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HARBURG INVESTMENTS PTY LTD v MACKENROTH - [2005] 2 Qd R 433

Court of Appeal
McPherson JA, Jerrard JA, White J

[App. 370/2005]

[2005] QCA 243

15 June; 15 July 2005

Gaming and wagering – Other matters – Gaming machine licences – Application for – Appeal to Minister against refusal – Relevant considerations – Whether public interest adversely affected – Community opposition – *Gaming Machine Act* 1991 *ss* 30(1), 30(2), 55(2). (A.Dig. 3rd [50]).

The *Gaming Machine Act* 1991 (Reprint No. 5) relevantly provides:

> **"Appeals to Minister**
>
> **29.(1)** A person who -
>
> ...
>
> (b) is or was an applicant for ... a licence under this Act and is aggrieved by a decision or determination referred to in subsection (9) ...
>
> may appeal against the decision or determination to the Minister.
>
> ...
>
> **(9)** An appeal under subsection (1)(b) may be made in respect of a decision or determination of the [Queensland Gaming Commission] -
>
> (a) under section 55, refusing to grant a gaming machine licence ..."
>
> **"Minister's determination of appeals**
>
> **30.(1)** The Minister is to consider -
>
> (a) the contents of the appeal under section 29 and information or material lodged with the appeal; and
> (b) information or material that is -
> (i) given to the Minister by the appellant; and
> (ii) given to the Minister by any person referred to in section 29(4)(d); and
> (iii) given to the Minister by the commission in respect of the appeal; and
> (iv) given to the Minister by the chief executive in respect of the appeal;
> ... and
>
> (c) such other information or material as the Minister considers relevant;

and, if the Minister is satisfied that the integrity of gaming and the conduct of gaming will not be jeopardised and that the public interest will not be adversely affected, the Minister may direct -

(d) that the appeal be disallowed; or
(e) that the decision or determination appealed against be set aside or varied.

(2) If the Minister is not so satisfied, the Minister must direct that the appeal be disallowed."

Held, allowing the appeal and dismissing an application under the *Judicial Review Act* 1991:

(1) That by referring to the "public interest" s. 30 authorised the Minister, in determining an appeal, to exercise a discretionary value judgment by reference to factual matters, confined only in so far as the subject matter and the scope and purpose of the Act enabled given reasons to be pronounced definitely extraneous to any objects the legislature could have had in view.

O'Sullivan v. Farrer (1989) 168 C.L.R. 210, 216 applied.

Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 C.L.R. 24, 40 considered.

(2) That those matters included the strength of local community opposition to the granting of gaming machine licences, irrespective of the cogency of their reasons for objecting to it.

South Australia v. O'Shea (1987) 163 C.L.R. 378, 388; *Hot Holdings Pty Ltd v. Creasy* (2002) 210 C.L.R. 438, 455 applied.

(3) That accordingly in the present case it was open to the appellant Minister under s. 30 to be left without a state of satisfaction that the public interest would not be adversely affected by the granting of the gaming machine licences sought by the respondent.

[2005] 2 Qd R 433 at 434

Decision of Mullins J. reversed.

CASES CITED

The following cases are cited in the judgments: *Adrenalin Sports Brisbane Pty Ltd v. Mackenroth* (Appn S2547/2003; McMurdo J., 20 June2003, unreported); [2003] QSC 184. *Hot Holdings Pty Ltd v. Creasy* (2002) 210 C.L.R. 438. *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 C.L.R. 24. *Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Palme* (2003)216 C.L.R. 212. *O'Sullivan v. Farrer* (1989) 168 C.L.R. 210. *South Australia v. O'Shea* (1987) 163 C.L.R. 378.

The following additional cases were cited in argument: *H A Bachrach Pty Ltd v. Caboolture Shire Council* (1992) 80 L.G.E.R.A. 230. *Minister for Aboriginal and Torres Strait Islander Affairs v. Western Australia* (1996)149 A.L.R. 78. *Minister for Immigration and Multicultural Affairs v. Yusuf* (2001) 206 C.L.R. 323. *Tickner v. Bropho* (1993) 40 F.C.R. 183. *Tickner v. Chapman* (1995) 57 F.C.R. 451. *Zhang v. Canterbury City Council* (2001) 51 N.S.W.L.R. 589.

APPEAL

P. J. Flanagan S.C., with him *M. O. Plunkett*, for the appellant, the Hon. Terrence Michael Mackenroth.

The judge erred in drawing the inference that the appellant had not considered the expert reports. She blurred the line between what weight a decision-maker may give to material as opposed to whether a decision-maker has given consideration to material. Whether or not the expert reports completely nullified the community concerns was a matter for the decision-maker, not for the Court: *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 C.L.R. 24 at 39 - 40. This is particularly so when the discretion to be exercised is a wide ministerial discretion: see generally *South Australia v. O'Shea* (1987) 163 C.L.R. 378 at 388 and *Hot Holdings Pty Ltd v. Creasy* (2002) 210 C.L.R. 438 at 455.

It was plausible that the appellant considered the reports but, nevertheless, was not satisfied that the public interest would not be adversely affected by the granting of the licences. The mere existence of strong community objections - regardless of how well-founded they might be - is itself a relevant factor. There is no longer any definition of "public interest" in the *Gaming Machine Act* 1991 and it is well established that the term imports a wide discretion: *O'Sullivan v. Farrer* (1989) 168 C.L.R. 210 at 216. The public interest may be well served when the community believes that its anxiety about a proposal in its area is given weight.

R. V. Hanson Q.C. for the respondent, Harburg Investments Pty Ltd as trustee for Peter Victor Francis Harburg.

The obligation of the Minister under s. 30(1) "to consider" relevant information or material is an obligation to engage in an active intellectual process directed at that information or material: *Tickner v. Chapman* (1995) 57 F.C.R. 451 at 462, 476 - 477 and 495 - 496. It requires knowledge, understanding or appreciation, and evaluation or assessment. What is required is a "proper, genuine and realistic consideration" of the material, and mere advertence to that material is not sufficient: *Zhang v. Canterbury City Council* (2001) 51 N.S.W.L.R. 589 at 601 [62] and [64]. The material identified in s. 30(1) as the material which the Minister is to

consider is a "fundamental element" or a "focal point" in his deliberations: *Zhang* at 602 and 603 [72], [73] and [77].

Satisfaction is a state of mind which also involves an active intellectual process requiring knowledge, understanding or appreciation, and evaluation or assessment of the relevant material.

There was an absence of evidence which demonstrated that the appellant understood or appreciated the relevant material, and that he evaluated or assessed that material. He made no finding about the matters raised in the objections or the response to those matters in the expert reports. The failure of a decision-maker to make a finding on a question of fact indicates that the decision-maker did not consider the matter to be material: *Minister for Immigration and Multicultural Affairs v. Yusuf* (2001) 206 C.L.R. 323 at 330 [5], 338 [37] and 346 [69]. In turn that may reveal that the decision-maker erred by not taking into account a relevant consideration: *Yusuf* at 331 [7].

C.A.V.

McPHERSON JA.

[1] This is an appeal from the Supreme Court in proceedings under the *Judicial Review Act* 1991 setting aside a decision of the Hon. Terrence Mackenroth as State Treasurer and the Minister responsible for making decisions under s. 30 of the *Gaming Machine Act* 1991. The respondent to this appeal is Harburg Investments Pty Ltd (referred to here as Harburg), which planned to establish a Cheers Tavern in premises at Marshall Lane, Kenmore. It applied for a general liquor licence, which was granted by the Liquor Appeals Tribunal on 11 January 2002. It also made application for licences in respect of 35 gaming machines, which was rejected by Queensland Gaming Commission on 22 May 2002. Harburg appealed against this refusal to the Minister under s. 30 of the *Gaming Machine Act*, but on 22 July 2002 its

appeal was "disallowed" (to use the expression in s. 30), and it filed this application for judicial review of that decision. The application was granted on 16 December 2004 by an order of the Supreme Court that set aside the decision of 22 July 2002 and referred it to the Minister for further consideration. The appeal in this Court is against that decision.

[2] Section 30(1) of the Act in the form in which it stood at the relevant time (which it is agreed was that contained in Reprint no. 5 of the Act) provided under the heading **Minister's determination of appeals** that the Minister is to consider various specified matters and "such other information or material as the Minister considers relevant". The subsection then goes on to say:

> "and, if the Minister is satisfied that the integrity of gaming and the conduct of gaming will not be jeopardised and that the public interest will not be adversely affected, the Minister may direct -
>
> (d) that the appeal be disallowed; or
> (e) that the decision or determination appealed against be set aside or varied."

Section 30(2) proceeds to add:

> "(2) If the Minister is not so satisfied, the Minister must direct that the appeal be disallowed."

Which is as much as to say that unless satisfied that the public interest will *not* be adversely affected, the appeal must be "disallowed" (that is, dismissed).

[3] A statutory provision which sets up, without defining it, "public interest" as the relevant criterion for decision and vests the power of determining it in a Minister of the executive government leaves little room for challenging the decision in a court of law. The expression "**in the public interest**", when used in a statute, was said in *O'Sullivan v. Farrer* (1989) 168 C.L.R. 210, 216, to import:

> "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'."

See generally *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 C.L.R. 24, at 40. Such a discretionary judgment extends to include taking account of "the likely reaction of the community" to the action proposed: *South Australia v. O'Shea* (1987) 163 C.L.R. 378, 388. There may, it was said in *Hot Holdings Pty Ltd v. Creasy* (2002) 210 C.L.R. 438, 455, be cases:

> "in which a decision-maker, especially a Minister, may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office".

The "whole object" of a statutory provision placing a power in the hands of a Minister is so that "he may exercise it according to government policy": *ibid.*

[4] Before the Act was passed in 1991, gambling and the possession or use of gaming machines was, under legislation then in force, generally prohibited in Queensland. Under the Act of 1991 the Chief Executive of the Queensland Office of Gaming Regulation was required to consider an application for a licence and to report his recommendation to the Commission. The Commission was to have regard to his recommendation and other information considered relevant. The Act has over the years been the subject of successive amendments which it is fair to say have considerably tightened and restricted the granting of gaming machine licences; but even at the date of Harburg's application on 15 November 2000, which was shortly before the amending Act of 2000 came into force on 1 December 2000, the matters that the Commission was entitled to consider in granting or refusing gaming machine licences included infor-

mation or material "about social and community issues": s. 55(2) of the Act.

[5] Harburg's application for gaming machine licences at the Cheers Tavern at Kenmore was supported by opinions of experts, who included Mr Denis Brown of Planning Australia and Professor Boreham, Professor of Political Science at the University of Queensland. Taken with the reports of others, there is a great deal of material in support of the application extending to some 1500 pages contained in six volumes of record on this appeal. Only about one of those volumes is devoted to material emanating from the Commission or the Minister. Some of the material was prepared for the hearing before the Liquor Appeals Tribunal which was successful; but it too has more or less relevance to the gaming machine licence applications and formed part of the material relied on by Harburg in support of the application to the Supreme Court.

[2003] 2 Qd R 453 at 457

[6] On the other side, there is material that people living in the locality were concerned about having gaming machines, or more of them, in the vicinity of Marshall Lane, Kenmore. Dr David Watson, Member of Parliament for Moggill, wrote to approximately 1,000 houses in the vicinity of the proposed Tavern advising residents of the applications for both the liquor licence and the gaming machine licence. He enclosed a response form so that he could receive the recipients' comments on the applications. Dr Watson's letter to the Executive Director of the Commission shows that, out of a total of 419 responses reviewed, only five were in favour of granting a gaming licence, while 414 were against it. A notation on his letter dated 12 January to the Commission records that Dr Watson had advised the Executive Director that he had never had such a strongly negative response to an issue. In addition, Ms Margaret de Wit, who is the local member of the Brisbane City Council, wrote opposing the application and stating that there was "a high level of concern about this application". Attending a meeting of the **Liquor Licensing** Commission in February 2001 to discuss the Tavern, officers of the Queensland Office of Gaming Regulation noted that the "tone" of those present (about 300 in number) was largely opposed to the gaming facility at the site.

[7] It was after this that Harburg provided the report dated 29 April 2002 from Denis Brown, which concluded that the concerns set out in the objections did not "in general, bear close scrutiny when assessed against the facts". In his report, Mr Brown relied on Professor Boreham's report to the effect that there were no good grounds for objection to Harburg's proposal. The Executive Director nevertheless prepared a report in which he referred to the proposed Cheers Tavern as capable of being considered "an inappropriate type of facility" in an area where there had been "strong community objection" from the local MP, the Councillor and members of the community. In the event, the Commission refused the application stating as reasons for the decision to do so that:

> "1. The premises ... is an inappropriate venue for licensing for gaming purposes.
> 2. The strong community objections ... indicate a high level of community concern at the potential for a negative impact of the proposed site on the local community."

[8] In disallowing the appeal under s. 29(1)(b) of the Act from the Commission, the Minister adopted one (option A) of several options presented in the briefing paper provided to him, saying that he was "not satisfied that the public interest would not be adversely affected", and stating the two reasons in paras 1 and 2 specified by the Commission. His decision was communicated to Harburg by letter dated 1 August 2002, which was followed by the provision of a statement of reasons pursuant to s. 33 of the *Judicial Review Act* on 9 September 2002. Harburg's application to the Court to review the Minister's decision followed on 8 October 2002.

[9] It may for present purposes be accepted that Professor Boreham's and Mr Brown's criticisms of the objections have validity. In the trial division, her Honour found that there was "abundant evidence" on behalf of Harburg "that there was no substance to the community objections". If this were the issue to be determined by the Minister, the present appeal would be likely to fail. But the question for the Minister, and inferentially for the primary judge, was not whether the

objections were well or ill-founded in substance. It was whether the Minister was, within the meaning of s. 30(1) of the Act,

entitled to be satisfied that, by allowing the appeal and setting aside or varying the decision of the Commission, the public interest would or "will not be adversely affected". If not so satisfied, the Minister was bound by s. 30(2) to direct that the appeal be disallowed, which is what he did.

[10] In turn, the question for determination by the court was not what is sometimes called "a merits review" of the Minister's decision. We do not know precisely what it was that determined the fate of the appeal before him except by reference to paras 1 and 2 of the reasons and the explanation communicated to Harburg by the letter of 1 August 2002 and what is said in the statement of reasons of 9 September 2002. The second of those reasons in the letter of 1 August 2002 takes up the "strong community objections" indicating "a high level of community concern" at "the potential for a negative impact of the proposed site on the local community". The letter may, on one view, be regarded as contradicting Professor Boreham's report and that of Mr Brown. But the Minister might have disagreed in fact with their conclusions and preferred those of the objectors. In doing so, he would presumably have been giving preference to what the objectors said, however little weight objectively speaking those objections merited. It was neverthe- less within the discretion conferred on him by s. 30 of the Act to adopt that approach.

[11] I consider it likely that he placed reliance on the existence of the strong community objections and the high level of community concern, whatever the reasons for it may have been, to which the first part of para. 2 of the reasons refers. In terms of the propositions stated in the decisions of the High Court to which reference has been made, it was within the Minister's authority to do so. He was exercising a discretionary value judgment in the course of which he was entitled to bring into consideration "the likely reaction of the community" which the granting of the gaming machine licences would have. There was nothing "definitely extraneous" to the scope and purpose of the statutory enactment in his doing so. Section 55(2) made "social and community issues", and information about them, relevant to the decision of the Commission from which the appeal came that he was considering. Given the existence of the community objections, it was open to the Minister to be left without a state of satisfaction that the public interest would not be adversely affected by the grant of the gaming machine licences sought by Harburg.

[12] That being so, it is not easy to see how the objection in the present case could succeed. It is true that on one view of it the "evidence" was all one way. But that assumes that the reports of Harburg's experts were the only material available to the Minister on which he could base his decision. On the contrary, there was the information collected by Dr Watson's survey of local residents, and his and Councillor de Wit's impressions of local attitudes in the community. Mr Hanson Q.C. for Harburg points to his client's expert opinion that collecting public opinion in that fashion is open to criticism. He said that Dr Watson's survey covered less than one per cent of the people of Kenmore. He was presumably basing this on the finding of the Liquor Appeals Tribunal that the estimated population in 2000 of the locality "as defined" was 37,345 persons or on Professor Boreham's estimate in 2002 of 39,000 individuals in an area extending well beyond Marshall Lane out to Moggill. This, however, misses the point of Dr Watson's survey. He wrote to "approximately 1000 houses in the vicinity of the proposed Cheers Tavern", and received 419 responses of which all but

five were opposed to the grant of the gaming machine licences; that is to say, something in the order of 41.9 per cent responded of whom 98.8 per cent were opposed to it. We do not know why the remaining 58.1 per cent failed to respond; but, as Dr Watson said, because of the time of year and limited time for response, he could not be sure that everyone who was sent a letter had the opportunity to respond. The Minister may as a matter of political judgment have considered opposition to the proposal was suf- ficiently strong that, if further encouraged, and organised, it might jeopardise the integrity or "conduct of gaming" elsewhere in Brisbane. It cannot be said that such a conclusion is "definitely extraneous" to the purposes and objects of the gaming machines legislation, or passed so far beyond its scope as to be wholly unreasonable and insupportable as a matter of law.

[13] It is, as her Honour observed in her reasons, correct to say that the court should not infer that the Minister failed to carry out the task required of him under the Act "unless there is evidence from which such an inference can be drawn".

Despite this, the learned judge found that in reaching his decision the Minister had failed to have regard to a relevant consideration, "namely the material relied on by Harburg that was directed at the topics raised by the community objections". In this her Honour was referring to "community concern at the potential for negative impact of the proposed site on the local community". She said that this reason failed to identify "the respects in which it was anticipated that there would be such a negative impact".

[14] It is true that the expression "negative impact of the proposed site on the local community" is a largely, perhaps entirely, vacuous notion that is not expanded or elucidated in the reasons. Her Honour said the Executive Director's report to the Commission "sought to rely on the fact that there were community objections, rather than any issue that was raised by the objections". That was the crux of the challenge to the Minister's decision. But it was the fact that community objections existed, and that those elicited were "strong", that constituted the reason or one of them for the Minister's non-satisfaction that the "public interest" would not be adversely affected. Expressed in the technical language of the law, they amounted, if you like, to original evidence of the reason for his failing to be satisfied of the absence of the adverse effect predicated by s. 30(1).

[15] For reasons I have already given, this was a legitimate consideration for the Minister to take into account. The application to her Honour ought therefore to have failed. But it was submitted that analysis of the Minister's reasons shows that he did not consider but ignored the latest reports of Professor Boreham and Mr Brown of Planning Australia, as well as Harburg's solicitors' contentions to the Minister that were based upon them. I find this submission perplexing. The letter of 1 August 2002 conveying the Minister's decision to Harburg's solicitors identifies the material before the Minister. It included the amended grounds of appeal forwarded by those solicitors. Paragraphs 5(g) to 5(j) of those grounds assert that "little weight" should be given to the community objections. Included among those grounds are that Professor Boreham in his report indicates that there is no evidence to suggest that the balance of outcomes for the economic and social structure of the community is "negative". The letter forwarding the amended grounds to the Minister bears the annotation "Noted by the Minister 19/6/02". The body of the letter of 1 August 2002 states that the Minister noted "all the

grounds of appeal" raised by Harburg's solicitors, together with the matters taken into consideration by the Commission in its reasons for refusal of the licences, and the information in the submissions by those solicitors including the most recent Planning Australia report.

[16] In his statement of reasons dated 9 September 2002 given pursuant to s. 33 of the *Judicial Review Act*, the Minister again lists the evidence or other material he had before him for consideration in making his decision on the appeal to him. It includes the report by Planning Australia drawing conclusions that (i) the Commission's reasons do not stand scrutiny; and (ii) that there is no evidence that the locality would suffer negative impacts if the application was granted.

[17] There is no basis for supposing that the Minister did not in fact consider the matters and submissions to which he refers except that he did not give effect to them. This is not an occasion on which the court is confronted by a question of credibility about what the Minister considered and what he looked at in deciding the appeal to him. If it were, he would almost certainly fail in these proceedings because he gave no sworn evidence. It was a matter greatly regretted by Mr Hanson Q.C., who was thereby denied the opportunity of cross-examining him in a case in which the onus of proof rested on his client. But it was not a dispute in which the credibility of the Minister was in issue. Instead, it resembles at most one where, for example, a judge's reasons are scrutinised on appeal to see if he overlooked considerations relevant to his decision. Her Honour's conclusion that the Minister failed to take account of the reports of Professor Boreham and of Planning Australia that there were no valid grounds for objecting to Harburg's proposal must be viewed in that context and not as a finding about whether the Minister should be believed or not. Because I consider that it was legitimate for the Minister to take account, as he did, of the strength of local community opposition to the granting of gaming machine licences for the Cheers Tavern, irrespective of the cogency of their reasons for objecting to it, the inference that he failed to have regard to the material presented in Professor Boreham's and Mr Brown's reports cannot stand.

[18] One matter remains to be considered. It is that in his statement of reasons of 9 September 2002 pursuant to s. 33 of the *Judicial Review Act*, the Minister's conclusions omitted what I have designated para. 2 of his reasons stating that "the strong community objections indicated a high level of community concern at the potential for negative impact of the proposed site on the local community". Instead, after setting out in para. 1 that the premises were unsuitable as a gaming machine venue for the reasons previously adopted by the Commission, para. 2 said simply:

> "2. I was thereby not satisfied that the public interest would not be adversely affected by allowing the appeal."

The question is whether this omission makes any difference to the result. Section 33(1) of the *Judicial Review Act* obliges a decision-maker, to whom a request is made under s. 32(1) for a written statement in relation to a decision, to provide the statement to the person requesting it. This provision must be read in conjunction with s. 27B of the *Acts Interpretation Act* 1954 that, if an Act requires a person making a decision to give written reasons for the decision, the instrument giving reasons must also: (a) set out the findings on material questions of fact; and (b) refer to the evidence or other material on which those findings are based. The *Judicial Review Act* does not, however, attach any specific consequence to a failure to give reasons

other than that s. 33 itself imposes a statutory duty capable of being enforced by proceedings under s. 41(2) of that Act: cf. *Re Minister for Immigration; Ex p. Palme* (2003) 216 C.L.R. 212, 226.

[19] Unlike some other statutes that are at times encountered in practice, the *Gaming Machine Act* 1991 is not one that itself incorporates, or at the relevant date incorporated, an obligation to give reasons either at all or as part of the decision-making process itself: *Re Minister for Immigration; Ex p. Palme*, at 225. The result is that the failure of the Minister in his statement of reasons of 9 September 2002 specifically to refer to or repeat the content of para. 2 of the reasons given in the letter dated 1 August 2002 did not vitiate or invalidate it as a reason for that decision: cf. *Adrenalin Sports Brisbane Pty Ltd v. Mackenroth* [2003] QSC 184 §13, in which McMurdo J. was considering this very statute. In any event, para. 10 of the Minister's statement of reasons pursuant to s. 33 of the *Judicial Review Act* makes it plain that the Minister did in fact consider the submissions of Harburg's solicitors on the question in issue. Paragraph 11 of that statement explains:

> "11. I agreed with the Commission's reasons for refusing to grant the gaming machine licence in this regard. I took into account the arguments raised by [the solicitors] for Harburg with respect to the information about the negative community comment and objections ... and rejected them."

The statement of reasons goes on to say he considered "all the above information and, on 28 July 2002, disallowed the appeal". It is only in paras 1 and 2 of the synopsis of his reasons at the end of the statement that reference to the strong community objections and the high level of community concern is not repeated. It was already embodied elsewhere in those reasons.

[20] I would allow with costs the Minister's appeal to this Court; set aside the order made on 16 December 2004; and dismiss with costs the application dated 8 October 2002 for a statutory order of review.

JERRARD JA.

[21] In this appeal, I have read the reasons for judgment of McPherson J.A., and respectfully agree with those and with the orders proposed by his Honour. I add the following remarks.

[22] I agree with the appellant that the letter of 1 August 2002 from the Minister's office said that the Minister had considered all of the information provided to him, which included all the grounds of appeal raised by Harburg Investments. Those amended grounds of appeal, originally annexed to a letter to the Minister sent by Harburg's

solicitors, described Harburg's response to the community objections to its application for a gaming licence, and included Harburg's submission that little weight should be given to those objections. The letter from the solicitors enclosing those grounds of appeal is marked "noted by Minister"; and that marking on the document accompanying those grounds of appeal makes it very difficult to justify a finding by a court that the Minister had not considered the argument that little weight should be given to the community objections.

[23] The fact that the Minister said he was not satisfied the public interest would not be harmed - after saying that the number of objections showed a high level of public concern - does not contradict the Minister's claim to have considered the material relied on in disparagement of those community objections. The material the Minister was entitled to consider included the fact that there was such a body of objectors, and their grounds. Nor does the

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fact that the Minister did not say in the letter of August 2002 if he had rejected the responses to the objections, or why he had rejected those responses (if he did), establish that the Minister did not consider the responses. The Minister was entitled and obliged to consider the fact of the level of public concern when deciding whether he was satisfied that granting the application was not contrary to the public interest. Nor does the fact that Harburg's expert witnesses made confident assertions that there was no substance in the objections by members of the public contradict the claim that the Minister did consider the statements by those expert witnesses. I accordingly agree with the orders proposed.

WHITE J.

[24] I agree with McPherson J.A. for the reasons that he gives that this appeal must be allowed and would make only the following brief comment. Section 30 of the *Gaming Machine Act* 1991 concerns the Minister's determination of appeals. In accordance with that provision:

> "(1) The Minister is to consider -
>
> (a) the contents of the appeal under section 29 and information or material lodged with the appeal; and
> (b) information or material that is -
> (i) given to the Minister by the appellant; and
> (ii) given to the Minister by any person referred to in section 29(4)(d); and
> (iii) given to the Minister by the commission in respect of the appeal; and
> (iv) given to the Minister by the chief executive in respect of the appeal;
> ... and
>
> (c) such other information or material as the Minister considers relevant."

Having considered that body of material "... if the Minister is satisfied that the integrity of gaming and the conduct of gaming will not be jeopardised and that the public interest will not be adversely affected, the Minister may direct ... that the appeal be disallowed". However, if the Minister is not so satisfied "... the Minister must direct that the appeal be disallowed".

[25] As McPherson J.A. has set out, the Minister had a body of information conveyed by the State Parliamentary member, Dr D. Watson, and by the local government representative, Councillor de Wit, indicating a high level of community feeling against the installation of gaming machines in the proposed Cheers Tavern in Marshall Road, Kenmore. He also had the closely argued opinions of two experts contained in reports provided by Harburg Investments, Professor Boreham, a political scientist, and a town planning report by Planning Australia, which sought to demonstrate the objectively unsustainable nature of the community objections.

[26] The letter of 1 August 2002 written on behalf of the Minister to Harburg Investments' solicitors states, in

straightforward terms, that the Minister considered all of the information which he was required to consider under s. 30, noting the grounds of appeal, the matters taken into consider- ation by the Gaming Commission and the submissions of Harburg Investments. The letter concluded

> "The Minister was not satisfied that the public interest would not be adversely affected. His reasons for disallowing the appeal are -
>
> 1. The premises, with a relatively limited range of facilities and a strong dependence on gambling and a non-integrated
>
> [2008] 1 Qd R 433 at 443
>
> layout is an inappropriate venue for licensing for gaming purposes.
> 2. The strong community objections to the proposed site indicate a high level of community concern at the potential for negative impact of the proposed site on the local community."

[27] That the Minister considered the material from Harburg Investments, particularly the reports countering the objections is confirmed, if confir- mation were necessary, by the notation on the letter to the Minister from Harburg's solicitors enclosing amended grounds of appeal, "Noted by Minister". On a review of the Minister's decision under the *Judicial Review Act* 1991 there is, therefore, no basis for concluding that the Minister failed to have regard to a relevant consideration.

[28] What seems to have concerned Harburg Investments was the failure by the Minister to *elaborate* why the reasoned analysis of its experts rejecting the objectors' concerns did not prevail. Harburg seems to have failed to appreciate that the Minister, having considered all the relevant material, is authorised by the Act to give pre-eminence to the strong community objections. The Act does not require the Minister to give reasons for not preferring a position which may have more "scientific" support over another which does not.

[29] I agree with the orders proposed by McPherson J.A.

Order

Appeal allowed.

Solicitors: *C. W. Lohe, Crown Solicitor* (appellant); *Connor O'Meara* (respondent).

P.F.A.

---- End of Request ----
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