NEW THEME PTY LTD v VICTORIAN CASINO & GAMING AUTHORITY BC200203274

Unreported Judgments Vic · 105 Paragraphs

SUPREME COURT OF VICTORIA COURT OF APPEAL

CALLAWAY, EAMES JJA AND O'BRYAN AJA

8370 of 2001

23 April 2002, 3 June 2002

[2002] VSCA 80

Headnotes

APPEAL — Gaming Machine Control Act 1991, s156(1) appeal from Victorian Casino and Gaming Authority is "to the Supreme Court" — S156(2) applies County Court Act 1958, s74 "with such modifications as are necessary" — Primary purpose of employment of s74 is as machinery provision for appeal process — Amendment to s74 to provide appeal "to the Court of Appeal", rather than "to the Supreme Court" — Whether appeal under s156(1) is to a judge or Court of Appeal — Supreme Court Act 1986 s10(1), s25(1) — Statutory interpretation — Whether s74 provision has "double effect" as both machinery provision and also granting jurisdiction for appeal to Court of Appeal — Interpretation of Legislation Act 1984 s14(2), s38 — Contrast with provision for appeal in Casino Control Act 1991, s155.

ADMINISTRATIVE LAW — Gaming Machine Control Act 1991, s27 — Application to Victorian Casino and Gaming Authority to modify licence so as to permit 24 hour gaming — Applicant required to file submission under s27(2A) — Whether onus of proof imposed on applicant — Whether applicant must establish "net economic and social benefit".

Callaway J

[1] The appellant is the holder of a venue operator's licence under the Gaming Machine Control Act 1991 ("the Gaming Act"). On 15th February 2001 it applied to the respondent to amend the licence to permit 24-hour gaming at the Golden Nugget, 117 Lonsdale Street, Melbourne. The respondent held an inquiry pursuant to s111 of the Gaming Act. On 2nd November 2001 the respondent refused the application and gave reasons for its decision.

[2] S156 of the Gaming Act provides:

"(1) A person aggrieved by a decision of the Authority -

(a) to cancel or suspend, or to refuse to cancel or suspend, a licence under this Act; or

(aa) to revoke, or to refuse to revoke, an approval of premises under Pt2A; or

(b) to amend, or to refuse to amend, the conditions of a licence under this Act; or

(c) to list, or refuse to list, a person on the Roll of Suppliers under Division 6 of Pt3; or

(d) to make a declaration under s136A; or

(e) to approve, or to refuse to approve, a person as a nominee under s25A -

may appeal to the Supreme Court from the decision on a question of law.

(2) S74 of the County Court Act 1958 applies to an appeal under subs(1) with such modifications as are necessary.

(3) The Supreme Court shall hear and determine the appeal and make such order as it thinks appropriate by reason of its decision, including, without limiting its power to make such orders -

(a) an order affirming or setting aside the decision of the Authority;

(b) an order remitting the matter to the Authority to decide again in accordance with the directions of the Supreme Court."[1]

[3] On 16th November 2001, which was within the 14-day limit prescribed by s74(2)(a) of the County Court Act 1958, the appellant filed and served a notice of appeal. The notice was expressed to be filed "In the Supreme Court of Victoria at Melbourne Common Law Division" and gave notice that the appellant intended to appeal "to the Supreme Court".

[4] A summons for directions filed by the appellant on 26th November 2001 was made returnable in the Court of Appeal. On 7th December 2001 it came before Charles and Batt JJA Their Honours ordered, among other things, that the question whether the appeal should be made to the Trial Division or to the Court of Appeal be referred to the Court of Appeal and heard and determined, if the Court determined that the appeal should be to the Court of Appeal and the Court thought fit, together with the appeal itself. That question and the appeal, in case the Court concluded that it did have jurisdiction, were argued before us on 22nd April 2002. There being no other contradictor, the respondent appeared by counsel to assist the Court in the manner described by Brennan J in Fagan v Crimes Compensation Tribunal.[2]

[5] As we have seen, s156 of the Gaming Act provides that a person aggrieved by a decision of the respondent may appeal "to the Supreme Court" on a question of law and that s74 of the County Court Act "applies" to the appeal with "such modifications as are necessary".

[6] S74 provides:

"(1) Any party to a civil proceeding who is dissatisfied with any judgment or order of the court may appeal from the same to the Court of Appeal, notwithstanding that the civil proceeding may have been brought in the County Court by consent as provided by this Act.

(2) An appeal by a party referred to in subs(1) -

(a) unless para(b) applies, must be brought by notice served within 14 days after the day of the judgment or order of the court on all parties to the proceedings;

(b) if the appeal is from a judgment or order refusing an application made without notice to a person, must be brought by notice filed in the Court of Appeal within 14 days after the judgment or order.

(2A) The Court of Appeal may extend the time within which an appeal may be brought, whether or not the time has expired and whether or not an application for extension of time has been made.

(2B) A notice of appeal -

(a) must state whether the whole or part only and which part of the judgment or order the appellant is dissatisfied with; and

(b) must state specifically and concisely the grounds of complaint and the judgment or order sought in place of that from which the appeal is brought.

(2C) A notice of appeal may be amended at any time as the Court of Appeal thinks fit.

(2D) An appeal does not lie to the Court of Appeal from a judgment or order of the court in an interlocutory application, being a judgment or order made on or after the commencement of s32 of the Constitution (Court of Appeal) Act 1994, except with the leave of the Court of Appeal.

(3) The Court of Appeal shall decide the matter of such appeal and shall have power to draw any inference of fact

and shall on the hearing of such appeal make such order as is just, and may either dismiss such appeal or reverse or vary the judgment or order appealed from, and may direct the civil proceeding to be reheard before the Trial Division of the Supreme Court or the County Court, but shall not in any case unless the Court of Appeal otherwise specially directs remit the proceeding for rehearing before the court constituted by the judge before whom the same was originally heard, and may make such order with respect to the costs of the said appeal and of the proceeding in which the judgment or order has been given or made, as such court may think proper and such orders shall be final.

(4) No such appeal shall operate as a stay of proceedings unless the County Court so orders, or unless within fourteen days after the judgment or order appealed from a deposit is made of or security given to the satisfaction of the court for a sum to be fixed by the court not exceeding the amount of the money or the value of the property affected by the said judgment or order.

(5) The rules for the time being in force with respect to ordering security for the costs of appeals from the Trial Division of the Supreme Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals from the County Court.

(6) Nothing herein contained shall authorize any party to appeal against any decision of the court given upon any question as to the value of any real or personal property for the purpose of determining the question of the jurisdiction of the court under this Act nor to appeal against the decision of the court on the ground that the proceedings might or should have been taken at any other place of sitting of the County Court.

(7) No appeal shall lie from any judgment or order of the court, if before it is pronounced the parties agree, in writing signed by themselves or their practitioners, that it shall be final. "

[7] At first glance, therefore, it might be thought that the appeal under s156 lies to the Court of Appeal, but I do not think it does. To my mind the history of the provisions shows that the appeal lies to the Trial Division. The fact that a reader of the provisions now in force might be misled is not sufficient to defeat the intention of Parliament or to deprive the Trial Division of a jurisdiction that is better suited to that division of the Supreme Court than to the Court of Appeal. One may sympathize to some extent with a reader of s74 in its present form, but such a reader should be alerted to the fact that things are not as they seem by the fact that the directly applicable provision, s156 of the Gaming Act, refers not to the Court of Appeal but to the Supreme Court. Having stated my conclusion, I turn to my reasons.

[8] The starting point is s156 of the Gaming Act as originally enacted and s74 of the County Court Act as then in force. S156 provided, then as now, that a person aggrieved by a decision, in those days being a decision of the Victorian Gaming Commission, might appeal to the Supreme Court on a question of law and that s74 of the County Court Act applied with such modifications as were necessary, but s74 referred neither to the Court of Appeal, which was not yet in existence, nor, except in subs(5), to the Full Court. In particular, s74(1) provided:

"(1) Any party to a civil proceeding who is dissatisfied with any judgment or order of the court may appeal from the same to the Supreme Court, notwithstanding that the civil proceeding may have been brought in the County Court by consent as provided by this Act."

It was s11(1)(c) of the Supreme Court Act 1986, not the County Court Act, which caused such appeals, where the County Court was constituted by a judge, to be heard by the Full Court.[3]

[9] In summary to this point, when the Gaming Act was passed, it provided (as it still does) for an appeal to the Supreme Court; s74 of the County Court Act applied to the appeal with such modifications as were necessary, but that section too referred to the Supreme Court; none of the provisions of s74 had the effect that an appeal from the County Court would be heard by the Full Court; that was achieved by s11(1)(c) of the Supreme Court Act, to which s156 of the Gaming Act made no reference expressly or by implication. The decision appealed against under s156 was not deemed to be a decision of the County Court or of that Court constituted by a judge[4] and the prima facie meaning of the words used in the section was that an appeal lay to a single judge of the Supreme Court: see Director of Public Prosecutions v Kanfouche.[5]

[10] If it is permissible to refer to a statute in pari materia, that conclusion is confirmed by the contrast between s156 of the Gaming Act and s155 of the Casino Control Act 1991 ("the Casino Act") as originally enacted.[6] It too provided for an appeal to the Supreme Court on a question of law and that s74 of the County Court Act applied with such modifications as were necessary, but, unlike s156, it contained an express provision[7] that the appeal was to be heard and determined "by the Supreme Court sitting as the Full Court".[8] A person reading the two Acts in 1991

would not have supposed that that provision was unnecessary and that both sections provided for an appeal to the Full Court. He or she would have thought that it was only the machinery of s74 that was being imported and that the words "may appeal to the Supreme Court" in s156 of the Gaming Act bore their prima facie meaning.

[11] Accordingly, had this case been heard before the advent of the Court of Appeal and the legislation that was passed in consequence, it would have been clear that the appeal lay to a single judge and not, in the first instance, to the Full Court. Has that position been altered by the insertion of references to the Court of Appeal in s74 as now in force?

[12] The amendments to s74 were made by the Constitution (Court of Appeal) Act 1994. After preliminary provisions in Pt1, Pt2 of that Act contained amendments to the Constitution Act 1975, Pt3 amendments to the Supreme Court Act and Pt4 amendments to the Crimes Act 1958. Pt5 contained transitional provisions and Pt6 was concerned with amendments to other Acts. One of those other Acts was the County Court Act, which was amended by s32 to bring it into the form appearing earlier in this judgment. S74(1) was amended by substituting "Court of Appeal" for "Supreme Court". Subs(2) was replaced by the present subs(2)-subs(2D). In subs(3) "Court of Appeal" was substituted for "Supreme Court" in two places and "reheard before the Trial Division of the Supreme Court" was substituted for "reheard before the Supreme Court". Similar changes were made in subs(5) and in s76.

[13] It is worth noting that s34(5) amended s155 of the Casino Act by substituting "Court of Appeal" for "Supreme Court" and repealing the former provision that an appeal under that section was to be heard and determined by the Supreme Court sitting as the Full Court. No such amendment was made to s156 of the Gaming Act. The Casino Act was picked up because of its reference to the Full Court, which the Gaming Act did not have, but it is difficult to believe that the Gaming Act would not have been amended too if Parliament had intended to transfer the jurisdiction conferred by s156 from a single judge to the Court of Appeal.

[14] In my opinion the legislative history shows that one of the necessary modifications referred to in s156(2) is to read s74 as if it still referred to the Supreme Court and not to the Court of Appeal.[9] The necessity arises from the fact that, if that were not done, the jurisdiction previously reposed in a single judge, and more suited to the Trial Division than the Court of Appeal, would be taken away by a side wind in circumstances where there is no reason at all to suppose that that was the intention of Parliament.[10] Jurisdiction is a matter of great importance. It is not to be decided by an accident of drafting, particularly where the change is readily explicable and the remedy, "necessary modification", is to hand.

[15] For these reasons I would determine the question referred to the Court by Charles and Batt JJA by saying that the appeal is to be heard and determined by a judge of the Trial Division. The appeal would not be incompetent, because, as the notice of appeal shows, it was brought as an appeal to the Supreme Court. There has simply been a subsequent doubt as to which division of the Court should hear it. But, as mine is a minority view and the other members of the Court are agreed on the appropriate disposition, the order of the Court will be that the appeal is dismissed.

Eames JA

[16] In this case I have had the benefit of reading in draft the reasons of Callaway JA and O'Bryan AJA in which the background and grounds of this appeal and the full terms of the relevant legislation are set out. The threshold issue in this case concerns the question of the jurisdiction of the Court of Appeal to hear the appeal, and I will turn to that issue first. Resolution of that question requires consideration of the history of s156, the appeal provision of the Gaming Machine Control Act 1991 ("the Gaming Act"), and of s74 of the County Court Act 1958, which was employed by s156 as the machinery provision for appeals "to the Supreme Court". The terms of s156 are set out in the reasons of Callaway JA and I will not repeat them. In considering the legislative intention behind the passage of s156 of the Gaming Act, when enacted and as subsequently affected by amendment to s74 of the County Court Act, the history of the comparable appeal provision of the Casino Control Act 1991 ("the Casino Act"), s155, also bears close examination.

[17] When the Gaming Machine Control Bill 1991 was introduced in the Assembly by the Attorney General there was no provision for an appeal from decisions of the Victorian Gaming Commission[11], in contrast to the right of appeal from decisions of the then Victorian Casino Control Authority under the Casino Act. The omission of any right of appeal, at all, to the Supreme Court was commented upon by the shadow Attorney-General, Mrs Wade, on

29 August 1991, who said that the issue was "whether there should be a right of appeal and whether there should be any limitations on that right." Mrs Wade referred to the right of appeal provided to the Full Court by s155 of the Casino Act, which had been passed on 6 June 1991.

[18] Mrs Wade observed that in the report of Mr Xavier Connor QC, upon whose recommendations the Casino Act was based, it was expressly recommended that there should be an appeal from the Victorian Casino Control Authority to the Full Court. Mrs Wade said "I do not suggest that there should be an appeal to any court on the merits of the decision but I consider that there should be a judicial appeal to the Full Court of the Supreme Court of Victoria by way of review . . .". Mrs Wade later referred, generally, to s155 of the Casino Act and asked why, given that the Attorney was prepared to accept the terms of legislation proposed by Mr Connor on "a very similar Bill", the Attorney General "has not put the same provision into this Bill".

[19] In the Legislative Council on 17 September 1991 Mr Chamberlain, on behalf of the opposition, argued that "a right of appeal" must be included in the legislation, and after citing passages of the report of Mr Connor as to "the need to allow recourse to the courts on such important matters as the cancellation and suspension of a licence" (as a check and balance, Mr Connor said, to the power of the Casino Control Authority), submitted that the arguments then used were as powerful in respect to the Gaming Bill as they had been for the Casino Act, and said that "amendments will be proposed to allow such an appeal". On the following day Mr Chamberlain introduced an amendment in the terms in which s156 of the Gaming Act was later enacted after the Government announced its acceptance in the Assembly on 8 October 1991[12]. Although, as discussed above, the opposition contended that there should be the same appeal rights under the Gaming Act as had been granted by the Casino Act, the appropriateness of there being an appeal to a judge rather than the Full Court was not discussed, at all, either in the Assembly or the Council.

[20] The omission from s156 when enacted of a similar provision to that contained in s155(4) of the Casino Act (which provided that the appeal was to be to "the Full Court"), could have been an accident, but it seems to me to have more likely been deliberate. The amendment which was proposed by Mr Chamberlain, and accepted by the government, followed the identical language and paragraph formatting as had been employed in s155 of the Casino Act, save for the omission of sub section (4), thus suggesting that the draftsperson of the amendment followed s155 closely in all other respects but then deliberately omitted the subsection which stated that an appeal was to be to the Full Court.

[21] There were good reasons why the government and opposition might have agreed that the considerations which justified an appeal to the Full Court under the Casino Act did not apply equally to the circumstances covered by the Gaming Act, and therefore justified different forums for first instance appeals. It might well have been thought, for example, that the consequences of cancellation or suspension of a casino operator's licence - having regard to the probable level of investment by a licence holder in a casino - would be considerably more severe than in the case of a gaming venue operator, sufficiently so as to justify a difference in the appeal provisions applicable in each case.

[22] There were other distinctions which could have been drawn, too. Mr J V C Guest observed during the debate in the Council on 17 September 1991 that the considerations which confronted Parliament under the Gaming Bill were quite different from those which arose under the Casino Act, and he mentioned such factors as the risk of organised crime involvement which was, he said, primarily with casinos. On the following day Mr Chamberlain contrasted certain provisions of the two pieces of legislation and asked why the government had differentiated between casino operators and venue operators, and the Minister replied that they were "two distinct pieces of legislation". Later that day Mr Chamberlain described his proposed amendment as providing "a limited right of appeal" and when introducing the amendment, he again quoted Mr Connor, but this time employing a general statement about the need for "recourse to the courts", and not quoting a passage from Mr Connor's report which mentioned the Full Court. In discussing the amendment Mr Chamberlain said of s74 of the County Court Act, that it was merely "a general appeal provision".

[23] In 1991 employment of the phrase in legislation that an appeal was to be to "the Supreme Court" would have been understood to mean that the appeal was to a judge and not to the Full Court[13]. The history of the introduction of s156 of the Gaming Act suggests to me that as at 1991 it was the intention of Parliament that an appeal under s156 was to be to a judge of the Supreme Court, not to the Full Court. As at that point it seems clear that s74 was being employed to provide a procedural mechanism for the appeal process, rather than as a provision which was required in order to determine the forum for the appeal. As I later discuss, however, notwithstanding its intended employment merely as a machinery provision, s74 constituted a source of jurisdiction for the Supreme Court to conduct appeals under s156, by virtue of the fact that it specified by s74(1) that an appeal under that section was

"to the Supreme Court". Furthermore, the terms of s74 were broader than being of merely procedural effect. In particular, s74(3) dealt extensively with the powers of the Supreme Court in determining an appeal.

[24] With the passage of the Constitution (Court of Appeal) Act 1994 s74 of the County Court Act was amended so as to substitute for the statement in s74(1) that a dissatisfied party may appeal "to the Supreme Court" the provision that the person may appeal "to the Court of Appeal". That change, counsel suggest, was sufficient to reflect an intention of the legislature that appeals under s156, thereafter, were to be to the Court of Appeal. Thus, s74 was no longer being employed merely as a machinery provision but was itself the sole, but indirect, source for the legislative requirement that appeals under s156 no longer be to a judge of the Supreme Court, but to the Court of Appeal.

[25] At common law an amendment to legislation which merely affected practice and procedure would be given retrospective effect unless there was clear evidence of a contrary legislative intention[14], but s14 of the Interpretation of Legislation Act 1984 would have the effect that the amendment of s74 would not affect the previous operation of the Act nor anything done pursuant to its terms[15]. Legal proceedings by way of an appeal pursuant to s156 commenced prior to the amendment of s74 would continue as if the amendment had not been made, even though the appeal had been made to a judge of the Supreme Court[16].

[26] As I have said, in my opinion s74 of the County Court Act was adopted in s156(2) merely as a provision concerned with practice and procedure. That was also the case of its adoption and application by s155(5) of the Casino Act. The right of appeal to the Full Court was provided expressly by s155(4) of the Casino Act, thus emphasising that s74 offered merely procedural support for s155. The express stipulation in s155(4) that the appeal would be to the Full Court necessarily overrode the reference to an appeal being to "the Supreme Court", as appeared in s74(1), which words would have otherwise meant that an appeal was to a judge, not the Full Court[17].

[27] It is apparent, in my view, that the right of appeal which Parliament intended to provide under the Gaming Act was that expressly provided by s156(1), namely, an "appeal to the Supreme Court", being an appeal to a single judge, not the Full Court. As to that conclusion, I respectfully adopt the reasons of Callaway JA, and I am not persuaded that the debates in the Legislative Assembly or Legislative Council demonstrate any contrary intention. An appeal from a judge of the County Court pursuant to s74 of the County Court Act, when that section was read with s11(1)(c) of the Supreme Court Act 1986, was to the Full Court, but neither s156 nor s74 incorporated s11(1)(c). Thus, until the amendments were made to s74 in consequence of the creation of the Court of Appeal it was not arguable that the right of appeal which would have been to a judge, by virtue of the use of the words "to the Supreme Court" in s156, was replaced by an appeal to the Full Court by reason of the operation of s11(1)(c) of the Supreme Court Act.

[28] After the amendment of s74, with the introduction of the words specifying that the appeal under that section was "to the Court of Appeal" a reading of that provision with s156 then asserted that the appeal provided by s156 was to the Court of Appeal unless - to employ the direction under s156(2), namely, that s74 was to be applied "with such modifications as are necessary" - it was a necessary modification to make to the terms of s74 to revert to the original language of s74, namely, "appeal to the Supreme Court", so as to be consistent with and give precedence to those words which still appeared in s156(1).

[29] Counsel for both the Victorian Casino and Gaming Authority ("the Authority") and for the appellant submitted that in consequence of the amendment of s74 the appeal was properly brought to the Court of Appeal and that it was not a necessary modification to read the language of s74 as though it continued to refer to "the Supreme Court". Not without some hesitation, I have concluded that their contentions as to jurisdiction are correct, and that it is not necessary to modify the language in s74 so as to produce the result that, although the merits of the appeal have been fully argued before us, this appeal must be directed to be heard by a judge.

[30] It is undoubtedly necessary that the operation of s74 should be modified so that its references to an appeal from a judgment or order of "the court" should be replaced by reference to "the Victorian Casino and Gaming Authority", but is it necessary to read s74 so as to replace the reference to "the Court of Appeal" with a reference to "the Supreme Court", thus producing an outcome that an appeal will be to a judge of the Trial Division?

[31] Although I have concluded that in 1991 Parliament intended that an appeal under s156 should be to a judge, and not to the Full Court, I do not consider that that precludes a Parliamentary intention that the Court of Appeal should assume the jurisdiction after the creation of this Court. It is, however, probable that the amendment of s74 was just one of the tidying up amendments which flowed from the change in the structure and nomenclature of the

appellate court process. We were not referred to any parliamentary debates which reflected a considered decision to alter the forum of appeal under s156 to an appeal to the Court of Appeal, rather than to a judge.

[32] S155(4) of the Casino Act was repealed at this time and s155(3) was amended by substituting the words "to the Court of Appeal" in lieu of "to the Supreme Court". The fact that s156 of the Gaming Act was not amended at the same time, so as to introduce similar references to the Court of Appeal as had been inserted in s155(3) of the Casino Act, might suggest a confirmation of the original legislative decision not to allow a similar appeal to the Full Court under the Gaming Act as had been granted under the Casino Act. Alternatively, it might be said to reflect an acceptance that an appeal to the Court of Appeal was now achieved by virtue of the amendment of s74, but that would not explain why express reference to the Court of Appeal was retained in s155(3) of the Casino Act, if the adoption of s74 by s155(5) would have been sufficient in that case, too, to ensure that jurisdiction was granted to the Court of Appeal. The more probable explanation for the fact that s155 was not altered at this time is that in consequence of the creation of the Court of Appeal the draftspersons were making wholesale amendments to legislation so as replace references to "the Full Court" by the words "the Court of Appeal", and s156 did not attract such amendment.

[33] If s74, upon its amendment, is to be interpreted as granting jurisdiction to the Court of Appeal for appeals under s156 of the Gaming Act then it must also be recognised that the function of both s156 and s74, and their relationship, would have changed from what had previously applied.

[34] With respect to appeals from the County Court, until 1989 s74(1) gave a right of appeal from "any judgment or order of the court or a judge". The appeal was "to the Supreme Court". By s12(f)(ii) of the County Court (Amendment) Act 1989 the words "or a judge" were omitted from s74(1). Thus, upon its amendment by s32 of the Constitution (Court of Appeal) Act 1994, s74(1) then provided a right of appeal from "any judgment or order of the court" to "the Court of Appeal".[18]

[35] Insofar as concerned appeals from a County Court judge s74 had, and continues to have, a double function, similar to that discussed in Byrnes v The Queen[19]. The section had previously both created the substantive right of appeal from judgments and orders of the County Court and also granted jurisdiction, first, to "the Supreme Court", which in the absence of any other direction meant a Judge of the Supreme Court, and subsequently, after its creation, to "the Court of Appeal". Before its amendment s74 itself did not confer jurisdiction on the Full Court. That was achieved by s11(1)(c) of the Supreme Court Act which provided that all appeals from a judge of the County Court were to be heard by the Full Court. After the establishment of the Court of Appeal s10(1)(c) provided that such appeals were to be to the Court of Appeal. Thus, prior to the amendment of s74 the grant of jurisdiction which it provided to a judge of the Supreme Court, by its provision that an appeal was to be "to the Supreme Court", was modified or overridden by s11(1)(c) and s25(1) of Supreme Court Act, but s74 nonetheless performed a double function of both granting a right of appeal and granting jurisdiction for its determination. It is not necessary for me to reach a final conclusion as to the precise effect of s74 prior to its amendment. The relevant matter for present purposes is that s74 undoubtedly made a grant of jurisdiction to the Supreme Court in the case of appeals from the County Court.

[36] Until its amendment s74(1), however, did not perform any apparent double function with respect to appeals from the Victorian Gaming Commission under the Gaming Act. The right of appeal was given only by s156(1), and that section also was a source of jurisdiction of a judge of the Supreme Court, by its grant of a right of appeal "to the Supreme Court"[20]. S74(1), so far as affected the Gaming Act, was intended to be a machinery provision for the purpose of s156. Given that the right of appeal was granted by s156(1), the reference in s74(1) to an appeal to "the Supreme Court" added nothing to what had been stipulated in s156(1) itself. The question whether s74 might also be a source of jurisdiction for a judge of the Supreme Court to hear an appeal was of no practical importance. In my opinion, however, even before its amendment, s74 was itself a source of jurisdiction for a judge to hear an appeal to the Supreme Court pursuant to s156.[21]

[37] If the Court of Appeal now has the jurisdiction to hear appeals under s156 which had hitherto been the province of a judge then s74(1) must be the source of that grant of jurisdiction (independently of s10(1)(c) of the Supreme Court Act). To produce that outcome s156 would continue to be the source of the right of appeal, but its reference to the appeal being to "the Supreme Court" must be overridden by the stipulation in s74(1) that an appeal under that section was to the Court of Appeal. Thus, the amendment of s74 meant that for the first time it was that section, and not s11(1)(c) of the Supreme Court Act (now s10(1)(c)) which provided that an appeal under s74 was to the Full Court (now the Court of Appeal) rather than to a judge.

[38] If s74, upon its amendment, now functions as the source of jurisdiction in the Court of Appeal for appeals

under s156, in addition to providing the machinery provisions for such an appeal, then its role is more important for s156, and somewhat different to the role played by s74 with respect to s155 of the Casino Act. S155(3) provides a right of appeal to the Court of Appeal, thus performing dual functions of giving a right of appeal and granting jurisdiction to the Court of Appeal. In those circumstances, s155(5), which is in almost identical terms to s156(2) - in providing that s74 of the County Court Act applies (with necessary modifications) - is very clearly assigning a mere machinery role to s74. Unlike the case of s156, it would be unnecessary to rely on s74 as the source of jurisdiction for the Court of Appeal[22].

[39] The significance of those changes in the purpose and operation of s156 and s74 - if s74, upon its amendment, is now the source of Court of Appeal jurisdiction - and also the quite different function which s74 plays with respect to s155 of the Casino Act, suggest caution must be exercised before concluding that s74 should now be assigned the function for which counsel contend. These considerations are important but not decisive in resolution of the question of jurisdiction. The fact remains that, by the words it now employs, s74 is capable of being the source of jurisdiction for the Court of Appeal to hear appeals under s156.

[40] As I have said, counsel both for the Authority and for the appellant submitted that the proposed modification to s74 (ie to substitute "Supreme Court" for "Court of Appeal" wherever appropriate in s74) is not necessary. The reader of s156 would today be confronted by the words in s156(1) of the Gaming Act that an aggrieved person "may appeal to the Supreme Court", but those words do not reflect any differentiation as between the Court of Appeal and the Trial Division. A reading of s75 of the Constitution Act 1975, as amended after creation of the Court of Appeal, and of the definition of the "Supreme Court" under s38 of the Interpretation of Legislation Act 1984, would not necessarily lead to the conclusion that "the Supreme Court" meant the Trial Division[23]. The reader of s156(2) would then be directed to s74 of the County Court Act, which refers to the Court of Appeal. To adopt a modification of s74 so that it was to be taken to refer to the "Supreme Court" would mean that a reader of s74 should ignore the plain words referring to the Court of Appeal. The proposed modification in the reading of s74 would create a confusing situation, which should be avoided if possible. In my opinion, the Court should be slow to conclude that plain language in s74 should not be given effect.

[41] Although the question is not without doubt, I am not persuaded that it is "necessary" to modify the reading of s74 - so as to replace references to the Court of Appeal with the words "the Supreme Court" - in order to reflect the intention of Parliament.

[42] Nor do I consider that it is necessary to make the modification by virtue of any suggested inappropriateness that an appeal from the Authority should be to the Court of Appeal. It is true that if a judge in the Trial Division were to hear such an appeal then one consequence would be that the Court of Appeal would have the benefit of a considered judgment of a trial judge should a further appeal later be taken. However, there are and have been many instances where the legislature has by-passed the trial judge in favour of a direct appeal from an administrative body to the Full Court or Court of Appeal (the appeal to the Court of Appeal under the Casino Act being the most pertinent example)[24]. Although the amendment sought to its licence by the appellant in this case was relatively minor, appeals might arise from the cancellation or suspension of licences of venue operators and it should not be presumed that the issues which might arise on appeals will be inconsequential.

[43] The legal question of jurisdiction can not be answered by reference to considerations of convenience, but it can be said that there is no suggestion that there is any practical necessity to spare the Court of Appeal the task of hearing of appeals under s156 of the Gaming Act. Although the Court of Appeal would thereby gain the benefit of a considered decision of a trial judge in the event that a further appeal was later taken to the Court of Appeal the modest numbers of appeals under this Act[25] does not point to a pressing need to direct appeals to the Trial Division.

[44] I conclude that the Court of Appeal does have jurisdiction to hear this appeal. I turn, then, to the substantive question raised on the appeal, concerning the approach adopted by the Authority in considering the appellant's application under s27 of the Gaming Act and its conclusion that s27(2A)(c)(i) imposed a "burden or requirement" on the applicant/appellant. The appellant complains that the Authority thereby, and wrongly, imposed an onus of proof on the appellant.

[45] For convenience of the reader I set out the terms of s27(2A):

"(2A) An amendment proposed by a venue operator -

(a) must be made in or to the effect of the form approved by the Authority; and

(b) must be accompanied by the prescribed fee and any information that the Authority may request; and

(c) in the case of an amendment referred to in subs(1)(d) or subs(1A), must be accompanied by a submission -

(i) on the net economic and social benefit that will accrue to the community of the municipal district in which the approved venue is located as a result of the proposed amendment; and

(ii) taking into account the impact of the proposed amendment on surrounding municipal districts -

in or to the effect of the form approved by the Authority and including the information specified in the form."

[46] The application in this case was made pursuant to s27(1A).

[47] In my opinion, s27 of the Gaming Act does not impose an onus of proof on the applicant at any stage, but it does impose a condition precedent for a successful application. S27(2A)(c)(i) provides that the applicant must provide a submission "on the net economic and social benefit that will accrue to the community . . . as a result of the proposed amendment".

[48] It is important to note the component factors - the obligatory matters - which the submission *must* be "on". The sub-section does not say that the submission must "address" the following topics. That word is used in subs(2C), which provides a right to a municipal council to "address" the economic and social "impact" of a proposal to increase the numbers of gaming machines. The use of the word "on" suggests to me that the submission must identify each of the components of subs(2A)(c)(i). In my view, the component parts of subs(c)(i), when regard is had to the purposes of the legislation, reflect that there is a requirement that the submission provide evidence of a net economic and social benefit to the municipality in which the venue is located. The component parts of (2A)(c)(i) with which the submission is concerned are:

- "the"
- "net"
- economic and social[26]
- "benefit"
- that "will"
- "accrue"
- to the community in the municipal district in which the approved venue is located . . .

[49] This sub-section is to be contrasted with (2A)(c)(ii), which requires merely that the submission must be "taking into account" what is called the "impact" of the proposed amendments on "surrounding municipal districts". The difference in language, purpose and emphasis in the two sub-sections is very plain.

[50] Since the section imposed an obligation that the submission be "on" each of those matters in (2A)(c)(i), a submission which asserted, but did not disclose on its face, such a net benefit to the community in the immediate municipal district would not meet the requirement of the subsection. The Authority did not purport to reject the application on the basis of such a threshold deficiency in the submission. Once a submission, on its face, did disclose such an arguable net benefit then, as the Authority recognised, its task was to conduct its proceedings on an inquisitorial and not an adversarial basis. The Authority understood that in the absence of legislative provision to the contrary there was no legal or evidentiary onus or burden of proof imposed on an applicant before such an administrative tribunal. The Authority cited McDonald v Director General of Social Welfare[27] and other appropriate authority for that proposition.

[51] The Authority held, correctly in my view, that the matters addressed in the submission under (2A) were all relevant matters for it to consider. In considering the merits of the application the Authority held that it "has to be persuaded on the facts that the amendment of the licence conditions to permit 24 hour gaming should be permitted". In conducting its evaluation of the merits and, it said, having regard to the terms of s27 and to "the object and purposes of the Act", the Authority held that:

"the applicant has the burden or requirement of establishing that there is a net economic and social benefit to the community of the municipal district (City of Melbourne) in which the venue is located as a result of the amendment."

[52] Counsel for the appellant contends that in making that statement the Authority in fact imposed on the applicant

an onus of proof, where none was imposed by the legislation. The reference to the object and purposes of the Act was no doubt an acknowledgment that when the Act was substantially amended by the Gambling Legislation (Responsible Gambling) Act 2000 - at which time s27 was amended by the introduction of subs(1A), subs(1B), subs(2A) subs(3B) and subs(4A) into the Gaming Machine Control Act 1991 - the avowed intention of the legislature[28] was the minimisation of the harmful effects of gambling in the community, and one of the express purposes of the amendments was, as provided by s1(c) of the amending Act, "to provide for restrictions on 24 hour gaming"[29].

[53] The Authority concluded that there was no net economic benefit to the community, but that there was a "nominal" social benefit. However, it said that "any social benefit is so small as to be negligible". Counsel for the appellant contends that that amounts to a finding of a net social benefit and since there was no onus of proof on the appellant it followed that it had succeeded in its application and should have been granted the amendment to its licence. Counsel referred to passages in the reasons of Woodward J in McDonald v Director General of Social Security[30], contending that they supported the proposition that where there was a state of uncertainty as to what conclusion to draw from material, but some evidence to support an application, an administrative tribunal should grant the application. I do not consider that the passages support so broad a proposition.

[54] Woodward J was concerned with the question whether a pension benefit should be cancelled on the basis that the qualifying condition no longer existed. Where there was some, but inconclusive, evidence in the applicant's favour then he held that the right should be held to continue but that if the inconclusive evidence pointed towards denying the continuance of the right but left the tribunal in a state of uncertainty so that it was not persuaded then that would be insufficient to entitle the tribunal to so find, having regard to the fact that there was no onus on the applicant. In the present case the Authority, in my opinion, was not identifying a state of uncertainty on the evidence, but an absence of evidence on an essential matter which had to be established if the application was to succeed.

[55] If, however, I am wrong in my understanding of the reasons of the Authority and the Authority was not concluding that there was an absence of evidence on a matter which had to be established if the application was to succeed (as I consider it did conclude, and correctly so in my opinion) then at the very least it was concluding that there was an absence of any evidence which was capable of persuading the Authority as to that proposition, and thus persuading it that it was an appropriate application to be granted.

[56] Although the language used by the Authority may be capable of either interpretation as to its finding, neither finding would have constituted an error of law in its approach, in my opinion.

[57] If the contention of the appellant was correct as to the task of the Authority - so that once a negligible net benefit was identified under subs(2A)(c)(i) the application had to be granted - then the Authority would be stripped of any evaluative role save for calculating whether there was a net economic or social benefit, however, marginal. Such a confined role would conflict with the requirement imposed on the Authority by s27(5) that any amendment proposed to be made be in the public interest, or for the proper conduct of gaming or for the purpose of implementing a regional limit, and would also ignore the factors identified in (c)(ii). The Authority was no doubt referring to the requirement of s27(5) when it stated that for the application to succeed "the Authority has to be persuaded that the proposal is for the good of the community."

[58] The appellant contended that even if the Authority considered the submission to be unconvincing in its assertion that there was a net economic and social benefit the Authority was not entitled to reject the application by reason of any failure of the applicant to persuade it that there was a net benefit. The Authority retained the obligation to decide for itself whether there was such net benefit; it was not the task of the applicant to persuade it as to that matter, so it was submitted. Thus, even if the applicant's submission failed to demonstrate any net benefit to the community the fact that there had been no onus on the applicant as to that matter meant, so the appellant contended, that the Authority might conduct its own inquiries (although it was accepted that it was not obliged to do so[31]) and conclude therefrom that it was to the net benefit of the community that the application be granted, thus overcoming the deficiencies of the applicant's own submission in advancing its cause.

[59] Having regard to the fact that the 2000 amendments to the Act, as discussed above, had as one of their purposes "to provide for restrictions on 24 hours trading" that interpretation of the role and function of the Authority seems to me to be quite unrealistic and to ignore the fact that it was solely the applicant which had an obligation imposed on it to provide material on the relevant issues. It is hardly likely that having regard to the purposes of the legislation, as stated in 2000, the Authority would demand further information from the applicant or seek information

from anyone else in order to enhance an applicant's prospects of increasing the availability of gaming in the community, when the applicant's own submissions had been unpersuasive.

[60] Counsel for the appellant offered an alternative contention to their assertion that the Authority was bound to grant the application once it concluded that there was a net benefit (no matter how marginal). Counsel for the appellant contended that even if the Authority was entitled to refuse an application notwithstanding that it had found there to be a net economic and social benefit then in this case the Authority imposed upon the applicant an obligation to persuade it that there was such a net social and economic benefit for the community as would justify a grant of an amendment to the licence to permit 24 hour gaming. By having improperly concluded that there was such an onus on the applicant then the Authority's decision-making was tainted, so counsel submitted, and the matter should be returned to the Authority to be reconsidered, without the imposition of any onus of proof or persuasion on the applicant/appellant.

[61] Counsel for the appellant contrasted an application under s27(1A) for an extension of operation to 24 hours, on the one hand, with the legislative regime which applied to an application under s27(1)(b) to increase numbers of gaming machines, on the other hand. That comparison demonstrated, they submitted, that, when an onus was to be imposed (as in case of an application for additional numbers of machines), the legislation expressly so provided. There was no similar requirement in the case of an application for 24 hour trading, they submitted, that the Authority be satisfied that there was a net economic and social benefit to the local community if the application was granted, and thus, no onus was imposed on the applicant to so satisfy the Authority.

[62] The regimes for the two types of application are quite different. An application for approval of additional machines does not require that the venue operator file a submission similar to that required for an extension to 24 hour operation. The venue operator is merely required to deliver to the municipal council in the relevant district a copy of the proposed amendment, and that council may make a submission "addressing the economic and social *impact*[32]" of the proposal on the well-being of the municipal district, and also taking into account the impact of the proposed amendment on surrounding districts (s27(2C)). The venue operator is given the opportunity to file a responding submission (s27(3)). The municipal council might, of course, contend in its submission that it was to the net economic and social benefit of the community that the application be granted. The sub section does not assume that the submission must be in opposition to the application. By s27(3B), however, the Authority is directed that it must not grant an increase in the number of machines unless it "is satisfied", inter alia, that the net economic and social "impact" will not be detrimental to the well-being of the community of the municipal district in which the venue operates (s27(3B)(ac)).

[63] It is to be noted that in an application for an increased number of gaming machines no obligation is cast on either the applicant or the municipal council to file a submission which demonstrates one way or the other whether there was a net "benefit" to the immediate or surrounding municipalities if the proposal was accepted. Even in the case of an application for additional numbers of machines, therefore, it is inappropriate to speak of their being an onus of proof cast on the applicant by express terms of the legislation. However, the requirement that an application be refused unless the Authority be satisfied of the absence of detriment to the community inevitably imposes a challenge to the applicant to persuade the Authority that it should be so satisfied. In the context of such legislation the observations of Woodward J in McDonald[33] are particularly apt where his Honour spoke of the artificiality of applying terms such as "onus of proof" to a situation where as a matter of practical reality an unpersuasive applicant must inevitably fail to achieve his desired outcome. Those observations, appropriate as they are in the case of an application which might generate adversarial submissions from a municipal council and the applicant, are even more apt in the case of an application for an extension of 24 hour trading, where it is only the applicant who is obliged to file a submission on the net benefit which will flow to the community.

[64] I am not persuaded that the Authority did impose an onus of proof on the appellant. I consider that the Authority was merely stating, perhaps inelegantly, that having considered the submission against the background of the purposes of the legislation it was unpersuaded that it had actually demonstrated a net economic and social benefit for the local community, a pre-requisite for the grant of the application. The legislation required the Authority to satisfy itself that there was such a net benefit to the immediate community in which the venue operated, before additional hours could be permitted. If that requirement was met then the Authority had to consider the impact of the proposed amendment on surrounding municipal districts, and such other matters as it deemed relevant to its assessment. It is important to note that the passage in the reasons of the Authority about which complaint was directed refers solely to the "burden or obligation" created by s27(2A)(c)(i). In my opinion, the Authority was correct in concluding that there was an obligation imposed on the applicant to identify a net economic and social benefit to the community in the City of Melbourne. A similar obligation to identify a net benefit was not imposed by subs(c)(ii) with respect to surrounding municipal districts, and the Authority did not suggest otherwise.

[65] I have concluded that the Authority held that the submission did not disclose a net economic and social benefit as required by subs(2A)(c)(i). However, even if its reasons should be read as reflecting that the Authority had accepted that there was a net benefit to the community an observation that the applicant had nonetheless not persuaded it to grant the application would still not reflect an impermissible imposition of an onus of proof, in my view.

[66] In circumstances where there was no contradictor for the application, and no obligation on the Authority to go beyond the material supplied by the applicant, so as to seek out additional information which might support the application, and where it was only the applicant who asserted that there was a net benefit, then it must necessarily be the case that if the applicant failed to persuade the Authority on the relevant matters it must fail to persuade it that the application should have been granted.

[67] So understood, the Authority was correct in asserting that it was the applicant which had the "burden or requirement" of establishing the net benefit of the proposal, because it was the applicant which had the task of providing a submission which demonstrated that there was such a net benefit. If it did not then there would be no material on which the Authority might be persuaded in favour of the application. But even if its submission did demonstrate a marginal net benefit the Authority was not entitled to grant an application which failed to satisfy it that it was appropriate to grant it having regard to the relevant matters specified and the purposes of the Act. The Authority did not say that the applicant carried an onus of proof in persuading the Authority in that way. If the Authority had not been persuaded that it should grant the application after considering the submissions of the appellant/applicant then it was inevitable that nothing, and no-one else, would have so persuaded it to do so. The situation would have been similar to that discussed by J D Phillips J (with whom Southwell and Tadgell JJ agreed) in Victorian WorkCover Authority v C E Heath Underwriting & Insurance (Australia) Pty Ltd[34] where his Honour observed that unless an applicant pointed to some reason why the benefit should be granted then the tribunal might be unable, itself, to discern any reason why it should so benefit. As I have earlier noted, it adds nothing to speak of there being an onus of proof on the applicant, and I am unpersuaded that the Authority imposed such a burden of proof on the appellant, knowing full well, as it stated, that it would be impermissible to do so.

[68] I conclude that the appeal should be dismissed.

O'Bryan AJA

[69] By a determination made and reasons given in writing dated 2 November 2001 the Victorian Casino and Gaming Authority ("the Authority") established under the Gaming and Betting Act 1994 refused an application by the appellant, the holder of a venue operator's licence issued under the provisions of the Gaming Machine Control Act 1991 ("the GMCA"), for amendment of the conditions of its licence to allow 24 hour gaming at the premises. The application was made under s27(1A) of the GMCA.

[70] The appellant commenced an appeal to the Supreme Court pursuant to s156(1) of the GMCA by Notice of Appeal dated 16 November 2001. The notice bore a heading "In the Supreme Court of Victoria At Melbourne Common Law Division". S156(1) provides in para(b) that a person aggrieved by a decision of the Authority to amend, or to refuse to amend, the conditions of a licence under the Act, may appeal to the Supreme Court from the decision on a question of law. Subs(2) provides: "S74 of the County Court Act 1958 applies to an appeal under subs(1) with such modifications as are necessary." The Notice of Appeal gave notice that the appellant intended to appeal to the Supreme Court against the determination and specified three questions of law involved in the decision.

[71] The appellant caused a summons to be filed and served on the respondent on 26 November 2001 on the hearing of an application by the appellant for directions. The heading at the top of the document was: "In the Supreme Court of Victoria at Melbourne In the Court of Appeal".

[72] The summons came on for hearing before Charles and Batt JJA on 7 December. Relevantly, the Court ordered that: The question whether this appeal should be made to the Trial Division or to the Court of Appeal be referred to the Court of Appeal and heard and determined, if the Court determines that the appeal should be to the Court of Appeal and if the Court thinks fit, together with the appeal proper.

[73] The Court granted the appellant leave to file and serve an Amended Notice of Appeal within seven days, which it did on 13 December. Identification of the question of law and the ground of appeal will be deferred until the question of the appropriate Division of the Supreme Court for the appeal hearing is determined. The question whether this appeal should be made to the Trial Division or to the Court of Appeal is a threshold question. Both the appellant and the respondent submitted that s156 of the GMCA provides a right of appeal to the Court of Appeal by reference to s74 of the County Court Act.

[74] Prior to the establishment of a Court of Appeal and a Trial Division in the Supreme Court of Victoria by the Constitution (Court of Appeal) Act 1994, which commenced on 7 June 1995, so far as Pt2 of the Supreme Court Act 1986 was concerned, the Full Court had jurisdiction to hear and determine, inter alia, all appeals, applications, questions and other matters, whether civil or criminal, which by or under any Act are required to be heard or disposed of by the Full Court (s11(1)(d)). In Pt2 of the 1994 Act Divisions of the Court were created by the insertion of s75A in the Constitution Act 1975. A new substituted s10 prescribed the jurisdiction and powers of the Court of Appeal. By subs(1) the Court of Appeal had jurisdiction to hear and determine, by subpara(c), all appeals from the County Court constituted by a judge.

[75] In Director of Public Prosecutions v Kanfouche[35] the Full Court considered whether a reference in the Bail Act 1977 to an appeal "to the Supreme Court" denoted an appeal to the Full Court. In the joint judgment of Young CJ and Ashley J their Honours said:

"an 'appeal to the Supreme Court', without more, is insufficient to require or entitle the intending appellant to appeal to the Full Court. It has long been a part of the law in Victoria that a single judge can exercise the jurisdiction of the Court unless the matter in which the jurisdiction is to be exercised is required by an Act or by Rules of Court to be heard by the Full Court. ...A reference in a statute to an appeal to the Supreme Court has generally denoted an appeal to a single judge of the court."[36]

[76] The Court referred to a number of statutes in which an appeal to the Supreme Court has generally denoted an appeal to a single judge of the Court. In contrast to such statutes the Court noted a number of other statutes giving a right of appeal to the Full Court eo nomine. Their Honours observed:

"An examination of a large number of statutes would show that the drafting style has not been uniform over the years but it can, we think, be said with confidence that in no modern statute has a right of appeal to the Supreme Court been construed as giving a right of appeal to the Full Court. Whenever an appeal to the Full Court is intended that is expressly so stated."[37]

[77] Whilst deciding that an appeal under s18A(1) of the Bail Act from a single judge of the Court to the Court of Appeal was not available, their Honours accepted that an appeal from a judge of the County Court might be brought to the Full Court for s11(1)(c) of the Supreme Court Act provided that the Full Court must hear and determine: "(c) all appeals from the County Court constituted by a judge."

[78] This is still the position. The substituted s10 in the Supreme Court Act, in subs(1)(c) gives the Court of Appeal jurisdiction to hear and determine all appeals from the County Court constituted by a judge.

[79] In 1991, when the GMCA was enacted, s74 of the County Court provided that an appeal to the Supreme Court may be brought by any party to a civil proceeding who is dissatisfied with any judgment or order of the Court. In subs(2) a number of procedural provisions are set out. Save for a reference to the Full Court in subpara(5) in relation to ordering security for the costs of appeals from the Supreme Court to the Full Court no other reference is made to the Full Court. S74 did not itself confer a right of appeal to the Full Court, that right was conferred by s10(1)(c) of the Supreme Court Act in respect of appeals from the County Court constituted by a judge.

[80] When s156 of the GMCA was enacted in 1991 a person aggrieved by a decision of the Authority was able to appeal "to the Supreme Court" from the decision on a question of law and s74 of the County Court Act applied to the appeal "with such modifications as are necessary". Applying the reasoning in Kanfouche an "appeal to the Supreme Court" without more was "insufficient to require or entitle the intending appellant to appeal to the Full Court" in 1991.[38] The reference to s74 of the County Court Act did not affect the position in any way because there was no nexus between s74 and s11(1)(c) of the Supreme Court Act.

[81] It is of particular interest to know how s156 became part of the Act. During the Second Reading debate in the Assembly the Attorney-General confirmed that there was to be no right of appeal from a decision of the

Commission. The opposition drew attention to the right of appeal to the Full Court of the Supreme Court included in the Casino Control Act 1991 which was enacted four months earlier. That right of appeal had been recommended in a report prepared for the government by an adviser in relation to the establishment of a casino. In the Legislative Council on 17 September 1991 the Hon B A Chamberlain for the Opposition drew attention to the absence of a right of appeal in the Bill and proposed an amendment to provide a right of appeal by adding after cl155 a new cl156. During the debate in the Legislative Assembly Mrs Wade, the Shadow Attorney-General, adverted to the right of appeal to the Full Court recommended in the report which had been included in the Casino Control Act. She said: "I do not suggest that there should be an appeal to any court on the merits of the decision, but I consider that there should be a judicial appeal to the Full Court of Victoria by way of review ...".

[82] The new clause to follow cl155 was submitted by Mr Chamberlain on 18 September 1991 in the form it has now in the GMCA. Mr Chamberlain said during the debate:

"S74 of the County Court Act is a general appeal provision. Parties dissatisfied with a judgment of the County Court in a civil proceeding may appeal to the Supreme Court notwithstanding that the civil proceeding may have been brought in the County Court by consent. That general provision is designed to provide the appeal provisions in this case."

[83] The new clause was accepted without amendment in both the Legislative Council and the Legislative Assembly by the government. No-one adverted to the legal consequence of including a reference to s74 of the County Court Act in s156. It did not have the effect of appeals proceeding to the Full Court from a judgment of the County Court. That right was then conferred by s11(1)(c) of the Supreme Court Act. The right of appeal conferred by s156 in 1991 was to a single judge of the Supreme Court.

[84] Since 1991, s156 of GMCA has not been amended in any relevant way. But s74 was amended by the Constitution (Court of Appeal) Act 1994. In s74(1) of the County Court Act, for "Supreme Court", "Court of Appeal" was substituted and in subs(2) for "Supreme Court" "Court of Appeal" was substituted.

[85] When this appeal was instituted by Notice of Appeal on 16 November 2001 pursuant to s156 of GMCA the reference to s74 of the County Court Act in subs(2) of s156 pointed to an appeal to the Court of Appeal. Without reference to the legislative history of s156 of the GMCA this may appear to have been a consequence unintended by Parliament, accidental perhaps. Since 1994, however, Parliament has left the position unchanged. The original intention of the Opposition in 1991 was effected, probably accidentally, in 1994.

[86] The Casino Control Act 1991 (No 47 of 1991), an Act related to GMCA (No 51 of 1991) provided initially for appeals to the Supreme Court from a decision of the Authority pursuant to s155(3). Subs(4) expressly said that an appeal under subs(3) "shall be heard and determined by the Supreme Court sitting as a Full Court". By subs(5), "S74 of the County Court Act applies to an appeal under subs(3) with such modifications as are necessary." When the Constitution (Court of Appeal) Act 1994 was enacted subs(3) of s155 was amended and the words "may appeal to the Court of Appeal from the decision on a question of law" were substituted for the words "shall be heard and determined by the Supreme Court sitting as a Full Court" in subs(4). Subs(4) was repealed. There are further references to the Court of Appeal in subs(6).

[87] It may be presumed, in my opinion, the Parliament intended that an appeal from the Authority on a question of law pursuant to the Casino Control Act was to be heard and determined by the Court of Appeal when the Court was created in 1994. The history of s155 points to that conclusion.

[88] The position is otherwise with an appeal pursuant to s156 of the GMCA when its history in the Parliament is considered. Nevertheless, when the appellant decided to appeal the determination of the Authority in November 2001 it was entitled, if not obliged, in my opinion, to appeal to the Court of Appeal. The respondent to the appeal is also of the opinion that the choice of the Court of Appeal is appropriate and compelled by the language of s74 of the County Court Act. In my opinion this Court should give effect to the current legislation. It would be unjust to shut out this appeal and require the parties to resort to the Trial Division of the Court for the purposes of the appeal with the possibility of an appeal to this Court in the future. If Parliament considers the current position is unsatisfactory, it may amend s156 to make it clear in which Division of the Court an appeal from the Authority is to be heard.

[89] I would hold, therefore, that this appeal is competent in this Court. If the view which I have expressed is incorrect and no appeal lies to this Court until the Trial Division has spoken, I think it right to state my views on the question of law which was fully argued, for two reasons; first, because an appeal may eventually reach this Court

and require the parties to re-argue a case already fully argued, and, secondly, because the parties reasonably believed that an appeal to this Court lay as of right.[39]

[90] I turn now to the question of law involved in the decision of the Authority and the grounds of appeal. By way of background reference must be made to the application by the appellant for amendment of the conditions of its venue operator's licence. The application was to permit 24 hour gaming at the appellant's premises in Lonsdale Street, Melbourne. The licence did not permit 24 hour gaming, hence the application.

[91] S27 provides that the conditions of a venue operator's licence, including variation of the number of gaming machines permitted in an approved venue, and variation of the days or dates on which 24 hour gaming is permitted in an approved venue under the licence, may be amended in accordance with the section -

"(1A) A venue operator's licence may be amended in accordance with this section to add a condition specifying days or dates on which 24 hour gaming is permitted in an approved venue, when none currently takes place.

....

(2A) An amendment proposed by a venue operator -

(a) must be made in or to the effect of the form approved by the Authority; and

(b) must be accompanied by the prescribed fee and any information that the Authority may request; and

(c) in the case of an amendment referred to in subs(1)(d) or subs(1A), must be accompanied by a submission -

(i) on the net economic and social benefit that will accrue to the community of the municipal district in which the approved venue is located as a result of the proposed amendment; and

(ii) taking into account the impact of the proposed amendment on surrounding municipal districts -

in or to the effect of the form approved by the Authority and including the information specified in the form."

[92] Where an application seeks approval for gaming or for an increase in gaming machine numbers at an existing venue, the municipality in which the premises are located has the right to make a submission to the Authority, addressing the economic and social impact of the proposal. The Authority must not grant the application to increase gaming machine numbers *unless it is satisfied* that the net economic and social impact of the amendment will not be detrimental to the community of the municipal district in which the premises are located (s27(3B)(ac)). Where the amendment sought is for 24 hour gaming without any increase in gaming machines (the position in this case) the legislation does not confer a right on the municipality to make a submission. The legislation does not require the Authority to be satisfied as to the net economic and social benefit that will accrue to the community of the municipal district in which the approved venue is located as a result of the proposed amendment. Nevertheless, it is mandatory that an amendment proposed by a venue operator applying to vary the days or dates on which 24 hour gaming is permitted be accompanied by a submission on the net economic and social benefit that will accrue to the community of the municipal district in which the approved venue is located as a result of the proposed amendment. The content of such a submission is clearly relevant and something the Authority is expected to consider and take into account before it determines an application.

[93] In the present case the appellant provided a submission as to the net economic and social benefit that would accrue to the community as a result of the proposed amendment. The Authority considered the submission and made the following observations:

"There was as conceded no identifiable economic benefit in the proposal. The benefit claimed was in the nature of the social and recreational opportunities that would be provided to the members of the community who wish to avail themselves of a 24 hour gaming facility." [Para20.]

[94] The Authority regarded the social benefit as the material factor and found "any social benefit is so small as to be negligible". The Authority said it did not attempt to draw an artificial distinction between "economic" and "social benefit" as would, in the absence of one or the other, cause the application to fail: "the concepts interact in the sense they should be examined as integral and not discrete elements of a composite phrase". [Para21.]

[95] The appeal focused on the following passage in para12 of the reasons for decision to refuse the application:

"In considering the merits of this application, the Authority has to be persuaded on the facts that the amendment of the licence conditions to permit 24 hour gaming should be permitted. In our understanding of the language of s27 and the object and purpose of the Act, the applicant has the burden or requirement of establishing that there is a net economic and social benefit to the community of the municipal district (City of Melbourne) in which the venue is located as a result of the amendment."

[96] The question of law is stated as follows:

A. Whether in the circumstances the Authority constituted by three members was in error in ruling in para12 of the said decision that the appellant had the burden or requirement of establishing that there was a net economic and social benefit to the community of the Municipal District (City of Melbourne) in which the venue was located as a result of the amendment, the nature of the hearing being an inquiry pursuant to s111 and s113 of the GMCA.

B. Alternatively, whether in the circumstances the Authority misdirected itself in determining that an onus lay on the appellant to establish that there was a net economic and social benefit to the community of the Municipal District arising from the grant of the said amendment.

[97] No challenge could be made in this appeal to the findings made by the Authority in para20 and para21 of its reasons for decision. When the Authority referred to the object and purpose of the Act in para12 it had in mind, no doubt, the recently enacted Gambling Legislation (Responsible Gambling) Act 2000 which amended the GMCA (Act No 16 of 2000). In s1 the purposes of the amending Act included: "(c) to provide for restrictions on 24 hour gambling". The objects and functions of the Authority under the GMCA are stated in s109 and s110. Those objects include regulating "the use of gaming machines in ... approved venues where liquor is sold" (s109(b)). Its functions include "such functions as are necessary or convenient to enable it to achieve its objects under the Act" (s110(a)). For the purpose of the exercise of its functions under the GMCA, the Authority may hold inquiries in public or in private, being inquiries presided over by one or more members of the Authority (s111(1)).

[98] Mr Larkins on behalf of the appellant submitted that in determining the application the Authority wrongly imposed an onus of proof on the appellant. It is clear, I consider, that the Authority did consider it had to be persuaded on the facts by the appellant that there would be a net economic and social benefit to the community of the municipal district (City of Melbourne) in which the venue is located as a result of the amendment.

[99] The Authority recognised that as an administrative body it was engaged in an inquisitorial and not an adversarial function in hearing and determining the application, for it said so in its reasons for decision. It made reference to the Federal Court decision McDonald v Director-General of Social Security[40] where observations concerning the inappropriateness of applying adversarial proceeding concepts such as onus of proof to the issues in an inquiry were made by Woodward J[41] and Northrop J[42] and Jenkinson J.[43]

[100] However, Woodward J said it "becomes a matter of choosing labels" and "it would probably be more convenient to avoid using the expression 'onus of proof' in cases such as the present".[44] Jenkinson J noted that a tribunal may find itself unpersuaded either that a circumstance, which is determinative of the question for decision, exists or that it does not exist.[45]

[101] I do not consider it should be assumed that the Authority in deciding the merits of the application departed from the principle stated in McDonald. I think the Authority was simply saying (in para12 of its reasons for decision) it was unpersuaded by the submission that there would be a net economic and social benefit to the community of the municipal district in which the venue was located as a result of the amendment. The choice of words: "the applicant has the burden or requirement of establishing" convey the notion of onus of proof, but when the requirements of s27(2A)(c) are taken into consideration, together with the purposes of the GMCA as amended by Act No 16 of 2000, it becomes clear that the Authority refused the application because it was unpersuaded by the submission of the appellant that there would be a net economic and social benefit to the community and, therefore, the application should be dismissed.

[102] Mr Larkins contrasted the function of the Authority provided in s27(3B) when an amendment proposed by a venue operator is to increase the number of gaming machines permitted in an approved venue with the absence of such a function when an amendment proposed is to amend the hours permitted in an approved venue to allow 24 hours gaming. In the former the sub-section requires that "the Authority is satisfied" of the matters specified in four sub-paragraphs before it can amend the venue operator's licence. In the latter, s27 does not require the Authority to be satisfied of anything. I consider the explanation for the difference is, that the former application may become an

inter parties inquiry, whereas the latter is a single party inquiry. S27(2B) requires the venue operator to send to the municipal council of the municipal district in which the approved venue is located a copy of the proposed amendment and subs(2C) allows the municipal council to make a submission to the Authority. The submission required by subs(2A)(c) must be considered by the Authority and unless it is persuasive the Authority may dismiss the application.

[103] Choosing the label "the burden or requirement of establishing" was unwise in the circumstances, and it would have been more judicious for the Authority to have said that it was unpersuaded by the submission and, consequently, the application failed.

[104] The submission required by s27(2A)(c) had to be furnished by the venue operator and was intended by the legislature to be taken into account by the Authority during the inquiry. The Authority said it was unpersuaded by the submission of the matters of economic benefit and social benefit, meaning it was unpersuaded by the appellant who had proffered the document. In these circumstances, I am not persuaded that the Authority fell into error in using the words "the [appellant] had the burden or requirement of establishing". It did have a burden of persuasion and it failed to persuade the Authority of the circumstances and requirements specified in the GMCA.

[105] I am of the opinion, therefore, that the question of law should be answered in the negative and the appeal dismissed.

Order

Appeal dismissed.

Counsel for the appellant: Mr J F M Larkins with Mr E L Bryant

Solicitors for the appellant: Batten Sacks

Counsel for the respondent: Mr M F Fleming

Solicitors for the respondent: Office of Gaming Regulation

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1 This version incorporates an amendment made to s156(1)(c) by s20(j) of Act No 88 of 2000. The amendment came into force on 1st December 2001.

2 (1982) 150 CLR 666 at 681-682.

3 The corresponding provision in the Supreme Court Act as now in force is s10(1)(c).

4 Contrast s82 of the Credit (Administration) Act 1984, referred to in Encyclopaedia Britannica (Aust.) Inc. v Director of Consumer Affairs [1988] VR 904 at 909.

5 [1992] 1 VR 141 at 146-147.

6 The Bill for the Casino Act was passed on 6th June 1991; the Bill for the Gaming Act was introduced the day before and passed on 8th October 1991.

7 Subs(4).

8 I have spelled "Full Court" in the conventional way, but it is spelled "full Court" in the Act as printed in the 1991 Volumes of the Victorian Statutes.

9 The exception is subs(5), which previously referred to the Full Court and now refers to the Court of Appeal.

10 This is not a case of the kind referred to in Commissioner of Stamps (SA) v Telegraph Investment Co. Pty Ltd (1995) 184 CLR 453 at 463 and 479.

11 That body was later replaced by the Victorian Casino and Gaming Authority by virtue of the Gaming and Betting Act 1994.

12 S156 was later amended in 1993, 1994 and 1997, but the terms of those amendments are not relevant for present purposes.

13 As reflected in the decision of the Full Court in Director of Public Prosecutions v Kanfouche [1992] 1 VR 141, which was handed down on 4 June 1991.

14 Maxwell v Murphy (1957) 96 CLR 261, at 266-267, 280-281, 285-287.

15 Interpretation of Legislation Act 1984, s14(2)(d).

16 Interpretation of Legislation Act 1984, s14(2)(g).

17 See Director of Public Prosecutions v Kanfouche, supra, at 146-147.

18 The County Court Act provided, by s4(1A) that "the court" consisted of the judges, masters and registrar of the County Court, but s25(1)(c) of the Supreme Court Act granted power to the Judges of the Supreme Court to make rules governing appeals from a Master of the County Court to a Judge of the Supreme Court.

19 Byrnes v The Queen (1999) 199 CLR 1, at 22-23, 28. See, too, Gao v Zhang [2002] VSCA 19.

20 s10(1) of the Supreme Court Act 1986 provided that a judge had jurisdiction over any matter not required to be heard by the Full Court.

21 The reference in s156(2) to s74 of the County Court Act must be taken to adopt the later amendment to s74: see s17 Interpretation of Legislation Act 1984.

22 Quite apart from any grant of jurisdiction by s155 itself, the Full Court gained jurisdiction to deal with appeals under s155 of the Casino Act by virtue of s11(1)(d) of the Supreme Court Act which expressly gave jurisdiction to hear appeals which, under any Act, were required to be heard by the Full Court. An equivalent source of jurisdiction is now to be found in s10(1)(d).

23 A reading of s10 of the Supreme Court Act 1986, which sets out the jurisdiction of the Court of Appeal, would not readily answer the question, either.

24 See the discussion in DPP v Kanfouche, supra, at 146-147. In Encyclopaedia Britannica (Australia (Inc) v Director of Consumer Affairs [1988] VR 904, at 909, Fullagar J observed that the somewhat surprising result that appeals from the Small Claims Tribunal were to be to the Full Court might reflect a legislative intention that successive appeals be kept to a minimum. There is no material in the present case which suggests that such considerations were taken into account by Parliament, but the avoidance of multiple appeals would be one outcome if appeals under s156 were to be heard by the Court of Appeal rather than a judge.

25 This appears to be the first appeal to the Court of Appeal brought pursuant to s156. The only instance of proceedings before a trial judge concerning the Gaming Act appears to have been David Syme & Co Ltd v Victorian Gaming Commission, unreported decision of Eames J, 11 September 1992, an application under the Administrative Law Act 1978 involving a challenge to a private hearing of the Commission, and not an appeal under s156.

26 The Authority concluded that it should not require that both an economic and social benefit had to be demonstrated, but could grant an application even where one of those benefits was not demonstrated. That was not a question argued before us, and I express no opinion on that interpretation.

27 McDonald v Director General of Social Security (1984) 1 FCR 354; also cited was Re: Elvin and Comcare (1998) 51 ALD 706, at 736-738. McDonald was approved by the Court of Appeal in Medical Practitioners Board of Victoria v McGoldrick (1999) 15 VAR 462, at 468.

28 See Second Reading Speech, Minister for Gaming, 2 March 2000, Assembly.

29 The amending legislation, by s6(f) inserted new purposes into s1 of the Gaming Act, including by s1(f)(i) "fostering responsible gambling in order to minimise harm caused by problem gambling".

30 McDonald v Director General of Social Security, supra, at 358-359.

31 The Authority had power under s23, s24 and s27(2C) to compel the applicant to provide further information. Counsel for the appellant submitted that that power and also the power under s111, when conducting an inquiry, to gain information from sources other than the applicant reflected the fact that there was no onus on the applicant to be the source of information which persuaded the Authority to grant the application.

32 In contrast with the requirement that a submission under s27(1A)(c)(i) be on "the net" economic and social "benefit". This suggests that the net benefit must be demonstrated, not merely be argued, and that a mere demonstrated absence of detriment would not meet the requirement.

33 McDonald v Director General of Social Security (1984) 1 FCR 354, at 357.

34 Victorian WorkCover Authority v CE Heath Underwriting & Insurance (Australia) Pty Ltd (1995) 8 VAR 328, at 337.

35 [1992] 1 VR 141.

36 DPP v Kanfouche (supra) at 146.

37 DPP v Kanfouche (supra) at 147.

38 DPP v Kanfouche (supra) at 146.

39 See Commonwealth of Australia v Bank of New South Wales [1950] AC 235 at 299.

40 (1984) FCR 354.

41 At 356-357.

42 At 366.

43 At 369.

44 McDonald v Director-General of Social Security (supra) at 357. The appeal was from a decision of the Administrative Appeals Tribunal.

45 At 369.

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