

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### OCCUPATIONAL AND BUSINESS REGULATION LIST

VCAT REFERENCE NO. B322/2006

#### CATCHWORDS

Gaming – Approval of gaming machine venue – Review of decision of Victorian Commission for Gambling Regulation – Shire of Macedon Ranges – Strip shopping centre – Transitional application - Benefits of approving gaming machines – Problem gambling – Relevant test under *Gambling Regulation Act 2003*

<b>APPLICANT</b>	Romsey Hotel Pty Ltd
<b>RESPONDENT</b>	Victorian Commission for Gambling Regulation
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Justice Stuart Morris, President
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14, 15 and 16 November 2006
<b>DATE OF ORDER</b>	11 January 2007
<b>CITATION</b>	Romsey Hotel Pty Ltd v VCGR [2007] VCAT 1

#### ORDER

- 1 The decision of the Victorian Commission for Gambling Regulation is set aside.
- 2 In lieu of the decision of the Commission, the tribunal approves the Romsey Hotel at 90-94 Main Street, Romsey as premises suitable for gaming, with 30 (thirty) gaming machines, and with the gaming machine area being as shown on the plan which accompanied the application. The approval is subject to the following condition:
  - (a) that the approval does not come into effect until the Commission has notified the applicant in writing that the premises have been inspected for the purpose of section 3.3.7(1)(b) of the Act and the Commission is satisfied that the premises are suitable for the management and operation of gaming machines.
- 3 The order set out in paragraph 2 hereof comes into effect on the date of this order.

Stuart Morris  
**President**

**APPEARANCES:**

For Romsey Hotel Pty Ltd

Mr Nick Tweedie of counsel instructed by  
Williams Winter, solicitors

For Victorian Commission of  
Gambling Regulation

No appearance

For Macedon Ranges Shire  
Council

Mr Ragu Appudurai, solicitor of Russell  
Kennedy instructed by Maddocks, solicitors

## REASONS

- 1 The applicant, which is the proprietor of the Romsey Hotel at 90 Main Street, Romsey, wishes to install 30 gaming machines. In May 2005 a planning permit was granted for the construction of additions to the hotel to create a gaming lounge of 160 square metres and a function room of 190 square metres. Subsequently the applicant applied to the Victorian Commission for Gambling Regulation (“the Commission”) for the approval of the premises as suitable for gaming. This application was made pursuant to section 3.3.4 of the *Gambling Regulation Act 2003* (“the Act”). On 21 April 2006, following an inquiry, the Commission decided to refuse the application. The applicant has now applied to the tribunal for the review of the decision.
- 2 Romsey is within the municipal district of the Shire of Macedon Ranges. The council of that shire (“the council”) opposes the approval of the premises as suitable for gaming as it is concerned with the extent and impact of problem gambling within its municipal district.

### **The nature of the tribunal’s powers and responsibilities**

- 3 Sadly, there remains some misconceptions about the nature of the tribunal’s powers and responsibilities under gaming legislation. This is so notwithstanding the detailed reasons set out in *Branbeau Pty Ltd v Victorian Commission of Gambling Regulation*.<sup>1</sup> In the reasons for that decision the tribunal set out an overview of Victoria’s gaming machine industry, which provides an important backdrop in the making of decisions about gaming machines. Also in that case the tribunal set out the relevant legislation, the nature of a review before the tribunal, and the relevant test that must be applied in determining applications for gaming machines (or gaming venues) under the Act. Some of these general principles were elaborated in the subsequent tribunal decision of *Ocean Grove Bowling Club Inc v Victorian Commission for Gambling Regulation*.<sup>2</sup> Significantly no party in the present proceeding sought to contest any of the principles of law outlined in those decisions.
- 4 It is important that I explain that review on the merits does not necessarily involve overriding the primary decision (that is, the decision made by the Commission). Still less does it involve overriding a decision made by a council, as no decision under the Act has been vested in a local council. Often the body charged with conducting a review on the merits is presented with additional or different evidence than the body which made a primary decision. As a matter of logic and reality this means that if the reviewing body takes a different view than the primary decision maker this does not mean that the primary decision was wrong. Indeed, this is a case where

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<sup>1</sup> [2003] VCAT 2606.

<sup>2</sup> [2006] VCAT 1921.

fundamental information relied upon by the Commission was not presented to the tribunal.

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

### **The application**

- 6 The Romsey Hotel is located on the north-eastern corner of Main Street and Barry Street, Romsey. The hotel is located in the southern section of the Romsey activity centre, which generally spans Main Street. The hotel is a single storey building which comprises a public bar with a capacity for approximately 40 patrons, a bistro with 100 seats, a TAB which accommodates about 30 patrons and a drive-through bottle shop. The hotel is typical of a small country hotel with a limited range of modest facilities.
- 7 The proposed extension of the hotel, to accommodate a gaming lounge and a function room, is to be accompanied by a renovation of the existing facilities. The applicant told the tribunal that the works to upgrade the hotel would not take place if the approval for gaming machines was not granted. The hotel proposes to source the machines from Tattersall's Gaming Pty Ltd ("Tattersall's").
- 8 The Romsey Hotel is the only hotel in Romsey. In 2001 Romsey had a population of a little under 3,000 persons, but this is estimated to be closer to 4,000 at the present time. The Romsey area is growing rapidly as a result of commuter settlement.
- 9 There are presently no gaming machines in Romsey.

### **The Commission's decision**

- 10 The initial application to the Commission had been based upon the installation and use of 50 gaming machines. However, by the time the Commission made its decision, this had been reduced to 30 gaming machines.
- 11 In its reasons for decision the Commission set out the cases advanced for the applicant and the council. The Commission then identified positive and negative features associated with the application.
- 12 In general terms, the Commission regarded the proposed alterations to the hotel as conferring a positive community benefit. It also noted that for those who enjoy gaming without harming themselves or others the additional convenience of a gaming outlet in Romsey would be beneficial.

The Commission concluded that although additional employment opportunities would be modest this was a further benefit which should not be lightly dismissed. Further, the evidence before the Commission was that the approval of gaming would enable the hotel to make financial contributions to local community groups. The Commission also noted as a strongly positive feature of the application that within the Shire of Macedon Ranges both the number of gaming machines and the level of gaming expenditure was well below the State average. It said:

This is plainly a matter which counts heavily in favour of the application, as is the fact that the socio-economic indicia for Macedon Ranges, and even for Romsey do not give rise for concern.

Subsequently the Commission commented that this statistical evidence was powerful.

- 13 In relation to negative factors, the Commission noted that one issue dominated: that is, that there was a comprehensive survey showing that members of the local community were opposed to the introduction of gaming machines into their community. In its conclusions the Commission said:

We have gained the overwhelming impression that members of the local community find the prospect of gaming at its only hotel so disconcerting that it would have a significant effect upon that community.

- 14 The Commission then concluded that when this point is considered the Commission found it hard to consider that the advantages associated with the application were sufficient to outweigh the negatives. As a result the Commission said that, on balance, it was unable to be satisfied that if the application was granted the net economic and social impact of the proposal would not be detrimental to the well being of the community within Romsey and its surrounding areas.
- 15 As I have said, the key evidence which influenced the Commission was a plebiscite directed at residents of Romsey which asked the question:

“Do you support the installation of electronic gaming machines in Romsey?”

The evidence was that there was a 69% return rate of the survey forms. Further, of the returned survey forms, 20% supported the provision of gaming machines in Romsey; but 79% did not support the installation of gaming machines in Romsey.

- 16 Although the tribunal is entitled to consider the reasons of the Commission, it is highly significant that the council did not seek to lead evidence of this community survey before the tribunal. The survey was referred to in a video shown to the tribunal, but the results and method of the survey, as such, were not presented. This cannot have been an oversight. Rather it must have been the result of a deliberate decision on the part of the council,

presumably on the basis that it recognised that such a survey was not relevant having regard to the test set out in the Act. In any event – and this is what is important – the facts placed before the tribunal are substantially different than those which were before the Commission. In particular, the key evidence which swayed the Commission and upon which its refusal was based was not presented before the tribunal. On the other hand, evidence was re-presented in relation to all the benefits identified by the Commission. Given this, the outcome of the tribunal’s consideration of the merits is hardly surprising.

### **Strip shopping centre and transitional provisions**

- 17 However before embarking on an analysis of the merits, it is necessary to deal with a question of law raised by the council. It is said that this question arises out of an amendment to the Macedon Ranges Planning Scheme on 18 October 2006. This amendment substituted a new version of clause 52.28 in the scheme: which is a State wide clause dealing with gaming. The council submitted that approval could not be given under the Act if the proposed use was not permitted under the planning scheme (or, at least, an application had not been made for such permission); and, in any event, there was no power to grant such a permit as the proposed venue was in a strip shopping centre where the installation or use of a gaming machine is prohibited.
- 18 The applicant replied to this submission by drawing the tribunal’s attention to transitional provisions contained in clause 52.28-5 of the planning scheme. This provides:

The requirements of clause 52.28 as in force immediately before 18 October 2006 continue to apply to a gaming machine referred to in a transitional application and permitted in the determination of a transitional application if a planning permit was not required immediately before 18 October 2006 for that gaming machine.

In this clause, “transitional application” means an application or request made, and not determined, before 18 October 2006 to the Victorian Commission for Gambling under the *Gambling Regulation Act 2003* for either:

- \* an approval of premises for gaming, or variation of approval of premises for gaming, or
- \* amendment of conditions of a venue operator’s licence to vary the number of permitted gaming machines for an approved venue.

The applicant maintained that the current application for an approval of premises for gaming was a “transitional application” within the meaning of this clause because, although it had been refused by the Commission before 18 October 2006, it had not been “determined” because it awaited a final decision from the tribunal in this review proceeding.

- 19 The council rejoined the applicant's submission based on clause 52.28-5 in two ways. First it said that the reference to an application being not determined was a reference to the decision of the Commission, not any decision by the tribunal. Second, it said that, in any event, the present circumstances were not circumstances where a planning permit was not required immediately before 18 October 2006 for the installation and use of gaming machines, but rather the installation and use of gaming machines was prohibited for the same reason as it is now prohibited: namely that the proposed venue is in a strip shopping centre.
- 20 The applicant surrejoined this second submission by contending that the council was estopped from relying upon this argument as, in a proceeding before the tribunal in relation to the planning permit for the hotel extension, it had acknowledged that the hotel was not in a strip shopping centre for the purpose of the gaming controls in the planning scheme.

### Estoppel

- 21 I doubt the correctness of the applicant's surrejoinder concerning estoppel. I think the import of the Court of Appeal decision in *Cook v Faithland Inc*<sup>3</sup> is that such principles do not apply in administrative review proceedings before the tribunal. In any event, having regard to my conclusions on other issues, it is unnecessary to determine this.

### Strip shopping centre

- 22 I regard it as desirable, if not necessary, to consider whether or not the proposed venue is in a "strip shopping centre".

### Principles

- 23 The provisions in relation to strip shopping centres are subtly different in the current planning scheme provision and the former provision. However it is sufficient to consider the current provision as any difference between the provisions is inconsequential. The current provision provides in clause 52.28-4 that the installation or use of a gaming machine is prohibited in a strip shopping centre in the Shire of Macedon Ranges. It then provides:

A strip shopping centre is in an area that meets all of the following requirements:

- \* it is zoned for business use;
- \* it consists of at least two separate buildings on at least two separate and adjoining lots;
- \* it is an area in which a significant proportion of the buildings are shops;
- \* it is an area in which a significant proportion of the lots abut a road accessible to the public generally;

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<sup>3</sup> (1993) 79 LGERA 308.

but it does not include the Capital City Zone in the Melbourne Planning Scheme.

- 24 It is apparent that the fact that land is zoned for business use does not automatically mean that such land is a strip shopping centre.<sup>4</sup> Yet such a zoning is an essential ingredient in identifying an area that is a strip shopping centre. The council referred the tribunal to the Business 1 Zone in Romsey. This zone is partly on the eastern side of the Melbourne-Lancefield Road (“the main road”) and partly on the western side of the main road. In substance the business zoning extends to the depth of one allotment on the eastern side; but on the western side it extends to a depth of several allotments, including a number of substantial allotments west of Pohlman Street. However the council did not submit that all the land in the Business 1 Zone is an area which is a strip shopping centre. Rather it submitted that the area which was a strip shopping centre was the land zoned Business 1 which abuts the main road.
- 25 The main road is, of course, a road accessible to the public generally: so the fourth essential ingredient of the definition is clearly satisfied by this formulation. Likewise, the council’s defined area consists of at least two separate buildings on at least two separate and adjoining lots: so the third essential ingredient is also satisfied.
- 26 The application of clause 52.28-4 requires the identification of an area; or, more accurately, requires consideration of whether a proposed gaming venue will be an identified area. In this respect I also note that the word “area” is defined in the *Planning and Environment Act 1987* to include two or more areas of land that are not adjoining. Hence the fact that allotments immediately to the north of the subject land, which consists of various council offices and related uses, are zoned Public Use Zone 6 does not seem to be of any moment.
- 27 In identifying the area of a strip shopping centre a key consideration will often be the proportion of buildings in the area which are shops. This is because an essential requirement of an area that is a strip shopping centre is that it is an area in which a “significant” proportion of the buildings are shops. What is “significant” will need to be determined by reference to the purpose of the provision, a matter I shall return to.
- 28 When is a building a shop? In my opinion, this will depend on both the building and the use of the building. For example a building designed to be used as a shop, but currently vacant, would ordinarily be regarded as a shop. On the other hand the same building would not be regarded as a shop if it had been permanently converted to residential use. It may be more difficult to decide whether a building is a shop if it was built as a dwelling but is now used for retail purposes. This is a nice question, but it is not necessary for me to determine it. However I should add that I would not regard a building to be a shop if it is used as a restaurant; although I would

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<sup>4</sup> See *Crestline Architects Pty Ltd v Greater Geelong City Council* [1998] VCAT 100 at [21].

regard it as a shop if it was a building used to sell take-away food. It is to be noted that the definition of the land use term “shop”<sup>5</sup> does not determine this question, because the clause is concerned with the proportion of *buildings* that are shops rather than land use as such.

- 29 Clause 52.28-4 has its origins in 1998 when there was public concern about shoppers being seduced into gaming venues whilst undergoing their retail activities. The theory which underpinned the prohibition was that persons who wished to engage in gaming should make a conscious decision to that effect and that gaming outlets should not be permitted to tempt shoppers carrying out everyday activities. However in inserting the prohibition into planning schemes there was a recognition that hotels and clubs (in which gaming must occur) are properly to be found in business areas, particularly in rural towns. Hence the reference to a “significant” proportion of the buildings being shops was designed to prohibit new gaming opportunities, not in business areas, but in those parts of business areas where shoppers congregate and where there is a significant degree of pedestrian traffic. Indeed, the importance of pedestrian activity was recognised as a relevant factor in *Crestline Architects Pty Ltd v Greater Geelong City Council*.<sup>6</sup>
- 30 In my opinion, an area will be one in which a “significant” proportion of the buildings are shops if the proportion of buildings in the area which are shops is significant having regard to the underlying policy objective. In this respect, foot traffic is important; because it is the possible temptation placed in the path of a pedestrian undertaking shopping activity that the provision is directed towards. Thus in determining an area which is a strip shopping centre it will be relevant to consider the number, proportion and nature of the shops in the area. However I think it is unhelpful to define “significant” by contrasting it with “insignificant”.<sup>7</sup>
- 31 Further, in my opinion, it is difficult to determine the issue of whether an area is one in which a significant proportion of the buildings are shops in isolation from identifying the area itself. The two are interrelated. It might be that by adjusting the area it becomes one in which a significant proportion of the buildings are shops; or by expanding the area it no longer becomes one in which a significant proportion of the buildings are shops. Hence, ultimately, in finding as a fact whether an area is a strip shopping centre – or whether a proposed gaming venue is within such an area – it will be necessary to exercise some kind of judgment in relation to the area that is regarded as a strip shopping centre.

#### Finding of fact

- 32 I find that the proposed gaming venue will not be in an area that is a strip shopping centre within the meaning of clause 58.28-4 of the planning

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<sup>5</sup> See clause 74 of the planning scheme.

<sup>6</sup> [1998] VCAT 100 at [17].

<sup>7</sup> Compare *Crestline Architects Pty Ltd v Greater Geelong City Council* [1998] VCAT 100 at 23.

scheme. This finding is also made in relation to the previous planning scheme provision.

- 33 One way of illustrating the basis of this finding is to consider the uses which are closest to the proposed venue.
- 34 Immediately to the north of the subject land is a municipal complex, consisting of offices, other community services and a car park; and these are (in large part) in a Public Use Zone, not a business zone. To the north of the council complex, there is a shop building which has two uses: a fast food outlet and a real estate agency. Further to the north there is an office style building which is used by an agricultural business. Yet further to the north is a dwelling, used as an accountant's office. And then, a building which is used as a saddlery. And to its north, there is a vacant lot; and then a brick commercial building, used as an estate agent's office, which also fronts the side road Stawell Street. I cannot find that the area on the east side of the main road, between Stawell Street and Woodend Wallan Road, is, or is part of, an area that is a strip shopping centre. In this area there is not a significant proportion of buildings that are shops. And, if this area was included in a wider area, there would not be a significant proportion of buildings that were shops in the wider area.
- 35 When I consider other buildings near the subject land, this reinforces my findings. To the south of the land, on the other side of Woodend Wallan Road, is a service station. Opposite the subject land, on the west side of the main road, is a Catholic church on a very large allotment.
- 36 The proposed venue is certainly part of the business centre of Romsey; but, in my opinion, it is farfetched to identify it as part of a strip shopping centre in the defined sense.
- 37 Indeed, if one looks at the land uses within the area which the council submitted was a strip shopping centre it becomes apparent that the proportion of buildings which are shops is not dominant. It may be that some portions of the area identified by the council as a strip shopping centre might be a strip shopping centre as defined; for example the portion in which the butcher is located and the portion where the supermarket and newsagency is located. But in identifying the relevant area, the planning control is not intended to be applied as a blunt instrument,<sup>8</sup> but in an intelligent and informed manner. Adopting such an approach it is quite unrealistic to conclude that the proposed venue is in an area in which a significant proportion of the buildings are shops. It is quite apparent from the spatial distribution of land uses that there is relatively little pedestrian traffic passing the proposed venue when passing from shop to shop.
- 38 It is relevant to note that the conclusion I have reached is precisely the same as that reached by the council planning officer when considering the planning application for the extension of the hotel. Further, it would appear

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<sup>8</sup> Compare *Crestline Architects Pty Ltd v Greater Geelong City Council* [1998] VCAT 100.

that the council acknowledged this to be the case when it made submissions to the tribunal on the review of the decision on the planning application.

### Transitional application

- 39 It remains desirable to consider the applicant's contention that the proposed installation and use of gaming machines is a transitional application for the purpose of the gaming provisions in the new planning scheme provisions.
- 40 Section 51 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that in exercising its review jurisdiction in respect of a decision the tribunal has all the functions of the decision maker. Thus, in exercising its review jurisdiction, the tribunal "stands in the shoes" of the primary decision maker.<sup>9</sup> A "function" is defined to include "jurisdiction, power, duty and authority".<sup>10</sup> And the tribunal's powers, including the power in section 51, should be construed liberally.<sup>11</sup> Section 51 further provides that in determining a proceeding for review of a decision the tribunal may, by order, affirm, vary, or set aside the decision under review; and in the last case it may either make another decision in substitution for the decision under review or it may remit the matter for reconsideration by the decision maker. Section 51(3) then provides, subject to exceptions which are not presently relevant, that a decision made by the tribunal in substitution for the decision of a decision maker is deemed to be a decision of that decision maker.
- 41 It is significant that the definition of "transitional application" in clause 52.28-5 of the planning scheme refers to an application made before 18 October 2006 to the Commission, and does not refer to the determination of the application by the Commission. In other words, the transitional provisions are not concerned with the identity of the determiner, but with the determination itself.
- 42 In my opinion, in the context of the transitional provision in clause 52.28-5, the "determination" of a gaming venue application embraces the entire process of determination and means the final determination of the application. As I will explain, this conclusion is not only preferable as a matter of jurisprudence, but also best gives effect to the obvious underlying policy of the provision.
- 43 If the tribunal orders that a primary decision is set aside it may do so with or without a specification of when that order will come into effect. If no date is specified then, in my opinion, the primary decision is set aside from the date the primary decision was made. In this circumstance, at least for substantive purposes, the primary decision is to be taken as having not been made.<sup>12</sup> This follows from the notion of "setting aside". It must also be so

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<sup>9</sup> *Davidson v Victorian Institute of Teaching* [2006] VSCA 193, at [21] per Neave JA.

<sup>10</sup> See section 3 of the *Victorian Civil and Administrative Tribunal Act 1998*.

<sup>11</sup> *Davidson v Victorian Institute of Teaching* [2006] VSCA 193, at [11] per Neave JA.

<sup>12</sup> This principle does not apply to the legal effect of the primary decision in providing a foundation for the application for review to the tribunal. This is so because of section 4 of the *Victorian Civil*

because, unless any order is made to the contrary, any decision made by the tribunal, in lieu of the primary decision, has or is deemed to have had effect from the time at which the decision under review has or had effect.<sup>13</sup>

Hence if the tribunal was to simply set aside the decision of the Commission (without specifying a date) the application will not be one which has been determined before 18 October 2006.

- 44 In interpreting legislation and subordinate instruments, the tribunal is entitled to have regard to the context and to any underlying policy revealed by that context. The transitional arrangements set out in clause 52.28-5 are designed to protect applicants who may have spent many thousands, even hundreds of thousands, of dollars preparing an application. It would be an odd and unfair outcome if the transitional arrangements protected those who had an application in the pipeline before the Commission but did not provide similar protection to an applicant whose application was further down the pipeline and was before the tribunal.
- 45 Thus I do not accept the submission by the council that the application the subject of this proceeding is not a “transitional application” within the meaning of clause 52.28-5 of the relevant planning scheme.
- 46 I should indicate that if I was of the view that the present proceeding was not a transitional application, I would hold that is open for the tribunal to consider the application for the approval of the premises as suitable for gaming and to grant approval, in accordance with section 3.3.9(3)(b) of the Act, subject to a condition that the approval does not take effect until the applicant satisfies the Commission that the applicant has obtained a permit permitting the premises to be used for gaming on gaming machines. Further, I would have granted approval subject to such a condition.

## **Evidence before the tribunal**

### The applicant's case

- 47 The applicant relied upon the following witnesses in support of its application for review:
- Mr James Anthony Hogan, a representative of the applicant, who outlined the operations of the existing hotel, the proposed development of the hotel and the manner in which gaming operations were expected to be conducted.
  - Mr Michael Lupton Clyne, a gaming analyst at Tattersall's, who gave estimates as to the likely additional expenditure that would occur if approval was given for 30 gaming machines; and the likely source of such expenditure.

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*and Administrative Tribunal Act 1998. See also Brian Lawlor Automotive Pty Ltd v Collector of Customs (NSW) (1978) 1 ALD 167 and Traill v Rural City of Wodonga (1989) 3 AATR 107.*

<sup>13</sup> See section 51(3)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*.

- Ms Colleen Peterson, a town planner, who gave evidence about the hotel and its patrons, about gaming in the Macedon Ranges Shire, the social and economic character of the municipality, and the social and economic effects of the proposal.

Much of the evidence presented to the tribunal by the applicant was the same that was presented to the Commission and commented upon, favourably, by the Commission.

#### The council's case

48 The council contended that the introduction of a gaming venue at Romsey would result in a net social and economic detriment to the wellbeing of the residents of the Shire of Macedon Ranges, particularly those in the Romsey district. The council did not disagree with the approach taken by the tribunal in the *Branbeau* and *Ocean Grove* cases, but emphasised that it was incumbent upon the applicant to satisfy the tribunal about economic and social matters.<sup>14</sup> The council was particularly critical of the social and economic data relied upon by Ms Peterson, suggesting that it was out of date and had been overtaken by events. The council was particularly concerned with the impact of the proposal on problem gambling within the municipality. In this respect it relied upon evidence from a financial counsellor working at Kyneton, Julie Anne Smith.

#### The Commission's position

49 The Commission did not support nor oppose the application for review. Nevertheless the tribunal has carefully considered the reasons given by the Commission in refusing the application and the extent to which the key factor relied upon by the Commission was not a factor at the forefront of the council case.

#### Inspection

50 On the day prior to the hearing I inspected the main street of the Romsey township and the hotel the subject of the application.

#### **The impact of the gaming machines**

51 I accept the evidence given by Mr Clyne that the additional gaming expenditure that is likely to be generated by the 30 machines sought by the applicant is in the order of \$1,805 per machine per week or \$2,815,800 per annum.

#### Improved services

52 The earnings from gaming will generate gross gaming commissions for the hotel of about \$700,000 per annum. Although the net gaming revenue will be substantially less than this sum, it remains true that gaming revenue will

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<sup>14</sup> In this respect the council relied upon the decision of the Court of Appeal in *New Theme Pty Ltd v Victorian Casino and Gaming Authority* [2002] VSCA 80 at [62] to [67] and [101] to [102].

be a substantial, if not the most substantial, part of the hotel's revenue. Mr Hogan gave evidence, which I accept, that this ongoing gaming revenue will enable the hotel to be transformed from a modest country pub into an hotel offering a wider range of services. Mr Hogan explained that the stream of gaming revenue would provide a financial basis for the hotel to be extended onto the adjacent vacant block to the north of the existing venue; with the extension containing a gaming lounge and a function room with a capacity for approximately 160 people. The extension would also provide other facilities such as bathroom facilities, a smoking lounge, and an administration office. The proposed works also involve creating a café lounge in place of the existing public bar and renovating the current TAB area to be a joint TAB/public bar area. Further the renovation proposals involve an upgrade to the bistro area with new furniture and children's play equipment. The estimated cost of these works is \$2.25 million.

- 53 The council submitted that the upgrade of the hotel could proceed without gaming. I accept that an upgrade of the hotel could proceed – and is likely – in the absence of gaming. But it is improbable that the proposed upgrade would proceed in the absence of gaming; in particular, it is quite improbable that the hotel would be extended north onto the vacant block. Put bluntly, there is clearly a strong relationship between the willingness of an hotel owner to make capital improvements and the likelihood of future revenue. As gaming can provide substantial revenue venues that can offer gaming are more likely to attract capital expenditure than those which do not have gaming.
- 54 The applicant emphasised the additional benefits that will flow from the improved physical facilities and improved services. The relevant comparator in this regard is not the state of existing facilities and services; but, rather, what facilities and services would be provided in the event that gaming was not approved. Notwithstanding this, I find that the quality of physical facilities and the extent of services provided is likely to be significantly better if gaming is allowed than if it is not. In particular, I would regard the construction and operation of a function facility as unlikely to proceed if gaming is not approved. Further, I find that this facility will provide additional benefit to the residents of the Romsey district. The council submitted that there were already sufficient function rooms and facilities in the Romsey district and provided a list of venues which can be used to host private functions. I doubt that all entries on this list are comparable to the proposed function room. But I think the proposed function room will make a significant contribution to the choice available to those wishing to hold private functions, not only by reason of its size and central location, but also by reason of its public character and quality.

#### Improved accessibility to gaming opportunities

- 55 The provision of a gaming venue at Romsey will significantly improve the accessibility of gambling opportunities for those living in the Romsey

district. As I explained in *Branbeau*, this could be regarded as both good and bad. However to the extent that it provides a better opportunity for recreational gamblers to exercise their own free choice to gamble, I would regard this as a benefit: an objective of the Act is to accommodate those without harming themselves or others.

#### Other benefits

56 There are other benefits that may accrue from the approval of the proposed facility. I discussed a number of these in *Branbeau*: such as increased taxation to fund community spending, greater convenience to patrons, less travel to accommodate the choice to gamble, and the generation of economic activity within the municipality. In the scheme of things these benefits are modest in this case; but they contribute towards the accumulation of benefits.

#### The source of gaming expenditure

57 It is now necessary to make findings about the source of additional gaming revenue, as this may be relevant to the issue of problem gaming. I find it is likely that at least 60 per cent of the gaming revenue will be transferred from existing gaming venues; that is, no more than 40% of the estimated \$2.8 million per annum will be “new” expenditure. In making this finding I rely upon the evidence given by Mr Clyne and the results of case studies in relation to the Sands Hotel, the Werribee Football Club and the Chelsea Heights Hotel in respect of which Mr Clyne has calculated transferred expenditure following the opening of a new venue at 51%, 61% and 69% respectively. I note that these calculations did not take into account expenditure that may have been transferred to new venues from venues beyond the catchment area of the new venue. As this is typically about 20% of expenditure at a venue, it is likely that the actual transferred expenditure in the case of the three case studies was in the order, not of 50% to 70%, but 60% to 80%. In relation to transferred expenditure I also rely upon the analysis I set out in *Ocean Grove Bowling Club Inc v Victorian Commission for Gambling Regulation*<sup>15</sup>.

58 Most of the “new” gaming expenditure will be from residents living in the Romsey district. It is wishful thinking – and wrong – to think that there will be significant gaming expenditure generated by tourists. There are a host of surveys that show that most of the expenditure on electronic gaming machines is locally generated.

#### The impact of “new” gaming expenditure on problem gambling

59 Thus the question becomes: to what extent will that portion of gaming spending at the proposed venue which is “new” gaming expenditure be likely to exacerbate problem gambling among Macedon Ranges residents?

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<sup>15</sup> [2006] VCAT 1921.

60 In *Branbeau* I commented that:

I am unaware of specific evidence as to the impact of a new gaming venue on problem gambling when residents of the area concerned already have good access to gaming opportunities.

This is still the case. Intuitively, it seems probable that persons with an existing gambling problem will be more likely to seek out and find a gambling opportunity than persons without such a problem. Further, evidence from the census shows that an overwhelming proportion of residents of the Romsey district have access to a motor vehicle. Hence it may be that the main risk of providing a gaming venue in Romsey will be that it will attract new recreational gamblers, a small proportion of whom may ultimately become problem gamblers. The extent of this problem is likely to be influenced by the socio economic circumstances of the Romsey area, which is the area from which most of the additional gaming expenditure is likely to be sourced.

The socio-economic circumstances of persons in the Romsey district

61 Ms Peterson gave extensive and detailed evidence about the socio economic circumstances of residents living in the Macedon Ranges municipality and, in particular, in the Romsey district. Most of these statistics were based upon an analysis of the 2001 census, which is the latest census for which data is available at the present time. Ms Peterson's evidence covered population and population growth, the age structure of the population, ethnicity, education, household income, the size of mortgage and rent payments, and a construct called "housing stress". She also provided statistics in relation to what is known as the SEIFA Index of Disadvantage, which I regard as a convenient measure of the extent to which a community is disadvantaged.<sup>16</sup> The SEIFA Index for the year 2001 for Macedon Ranges was 1,058, which is significantly higher than the average for both Victorian municipalities and Victorian country municipalities. Further, the SEIFA Index of Disadvantage for the Romsey postcode (3434) – from which most of the new gaming expenditure will be sourced – was 1,041.

62 Ms Peterson also presented other evidence in support of her conclusion that the Romsey district was comparatively well off in relation to other Victorian areas. For example, she relied upon statistics prepared by Jesuit Social Services, Australian Taxation Office statistics in relation to taxable income, property price statistics and unemployment statistics. It is significant that all the statistics relied upon by Ms Peterson point in the

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<sup>16</sup> The SEIFA Index of Relative Socio Economic Disadvantage is produced by the Australian Bureau of Statistics. The index is created by combining numerous measures of disadvantage, for example, the proportion of persons in a municipal district who have low educational attainment, level of high unemployment, percentage of families with combined incomes of less than \$15,600 and level of population in unskilled occupations. A higher index score means an area is less disadvantaged. The index score is standardised to achieve a mean of 1,000 for all collector districts within Australia with a standard deviation of 100. This means that 95% of all index scores for all collector districts within Australia fall within the range of 800 to 1,200.

same direction – namely that the Macedon Ranges municipality and the Romsey district are areas of comparative advantage. For my part, I would regard the SEIFA score for Macedon Ranges and for the Romsey district as indicative – and reliably indicative – of the socio economic character of these areas.

- 63 The council submitted that the 2001 census data was unreliable. I do not accept this. Experience shows that the ranking of areas in terms of socio economic advantage (or disadvantage) from census to census is relatively stable. Even if it is true that the Romsey area has changed since 2001, it is highly likely that it is still an area which is comparatively advantaged. Further, not all the statistics relied upon by Ms Peterson were 2001 census figures; and all the latter figures do is reinforce the 2001 census figures. The council submitted that recent interest rate rises had added to the stress suffered by Romsey residents and made the 2001 census data out of date. At the time of the 2001 census the Reserve Bank reference rate was 5%; whereas it is now 6%. Such a difference is hardly significant. By way of contrast I point out that in January 1990 the reference rate was 17.5%.
- 64 The council also submitted that there was likely to have been a downward shift in the socio economic circumstances of the Romsey community since 2001. I doubt whether such a theory is correct; and I am not prepared to accept it. It is significant that the council did not place any evidence before the tribunal to support this theory. In any event, even if there has been some change in the socio economic circumstances of the Romsey community since 2001 I would expect such a change to be modest; with the result that both Macedon Ranges and Romsey remain areas that are better off than the average Victorian community.

#### The existing availability of gaming opportunities

- 65 According to data produced by the Commission, as at 30 June 2006 there were 81 gaming machines within the Macedon Ranges municipality. This equates to only 2.69 gaming machines per 1,000 adults, a figure which is substantially lower than the State average of 6.92 gaming machines per 1,000 adults. Although the approval of the proposed venue will increase this figure modestly, the municipality will remain one where the number of gaming machines per 1,000 adults is well below average.

#### **Conclusions on social and economic impacts**

- 66 Having regard to the findings and observations set out above, I am satisfied that the net economic and social impact of the approval of the Romsey Hotel as suitable for gaming, with 30 machines, will not be detrimental to the wellbeing of the community of the municipal district of Macedon Ranges. I have outlined a number of benefits to the community if the venue is approved. These benefits need to be balanced against an increased propensity for the occurrence of problem gambling, with the community problems this creates. However the extent of the latter is amorphous; and

the socio economic circumstances of the Romsey area are likely to mitigate the problem to some extent. Moreover the approval of the venue will still leave the Macedon Ranges shire with a comparatively low number of gaming machines per adult. Hence it seems clear to me that this case is not one which fails at the threshold test set out in the Act.

**Discretion**

67 Further, for the same reasons, I am satisfied that I ought exercise the discretion to allow the application.

Stuart Morris  
**President**