by the venue (para. 52) (Pakenham Racing Club v Cardinia SC 2017).

*‘Balance’ between gaming and non-gaming activities*

The Tribunal favours the application for providing space for additional EGMs without compromising the balance between gaming and other activities (para. 33) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

**Employment creation**

A projected rise in employment levels in a community, resulting from an application, is viewed with favour by the Tribunal, especially if the community is already disadvantaged. The possibility that such employment growth may be matched by declines in other industry sectors, or in the case of transferred expenditure, by corresponding reductions in local gaming venues, does not appear to have entered upon the Tribunal’s deliberations.

The Tribunal comments favourably that an EGM increase will create jobs at the venue (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

Employment of further staff under the proposal would be of benefit – all the more so in a less affluent community (para. 63)(L’Unico v Monash CC 2013).

Increased employment during refurbishment is an economic benefit, especially in disadvantaged Braybrook, even if there are no guarantees as to who will get the jobs (para. 62) (Bakers Arms Hotel v VCGLR 2014).

By contrast, the Tribunal states that the prospective impact of a rise in employment is reduced as locality already has high levels of employment (para. 44)(Kingfish Victoria v Melbourne CC 2013).

**Community contributions**

Community contributions that would result from an application are considered beneficial, especially if they favour the community which patronises the venue or address gambling problems.

*Benefits of community contributions*

The Tribunal comments with endorsement that the venue had proposed an increase in its community donations as part of the application (para. 81)(Molwin v Mornington Peninsula SC 2015).

The Tribunal favours further $10,000 in community donations (paras. 33-37). (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

Donations by the venue are beneficial as they can “…be used to counter the factors that contribute to problem gambling including social isolation, and to directly support those who are problem gamblers” (para. 63)(L’Unico v Monash CC 2013)*.*

Community contributions are a social and economic benefit – the latter because the beneficiaries may purchase locally-secured goods and hire local labour (para. 65) (Bakers Arms Hotel v VCGLR 2014).

Beneficial features of the application include proposed increase in community contributions to $100,000 p.a. (para. 38) (Bakers Arms Hotel v VCGLR 2014).

*Limitations of community contributions*

The Tribunal comments disapprovingly, that none of the donations will address problem gambling (para. 45)(Sporting Legends Club v Wellington SC 2016).

Community contributions are of most weight if they benefit groups or charities which operate in the same community (para. 67)(Kingfish Victoria v Melbourne CC 2013).

The Tribunal discounts the significance of the applicant offering to set a ‘floor’ of $120,000 on its annual community donation, “…as this is that nature of the club and reflects an existing pattern of its operations.” (para. 46)(Sporting Legends Club v Wellington SC 2016).

The Tribunal cautions that it is difficult to assess the extent of possible problem gambling from the proposal and other criteria too – adding that the fact that community contribution can be quantified “should not cause that factor to be accorded undue significance” (para. 59)(Molwin v Mornington Peninsula SC 2015).

**Benefits of non-problem gaming expenditure**

The addition of gaming machines is considered beneficial where it adds to the range of choice for patrons and accentuates local competition among venues – though less so where there are already many opportunities to gamble, lower demand and fewer periods of peak activity (sometimes defined as >60% of machines in use).

Most gaming expenditure is not associated with problem gambling (para. 64)(Kingfish Victoria v Melbourne CC 2013).

To the extent that new expenditure is not accompanied by increased gambling problems, it is “consumer surplus” and is an “economic benefit” (para. 60) (Bakers Arms Hotel v VCGLR 2014).

The effect of addition of EGMs upon ordinary recreational gamblers is economic benefit (para. 36)(Sporting Legends Club v Wellington SC 2016). and (para. 20)(L’Unico v Monash CC 2013).

Yet..

The economic benefit of non-problem gambling expenditure is reduced by the fact that “ economic multipliers applicable to expenditure on EGMs are among the lowest of all industry sectors in terms of flow-on to the regional economy” (para. 86), making the economic benefit marginal in this case (ALH Group v Whittlesea CC 2017).

**Increased competition & choice**

Increased competition due to additional EGMs is an economic benefit – though low because there are already many EGMs in the local market and the application is for a small number of machines (para. 66) (Bakers Arms Hotel v VCGLR 2014).

The Tribunal comments with approval that there is demand for more EGMs (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

The main impact of this top-up application will be in peak periods “…as there are already opportunities for people wishing to engage in gambling on EGMs in the shire” (para. 65)(Molwin v Mornington Peninsula SC 2015).

*Scale of application – increased choices, competing, EGM losses and gambling problems*

Small number of EGMs

The Tribunal favours evidence that the risk of problem gambling due to 10 EGMs is low (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

The prospect of problem gambling arising from addition of EGMs would be alleviated by limited number of EGMs in the application (para. 63)(L’Unico v Monash CC 2013).

Few EGMs/minimal risk of gambling problems/small benefit of refurbishments, compared with what is already available in the area

Little weight given to the increased variety of EGMs, and intensified competition, since there are already many EGMs in the area (para. 37)(Sporting Legends Club v Wellington SC 2016).

Additional EGMs would escalate competition – which is positive – but only by a small extent in a community with other venues (para. 63). Similarly, increased access to gaming for non-problem gamblers is a benefit, but a small one since there are other venues nearby (para. 63)(L’Unico v Monash CC 2013).

The number of EGMs sought in the application is relatively low compared with the total in the municipality with the result that they would add little to the many existing opportunities for gambling (para. 84) (Bakers Arms Hotel v VCGLR 2014).

The prospect of problem gambling arising from addition of EGMs would be extenuated by the fact that gaming is already widely available (para. 63)(L’Unico v Monash CC 2013).

The prospect of problem gambling related to application is largely negated by presence of other nearby venues [hence this application is not likely to make matters much worse] (para. 74)(Kingfish Victoria v Melbourne CC 2013).

A prospective rise in gaming expenditure and choice has benefit but this effect is small in a community with an already wide choice and high expenditure on gaming (para. 44)(Kingfish Victoria v Melbourne CC 2013).

Substantial refurbishments represent a small increase in level of hospitality services already available to the community, and so are accorded marginal weight (para. 127)(ALH Group v Whittlesea CC 2017).

THE EXTENT AND NATURE OF GAMBLING PROBLEMS

**Estimates of increased revenue**

Some decisions reveal an acceptance of the validity of the Geotech model for estimating rises in gaming revenue and the proportion of that increase which may be attributed to ‘new’ expenditure. Other decisions affirm the view that the marginal rise in expenditure per additional EGM is less than the existing level of gaming revenue per gaming machine.

Notably, one decision considers with perceptive incredulity the comparison between a recent surge in gaming revenue in the absence of additional EGMs, with a conservative estimate of future expenditure even after the proposed installation of further gaming machines.

*Acceptance of Geotech model*

While the Tribunal has entertained concerns about the Geotech system, it has been updated and shows increased accuracy (para. 55). (Bakers Arms Hotel v VCGLR 2014).

*Marginal increase in revenue is of relevance*

The Tribunal does not accept Council evidence about problem gambling expenditure because it relates to all gaming expenditure rather than the marginal impact of this application (para. 57). (Bakers Arms Hotel v VCGLR 2014).

*Impact of additional EGMs not equal to that of existing machines*

The Tribunal discounts council’s assertions about problem gambling expenditure because it had assumed the level of expenditure on new machines could be equal to that of existing EGMs – which tend to be lower in a top-up application (paras. 80-81) “In other words”, the Tribunal concluded, “the straight line estimate …is not supported by the evidence.” (para. 57). (Bakers Arms Hotel v VCGLR 2014).

*Recent rise in gaming expenditure may discredit a conservative estimate of revenue increase*

The Tribunal acknowledges the argument that gaming revenue in the hotel has risen markedly in recent years, without any rise in EGMs or change in opening hours and with only slight renovation, is “a striking result”. The Tribunal therefore concludes that it is improbable that revenue could rise to this extent without big changes and yet rise to an extent not much greater with the addition of 14 EGMs and major refurbishment, according to estimates submitted by the applicant (paras. 52-53). (Bakers Arms Hotel v VCGLR 2014).

**Some expenditure causes gambling problems**

It is acknowledged that new gaming expenditure may contribute to gambling problems, through the Tribunal maintains that the scale of such adverse effects is minimised where the level of ‘new’ expenditure is revised downward at a hearing, or if, in its appraisal, expenditure related to gambling problems accounts for a small proportion of gaming revenue.

“…the amount of additional (non-transferred) expenditure attributable to problem gambling is part of the context within which the extent of the benefit of community contributions is to be considered: community organisations will be winners, and problem gamblers and their families will be losers” (para. 115) *(*ALH Group v Whittlesea CC 2017).

*But…*

The Tribunal notes that EGMs are being reinstalled at a club where they operated in the past, with no evidence that they caused any gambling problem at that time (para. 79) *(Pakenham Racing Club v Cardinia SC 2017).*

Number of EGMs is low and a small proportion of anticipated expenditure is new, and the proportion of that which contributes to problem gambling is trifling, with the consequence that the risk of problem gambling from the application is low(Pakenham Racing Club v Cardinia SC 2017).

Most gaming expenditure is not associated with problem gambling (para. 64)(Kingfish Victoria v Melbourne CC 2013).

*Transferred expenditure causes no net harm*

Transferred expenditure should not be included as “such expenditure cannot exacerbate problem gambling” (para. 113) (Bakers Arms Hotel v VCGLR 2014).

*Downward revision of new expenditure may improve an application*

The Tribunal comments favourably that the venue had refined the calculation of new expenditure downward, adding that this reduction is ‘accepted by all parties’ (para. 93) yet elsewhere concludes that it is ‘even more difficult to predict than gross expenditure’ (para. 38)(Molwin v Mornington Peninsula SC 2015).

Reduced estimate of new expenditure reduces the risk of problem gambling(Molwin v Mornington Peninsula SC 2015).

*Scale of new expenditure is small, relative to municipal levels*

The level of transferred expenditure is not a key issue, as the application is for a top-up only, and the likely level of new expenditure is "…less than 1% increase in the existing level of overall annual gaming expenditure in this municipality.” (para. 41)(L’Unico v Monash CC 2013).

*Low EGM utilisation rates*

Low EGM utilisation rates mean that addition of gaming machines will have little effect on accessibility of gaming, so to the extent that this may affect problem gambling it will not be a factor(Pakenham Racing Club v Cardinia SC 2017).

**Net machine revenue**

The Tribunal adopts 60% of EGMs being used as its criterion for “peak utilisation” (para. 73)(Pakenham Racing Club v Cardinia SC 2017).

The Tribunal cites evidence of an applicant witness that there may be some problem gambling at the club, owing to the high net machine revenue (NMR) and the low EGM utilisation rate (para. 71)(Pakenham Racing Club v Cardinia SC 2017).

Since the venue has the “ambiance” of a metro family hotel – and not an RSL – then NMR is compared with metropolitan hotels with the finding that it is not relatively high [whereas it would be high compared with RSL clubs etc.](Pakenham Racing Club v Cardinia SC 2017).

**Extent of gambling problems among venue patrons**

Tribunal decisions have accepted findings of the Productivity Commission which include the proposition that a substantial proportion of gaming patronage and expenditure is a product of severe or moderate gambling problems. Such decisions though, do not acknowledge the impact of mild gambling problems, which researchers conclude, account for a high proportion of gambling losses and patronage.

Tellingly, the Tribunal acknowledges the insufficiency of evidence concerning the nature and extent of gambling problems – though at times, the absence of such information has not deterred it from reaching firm conclusions about the likely prospective extent of gambling problems associated with gaming applications.

The Tribunal recounts Productivity Commission findings that about 0.5-1% of adults have severe gambling problems and 1.4-2% moderate, and that gamblers account for an average of 41% of gaming expenditure (para. 45)(L’Unico v Monash CC 2013; ALH Group v Whittlesea CC 2017).

The Tribunal cites with approval the findings of Dwyer in Mt Alexander Shire vs VCGLR and Ors 2013 VCAT 101, who noted that research findings that indicate:0.5% to 1% of adults suffer significant gambling problems and 1.4%-2.1% moderate problems and Problem gambling may account for 41% of gaming expenditure and moderate-problem gambling for about 42-75% of gaming expenditure (para. 18)(Sporting Legends Club v Wellington SC 2016).

*Sound evidence required about the extent of gambling problems associated with an increase in new expenditure*

Regarding the quality of evidence, the Tribunal comments that “…lack of cogent and reliable evidence about the scope, nature and significant of problem gambling has been a feature of case after case in both the commission and the tribunal …” (para. 19) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

*Harm from increased gaming losses may be aggravated by increased losses and density*

The Tribunal acknowledges that harm from the proposal may be aggravated by high EGM density in local suburbs and municipality, and by the high rate of losses at the venue (Bakers Arms Hotel v VCGLR 2014).

Increasing local population means that the proposed increase in EGMs would not raise the density of gaming machines in the area (para. 28) (Benmara v Whittlesea CC 2015).

**Socio-economic disadvantage aggravates gambling problems**

The vulnerability of socioeconomically disadvantaged communities to gambling problems is acknowledged by the Tribunal, with low incomes, overall disadvantage and social housing cited as factors associated with such vulnerability in some decisions, yet dismissed as irrelevant in others. A lack of thorough and persuasive evidence about this subject appears to have contributed to this conflicting and tentative understanding of gambling issues by the Tribunal.

*Impact of gambling problems worse in disadvantaged communities*

Problem gambling has social, financial and economic impacts and it has “greater impact in areas of socioeconomic disadvantage” (para. 61)(Molwin v Mornington Peninsula SC 2015).

The Tribunal observes that, “..although problem gambling can affect all categories of people in our society, its impact is most strongly felt by communities with lower socioeconomic characteristics (para. 135), adding that lower socio-economic areas are more inclined to gamble (para. 141)(ALH Group v Whittlesea CC 2017).

The Tribunal accepts that the suburb where the venue is situated is disadvantaged, remarking that “people on low incomes are not more likely to be problem gamblers, but if they are, they and their families will suffer more harm” (para. 101) (Bakers Arms Hotel v VCGLR 2014).

People in disadvantaged areas are not more likely to be problem gamblers, “..it is that they are their families are more seriously affected by problem gambling when it does occur” (para. 68)(Molwin v Mornington Peninsula SC 2015).

Low socioeconomic conditions in the area around the venue and municipality as a whole indicates that the community “has a low level of resilience to even modest number of additional EGMs” (para. 53)(Sporting Legends Club v Wellington SC 2016).

Significant weight is ascribed to the prospect that the addition of 6 EGMs may aggravate problem gambling, the Tribunal stating that: “We accept that council has provided us with convincing information (corroborated by the findings of the commission ) that the level of usage of EGMs in this Shire is near its cap and that this shire has an existing level of social disadvantage which is at the high end of the applicable range. While acknowledging that merely six extra EGMs are proposed we find that the existing heavy utilisation of EGMs in this substantially disadvantaged/more vulnerable municipal community creates a more acute risk of additional problem gambling and associated social harm. We are unsatisfied that there is any reliable evidence that this risk [of a small rise in EGMs in a disadvantaged locality] is acceptably mitigated by the applicant’s management and ‘responsible gaming’ practices’.” (para. 37)(Sporting Legends Club v Wellington SC 2016).

*Inversely, gambling is held to exert a lesser impact in affluent areas*

The Tribunal remarks on the relative affluence of location, resulting in resilience to gambling problems (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

**Types of disadvantage associated with gambling problems**

*Social housing*

The Tribunal notes favourably that there is no social housing nearby (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

Tribunal comments that the venue is not near social housing (Pakenham Racing Club v Cardinia SC 2017).

But…

The Tribunal concedes that evidence shows the proportion of social housing in the local suburb and municipality is high, but argues that no evidence was presented to show that this increases risk and concludes that the real issue was income, which is associated with risk of problem gambling (para. 74-75) *(*Bakers Arms Hotel v VCGLR 2014).

*Low incomes*

The Tribunal accepts that the suburb where the venue is situated is disadvantaged, adding that “people on low incomes are not more likely to be problem gamblers, but if they are, they and their families will suffer more harm” (para. 101) (Bakers Arms Hotel v VCGLR 2014).

But…

The Tribunal agrees with the Pink Hill Hotel decision that income has little relationship to gambling problems(Pakenham Racing Club v Cardinia SC 2017).

*Unemployment*

Reviewing an application in Langwarrin, the Tribunal remarks with favour, that local unemployment levels are lower than the metropolitan or state level (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

*Overall disadvantage – the SEIFA Index*

The fact that the subject venue is situated in a locality with a low level of socioeconomic disadvantage according to the SIEFA Index, is counted in favour of the application (para. 39) (Baretta’s Langwarrin Pty Ltd v Frankston CC 2016).

The Tribunal cites with endorsement, the applicant’s claims that local disadvantage is not as grievous as SEIFA suggests, as local residents are largely an older population who while on lower incomes, have a solid asset base and are less susceptible to problem gambling than others, and many of them would not have been counted in the Census (para. 51) [ source given: Problem Gambling from a Public Health Perspective, 2009: 84](Molwin v Mornington Peninsula SC 2015).

The Tribunal discounts the relevance of SEIFA Index to a community’s susceptibility to problem gambling because incomes are a key component of SEIFA and the link between income and problem gambling is “doubtful” and “not settled” (para. 44)(Glenroy RSL v Moreland CC 2017).

**Community concerns**

While the Tribunal acknowledges the importance of public apprehensions about gambling, efforts to document the prevalence of such concerns are generally dismissed as reflections of popular misgivings about gaming in general – rather than any disquiet about the features of a particular application.

*Community concerns are of relevance, in principle*

Evidence about “the views of the particular affected community…are relevant to a decision” (para. 13)(Molwin v Mornington Peninsula SC 2015).

Impact on the community can involve “…consideration of the impact upon a relevant part of the community” (Mount Alexander SC v VCGLR 2013).

To some extent, community opposition to an application is reflected by the fact that council “as the representative body of the relevant community” (para. 145) has made a submission and appeared before the Commission.(ALH Group v Whittlesea CC 2017).

*General opposition to gambling not given weight*

The Tribunal discounts the findings of a council survey which found that most respondents opposed the addition of EGMs, noting that “this situation is consistent it the typical results of equivalent State-wide or national survey data” (para. 37)(Sporting Legends Club v Wellington SC 2016).

The Tribunal dismisses the result of a survey since it largely determined only that most people are concerned about gambling in general in our community, and secondly, because “…this type of review hearing is not meant to constitute a community referendum on gaming…” (para. 74)(Kingfish Victoria v Melbourne CC 2013).

A community survey is discounted as it merely shows that many people are concerned about gaming – “which is already established by state-wide data” (para. 63)(L’Unico v Monash CC 2013)*.*

Community sentiment is important, but hearings are not “popularity contests” (para. 38) and one cannot give "great weight to very generalised opposition to the use or installation of gaming machines…” (para. 40)(Mount Alexander SC v VCGLR 2013).

The Tribunal notes that a council survey found many residents object to the proposal but adds that they did not consider it a threat to their own wellbeing, expressing concern for the welfare of others (para. 53)(Molwin v Mornington Peninsula SC 2015).

*Methodological limitations may discount survey findings*

The Tribunal disparages a council-sponsored survey as a “simple survey monkey survey” with “no attempts made to ensure that the result was representative of the population generally” (para. 89)*;* one thatonly attracted 103 responses, “…which does not demonstrate substantial community opposition to the application” (para. 90) (Molwin v Mornington Peninsula SC 2015).

OTHER ISSUES

**Council policies and plans**

In response to a council’s claims that its gaming policy which was recently incorporated into its planning scheme, should be given special weight, the Tribunal observes that “There is no difference in substance between the Council’s policy before the commission and the policy not before us that is included in the scheme” (para. 19)(Glenroy RSL v Moreland CC 2017).

Throughout a decision, the Tribunal refers to council’s gambling-related local planning policies, such as clauses to discourage EGMs in areas where concentration exceeds metropolitan average, in core areas of activity centres, within 800 m. of sensitive land uses and in destination venues. (para. 48-70)(Glenroy RSL v Moreland CC 2017).

The Tribunal ascribes weight to the fact that the council precinct plan provided for development of this hotel including its gambling functions (para. 23) (Benmara v Whittlesea CC 2015).

The Tribunal favours the fact that the benefit of improved facilities is recognised under the Council planning scheme (para. 89) (Bakers Arms Hotel v VCGLR 2014).

**Backfill**

The Tribunal addresses the issue of ‘backfilling’, where EGMs are installed at a venue where number of attached entitlements is less than the number of EGMs approved in that venue (para. 85) [thereby allowing the relatively few EGMs which may be installed in a capped area before the cap is reached, to be installed in a venue without a hearing before the VCGLR]. The Tribunal gives ‘some weight’ to the idea that EGMs could be installed in a couple of local hotels ‘without consideration’ of the net social and economic benefits (para. 129) (Bakers Arms Hotel v VCGLR 2014). [Such an outcome, the applicant had argued, would be less preferable than installing the machines in its venue]

**Increased gambling expenditure and local retail activity**

While increased gaming expenditure will divert expenditure from local retail establishments, the effect would be so widely dispersed that no single business will suffer greatly (para. 120)(ALH Group v Whittlesea CC 2017).

**Limited benefit of funds flowing to the government**

Funds flowing to the government offer little benefit since it is unclear how much will return to the same community (para. 44)(Kingfish Victoria v Melbourne CC 2013).

**Gambling problems and local services**

While local support agencies have cautioned that the application would increase demand for their services, there is no evidence that they could not cope, with the result that this consideration is accorded low weight. (para. 126)(ALH Group v Whittlesea CC 2017).

**Diversion of expenditure from other goods**

Increased expenditure on EGMs by problem gamblers may act as an economic liability by diverting expenditure from other goods and services – an effect magnified in an area of disadvantage. The Tribunal adds through, that the level of economic detriment is “difficult to quantify”, noting that “there was no expert evidence” (para. 68) (Bakers Arms Hotel v VCGLR 2014).

REFERENCES

ALH Group Property Holdings Pty Ltd v Whittlesea CC (Corrected) [2017] VCAT 2164 (21 December 2017)

Baker Arms Hotel Pty Ltd v Victorian Commission for Gambling and Liquor Regulation [2014] VCAT 1192 (25 September 2014)

Benmara Pty Ltd v Whittlesea CC [2015] VCAT 1463 (16 September 2015)

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Glenroy RSL Sub Branch Inc v Moreland CC [2017] VCAT 531 (19 April 2017)

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