

# Macedon Ranges Shire Council's Appeal to the Supreme Court and Subsequent Re-hearing in the Victorian Civil and Administration Tribunal

## Timeline

- 2005 Application to Macedon Ranges Shire Council to install 50 pokie machines in the Romsey Hotel is refused.
- April 2006 The Victorian Commission for Gambling Regulation refuses the application to install pokie machines in the Romsey Hotel.
- January 2007 The matter is appealed by the applicant in the Victorian Civil and Administration Tribunal and the application to install 30 pokie machines is approved. No community opposition evidence is called.
- February 2007 Macedon Ranges Shire Council unanimously vote to appeal the VCAT decision in the Supreme Court of Appeal.
- November 2007 The matter is heard in the Supreme Court of Appeal.
- March 2008 The Supreme Court of Appeal sets aside the VCAT decision due to "an error in law" and emphasises the importance of community views in government decision-making.
- September 2008 The matter is re-heard in the Victorian Civil and Administration Tribunal.
- November 2009 The Victorian Civil and Administration Tribunal refuses the application to install 30 pokie machines in the Romsey Hotel and supports the Supreme Court findings of the importance of community views being taken into account in State decision-making.

## Background

An application to install 50 pokie machines in the only hotel in the small town of Romsey (pop. 3,522) came before Macedon Ranges Shire Council in 2005 and was refused. The matter then went to the Victorian Commission for Gambling Regulation (VCGR) in April 2006 where Council's decision was supported and the application again refused. The applicant then took the matter to the Victorian Civil and Administration Tribunal (VCAT) in January 2007, where the decisions of Council and of the VCGR were overturned and approval was given for installation of 30 pokie machines in Romsey.

At a special Council meeting on 7 February 2007, Macedon Ranges Shire Councillors unanimously voted to appeal the VCAT decision in the Supreme Court. The matter was heard on 26 November 2007 in the Supreme Court before Court of Appeal Judges: Chief Justice Marilyn Warren; Justice Chris Maxwell; and Justice Robert Osborn. The Supreme Court handed down its finding on 19 March 2008. The finding upheld Council's position, rejected the hotel's arguments that community objections were irrelevant and concluded that VCAT had erred.

## The Plebiscite

A point of discussion was Council's plebiscite which showed community views in numerical form. There was only one question on the plebiscite which was: "Do you support the installation of electronic gaming Machines in Romsey?". Please mark one box only: "Yes" or "No". The question was sent to all people living in

the Romsey postcode 3434 who were on the State Electoral Roll at the time of the previous State election. The question was sent out on 18 March 2005. 61% of 2,485 postal votes sent out were returned (an excellent rate for a postal survey). Of the returned votes, 79% said "No" to pokies in Romsey.

### **Decision to Appeal to the Supreme Court**

Council felt that the VCAT decision to approve the pokies was a gross undermining of community wishes and of Council's serious concerns about the health and wellbeing of the small, rural Romsey community. The fear also was that the Romsey decision would pave the way for many more pokie applications to be made for installation in other small town communities and economies.

Macedon Ranges Shire Council's philosophy is that the voice of the community must be heard and taken account of in a democratic society. It should not be pushed aside and community wishes and wellbeing compromised to make way for multi-national, multi-billion dollar industries like that of the gaming industry. No evidence was put forward that gave confidence that there would not be any harmful outcomes to the town's economy or the health and social wellbeing of its community by installation of 30 pokie machines in the middle of the town at its only hotel. Instead sweeping assurances with no creditable data to back them up had in this, and past cases related to pokies at VCAT, been enough to positively influence decisions and approvals. It appeared that very little value was placed by VCAT on community views and wishes about pokies in their local community or on its true impact on the town's economy.

Macedon Ranges Shire Councillors unanimously voted to initiate an action to proceed to the Supreme Court. The main contention was that the VCAT hearing had failed to call for or consider the evidence of Council's plebiscite which had shown considerable community opposition to the installation of pokie machines in the town.

### **Implications of the 2008 Supreme Court decision**

The win in the Supreme Court represented a land mark decision in Victoria that will have a profound affect at all future VCGR and VCAT hearings on pokies. The decision has given status and support to the fundamental principal that community views and wishes about an issue are important, and must be considered seriously. Previously local governments across Victoria have not felt they have been able to represent their communities successfully because the views and opinions of the community have held little or no weight.

### **Re-hearing in the Victorian Civil and Administrative Tribunal**

The overturning of the original VCAT decision by the Supreme Court of Appeal enabled the matter to be re-heard in the Victorian Civil and Administration Tribunal. The matter was re-heard in September 2008. A new survey, to reflect the findings and wordings of the Supreme Court decision, was developed by Ballarat University and a panel of legal experts and social planners. The new survey was a random digit dial telephone survey of local residents, conducted by the University of Ballarat.

In November 2009 a decision was handed down which refused the application to install 30 pokie machines in the Romsey Hotel. The VCAT decision supported the original Gambling Commission decision to reject the application. It also reinforced the findings of the Supreme Court and the contention of Macedon

Ranges Shire Council that in a democratic society the voice of the community should be heard and taken seriously to account in State decision-making.

### **Implications of the 2009 VCAT decision**

The VCAT has now articulated, through the Macedon Ranges Shire Council v Romsey Hotel case, the importance of community views in State decision-making and also the role of community surveys:

The . . . surveys reveal a genuine and legitimate feeling in the community that the social character of Romsey would be damaged by bringing gaming machines into the hotel. They [Council] urge the tribunal to listen to the views of the community. The tribunal should be reluctant to force gaming machines on a community which does not want them. This is the kind of application that should not be approved under the no net detriment test.<sup>1</sup>

The various findings in the Romsey Hotel case should be able to be used by other local governments when challenging applications for installation of pokie machines and where there is community disquiet, discontentment and unhappiness about their installation.

Additionally, local governments could consider the Victorian Government Solicitor's Office recommendation that the Victorian Commission for Gambling Regulation should attend VCAT hearings to defend its decision to refuse applications. VCGR may be requested to attend VCAT hearings, rather than local governments trying to defend a VCGR decision to refuse on their own.

The Romsey Hotel case illustrates that despite 'Hardiman', primary decision makers [ie: VCGR) should not be reluctant to participate in VCAT reviews<sup>2</sup>.

### **Community Benefit**

Benefit to the community is often cited as a reason that pokies should be encouraged - although rigorous data that would demonstrate this is not provided. As one third of profit from pokie machines goes to the State government, one third to the machine owners (TabCorp or Tatts) and one third to the venue owner, a considerable amount of money leaves the town - especially as patrons of a venue will generally live within a five kilometre radius of the venue (Livingstone 2006). While much of the 'benefit' of pokies is related to the operation and expansion of the host venue a small amount of cash or kind may be allocated directly to the community. This local benefit is under the VCGR community benefit fund categories of:

- 'gifts of funds' (category 2);
- 'sponsorships' (Category 3);
- 'gifts of goods' (Category 4); and
- 'voluntary services provided to the community' (Category 5).

Council analysis shows that 53 pokie machines in Kyneton in 2007/08 resulted in losses to players of \$4,117,969 per year. This is a loss of \$1,245 per adult per year in the town. However, direct gifts, sponsorships and donations into the Kyneton town community amounted to only \$49 per adult per year. Similarly in Gisborne, for the

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<sup>1</sup> Victorian Civil and Arbitration Commission (2009) *Decision in Romsey Hotel Pty Ltd v VCGR and Macedon Ranges Shire Council*. 12 November Citation [2009] VCAT 2275. VCAT Reference No.B322/2006

<sup>2</sup> Victorian Government Solicitor's Office, (2008) 'Participation by primary decision makers in merits review proceedings – The Romsey Hotel decision' in *Client Newsletter*. May

\$1,150 lost per adult per year at the 42 pokies in 2007/08, only \$3 per adult was returned directly into the town's community. These figures do not give confidence that the broader community is gaining more than it is losing from pokie machines.

Additionally, the more direct benefit money into towns is allocated at the sole discretion of the venue operator and thus typically is directed toward male sport clubs (where there are arguably higher promotion and marketing opportunities). There is no mechanism to direct benefit money to areas of greatest community need. However, following Council encouragement, the Gisborne pokie venue has now set up a community trust fund where funds can be allocated more broadly through administration by a community board of members.

The enormous amounts of money being lost to pokies from the pockets of locals living in small, regional towns has an impact on the local economy and compounds existing financial strains such as those associated with the drought, rising interest rates and high food and transport costs.

There is no evidence to show that the positive social consequences of pokie machines, particularly in rural towns, outweigh the negative consequences. There is indeed considerable and mounting research and inquiry data that shows there are serious negative health and social consequences to pokie machine gaming. This is particularly the case where the pokie venues are located in areas where people go about their normal daily business (shopping and accessing services) ie: 'convenience gaming' - which would have been the case with pokies in the Romsey hotel.

### **Implications for Victoria and Local Communities**

The proliferation of pokie machines, particularly in small, vulnerable rural towns in Victoria has been alarming. Macedon Ranges Shire Council has made a huge contribution to slowing this trend through the Supreme Court finding:

"The long-awaited Romsey ruling is being hailed by local councils and gaming critics as an important breakthrough in the campaign for more local control over pokies. Victorian Local Governance Association Chief Executive Rae Perry applauded Macedon Ranges Council's leadership in the 'David and Goliath battle' over poker machines" (The Age 20/03/08: 3).

The Supreme Court and the Victorian Civil and Arbitration Commission have now sent a strong message that community views are important and must be taken seriously:

"If as the Commission found to be the case in Romsey - members of the relevant community 'find the prospect of gaming at [the proposed venue] disconcerting . . .' it is immaterial whether such concerns are founded on philosophical or moral or religious views . . . or simply reflect unarticulated views about the kind of community in which people wish to live." <sup>3</sup>

These decisions have given confidence and renewed 'heart' to other local governments in Victoria - and especially other vulnerable rural areas - who have been battling the proliferation of pokie machines against what have been, up to now, insurmountable odds.

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<sup>3</sup> Court of Appeal of the Supreme Court of Victoria, *Summary of Judgment Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45. 19 March 2008:2