

**Australian Newsagents Federation Ltd (SA)**

## **Supplemental submission**

**Tabled at Review 2006 public hearing—23 May 2006**



Submissions for hearing 23 March 2006

Review 2006 – Regulatory Functions – Codes of Practice conducted by the Independent Gambling Authority

**Submissions on scope and limitation of IGA's power**

1. The Lotteries Commission of South Australia has power according to section 13(1)(a) of the *State Lotteries Act 1966* to “*promote and conduct lotteries*”, and according to section 13(1)(b) of that Act to “*appoint, on such terms as it thinks fit, agents*”.
2. The powers of the Commission to promote and conduct lotteries, and to appoint agents, are subject only, according to section 13, to the Act and to the directions of the Minister.
3. If the legislators had intended the Authority to have general regulatory powers with respect to the Commission's activities they would have provided accordingly in section 13. They did not do so.
4. Instead, the activities of the Commission are regulated by the Independent Gambling Authority only with regard to the adoption and review of certain codes of conduct (under section 13B, section 13C, and section 13D).
5. The Authority does not have any general power to sanction the Commission's promotion and conduct of lotteries, or who and on what terms it chooses from time to time to appoint as its agents for that purpose.

6. Further, section 18(1)(f) of the *State Lotteries Act 1966* provides that “*The Commission may, with the approval of the Minister, make rules, not inconsistent with this Act, providing for or regulating the practices, procedures and operations of the Commission, including (without limiting the generality of the foregoing) the appointment of agents to sell tickets in lotteries, the duties of such agents and the termination or suspension of their services.*”
7. Keno is a lottery promoted and conducted by the Commission in accordance with the Act.
8. The Newsagents that conduct Keno, who form a majority of all newsagents in SA, have been appointed by the Commission as its agents for the purpose in accordance with section 13(1)(b) of the *State Lotteries Act 1966*.
9. There is accordingly no basis upon which the Authority has power to regulate their appointment as such.
10. Moreover even in relation to the codes of conduct the subject of the Authority’s approval, the Authority is not responsible to ensure compliance with those codes. That responsibility is the Commission’s.
11. The specific matters dealt with in section 13B, 13C, and 13D, which I referred to earlier relate to:
  - 11.1 a code of practice on advertising (section 13B);
  - 11.2 a code of practice dealing with the display of signs, and provision of information at agencies relating to responsible gambling, and availability of services to address problems associated with problem gambling, the provision

of staff training in this regard, and any other matters designed to reduce the incidence of problem gambling (section 13C);

11.3 the review of the above two codes by the Authority in consultation with the Commission at least every two years (section 13D).

12. The Authority is required to approve each of the codes of practice referred to above.
13. That is the scope of the Authority's role as a regulator of the Commission.
14. It is clearly not within the scope of this regulatory power of the Authority effectively to usurp either the general powers of the Minister or the powers of the Commission under section 13(1) and section 18(1)(f).
15. However the proposal the subject of Issue 10 of this review, that is that "*The codes applying to the Lotteries Commission should provide for the withdrawal of Keno from non-licensed premises (newsagencies, shopping centre kiosks, pharmacies &c) over a period of 5 years*", would do just that.
16. If the Authority were to form such a view, the appropriate course for the Authority in those circumstances is to bring the matter to the attention of the Minister, and not to seek to extend its powers by means of the section 13B and 13C codes.
17. The Authority has specific and limited regulatory power with regard to the Commission according to the *State Lotteries Act 1966*. Moreover the powers and functions of the Authority generally as provided, the *Independent Gambling Authority Act 1995* are also of a kind that is not related to the matters it is now considering attempting to regulate via the codes. It is not, for example, a power or function of the Authority to determine the persons who should conduct lotteries.

Those matters are determined by the Commission in accordance with the *State Lotteries Act 1966*.

18. As provided in section 11 of the *Independent Gambling Authority Act 1995*, the functions and powers of the Authority are quite specific. They are, with regard to certain social and economic effects of gambling, to:
  - 18.1 develop and promote strategies (section 11(1)(aa));
  - 18.2 undertake research (section 11(1)(ab));
  - 18.3 ensure there is a system of supervision for licensees (section 11(1)a));
  - 18.4 advise the Minister regarding licensees or the operation of prescribed Acts (which includes the *State Lotteries Act 1966*); (section 11(1)(b)); and
  - 18.5 perform other functions assigned to the Authority under the Act or a prescribed Act (including the authorising of the codes in section 13B, and 13C) or the Minister (section 11(1)(c)).
19. The only proper course for the Authority, should it consider that a withdrawal of Keno from non-licensed premises is desirable and consistent with its functions, is provided for in section 11(1)(b), that is by advice to the Minister.
20. The current review deals with the section 13B and section 13C codes of practice, and not with the other general functions of the Authority. Accordingly while issues 10 and 11 as described under the heading, "Code issue - Starting point for discussion" might be of general relevance to the Authority's functions, it is not appropriate to proceed with a discussion of those issues in the context of the code review.

### **Distinction between power to regulate and power to prohibit**

21. In *McEldowney v Forde* [1971] AC 637 the House of Lords set down the following test where the validity of delegated or subordinate legislation is to be determined as follows:

*“Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the court has a threefold task: first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.”*

22. His Honour Justice Gummow restated the test in *Minister of State for Resources and others v Dover Fisheries Pty Limited* (1993) 116 ALR 54 as follows:

*“The fundamental question is whether the delegated legislation is within the scope of what the Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws...”*

23. It is necessary to distinguish a power to “regulate” from a power to “prohibit”.

24. The Independent Gambling Authority’s power, as it relates to the *State Lotteries Act*, is a power to regulate lotteries by approving certain codes of conduct, in relation to the matters set out above. It has no power to prohibit the appointment of certain agents as sellers of tickets in lotteries.

25. The case of *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 provides a succinct interpretation of the power to regulate, per Justice Dixon at page 762:

*“...a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or course of conduct to be regulated.”*

26. The limit on a power to “regulate” was discussed in the earlier case of **Country Roads Board v Neale** [1930] VLR 224 where the court cited with approval Lord Davey in *Toronto Municipal County v Virgo* (1907) 98 LT 537:

*“There is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.”*

27. According to **D Pearce and S Argument, Delegated Legislation in Australia, 3<sup>rd</sup> Edition** at page 172, *“The regulation of any activity, of necessity, involves some constraint being placed upon what would otherwise be freedom of action. To this extent any regulation must contain an element of prohibition. However, as was stated in the Swan Hill case, the distinction must be drawn between interference with an activity and preventing the activity from continuing at all.”*

### Inconsistency with other legislation

28. In the present circumstances not only is it necessary to consider the scope of the regulating power, and the validity of any purported regulation under that power. It is necessary to consider authorities dealing with regulations that are inconsistent with another Act.
29. In this case the *State Lotteries Act* grants general powers to the Lotteries Commission.
30. As Pearce and Argument states at page 174, "*The general approach to delegated legislation that it cannot make provisions repugnant to an Act may constrain what might otherwise appear to be a broad power to regulate an activity.*"
31. In *Lyster v Camberwell City Council* (1989) 69 LGRA 250 a general power to regulate health could not be used to make by-laws that, in effect, prohibited the maintaining of brothels. While the constraints were based on health grounds and might otherwise have been defensible, their scope was so broad that prostitution would be prevented in the council area. Such a prohibition was counter to *Prostitution Regulation Act 1986* (Vic) which permitted the activity.
32. In *Macris v Lucas* [1971] SASR 329, the court considered a provision of the *Mining Act 1930* (SA) that provided: "*No person shall at the same time own more than one claim by virtue of the same miner's right; but any person may hold any number of miner's rights, and for each miner's right so held by him he may own one claim.*" A regulation was made that provided: "*Unless otherwise provided for in these regulations, no person shall at any time hold more than one precious*

- stones claim...*”. Justice Mitchell held that the regulation was inconsistent with the Act and therefore invalid.
33. Similarly where a regulation sets conditions upon the rights granted by an Act the regulation may be invalid.
34. In *Ira, L&AC Berk Limited v Commonwealth* (1930) SR (NSW) 119 the New South Wales full court held that a regulation that purported to limit the time within which a refund could be claimed was invalid where the Act granted a right to a refund to “*be made in a manner prescribed*”. The regulation properly set out the form and place for applications for a refund to be made, but the purported limitation on time was a restriction that limited a right otherwise given in an Act and was therefore held to be invalid.
35. Perhaps most directly analogous to the facts here is the case of *Powell v May* [1946] KB 330. In that case the court held to be invalid a by-law made by a local council prohibiting bookmaking and betting in streets or public places. In that case, the *Street Betting Act* 1906 (UK) and the *Betting and Lotteries Act* 1934 (UK) also dealt with betting in public places. The Acts covered all matters to which the by-law related, and provided certain defences to charges of betting in a public place that the by-law did not allow. Because the by-law purported effectively to override the operation of the two relevant Acts, the by-law was invalid.
36. In the present case, the *State Lotteries Act* clearly grants the Lotteries Commission with power to appoint agents as it sees fit (section 13(1)(b)) and to control the conduct of and if necessary terminate their agents (section 18(1)(f)).

37. *Powell v May* illustrates the law preventing an amendment to the codes that would prohibit the Commission from appointing newsagents or any other unlicensed trader per se.
38. The present proposal to amend the codes to prohibit Keno from unlicensed premises is contradictory to the Lotteries Commission's powers under the *State Lotteries Act*.

**Submissions on the merits of the relevant issues (Stage Two, issues 10, 11)**

39. Notwithstanding the submissions as to the scope of the Authority's regulatory power under the codes, as the Authority is proceeding with a discussion of issues 10 and 11 at this time, and accordingly I am instructed to make submissions on those issues generally.
40. There is no proper basis for the Authority to form the view that a withdrawal would be consistent with its objects.
41. Along with its functions and powers the Authority is required to have regard to its objects, as set out in section 11(2a) of the *Independent Gambling Authority Act 1995* as follows:
- 41.1 fostering responsible gambling, minimising harm, recognising positive and negative impacts of gambling on communities; and
- 41.2 maintenance of an economically viable and socially responsible gambling industry.
42. Reference is made to the Submission from the South Australia Branch of Australian Newsagents Federation Limited to this Review.

43. Reliance is also placed upon the Submissions of others, in particular those of the **AHA, the Heads of Christian Churches, the Lotteries Commission, and the Hon. Nick Xenophon MLC.**