IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

2023/198867

INDEPENDENT LIQUOR AND GAMING AUTHORITY
Applicant

WHITEBULL HTL PTY LTD
Respondent

2023/198861

INDEPENDENT LIQUOR AND GAMING AUTHORITY
Applicant

AREA HOTEL UT PTY LTD
Respondent

2023/198869

INDEPENDENT LIQUOR AND GAMING AUTHORITY
Applicant

THE GRIFFITH HOTEL PTY LTD
First Respondent

NORTH RYDGE PTY LTD
Second Respondent

APPLICANT'S SUBMISSIONS

Introduction

1. The Independent Liquor and Gaming Authority (**Authority**) applies for leave to appeal from the judgments given by McNaughton J (**primary judge**) on 5 June 2023 contained in White Folder (**WF**) Tabs 14–16. Her Honour gave those judgments for the reasons at WF Tab 13 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 (**J**). The

Authority submits that the primary judge erred in her Honour's construction of the *Liquor Act 2007* (NSW) and the *Gaming Machines Act 2001* (NSW) (**GM Act**).

2. Pursuant to orders made on 26 June 2023, the applications for leave to appeal in each of the proceedings are to be heard together and concurrently with argument on the appeal. These submissions replace the summary of argument at WF Tab 7.

Factual Background

3. Each of the respondents applied to the Authority to change the gaming machine entitlements of particular hotels.

4. In connection with the White Bull Hotel (Case Number 2023/198867), the Authority exercised its power to approve an application to increase the Hotel's gaming machine threshold pursuant s 34(4) of the GM Act (J [9]-[10]). At the same time, the Authority determined to exercise its power under s 53(1) of the *Liquor Act* to impose conditions on the licence of the White Bull Hotel. Those conditions required the presence of a responsible gambling officer after midnight and the maintenance of a gambling incident register (J [10], [25]).

5. In connection with the Area Hotel (Case Number 2023/198861), the Authority exercised its power to approve an application to increase the Hotel's gaming machine threshold pursuant to s 34(4) of the GM Act and to approve the lease of gaming machine entitlements by the Hotel pursuant to s 25(1) of the GM Act (J [14]-[15]). At the same time, the Authority determined to exercise its power under s 53(1) of the *Liquor Act* to impose conditions on the licence of the Area Hotel. Those conditions were substantively the same as the conditions imposed on the White Bull Hotel, save that the responsible gambling officer was required to be present whenever the gaming machines were operating (J [15], [25]).

6. In connection with the Griffith Hotel and the Gemini Hotel (Case Number 2023/198869),[1] the Authority refused to approve an application to transfer a gaming machine entitlement and an application to increase the gaming machine threshold for the Gemini Hotel, pursuant to s 19(2) and s 34(4) of the GM Act respectively (J [18],

[1] North Rydge Pty Ltd is the business and premises owner of the Gemini Hotel (J [18]).

[22]). In its reasons for the refusals, the Authority referred to "concerns about gaming harm minimisation" and the "public interest" (J [22]).

7. The primary judge concluded that there is "no overriding discretion in s 53 of the *Liquor Act* in relation to [the] subject matter" of the GM Act, being regulation of the keeping, transfer and leasing of gaming machines (J [155], [160]). Accordingly, her Honour declared that the conditions referred to above and imposed on the licences of the White Bull Hotel and the Area Hotel pursuant to s 53(1) of the *Liquor Act* (the **impugned conditions**) were invalid and of not effect. The Authority was ordered to amend its records to remove the impugned conditions.

8. The primary judge also concluded that there is no "residual discretion in ss 19 or 34" of the GM Act to refuse to approve applications (J [155], [161]). Accordingly, her Honour quashed the Authority's decision to refuse the applications concerning the Griffith Hotel and the Gemini Hotel and ordered that the applications be granted.

9. The primary judge made declarations to the effect that:

   (a) the GM Act sets out exhaustively the relevant statutory considerations for the determination of applications under Divisions 2 and 2A of Part 3 (for the transfer (s 19) or leasing (s 25) of gaming machine entitlements) and Division 1 of Part 4 (for increases in gaming machine thresholds (s 34)); and

   (b) the possible or likely impacts on the local community are irrelevant considerations (except in so far as a local impact assessment (**LIA**) is required (s 35)).

Leave

10. Though her Honour's judgments were final, leave is sought because the monetary value in issue in each proceeding is not clearly quantified.[2] Despite that, the evidence before the primary judge was to the effect that the cost of complying with the conditions

[2] *Supreme Court Act 1970* (NSW), s 101(2)(r). See, eg, *Kay v Playup Australia Pty Ltd* (2020) 19 BPR 40,037; [2020] NSWCA 33 at [12] per Brereton JA (Macfarlan JA and Simpson AJA agreeing); *Marroun v State Transit Authority* (2017) 96 NSWLR 295 at [12].

imposed under s 53(1) of the *Liquor Act* (which her Honour found were invalid) would clearly exceed $100,000.[3] This weighs in favour of a grant of leave.

11. Further, leave should be granted because the matters involve questions of law that are of general importance. The proper construction of the powers of the Authority under the *Liquor Act* and the GM Act is of significant consequence to the administration and regulation of liquor licences and gaming machine entitlements in New South Wales.[4] For the reasons given below, the primary judge construed s 53 of the *Liquor Act* and ss 19, 25 and 34 of the GM Act in a manner that erroneously narrowed and confined the Authority's powers.

Argument: Scope of the power in s 53(1) of the *Liquor Act*

12. Section 53(1) of the *Liquor Act* relevantly provides that the Authority "may at any time … on [its] own initiative, impose conditions on a licence". Section 53(1A) provides:

> The conditions that may be imposed by the Authority on a licence under this section include, but are not limited to, conditions—
>
> (a) prohibiting the sale or supply of liquor on the licensed premises before 10 am or after 11 pm (or both), and
>
> (b) restricting the trading hours of, and public access to, the licensed premises.

13. In connection with the White Bull Hotel and the Area Hotel, the Authority concurrently considered the applications for gaming machine threshold increases pursuant to s 34(1) of the GM Act and whether to impose conditions on the licences under s 53(1) of the *Liquor Act*, the latter being something that may be done on the Authority's initiative at any time. The power to make both decisions was conferred on the Authority as the regulator with functions under "the gaming and liquor legislation",[5] specifically including the GM Act and the *Liquor Act*.[6] As will be explained (see [23] below), that legislation is interdependent.

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3 See affidavit of James Huntly Knox affirmed 14 December 2021 at [10], [17] (WF Tab 20 pp 167-168).

4 See affidavit of Andrew Bell affirmed 21 June 2023 at [7]-[10] (WF Tab 8 pp 37-38).

5 *Gaming and Liquor Administration Act 2007* (NSW), ss 6(1), 9(1)(a).

6 See GM Act, s 1 (Note); *Liquor Act*, s 1 (Note).

14. The primary judge held that the power conferred by s 53(1) of the *Liquor Ac*t did not extend to the imposition of the impugned conditions, reasoning (J [160]):

> Either by way of the maxim identified in *Anthony Hordern* [(1932) 47 CLR 1] as sensibly extended to accommodate separate statutory instruments, or simply by way of construing the legislative scheme itself, it is clear that the relevant legislative authority for the regulation of gaming machines is within the GM Act and any discretionary power purported to be exercised pursuant to s 53 of the *Liquor Act* is *ultra vires*.

15. The Authority seeks to challenge this conclusion by Ground 1 in the Draft Notices of Appeal in Case Numbers 2023/198867 (WF Tab 2 p 6) and 2023/198861 (WF Tab 4 p 14) concerning the White Bull Hotel and the Area Hotel, respectively.

Subject matter, scope and purpose of the Liquor Act

16. As the primary judge observed, the power to impose conditions pursuant to s 53(1) of the *Liquor Act* is unconstrained in its terms (J [55]). It may be accepted that neither s 53(1), nor the expressly non-exhaustive list of conditions in s 53(1A), refer to the use of gaming machines. It may also be accepted that the discretion in s 53(1) is confined by the subject matter, scope and purpose of the *Liquor Act*.[7] But an analysis of the Act demonstrates that the kind of conditions imposed here are comfortably within that subject matter, scope and purpose.

17. The *Liquor Act* is not narrowly focussed on the sale and supply of liquor. One of the objects of the *Liquor Act* is to "contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries" (s 3(1)(c)). Further, the *Liquor Act* regulates matters concerning the provision of food.[8] Most importantly for present purposes, it regulates the use of gaming machines in licensed venues. For example:[9]

    (a) under s 15, the authorisation conferred by a hotel licence will not apply if the keeping or operation of gaming machines, as authorised under the GM Act,

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[7] See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [34] per French CJ, Kiefel and Bell JJ, and the authorities cited therein.

[8] See *Liquor Act*, ss 17(4), 20C(4), 27(1). Liquor may only be sold or supplied in a hotel or small bar, or on licensed premises, if food of a nature and quantity consistent with the responsible sale, supply and service of alcohol is made available whenever liquor is sold or supplied under the relevant licence.

[9] See also *Liquor Act*, s 92(1)(c), (2)(a); s 108; s 122(4)(e).

unduly detracts from the character of the hotel or from the enjoyment of persons using the hotel otherwise than for the purposes of gambling; and

(b) under s 16(3), the keeping or operating of gaming machines on premises to which a general bar licence relates is prohibited and cannot be authorised under the GM Act.

18. Section 48 of the *Liquor Act* makes clear that the Authority is empowered to consider the impact on the community of granting certain licences, authorisations or approvals. Section 48(3) requires that any application within the scope of the section must be accompanied by a community impact statement. Section 48(2)(a) includes within the scope of the section applications for hotel licences. Section 48(2)(f) permits the Authority to require any particular application or class of applications to be accompanied by a community impact statement (including, for example, an application to impose, vary or revoke conditions under s 53). A community impact statement accompanying an application for extended trading authorisation in relation to a hotel licence is required, by s 48(7), to address matters relating to gambling activities.[10] It would be open to make regulations under s 48(6) requiring community impact statements in other circumstances to address matters relating to gambling activities.

19. Further, the provisions of the *Liquor Act* acknowledge a connection between potentially problematic gambling behaviour and the sale, supply and consumption of liquor. That is why, for example, s 15A contemplates the cessation of liquor sales in certain circumstances involving gambling activities.[11]

20. The primary judge accepted that the *Liquor Act* contains provisions relating to gaming machines but considered that those provisions are "in a very restricted context" and do not detract from "the core role of the GM Act" (J [155]). The analysis above demonstrates that her Honour took too narrow a view. Consideration of the *Liquor Act* as a whole supports the conclusion that the discretion in s 53(1) extends to the imposition of conditions of the kind at issue here. The link between the problematic

[10] See also *Liquor Regulation 2018* (NSW), cl 28.

[11] See the Second Reading Speech for the Clubs, Liquor and Gaming Machines Legislation Amendment Bill 2011 (NSW) which introduced s 15A of the *Liquor Act*: Parliamentary Debates, *Hansard*, Legislative Assembly, 17 October 2011 at 6426.

gambling behaviour to which the impugned conditions are directed and the consumption of alcohol is obvious.

Anthony Hordern

21. The primary judge relied on "the maxim identified in *Anthony Hordern*" in support of the conclusion that the discretionary power in s 53(1) of the *Liquor Act* does not extend to conditions with the effect of regulating gaming machines (J [160]). As explained in *Minister for Immigration v Nystrom*,[12] the relevant principle of construction is engaged where two statutory powers are the "same power" or are with respect to the same subject matter, or where a general power encroaches upon the subject matter exhaustively governed by a special power: on each analysis, "it must be possible to say that the statute in question confers only one power to take the relevant action". That is not the case here. The *Liquor Act* and the GM Act do not cover the same subject matter. The primary judge accepted as much (J [155]). The Authority's powers under the *Liquor Act* and the GM Act are distinct and cumulative.[13]

22. The primary judge reasoned that the imposition of conditions for the regulation of gaming machines on a licence pursuant to s 53(1) of the *Liquor Act* could "set to nought" an approval under the GM Act (J [154], [160]). But the power to impose conditions on a licence pursuant to s 53(1) and the powers to refuse applications under the GM Act are not powers "to do the same thing".[14] There is nothing unusual, or unlikely as a matter of Parliamentary intention, about the existence of different statutory powers which, by different processes, achieve (in some circumstances) similar practical outcomes.[15] It should not be accepted that, as a matter of construction, the power in s 53(1) of the *Liquor Act* is insusceptible of exercise in circumstances where an application in relation to gaming machine entitlements has been approved under the GM Act.[16]

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[12] (2006) 228 CLR 566 (***Nystrom***) at [59] per Gummow and Hayne JJ; see also at [2] per Gleeson CJ. See also *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at [106].

[13] See *Nystrom* (2006) 228 CLR 566 at [162] per Heydon and Crennan JJ (Gleeson CJ agreeing).

[14] *Anthony Hordern* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J; *Nystrom* (2006) 228 CLR 566 at [149] per Heydon and Crennan JJ (Gleeson CJ agreeing).

[15] See *Nystrom* (2006) 228 CLR 566 at [2] per Gleeson CJ, [67] per Gummow and Hayne JJ, [166] per Heydon and Crennan JJ (Gleeson CJ agreeing).

[16] *Nystrom* (2006) 228 CLR 566 at [51] per Gummow and Hayne JJ.

23. That is particularly so given the extent to which it is within the subject matter, scope and purpose of the *Liquor Act* to address gambling related matters with conditions of the kind at issue here. And, conversely, the extent to which the GM Act is interdependent with the *Liquor Act*. Gaming machine entitlements under the GM Act (ss 16, 19) and authorisations to keep gaming machines (s 56) may only be held by the holder of a licence under the *Liquor Act.*[17] The GM Act makes the keeping or operating of approved gaming machines lawful only in hotels and clubs, being premises regulated by the *Liquor Act*.[18] Under s 59 of the GM Act, there can be no authorisation to keep a gaming machine if the "hotel primary purpose test" in s 15 of the *Liquor Act* is not satisfied in respect of the hotel. Gaming machines may only be operated in hotels at times when liquor can lawfully be sold or supplied under the *Liquor Act* or when continued provision of gambling activities is permitted by the *Liquor Act*.[19] Disciplinary action under the GM Act may include the cancellation of licences under the *Liquor Act*.[20]

24. In this context, it is plain that the requirements of the *Liquor Act* were intended to be cumulative upon, not reduced by reference to, the requirements of the GM Act. It is not the case that the *Liquor Act* and the GM Act confer only one power to impose conditions of the kind impugned here, which have the effect of regulating gaming machines.

Power to impose conditions under the GM Act

25. It is necessary finally to address a matter upon which the primary judge did not rely, but which was referred to in argument below.

26. The GM Act empowers the Authority to impose conditions in two circumstances.

    (a) The Authority may impose a condition on the approval of an LIA pursuant to s 36(7). An LIA is provided and approved at a particular time in connection

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[17] GM Act, s 4(1) (definitions of "club", "club licence", "hotel" and "hotel licence"); *Liquor Act*, s 4(1) (definition of "club premises" and "hotel"). See also GM Act, s 34(7).

[18] GM Act, s 7.

[19] GM Act, s 68A.

[20] GM Act, s 131(2)(c).

with a threshold increase application. Section 36(7) is a mechanism available to the Authority only in connection with threshold increase applications.

(b) The Authority may also impose conditions on an authorisation for the keeping or disposal of approved gaming machines pursuant to s 56(6). The GM Act draws a distinction between keeping (including acquiring or possessing) and operating (including using or playing) approved gaming machines.[21] In its terms, s 56(6) does not concern the operation of approved gaming machines. It is only engaged where a relevant gaming machine is actually kept, as opposed to at the time an entitlement is determined.

27. These additional condition-making powers in the GM Act, not relied on in the primary judge's reasoning, do not establish that the power in s 53(1) of the *Liquor Act* is incapable of supporting the impugned conditions. *First*, the power in s 53(1) is not subject to the same limitations as the powers in the GM Act (see at [26] above). Conversely, the powers in the GM Act are capable of operating in circumstances different from, and supporting conditions different from, those covered by s 53(1) of the *Liquor Act*. *Secondly*, as explained above (at [16]-[24]), the GM Act does not make exhaustive provision on the topic of gaming machines to the exclusion of the *Liquor Act*. The express condition-making powers in GM Act operate together with, not in detraction from, the power conferred by s 53(1) of the *Liquor Act*.

Conclusion

28. For these reasons, the primary judge erred in concluding that the impugned conditions imposed pursuant to s 53(1) of the *Liquor Act* were *ultra vires* because they regulated the use of gaming machines within the White Bull Hotel and the Area Hotel.

Argument: Discretion to refuse applications under the GM Act

29. The primary judge concluded that there is no discretion on the part of the Authority to refuse an application under s 19 or s 34 of the GM Act because such discretion "would undermine the carefully crafted scheme of the GM Act" (J [161]). It appears that her

[21] GM Act, ss 4(1) (definitions of "keep" and "operate"), 7.

Honour reached the same conclusion with respect to s 25, although no reasoning was directed to that provision.

30. The proper construction of ss 19, 25 and 34 of the GM Act in this regard arises in the following way.

(a) The primary judge declared that the relevant statutory considerations for determining an application to transfer a gaming machine entitlement are exhaustively set out in Division 2 of Part 3 of the GM Act and, seemingly as a result, the possible or likely impacts on the local community are irrelevant. This declaration was made in connection with the application by the Griffith Hotel and the Gemini Hotel pursuant to s 19 of the GM Act, which was refused by the Authority. The primary judge also quashed the decision to refuse the transfer. See orders 1, 2, 3 and 4 made by the primary judge in respect of the Griffith Hotel and the Gemini Hotel at WF Tab 16 p 103. The Authority challenges her Honour's conclusion regarding s 19 in the Draft Notice of Appeal in relation to these Hotels (Case Number 2023/198869) at WF Tab 6 p 22.

(b) The primary judge declared that the relevant statutory considerations for determining an application for the leasing of a gaming machine entitlement are exhaustively set out in Division 2A of Part 3 of the GM Act and, seemingly as a result, the possible or likely impacts on the local community are irrelevant. This declaration was made in connection with the application by the Area Hotel pursuant to s 25 of the GM Act, despite the Authority having approved the application and that decision not being challenged. See orders 3 and 4 made by the primary judge in respect of the Area Hotel at WF 15 p 100. The Authority alleges error in the making of this declaration in the Draft Notice of Appeal in relation to this Hotel (Case Number 2023/198861) at WF Tab 4 p 14.

(c) Though the question of construction is the same, s 34 of the GM Act arises for consideration in different ways between the proceedings.

(i) The primary judge quashed the decision of the Authority to refuse the application to increase the gaming machine threshold for the Gemini Hotel. Her Honour also declared that questions of the possible or likely impacts on the local community are irrelevant to the determination of a

gaming machine threshold increase where no LIA is required (as was the case for the Gemini Hotel (J [114])). See orders 1, 2 and 5 made by the primary judge in respect of the Griffith Hotel and the Gemini Hotel at WF Tab 16 p 103. The Authority challenges her Honour's conclusion regarding s 34 in the Draft Notice of Appeal in relation to these Hotels (Case Number 2023/198869) at WF Tab 6 p 22.

(ii) In relation to the White Bull Hotel, the primary judge declared that considerations of possible or likely impacts on the local community were irrelevant in determining the application for an increase in the gaming machine threshold of the White Bull Hotel. An LIA was required in respect of that application (J [41]-[42], [95]). There was no challenge to the Authority's decision to approve the application. See orders 3 and 4 made by the primary judge in respect of the White Bull Hotel at WF Tab 14 p 96. The Authority challenges the making of that declaration in the Draft Notice of Appeal in relation to that Hotel (Case Number 2023/198867) at WF Tab 2 p 6.

(iii) In relation to the Area Hotel, the primary judge declared that questions of the possible or likely impacts on the local community are irrelevant in determining a gaming machine threshold increase application where no LIA is required (as was the case for the Area Hotel). There was no challenge to the Authority's decision to approve the application. See order 5 made by the primary judge in respect of the Area Hotel at WF Tab 15 p 100. The Authority challenges the making of that declaration in the Draft Notice of Appeal in relation to that Hotel (Case Number 2023/198861) at WF Tab 4 p 14.

31. It is evident from the above that there may be some irregularity with aspects of the declarations made by the primary judge insofar as they were made in cases where there was no challenge to the Authority's decision. It is unnecessary to pursue this issue because, for the following reasons, they reflect incorrect conclusions as a matter of substance.

Section 19 of the GM Act

32. Section 19 of the GM Act is within Division 2 of Part 3 of the Act. It provides that a gaming machine entitlement may be transferred if the transfer "is approved by the Authority" (sub-s (2)(a)) and "complies with the requirements of this Division and any requirements specified in the regulations" (sub-s (2)(b)). The power to approve transfers is implicit in s 19(2) and its scope may be discerned from the structure of that provision. The compliance of the application with the statutory requirements is a separate criterion from the Authority's approval. Put another way, in express terms the Authority's approval is not limited to determining compliance.

33. It is not correct, as the primary judge stated, that "questions of the possible or likely impacts on the local community are irrelevant" to determining an application under s 19(2). That result would be contrary to the objects of the GM Act set out in s 3(1) and the duty imposed on the authority by s 3(2):

> (1) The objects of this Act are as follows—
>
> (a) to minimise harm associated with the misuse and abuse of gambling activities,
>
> (b) to foster responsible conduct in relation to gambling,
>
> (c) to facilitate the balanced development, in the public interest, of the gaming industry,
>
> (d) to ensure the integrity of the gaming industry,
>
> (e) to provide for an on-going reduction in the number of gaming machines in the State by means of the tradeable gaming machine entitlement scheme.
>
> (2) The Authority … [is] required to have due regard to the need for gambling harm minimisation and the fostering of responsible conduct in relation to gambling when exercising functions under this Act.

34. Division 2 of Part 3 generally requires no more than that gaming machine entitlements be transferred between hotel or club licences in blocks of two or three and that one entitlement be forfeited for each block transferred. In the absence of a discretion in s 19(2) to refuse a transfer, the Authority would be unable to give effect to the objects of the GM Act in respect of those decisions, as doing so may well go beyond considering simply the transfer block and forfeiture requirements. There would also be

little reason for the Authority's broad power to require particulars under s 19(3)(b) if the Authority were confined to considering an application's compliance with the statutory requirements.

35. For these reasons, s 19(2) confers a discretion on the Authority not to approve an application for a transfer in circumstances where the transfer is compliant and, thus, the power of approval could be exercised. Having regard to s 3 of the GM Act, consideration by the Authority of the impacts on the local community could not be said to be irrelevant in the sense of "reflect[ing] an extraneous or improper purpose or … render[ing] the decision arbitrary or capricious".[22]

Section 25 of the GM Act

36. Section 25(1) of the GM Act, within Division 2A of Part 3, provides that a lease of a gaming machine entitlement does not have effect "unless the lease is approved by the Authority ***and*** complies with the requirements of this Division and any requirements of the regulation" (emphasis added). Equivalent analysis to that above with respect to s 19 applies to s 25. It should not be concluded that the requirement for the Authority's approval adds nothing to the requirement for compliance with the statutory requirements. The requirements in s 24 focus on the eligibility of hotels and clubs to lease. There is no reason to think that the relevance of the impacts on local communities is exhausted by those requirements.

Section 34 of the GM Act

37. Section 34 of the GM Act relevantly provides:

> (1) A hotelier or club may apply to the Authority to increase the gaming machine threshold for the hotel or the premises of the club (***a threshold increase application***).
>
> (2) The hotel or club premises to which a threshold increase application relates is referred to in this Division as the ***relevant venue***.
>
> (3) A threshold increase application must comply with the requirements of this Division and the regulations.

[22] *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86 at [9] per Basten JA (Beazley P agreeing). See also *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40 per Mason J.

(4) The Authority may approve a threshold increase application only if the Authority is satisfied that the requirements of this Division and the regulations have been complied with in relation to the application.

(4A) The Authority must determine a threshold increase application within the time required by the regulations. [underlining added]

38. Consistently with the meaning of "may" prescribed by s 9(1) of the *Interpretation Act 1987* (NSW), the Authority may or may not, at its discretion, exercise the power in s 34(4) to approve a threshold increase application. Compliance with the requirements of the Division and regulations is a pre-condition to approval, as indicated by s 34(3) and the closing words of s 34(4). But the Authority is not obliged to approve a threshold increase application where such compliance is shown and its power to approve is engaged.[23] There is a discretion in s 34(4) not to exercise the power. There is no reason to construe s 34(4) otherwise.[24] To the contrary, the contrast between the permissive language of s 34(4) ("may") and the mandatory language of s 34(4A) ("must") supports the existence of such a discretion.

39. The broad objects of the GM Act discussed above (at [33]) make clear that the Authority is generally empowered and indeed required to have regard to the interests of the community when exercising its functions. Contrary to the primary judge's view, the existence of a discretion in s 34(4) to refuse a threshold increase application is not at odds with the requirements of ss 35 and 36 of the GM Act in relation to the provision and approval of an LIA.

40. Section 35(1) generally requires threshold increase applications to be accompanied by an LIA. Section 35(2) provides an exception to this requirement in certain circumstances where the application is made together with a transfer or lease application (J [43]). This exception applied to the Area Hotel and the Gemini Hotel. If an LIA is required, s 35(3) and (4) create two classes of LIA applicable to different applications. Section 36(1) provides that a threshold increase application accompanied

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[23] That the Authority need not act upon a compliant application is reflected also in ability of the Authority to decline to increase the gaming machine threshold by the number to which the application relates: GM Act, s 34(6).

[24] *Interpretation Act*, s 5(2); *Cain v NSW Land and Housing Corporation* (2014) 86 NSWLR 1 at [14]-[15] per Basten JA (Gleeson and Leeming JJA agreeing); *Director of Public Prosecutions (NSW) v Khoury* (2014) 238 A Crim R 251; [2014] NSWCA 15 at [38] per Basten JA; *ICI Operations Pty Ltd v The WorkCover Authority (NSW)* (2004) 60 NSWLR 18 at [313]-[314] per McColl JA (Mason P and Meagher JA agreeing).

by an LIA cannot be approved unless the Authority also approves the LIA. Section 36(3) sets out the requirements for the approval of an LIA. Relevantly:

(a) for a "class 1 LIA", the Authority must be satisfied under s 36(3)(c) that the proposed increase in the gaming machine threshold will provide a positive contribution towards the local community where the venue is situated; and

(b) for a "class 2 LIA", the Authority must be satisfied under s 36(3)(d) that the proposed increase in the gaming machine threshold will have an overall positive impact on the local community where the venue is situated.

41. A class 1 LIA was required in connection with the White Bull Hotel (J [95]). Generally speaking, the requirements are less stringent for a class 1 LIA.

42. Sections 35 and 36 are intended to make clear what information is required from an applicant in order to facilitate the Authority's consideration of an application.[25] No negative implication is warranted that the Authority is precluded from considering the interests of the community other than in connection with an LIA, or that the Authority is precluded from considering the interests of the community altogether where no LIA is required by reason of s 35(2).

43. There is no inconsistency between the existence of a discretion in s 34(4) to refuse a threshold increase application, including on grounds relating to the possible or likely impacts on the local community, and the prohibition in s 36(1) on approving a threshold increase application unless an LIA is approved. The two provisions "operate in different ways": the former confers a discretion, whereas the latter mandates refusal for non-satisfaction of a prescribed criterion in certain cases.[26] As the Full Court of the Federal Court explained in *Minister for Immigration v BFW20*[27] with respect to overlapping powers to refuse a visa under the *Migration Act 1958* (Cth), the fact that one provision "lead[s] to automatic refusal" while a second provision "merely

[25] See Second Reading Speech for the Gaming Machines Amendment Bill 2008: Parliamentary Debates, *Hansard*, Legislative Assembly, 29 October 2008 at 10784-10785.

[26] See similarly *ENT19 v Minister for Home Affairs* [2023] HCA 18 at [36]-[40] per Kiefel CJ, Gageler and Jagot JJ, [63] per Gordon, Edelman, Steward and Gleeson JJ.

[27] (2020) 279 FCR 475 at [129]-[130].

enliven[s] a discretion to refuse" "provides an intelligible basis" for the existence of both powers.

44. For the reasons given, in exercise of the discretion to refuse a threshold increase application, the Authority may consider the possible or likely impacts on the local community whether or not an LIA is required.

45. In circumstances where s 34(4) involves a discretion on the part of the Authority to refuse a threshold increase application and the exercise of such discretion is to be informed by the broad objects of the GM Act, the primary judge erred in declaring in each matter that considerations of the possible or likely impacts on the local community are irrelevant. Her Honour likewise erred in quashing the Authority's decision to refuse the application to increase the gaming machine threshold for the Gemini Hotel on public interest grounds.

46. In fact, an LIA was required in connection with the application by the White Bull Hotel, whereas none was required for the Area Hotel and the Gemini Hotel by reason of the exception in s 35(2) of the GM Act (J [95], [114]). The primary judge's declaration that considerations of the possible or likely impacts on the local community were irrelevant to the Authority's determination of the application to increase the gaming machine threshold for the White Bull Hotel is additionally problematic in circumstances where, even on her Honour's view, the Authority was to consider the LIA as a requirement of the Division and matters addressed by the LIA could be characterised as possible or likely impacts on the local community.[28] In any event, for the reasons above, the declaration ought not to have been made.

Orders

47. In each matter, leave to appeal should be granted, the appeal allowed and the orders of the primary judge set aside. In place of those orders, in each matter it should be ordered

[28] See *Tourist Accommodation Pty Ltd v Independent Liquor and Gaming Authority* [2023] NSWCA 67 at [68]-[75] per Bell CJ (Brereton and Kirk JJA agreeing).

that the summons be dismissed, with costs. The respondent in each matter should pay the costs of the appeal, including leave to appeal.

[redacted]

P D Herzfeld
Eleven Wentworth Chambers
T: [redacted]
E: [redacted]

[redacted]

E S Jones
Sixth Floor Selborne Wentworth Chambers
T: [redacted]
[redacted]

7 July 2023