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Hoteliers on tilt after NSW Court of Appeal deals losing hand

BY DARCY PLOWMAN - JUN 07, 2024 8:25 AM AEST

SNAPSHOT

- Following a NSW Court of Appeal decision, the Independent Liquor and Gaming Authority has a wide discretion to refuse, or impose licence conditions in response to, applications to transfer or lease pokies between licensed hotels in NSW on social impact grounds.
- The complicated structure of the provisions regulating such applications does not permit reading down generally-worded powers without any express limits or criteria.
- The *Liquor Act 2007* and *Gaming Machines Act 2001* operate to establish symbiotic, not separate, regimes.

In *Independent Liquor and Gaming Authority v Whitebull HTL Pty Ltd; v Area Hotel UT Pty Ltd; & v The Griffith Hotel Pty Ltd* [2023] NSWCA 224 (‘***Whitebull***’), the Court considered the scheme, established by the *Gaming Machines Act 2001* (NSW) (‘**Act**’), that regulates the transfer and leasing of gaming machine entitlements (‘**GME**s) between hotel licences in NSW. To transfer or lease GMEs, or to increase the maximum number of GMEs – the gaming machine threshold (‘**GMT**’) – a licence may hold, a licensee must apply to the Independent Liquor and Gaming Authority (‘**Authority**’) for approval.

The case pivoted on the nature of the Authority’s approval powers. If the Authority receives a GMT increase, GME transfer or GME lease application that complies with all the spelt-out statutory requisites, is it bound to grant it? Or, does the Authority have an overriding discretion to refuse it outright? Or, a discretion to grant it only while protectively imposing new conditions on the liquor licence, for fear of social impacts?

Historical background

In the 1990s, hotels in NSW were authorised to have gaming machines (‘**pokies**’) for the first time as a result of amendments to the former *Liquor Act 1982* (NSW). Initially, the State auctioned off a set of new licences to keep gaming machines on premises, known as ‘poker machine permits’. Soon thereafter, hotels were allowed, in addition to any ‘permit machines’ they had, to place up to 15 machines on their premises.

In 2002, the Act came into force and made some key changes. A ‘poker machine entitlement’ (later renamed GME) was issued for each machine (apart from the permit machines) physically in place at hotels; a state-wide cap on their numbers was imposed; and a scheme introduced whereby the GMEs could be traded between hotels by applying to the former Liquor Administration Board to transfer them. This scheme requires GMEs be sold in blocks of two or three, with one forfeited to the State in each, so as to gradually reduce the numbers of machines in the State.

Further amendments to the Act have created limited exceptions to block/forfeiture requirements, a scheme whereby GMEs may be leased between licences and the GMT scheme.

GMT scheme

Under Part 4, Division 1 of the Act, the Authority sets the GMT for each hotel licence (up to a maximum of 30). A licensee can seek a GMT increase under s 34(1) which can be lodged whilst simultaneously applying for a transfer or lease of GMEs, or by itself, in which case a transfer or lease application would be lodged after its approval.

There are three types of GMT increases:

1. those requiring no local impact assessment (‘**LIA**’);
2. those requiring a class-1 LIA; and

3. those requiring a class-2 LIA.

Where no LIA is required, the only express requirements are general compliance with the division and regulations (s 34(3) and (4)). LIA applications, by contrast, face substantive requirements under s 36(3) – more stringent for class-2 than class-1 – including community consultation, demonstrating adequate harm minimisation measures and meeting threshold tests related to social impact. Positive contributions are usually effected by paying money into the responsible gambling fund (s 36A). An LIA must be approved under s 36, before a GMT increase can be approved under s 34(4).

Facts of *Whitebull*

The various plaintiffs, all related companies, filed three summonses against the Authority seeking orders in the nature of *certiorari* and detailed supporting declarations, which were heard jointly.

The first summons concerned an application to increase the GMT of the Whitebull Hotel, Armidale by eight (from 17 to 25). The GMT increase required a class-1 LIA and was lodged alone. The second summons concerned simultaneous applications to increase the GMT of the Area Hotel in Griffith by seven (from 23 to 30) and to simultaneously lease seven GMEs from the Griffith Hotel. It did not require an LIA.

In each case, the Authority had approved the applications but imposed conditions on each applicant's liquor licence, which the applicants had opposed. On the Whitebull Hotel, the Authority imposed a condition requiring a 'responsible gambling officer' to be in the gaming room at all times. On the Area Hotel, the Authority imposed an equivalent condition plus another requiring the hotel to maintain a 'gambling incidents register'.

The plaintiffs sought to quash the licence conditions but allow the GMT increases and (for the Area Hotel) GME lease to stand. The plaintiffs contended the relevant conditions were imposed in excess of power and sought declarations from the Court to the effect that:

1. the impugned licence conditions were invalid and of no effect;
2. the statutory criteria for the exercise of the Authority's discretion are set out exhaustively in Div 1, Pt 4 of the Act; and
3. considerations of possible or likely social impacts on the local community were irrelevant.

The third summons concerned simultaneous applications to increase the GMT of the Gemini Hotel, Griffith, by one (from 29 to 30) and transfer a single entitlement from the Griffith Hotel (under a forfeiture exemption) which did not require an LIA. The Authority had sought the applicant's consent to comparable licence conditions but this time, upon the applicant refusing consent, the Authority refused the applications. This third summons sought similar relief to the first two plus an order the applications be granted without the conditions.

First instance

A first, the summonses succeeded before McNaughton J, in *Whitebull HTL Pty Ltd v Independent Liquor and Gaming Authority; Area Hotel UT Pty Ltd v Independent Liquor and Gaming Authority; The Griffith Hotel Pty Ltd v Independent Liquor and Gaming Authority* [2023] NSWSC 588, who granted all the substantive relief sought.

The decision emphasised the detailed nature of the provisions governing GMT increase and GME transfer/lease applications, finding the Authority's interpretation could 'set to nought' the statutory regime as an application could meet all statutory and regulatory requirements but still be refused or made subject to conditions (at [154]).

Her Honour treated the Act as having 'a regime which provides a predictable, certain and transparent way of keeping, transferring and leasing gaming machines': a standalone regime which would have been undermined if the Authority could exercise an overriding discretion (at [153]-[155]). It would, moreover, undercut that legislative intention if the Authority could use the *Liquor Act 2007* (NSW) ('***Liquor Act***') to impose licence conditions in response to gaming applications, given they arise under a separate regime (at [160]-[161]).

Her Honour placed emphasis on the second reading speech for the Act which had stressed industry certainty (at [157]-[159]), and also on the broader legislative history which showed that the regime in the Act had replaced an earlier regime managed solely under the former *Liquor Act 1982*.

On appeal

His Honour Kirk JA gave the main judgment (Meagher JA and Griffiths AJA concurred). The judgment gave little weight to the wider legislative history or the structure of the Act, and gave less weight to the second reading speech. Instead, the judgment focused on the wording of the provisions granting the Authority power.

Transfers/leases

His Honour began with s 19(2), which empowers the Authority to approve a transfer. It provides that a transfer 'has no effect' unless it: (a) is approved by the Authority; and (b) complies with the requirements of the division and regulations. As s 25 uses equivalent language for leases, it was treated identically (at [73]).

His Honour found the first limb of s 19(2) – though it presupposed, rather than defined, the approval power – did not subject its exercise to any criteria or limits. The separation between the first and second limbs, moreover, suggested that 'approval' contemplated more than mere compliance with the mandatory requirements. The Authority's ostensibly unfettered ability to require an applicant to give further 'particulars or other matter' with a transfer application reinforced that interpretation (at [72]-[79]).

Kirk JA cited *R v Australian Broadcasting Tribunal; Ex Parte 2HD Pty Ltd* (1979) 144 CLR 45 which indicates that, where a discretion is expressed without qualification, it is unconfined but for limitations derived from the 'context and scope and purpose' of the statute (at [76]-[77]).

His Honour derived these from the objects and purposes of the Act under s 3(1)(a) and (b), and (2)-(3). As the objects included the need to minimise harm associated with gaming and to foster responsible conduct of gambling, they suggested a wide discretionary ambit for the approval power, including social impacts (at [78]-[86]).

GMT increases

Kirk JA then considered the power to increase GMTs in s 34(4). His Honour saw the plaintiffs' arguments as having more force here, given the tiered nature of the LIA approval process (at [94]-[95]). Nonetheless, his Honour still found the provision bestowed a power in unconfined terms – here, by using the word 'may' – subject only to satisfaction that the division and the regulations had been complied with. The power's scope was also informed by the objects of the Act and similarly wide-ranging. His Honour drew on s 9(1) of the *Interpretation Act 1987* (NSW) to suggest that 'may' should not be construed as 'must' in the context, as well as the other subclauses in s 34 of the Act, such as the discretion to grant a smaller GMT increase than that sought by an applicant (s 36(6)).

Licence condition

Kirk JA also found that s 53 of the *Liquor Act* could be used to impose conditions on the liquor licence to mitigate potential social impact concerns arising from granting a gaming application. As above, s 53(1) grants a discretionary power in substantively untrammelled terms and so is limitable only by the Act's purpose and scope (at [105]-[111]).

Kirk JA found that the *Liquor Act* and the Act established 'symbiotic', not standalone, regimes and emphasised the various extant links between them (at [112]-[135]). It followed that the gaming-related harms fell within the scope of the *Liquor Act*.

Tourist Accommodation

Prior to *Whitebull*, the Court of Appeal considered LIA approvals in *Tourist Accommodation Pty Ltd v Independent Liquor and Gaming Authority* [2023] NSWCA 67 ('***Tourist Accommodation***'). There, the plaintiff sought to limit the Authority's discretion to consider social impacts when deciding a class-1 LIA under s 36(3). It did so by advancing an *expressio unius* argument, contending that such a discretion would obliterate the distinction between a class-2 LIA – which requires that the increase have 'an overall positive impact on the local community' – and a class-1 LIA, which only requires that it provide a 'positive contribution towards' it.

The Court rejected the plaintiff's arguments because, for both classes of LIA, the Authority must be satisfied that it is 'otherwise appropriate that the LIA be approved' (at [67]-[76]). Such naturally discretionary wording was inapt to be read down as the plaintiff contended.

Implications

Whitebull has extended the basic reasoning in *Tourist Accommodation*, which only concerned LIA approvals, to all GME transfers, leases and LIA-exempt GMT increases.

Before *Whitebull*, there had been a widespread view that a valid GMT increase which does not require an LIA should be approved as a matter of course, and that the Authority's substantive discretion resided solely in approving an LIA, not a transfer or lease. The Authority itself may once have thought so. In *The Griffith Hotel Pty Ltd and Anor v Independent Liquor and Gaming Authority* [2021] NSWSC 933**,** Bellew J awarded costs against the Authority where it had granted, almost immediately after receiving a mandamus summons, an LIA-exempt application that it had delayed for over six months.

That view has been overturned. Importantly, the judgment finds that – even where an applicant has obtained a GMT increase *before* applying for a GME transfer – the Authority retains a discretion to refuse the transfer (at [85]-[87]). Thus, an applicant who has committed to paying a lot of money to gain approval of a class 1 or 2 LIA may find they cannot transfer GMEs to themselves to fulfil the GMT increase.

Some hoteliers may now be deterred from making certain transfers to avoid conditions being placed on the licence, preferring to preserve the rights they have. That may work against another object of the Act, which is to reduce the numbers of gaming machines in the State gradually via forfeiture (s 3(1)(e)).

Ultimately, in *Whitebull*, Kirk JA found the only clear limits on the approval powers were that they must be exercised in good faith and not be legally unreasonably (at [91], [98] and [135]).

Whitebull suggests that, despite the complicated structures and procedures in the liquor and gaming legislation, when considering any general or vaguely worded powers, the Court of Appeal may prefer a wide, rather than narrow, construction.

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