

**SUBMISSIONS OF NICK XENOPHON MLC TO THE INDEPENDENT
GAMBLING AUTHORITY**

Introduction

1. These submissions are made on behalf of the Honourable Nick Xenophon MLC pursuant to leave given by the Independent Gambling Authority ('**the Authority**') and s.15(1)(a) and (b) of the *Independent Gambling Authority Act 1995 (SA)* ('**the Act**').
2. These submissions respond to the written submissions of the Australian Hotels Association (SA), Clubs SA & Racing SA Pty Ltd ('**the AHA**') by the AHA; and submissions of the Australian Newsagents Federation Ltd (SA) ('**the Newsagents**') by the Newsagents at the Authority's Review 2006 hearings on 23 May 2006.
3. The first of the above submissions, the AHA's, contends that there is a lack of power on the part of the Authority in relation to devising codes of practice (at [2])¹. Furthermore, it is also contended that one of the provisions contained in Schedule 1 to the *Gaming Machines Act 1992 (SA)* ('**the GMA**') is *ultra vires* (at [6]).
4. The Newsagents' submissions contend that the Authority does not have general regulatory powers with respect to the Lotteries Commission of South Australia (at [3]) and, furthermore, that the Authority has no power to regulate the appointment of Newsagents that engage in certain forms of activities as agents on behalf of the Lotteries Commission (at [9]).

The Independent Gambling Authority Act 1995 (SA)

5. The starting point for consideration of whether there is any substance to the submissions of the AHA and the Newsagents must be the Act establishing the Authority. What follows is a brief review of the most important provisions.
6. The Authority is established pursuant to s.4 of the Act. In particular, it has by s.4(3)(d) the functions and powers assigned or conferred under [that Act] or

¹ References to paragraph numbers in []'s are to paragraph numbers in the written submissions of the AHA or the Newsagents.

any other Act. The Authority has functions and powers assigned or conferred upon it under the:-

- *Casino Act 1997*;
- *The Gaming Machines Act 1992*;
- *The State Lotteries Act 1966 ('the SLA')*.

7. The AHA has drawn attention to s.11 of the Act. It is of fundamental importance to realise that s.11 distinguishes between, on the one hand, “functions” and, on the other hand, “powers”. Thus, s.11(1) refers to the **functions** of the Authority and s.11(2) refers to the power of the Authority:-

“The Authority has power to do anything that is necessary for, or incidental to, performance of its functions”.

That distinction is further illustrated in s.11(2)(a) which refers to:-

“Before performing its functions and exercising its powers under this Act, or a prescribed Act, the Authority must have regard to the following objects”.

8. Section 11(2) gives to the Authority power *to do anything that is necessary for, or incidental to, performance of its functions* under s.11(1)(aa) to (c). It is clear from s.11(1)(c) that other functions may be assigned to the Authority either under its own Act or another Act, such as the GMA or SLA.
9. The contention by the AHA (in para [2]) that s.11 does not give the Authority power to devise codes of practice overlooks two matters. First, that s.11(1) deals only with functions not powers and, secondly, that s.11(1)(c) gives to the Authority other functions under other Acts. One of the other functions given to the Authority (which would also fall within s.11(1)(c)) is the approval of codes under the GMA. For that particular function, the Authority has power under s.11(2) to do *anything* that is necessary for, or incidental to, the performance of that particular function. It follows that, once a function is imposed upon the Authority under the GMA, the Authority has the power under its own Act to do anything that is necessary for, or incidental to, the performance of its function. It is implicit in the power to approve codes of

practice that it also has the power to devise such codes of practice. In *D'Emden v Pedder* (1904) 1 CLR 91 at 110, Griffith CJ said the following:

"[W]here any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case".

To deny the existence of the power to devise codes would render the grant of approving any such codes of practice ineffective.

10. It also follows that the submission by the AHA that s.11 does not give the Authority power to devise codes of practice should not be accepted.
11. We will come back to the contention by the AHA in para [6] that para (nb) (C) in Schedule 1 of the GMA is *ultra vires*.

The State Lotteries Act 1966 ('SLA') and the Newsagents Submissions

12. It is apparent from what has been said above that the functions and powers of the Authority are not limited to those set out in s.11 of its Act but extend to those functions conferred upon it under other Acts such as to the *State Lotteries Act 1966 (SA)*.
13. Although primarily concerned with the powers and functions of the Lotteries Commission, the SLA is not confined to dealing with the Commission. For example, Section 13D requires the Authority, in consultation with the Lotteries Commission, to review codes of practice at least every two years. When the Authority has a function under that Act it must also have the power to carry out that function by virtue of s.11(1)(c) and s.11(2) of the *Independent Gambling Authority Act 1995* for the reasons already given above.

14. The relevant sections of the SLA are s.13, 13A to 13E. It is important to note that s.13 SLA begins as follows:-

“13(1) Subject to this Act and the directions of the Minister that are not inconsistent with this Act, the Commission may –” (underlining added).

15. The submissions put forward by the Newsagents are to the effect that the Authority has no general regulatory power with respect to the Lottery Commission’s activities and that, had Parliament intended for it to do so, it would have so provided in s.13 of the SLA. As it did not do so, the Authority is asked to draw the conclusion that it has exceeded its jurisdiction.
16. With respect, the Newsagent's submissions do not place sufficient importance upon the opening words of s.13(1) which are “*Subject to this Act*”. In other words, the Commission’s activities as set out in s.13(1)(a) to (d) are subject to other provisions of that Act. Other provisions of that Act include s.13A to s.13E. Of particular significance is that, in s.13E, a code of practice under the SLA is to be forwarded to the Minister who is to lay it before both Houses of Parliament: s.13E(2). Pursuant to s.13E(3) sections 10 and 10A of the *Subordinate Legislation Act 1978* apply to a code as if it were a regulation within the meaning of that Act. In other words, a code receives Parliamentary approval. Parliament has the opportunity to review the code and to reject it if need be. A Code is like an Act of Parliament. It is required to be observed as part of the law of the land in the same way as any other regulation is required to be observed as part of the law of the land.

Regulation or prohibition

17. In particular, the Newsagents seek to argue that the Authorities’ powers are limited so that it is not able to prohibit the appointment of certain agents as **sellers of lotteries products.**
18. Two points immediately spring to mind, first, whilst s.13(1)(b) enables the Commission to employ, or appoint, on such terms and conditions as it thinks fit, servants and agents; s.13 does not in terms prohibit the Authority from

dealing with such matters in respect of a code of practice. That the Authority is able to deal with the activities of agents is clear from s.13C(a) which requires the Commission to adopt a code of practice approved by the Authority dealing with:-

- “(i) the display of signs, and the provision of information, at offices, branches and agencies of the Commission relating to responsible gambling and the availability of services to address problems associated with gambling; and*
- (ii) any other matters designed to reduce the incidents of problem gambling determined by the authorities; and*
- (iii) must ensure that, in the performance of its function, the Commission confirms with the code of practice approved under this section.”*

19. We have earlier seen that the Authority has powers both necessary for the performance of its functions and incidental thereto: (s.11(2) of the Act). It follows that, insofar as the Authority has decided to include in one or more of its codes matters dealing with agents appointed by the Commissioner it has the power to do so and s.13C(a)(iii) and (b) require the Commission to conform to such a code of practice.

20. Once it is realised that the Authority has the power, in performance of its function of approving codes, to deal with matters necessary or incidental to such a function, then to assert that the Authority has no power to regulate the appointment of agents is to overlook the broad nature of the power conferred on the authority under s.11(2) of its Act.

21. The Newsagents further submit in their written submissions that there is a difference between the power to regulate and a power to prohibit and that the Authority has no power to prohibit the appointment of certain agents as sellers of lotteries products.

22. However, such submission overlooks the breadth of s.11(2) which confers on the Authority power to do *“anything that is necessary for, or incidental to, the performance of its functions”*. In other words, if it is necessary for, or incidental to, the performance of its functions including those functions set out

in s.11(1)(a) or s.11(1)(c) or its functions under another Act such as the SLA or GMA, it has the power to do so.

23. The cases referred to by the Newsagents namely *McEldowney v Forde* [1971] AC 637, *Minister of State for Resources & Ors v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, *Swanhill Corporations v Bradbury* (1937) 56 CLR 746 at 762, *County Roads Boards v Neale* [1930] VLR 224 do not really assist the Authority. With respect, the Newsagents have set up a false trail. Each of those cases have to be read in light of the particular legislation being therein considered. The question is whether the power conferred on the Authority by s.11(2) is in some ways limited to mere regulation or is broader. Section 11(2) does not in terms use the expression “regulation” or any similar word. Rather, the power conferred is “to do anything” that is necessary for, or, incidental to, the performance of its functions. A broader conferral of power could not be imagined.

Ultra Vires

24. The matters referred to above are sufficient to dispose of the arguments raised by the AHA and the Newsagents with the exception of one matter, namely the contention by the AHA that para (C) in sub para (nb) in Schedule 1 of the GMA is *ultra vires*. With respect, that assertion overlooks the fact that paragraph (nb)(C) in Schedule 1 is not a regulation (as asserted in para [6] of the AHA’s submissions). It is in a Schedule to an Act of Parliament. The Schedule is passed as part of the Act of Parliament. It is not a regulation made under s.87 (the regulation making power) of the *Gaming Machines Act 1992*. In *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, Agreements between Ansett and the Commonwealth were set out in Schedules to the *Airlines Agreements Act 1952-1973* (Cth) in respect of which Barwick CJ had the following to say:-

“I would add that it is significant in this case that the Agreements have been authorised by the Parliament. There is no question, in my opinion, that the Parliament had constitutional authority to authorise their making. We are

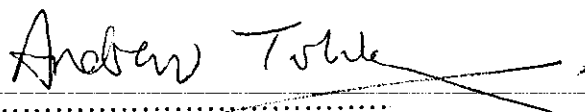
not considering an agreement resting merely on the authority of the executive, though I agree with my brother Aickin in thinking that, even if we were, there is no ground for thinking that the Agreements or any of them are beyond the competence of the executive." (underlining added).

25. Schedule 1 to the GMA, like the Agreements in the *Ansett* case, was authorised by the Parliament. There is no doubt that the South Australian Parliament has the power to make laws for the peace order and good government of South Australia. Its law making power is relevantly unfettered. It follows that paragraph (C) in sub paragraph (nb) of Schedule 1 is a valid law of South Australia.

Conclusions

26. For the reasons referred to above:-
- 26.1 The Authority has a broad power under s.11(2) of the *Independent Gambling Authority Act*.
- 26.2 It not only has the power to make codes of practice but such codes of practice can deal with matters such as prohibiting persons who deal in matters the subject of the various codes.
- 26.3 The contrary arguments are not, with respect, supported by the clear words of the Acts.
- 26.4 The submissions on behalf of the AHA and others and on behalf of the Australian Newsagents Federation Ltd (SA) should be rejected.

DATED this 14th day of June 2006



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ANDREW TOKLEY
Torrens Chambers