

SUPREME COURT OF QUEENSLAND

CITATION: *The Syndicate Club Pty Ltd v State of Queensland* [2003] QSC 104

PARTIES: **THE SYNDICATE CLUB PTY LTD ACN 078 506 662**
(applicant)
v
STATE OF QUEENSLAND
(respondent)

FILE NO: S 6382 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 April 2003

DELIVERED AT: Brisbane

HEARING DATE: 13 September 2002

JUDGE: Philippides J

ORDER: **It is declared that:**

- 1. the OzPower System would not be reasonably confused with a lottery within the meaning of s 6(2)(a) of the *Lotteries Act 1997*.**
- 2. the applicant did not, by use of the OzPower System, conduct a gaming scheme, that is not a lottery, when the gaming scheme may reasonably be confused with a lottery, contrary to s 6(2)(a) of the *Lotteries Act 1997*.**

CATCHWORDS: GAMING AND WAGERING – LOTTERIES – whether syndicated scheme conducted by applicant is contrary to *Lotteries Act 1997* – where scheme based upon draws in Powerball, Gold Lotto and Oz Lotto – where members provide weekly contributions – where director of applicant purchases tickets in Powerball, Gold Lotto and Oz Lotto in his own name – where Lotto winnings of the scheme distributed to members – whether syndicated scheme is a “gaming scheme” under s 6(2)(a) of the *Lotteries Act 1997* – whether a member of the applicant took part in an approved lottery – whether applicant for gain or reward induced another to take part in an approved lottery or offered another an opportunity to take part in an approved lottery – whether scheme conducted by applicant was “a gaming scheme” which may be reasonably confused with a lottery contrary to s 6(2)(a) of the *Lotteries Act 1997* – whether scheme similar

to a lottery and if so whether it may reasonably be taken to be in direct competition with a lottery contrary to s 6(2)(b) of the *Lotteries Act 1997*

STATUTES – INTERPRETATION – statutory construction – meaning of “take part in” under s 151(1) of the *Lotteries Act 1997* – whether persons who participate in scheme “take part in” an approved lottery under s 151(1)(a) of the *Lotteries Act 1997* – whether the applicant induces others to “take part in” an approved lottery – whether applicant offers an opportunity to others to “take part in” an approved lottery – whether scheme was a “gaming scheme” within the meaning of s 6(2) of the *Lotteries Act 1997*

Acts Interpretation Act 1954, s 14A

Lotteries Act 1997, s 2A, s 2A(1), s 4, s 5, s 6(1), s 6(2), s 6(2)(a), s 6 (2)(b), s 6(4), s 78, s 129, s 130, s 151(1), s 151(1)(a)(i), s 152, s 144, s 145, s 149, Schedule 3

Lotteries Rule 1998, s 3

Beckwith v The Queen (1976) 135 CLR 569, applied

Commissioner for Corporate Affairs v Bracht [1989] VR 821, considered

Marshall v British Broadcasting Corporation [1979] 1 WLR 1071, considered

R v Commons; ex parte Attorney General (1987) 1 Qd R 158, considered

R v Tranby (1992) 1 Qd R 432, considered

United States Postal Service v Amada US Ninth Circuit Court of Appeals No 9815589, distinguished

Van Rassel v Kroon (1953) 87 CLR 298, considered

COUNSEL: W Sofronoff QC and B Cronin for the applicant
M Griffin SC and B Thomas for the respondent

SOLICITORS: Mallesons Stephen Jaques for the applicant
Crown Solicitor for the respondent

PHILIPPIDES J:

[1] The applicant, the Syndicate Club Pty Ltd (“the Club”), seeks declarations that the “OzPower System” conducted by it does not breach s 6(2) and s 151(1) of the *Lotteries Act 1997* (“the Act”). The applicant thus seeks the following declarations:

1. that a person who participated in the applicant’s OzPower System did not “take part in an approved lottery” within the proper meaning of s 151(1)(a)(i) of the Act;
2. that the applicant, by using the OzPower System, did not for gain or reward induce another to take part in an approved lottery as defined in the Act;

3. that the applicant, by using the OzPower System, did not for gain or reward offer to another an opportunity to take part in an approved lottery as defined in the Act;
 4. that the OzPower System is not a “gaming scheme” within the proper meaning of s 6(2) of the Act;
 5. that the OzPower System would not be “reasonably confused with a lottery” within the proper meaning of s 6(2)(a) of the Act;
 6. that the applicant did not, by use of the OzPower System, conduct a gaming scheme that is not a lottery, when the gaming scheme may reasonably be confused with a lottery, contrary to s 6(2)(a) of the Act;
 7. that the OzPower System was not similar to a lottery within the proper meaning of s 6(2)(b) of the Act;
 8. that the OzPower System could not reasonably be taken to be “in direct competition with a lottery” within the proper meaning of s 6(2)(b) of the Act;
 9. that the applicant did not, by use of the OzPower System, conduct a gaming scheme similar to a lottery and that may reasonably be taken to be in direct competition with a lottery contrary to s 6(2)(b) of the Act.
- [2] The respondent brought proceedings by way of complaint and summons against the applicant and its sole director and shareholder, Michael Kuhne, asserting that he and the applicant had failed to comply with various provisions of the Act. Because of the complexity of the legal issues and the business about which the complaints are made, the parties agreed upon an approach of seeking determinations, based on the Agreed Statement of Facts, as to whether various components of the conduct set out therein breached the provisions of s 6(2) and s 151 of the Act insofar as Gold Lotto, Oz Lotto and Powerball are concerned.
- [3] Declaratory relief impinging on criminal proceedings already commenced will only be granted in exceptional circumstances.¹ In this case, both parties urge this course on the ground that it is in the interests of the parties that the issues in dispute be determined in this way on the basis of the Agreed Facts, rather than through a lengthy trial before a Magistrate with the possibility of a number of avenues of appeal thereafter.² Except where I have indicated below in respect of declarations 7 to 9, it is appropriate that the issues raised by the application be determined in a declaratory context on the material before the Court.

THE SCHEME OF THE ACT

(i) Regulation of Lotteries

- [4] The stated object of the Act “is to ensure that, on balance, the State and the community as a whole benefit from lotteries”.³ The Act states that this balance:

“ . . . is achieved by allowing lotteries subject to a system of regulation and control designed to protect players and the community through –

¹ *Sankey v Whitlam* (1978) 142 CLR 1 at 26; *Imperial Tobacco Ltd v Attorney General* [1981] AC 718.

² See *Anderson & Ors v Attorney General for NSW & Ors* (1987) 10 NSW LR 198 at 200; and *Crane v Gething* (2000) 97 FCR 9 at 23.

³ Section 2A (1) of the Act.

- (a) ensuring the integrity and fairness of games; and
 - (b) ensuring the probity of those involved in the conduct of lotteries; and
 - (c) minimising the potential for harm from lotteries.”
- [5] A “lottery” is defined in s 5 of the Act as “a gaming scheme classified under a rule as a lottery”. “Gaming scheme” is relevantly defined in s 4 of the Act as:
- “a game, scheme or arrangement in which the winners of prizes are decided ...
- (a) wholly or partly by chance...”
- [6] For present purposes, it is to be noted that Gold Lotto, Oz Lotto and Powerball are each classified as lotteries under the *Lotteries Rule* 1998.⁴ The business conducted by the applicant cannot, given the definition of “lottery”, itself be a lottery.
- [7] Section 6(1) of the Act is a penal provision regulating the conduct of lotteries. It provides that “a person must not conduct a lottery unless the person is authorised to do so under a lottery licence”. It is common ground that the sole licensee for Gold Lotto, Oz Lotto and Powerball, the three lotteries the subject of inquiry, is Golden Casket Lottery Corporation Ltd.
- [8] Part 7 of the Act concerns the “Conduct of Approved Lotteries”, and Division 5 of that Part, deals with “Lottery Offences”. “Approved lottery” is defined in schedule 3 of the Act as “a lottery conducted by a lottery licensee under a lottery licence”.⁵ The three lotteries in question here are “approved lotteries”.
- [9] Section 151(1) of the Act which appears in Division 5 is a penal provision which provides:
- “(1) Except as authorised under an agency agreement, a person (other than a lottery licensee) must not -
- (a) for the person’s gain or reward –
 - (i) induce anyone else to take part in an approved lottery; or
 - (ii) offer to anyone else an opportunity to take part in an approved lottery ...”
- [10] An “agency agreement”⁶ is “an agreement between a lottery licensee and another person -
- (a) appointing the other person as an agent (a “lottery agent”) for 1 or more of the following purposes –
 - (i) selling lottery tickets;
 - (ii) paying prizes;
 - (iii) promoting lotteries conducted by the lottery licensee;
 - (iv) another purpose relating to the conduct of lotteries by the lottery licensee; and
 - (b) dealing with the lottery agent’s authority; and

⁴ See *Lotteries Rule* 1998, s 3 and schedules thereto.

⁵ The terms “lottery licence” and “lottery licensee” are defined in schedule 3 of the Act.

⁶ See s 78 of the Act.

- (c) stating the conditions under which the lottery agent acts as, and remains, an agent of the lottery licensee.”

[11] The applicant is neither a lottery licensee nor an authorized agent for the purposes of s 151 of the Act and therefore is not exempted from that section.

(ii) Regulation of Gaming Schemes

[12] The conduct of “gaming schemes” is regulated by s 6(2) of the Act, which is also a penal provision. It does not prohibit the conduct of gaming schemes *per se*, otherwise than under licence, unlike s 6(1) of the Act, which prohibits the conduct of lotteries except under licence. Rather, s 6(2) of the Act provides that:

“A person must not conduct a gaming scheme that is not a lottery if –

- (a) the gaming scheme may reasonably be confused with a lottery; or
 (b) because of the scheme’s similarity to a lottery, it may reasonably be taken to be in direct competition with a lottery.”

[13] Section 6(2) does not apply if the gaming scheme is conducted under a Gaming Act. There is no provision, similar to s 151, prohibiting a person from inducing another to take part in a gaming scheme not authorised under the Act or a Gaming Act. However, s 6(4) of the Act provides:

“A person must not participate in a lottery, or a gaming scheme mentioned in subsection (2), knowing the person who is conducting the lottery or scheme is not authorised under this Act or a Gaming Act to conduct the lottery or scheme.”

[14] Schedule 3 defines the term “participant”, by stating that “‘participant’ in an approved lottery or other gaming scheme, means a person who purchases a ticket, or otherwise participates, in the lottery or gaming scheme”. “‘Ticket’ in an approved lottery or other gaming scheme” is defined in schedule 3 as meaning:

“a right of participation (however described) in the lottery or other gaming scheme and includes a document, token or other thing evidencing a right to participate in the lottery or other gaming scheme.”

THE OZPOWER SYSTEM

[15] The applicant operates the OzPower System and a Members’ Bonus Plan. The OzPower System is that part of the applicant’s business which is based upon draws in Powerball, Gold Lotto⁷ and Oz Lotto. To use the OzPower System operated by the applicant, a person must apply for membership of the applicant on the terms and conditions attached to the application.⁸ Upon acceptance of the membership, that person enters into a contract with the applicant. Membership is of 12 months duration and is automatically renewed unless notification takes place as specified in the terms and conditions.

⁷ Gold Lotto is also known as and referred to in the documentation as Saturday Night Lotto.

⁸ As to the terms and conditions, see Exhibit B of the Statement of Agreed Facts.

[16] Each member receives a Membership Card. Clause 3 of the terms and conditions, which deals with the Membership Card and the entitlements which flow from it, provides as follows:

“3.1 If we accept you as a Club Member, we will issue you with a Card. Five numbers that we select are printed on the Card.

3.2 We will issue up to a total of 25 Cards to members of the Club, which have the same five numbers as printed on your Card.

3.3 Subject to clause 3.5, where any combination of numbers printed on the Card issued to you, plus any other number, result in a match in a Saturday Night Lotto or Oz Lotto draw while you are a Club Member, we will credit your Club account with an amount equal to $1/25^{\text{th}}$ of the corresponding winnings applicable to an entry in such lottery with those numbers.

3.4 Subject to clause 3.6, where any combination of numbers printed on the Card issued to you result in a match with the numbers drawn from the first machine in a Powerball draw while you are a Club Member, regardless of the Powerball number, we will credit your Club account with an amount equal to $1/25^{\text{th}}$ of the corresponding winnings applicable to an entry in such Powerball lottery with those numbers.

3.5 Where any combination of numbers printed on the Card issued to you, plus any other number, result in a match in a Saturday Night Lotto or Oz Lotto draw while you are a Club Member that is equivalent to a Division 1 prize, we will pay to you by cheque in Australian dollars an amount equal to $1/25^{\text{th}}$ of the corresponding winnings applicable to an entry in such lottery with those numbers.

3.6 Where any combination of numbers printed on the Card issued to you result in a match with the numbers drawn from the first machine in a Powerball draw while you are a Club Member that is equivalent to a Division 1 prize, regardless of the Powerball number, we will pay to you by cheque in Australian dollars an amount equal to $1/25^{\text{th}}$ of the corresponding winnings applicable to an entry in such Powerball lottery with those numbers.”

[17] Pursuant to clause 2, a Club account is set up for each member. In order to participate in the OzPower System, the member pays an initial fee of \$122, comprising a \$22.00 membership fee; \$50.00 to cover the first 4 weeks of participation in the system (calculated at \$12.50 per week) and \$50.00 as a reserve fund held by the Club on the member's account for the next 4 weeks of participation should there be insufficient funds to meet the next instalment. The sum of \$53 must be paid every 4 weeks (\$50 in advance for 4 weeks participation and a \$3 statement/account fee). Payment is mostly by way of credit card or a direct debit bank system. Cash and personal cheques are not accepted. Every 4 weeks the applicant administers the member's account and provides a statement, showing, *inter alia*, weekly payments made by the member for participating in the OzPower System and payments made into the account by the applicant in respect of “winnings”.

- [18] For each group of 25 members, a weekly amount of \$312.50 is paid. While the membership terms are silent as to what is to be done with each group's weekly payments of \$312.50, it is explained in the Agreed Facts. The Agreed Facts state that, out of the \$312.50, \$80.82 is allocated to the OzPower System and is provided to Mr Kuhne to purchase tickets in Oz Lotto, Gold Lotto and Powerball from Golden Casket. The \$80.82 covers the cost to purchase 40 games in Oz Lotto, Gold Lotto and 45 entries in Powerball, all of which are bought 10 weeks in advance thereby generating savings, which are passed onto the applicant and thus the members. With the funds thus provided by the applicant, Mr Kuhne purchases Golden Casket tickets in his name.
- [19] According to the Agreed Facts, members are made aware of how the member's \$12.50 weekly payment is allocated by the applicant; the applicant's website includes a pie chart that shows a percentage breakdown of the costs as being 26% for the product, 8% for administration and 66% for the Bonus Plan.
- [20] While the Agreed Facts state that Mr Kuhne purchases lottery tickets, clause 5 of the membership terms purports to exclude any agency relationship or any interest in the tickets so purchased. It provides:

“Lottery Tickets

- 5.1 We do not buy any lottery tickets in your name or on your behalf. By virtue of your membership of the Club, you do not acquire any interest in any lottery ticket or participate in any lottery.
- 5.2 We stand in a relationship to you of debtor and creditor only.
- 5.3 We do not draw any numbers or determine the amount of any prize.
- 5.4 We do not conduct a lottery and we do not have a license to conduct a lottery.”

- [21] The agreed facts reveal that, while the applicant does not make a profit from the OzPower System, it does make a profit from the Bonus Plan. In respect of the \$312.50 per week received for each group of 25 members, the sum of \$206.25 is allocated for distribution in accordance with the Bonus Plan, with the Club retaining any balance remaining. The Bonus Plan is described by the applicant in its submissions as “a multi level marketing structure similar to that used by Tupperware or Amway to promote their products”. The details of the Bonus Plan are set out in the Agreed Facts and accompanying documentation.⁹ Essentially, when an existing member tells a new member who is not a member of the Club about the OzPower System and that new person subsequently decides to participate in the system, the existing member's cost of participation in the OzPower System is reduced by \$2.50 per week. There are bonus payments and other incentives for new members attracted.
- [22] Exhibited to the Agreed Facts is the OzPower Product Book (“the Product Book”),¹⁰ which compares the OzPower System with the “usual way of playing Lotto”. It makes the claim of the OzPower System that “the odds just got better”. It also states that “OzPower is now in three lotteries” and that using the OzPower System

⁹ The terms of the Bonus Plan are set out in Exhibit B to the Agreed Statement of Facts.

¹⁰ See Exhibit G of the Agreed Facts.

covers draws in Oz Lotto, Saturday Night Lotto and Powerball. It lists the benefits of being a club member as: “increased chances of success, saving time and money, and not having to worry about entries in lotteries each week or having to check the lotto draws”, as the Club does “all the work”. The Product Book explains the way OzPower System works, by stating:

“You are given a set of five permanent numbers that are entered in three draws every week ... We guarantee one of the six numbers drawn in the OzLotto and Saturday Lotto draws as well as every PowerBall number from the 2nd barrel in the PowerBall Draw. The chances of members receiving money are significantly increased. So for only \$12.50 you get a chance to benefit from an equivalent of 125 games! We take no percentage of any amount received from the lottery commission.

...

How do we guarantee one of the 6 numbers for Ozlotto, Saturday Lotto and PowerBall? We combine your 5 numbers with the remaining 40 numbers in the barrel...”

[23] The Product Book contains a table setting out the amounts payable by the Lotto Commission should the numbers drawn in Oz Lotto and Gold Lotto match the 5 numbers on a member’s card. There is also a table for the same exercise in respect of Powerball. It also refers to the Club Account and to the Statements issued by the applicant every four weeks and explains that “any money that is payable by us to you is credited to your Club account and transferred into your nominated bank account or credit card account ... We do not take any percentage of our lottery wins.”

[24] Also exhibited to the Agreed Facts is the Members Bonus Plan Booklet (“the Bonus Plan Booklet”).¹¹ It makes the statement that “The odds just got better” and refers to the following statement of Mr Kuhne:

“Our mission: ‘to develop a system which helps people dramatically increase their chances of winning’... The Syndicate Club was pioneered with my own family and friends! People who just wanted something more, a little extra cash and may be a win in Lotto... you can simply play the OzPower System to ... increase your chances of winning.”

[25] The Bonus Plan Booklet asks, “What makes the Syndicate Club different?” and provides answers as follows:

- (a) “The Product – Readily accepted by everyone. Do you know anyone that wouldn’t like to win Lotto?”
- (b) “Good Value - Play Lotto three times each week for half the cost of purchasing Quickpics with dramatically increased chances of winning”.
- (c) “Proven System – 53,000 lotto wins in first 12 months, one 1st Division win of \$1.1 million and numerous 2nd and 3rd Division wins. No one can match that!”

¹¹ See Exhibit F of the Agreed Facts.

- (d) “Longevity – The Syndicate Club has real potential for longevity - How long has lotto been going? ‘The odds just got better’ with our unique OzPower System!’...”
- (e) “Minimal Attrition ...With the Syndicate Club our members stay with us ... and why wouldn’t they, when they can play Lotto three times a week for no direct cost to them?”
- (f) “How much? \$12.50 per week to play in the OzPower System which plays three Australian Lotteries each and every week. We lodge, check, collect and bank into your nominated account for you. No more missed entries. The Club does it all for you.”
- (g) “Look at our simple Bonus Plan. Find out how you can play for no cost each week”.

[26] The Bonus Plan Booklet states: “Play three Lotteries each week for just \$12.50” referring to “Oz Lotto, Powerball and Saturday Night Lotto” and states:

“What would you do if your syndicate won \$10 million? ... If you play in an OzPower System each week, you alone cover the cost of your entry... You still get all the chances of winning Lotto. What could be better? How about playing every week and receiving a residual income. ... However, when he mentioned lotto we knew the potential of a product almost everybody could identify with.”

[27] The Bonus Plan Booklet also contains the following statements:

- (a) “The best experience for us so far was attending the handing over of the large cheque to three of our downline for their share of a first division win”.
- (b) “Frequently asked questions. ... How are my winnings paid? All wins will be paid into your nominated account ... For large first and second division wins (depending on the dividends that night) you will be paid via a bank cheque ... Why is there a reserve of \$50? This ... will cover the cost for you to play that month. ... This ensures that you will not miss out on playing each week (imagine if your numbers came up!) ... Your statement: This is an example ... showing deductions for playing in the OzPower System, winnings paid to you...”
- (c) “... there has never been an easier way to play Lotto and when you link this together with the bonus plan like no other we have seen, you have instant success”.

[28] The Bonus Plan Booklet contains the following note: “Interpretation: Reference to the words “play” or “win” please see our terms and conditions”. The membership terms and conditions however contain no specified definition of “play” or “win”, although clause 3.5 refers to “winnings”.

DECLARATIONS SOUGHT IN PARAGRAPHS 1 – 3 OF THE ORIGINATING APPLICATION:

[29] The applicant seeks the following declarations concerning s 151 of the Act:

- Declaration 1: that a person who participated in the applicant's OzPower system did not "take part in an approved lottery" within the proper meaning of s 151(1)(a) of the Act;
- Declaration 2: that the applicant, by using the OzPower System, did not for gain or reward induce another to take part in an approved lottery as defined in the Act;
- Declaration 3: that the applicant, by using the OzPower System, did not for gain or reward offer to another an opportunity to take part in an approved lottery as defined in the Act.

- [30] Section 151 of the Act, as previously stated, prohibits a person (other than a lottery licensee or a person authorised under an agency agreement) for gain or reward from inducing another or from offering an opportunity to another to take part in an approved lottery.

Applicant's Submissions as to Declaration 1

- [31] The applicant contended that, in participating in the OzPower system, its members did not "take part in" an approved lottery, that is, in one of the three approved lotteries in question, for the purposes of s 151 of the Act.
- [32] The applicant submitted that the principles applicable to the interpretation of penal provisions require a narrow interpretation to be given to the words in question. Further, it was said, relying on s 14A(2) of the *Acts Interpretation Act* 1954 and cases such as *R v Tranby*¹² and *Beckwith v The Queen*,¹³ that if two possible interpretations are available, any ambiguity should be resolved in the applicant's favour, so that a narrow interpretation of the words "take part in" should be adopted.
- [33] It was submitted that the words "take part in" require a direct and active participation, such as a member buying tickets in the approved lottery. In this respect, the applicant referred to *Marshall v British Broadcasting Corporation*¹⁴ and *R v Commons; ex parte Attorney-General*¹⁵ and *Commissioner for Corporate Affairs v Bracht*.¹⁶
- [34] It was also submitted that generally the words "take part in" are not synonymous with "participate in", which it was said was a wider concept, importing a passive sharing, whereas, it was submitted, one may "take part in" only actively. The applicant submitted that it would have been possible for the legislature to prohibit a person from inducing another or offering an opportunity to another "in any way, directly or indirectly to take part in" an approved lottery and only a proscription of such wide scope might have encompassed the applicant's activities.
- [35] However, it was also submitted that the meaning of the words "take part in" in s 151 of the Act should be interpreted in light of the scheme of the Act and were informed by the concept of "participant" as defined in the Act. The applicant argued that

¹² (1992) 1 Qd R 432 at 439.

¹³ (1976) 135 CLR 569 at 576.

¹⁴ [1979] 1 WLR 1071 at 1073.

¹⁵ (1987) 1 Qd R 158.

¹⁶ [1989] VR 821 at 831.

ordinarily the word “participate” includes the meaning “one who takes part in.”¹⁷ It was thus submitted that regard should be had to the fact that the words “take part in” appear in the context of a statutory regime which defines “a participant” as “a person who purchases a ticket or otherwise participates in a lottery,” and which defines “ticket”, *inter alia*, as a document evidencing a *right* of participation. Thus, according to the applicant’s submissions, what the words “take part in” in s 151(1) envisage is the acquisition of a ticket in a lottery or an interest in that ticket; that is, that a person has a legal or equitable entitlement to a lottery ticket.

- [36] This result was said to follow from construing the words “take part in” in conformity with the Act as a whole and with the word “participant” which is used in a number of places. Section 129 for example refers to a participant’s “entitlement” to claim a prize in an approved lottery.¹⁸ It was said that the words “take part in” must not be read so that they would give a person with no legal or equitable interest in a ticket a statutory entitlement to a prize. Likewise, it was said that all employees of a licensee of an approved lottery “take part in” or “participate” in a factual way in the lottery by doing work to enable the lottery to be conducted. Yet the Act could not sensibly be construed so that such a person, who “as a matter of fact” was “involved” in an approved lottery, was regarded as “taking part in” it for the purposes of s 144, which prohibits “participation” in lotteries by employees.
- [37] The applicant submitted that an OzPower member had no legal entitlement to a lottery ticket purchased by Mr Kuhne, nor did any trust or beneficial interest in the ticket or the winnings from it arise in the member’s favour. Accordingly, there could be no participation by the member in an approved lottery. Furthermore, it was submitted that, even if s 151 did not require that the inducement or offer be one to acquire a legal entitlement to a lottery ticket, so that it was sufficient that there was merely an inducement or offer to take part in an approved lottery “as a matter of fact”, an OzPower member could not be said to take part in an approved lottery in fact, by virtue of the OzPower System.
- [38] Critical to the applicant’s submission is clause 5 of the membership terms and conditions. The applicant relied on that provision in submitting that the applicant does not in law purchase any tickets in an approved lottery on behalf of any member and that a member does not therefore hold a ticket in an approved lottery. It was said that the member has no entitlement to a lottery ticket purchased by Mr Kuhne, nor to its proceeds. Nor was there any legal obligation on the applicant to purchase any tickets in an approved lottery on behalf of a member. Further, members were informed that they did not participate in an approved lottery.
- [39] It was said that the fees paid by the member to the applicant were not held on any trust for the members and that the applicant was not contractually obliged to use the fees in any specified manner, for example to purchase lottery tickets. Furthermore, no lottery tickets were purchased by the applicant; all purchases were made by Mr Kuhne. It was also said that there was no correlation between any lottery tickets purchased by Mr Kuhne and payments made by a member to the applicant. This was said to be borne out, amongst other things, by the fact that tickets were purchased 10 weeks in a advance and a member could have cancelled membership

¹⁷ See the Oxford English Dictionary.

¹⁸ See also s 130 which deals with the payment of prizes to the holder of a winning ticket, ticket being defined as a “right” of participation.

with the applicant in the meantime. It was said that at best, the tickets that were purchased could be regarded as insurance taken out by the applicant against a payout. It was also contended that, while the applicant in fact provided money to Mr Kuhne, who purchased tickets in an approved lottery, the tickets were purchased in his own name and all winnings were paid to the applicant or to Mr Kuhne and not to the members.

Respondent's Submissions as to Declaration 1

- [40] The respondent submitted that on the proper construction of s 151 of the Act, a member could be said to “take part in” an approved lottery without the need to demonstrate any correlative enforceable legal or beneficial right or interest in a lottery ticket or winnings. It was argued that the existence of a legal or equitable right or interest was not determinative of the question of whether a member took part in an approved lottery. Taking into account the scheme of the Act as relevant to the question of its interpretation,¹⁹ and given that it was a protective one, it was said that a broad interpretation should be given to the words “take part in” in s 151, so as to include an indirect or passive taking part in. The respondent submitted alternatively that, if an enforceable right or interest in the lottery winnings was required in order that a member could be said to “take part in” an approved lottery, such a requirement was in any event satisfied here.
- [41] In support of these propositions, the respondent submitted that, while the applicant attempted to characterise the scheme as a contractual arrangement between the applicant and a participant, the scheme was one which required the member, the applicant and Mr Kuhne to be active participants in an arrangement, whereby the member paid money to the applicant who then passed money to Mr Kuhne, to purchase Lotto tickets and return any winnings from Lotto to the applicant. This money was passed on, without alteration or deduction, to the members of the syndicate. It was submitted that the contract was only part of the relationship amongst the entities and that regard had to be had to the totality of the arrangement to see exactly what “scheme” the member was taking part in. The respondent placed reliance on the Agreed Facts and in particular the following matters:
- (a) A percentage of each member’s weekly contribution is deliberately segregated to be passed from the applicant to Mr Kuhne to purchase Lotto entries, \$80.82 per week being the amount necessary to purchase lotto entries for each syndicate;
 - (b) The applicant purports to pass on savings made on Lotto entry purchases to members,²⁰ while at the same time asserting that the members have no interest in the entry;
 - (c) The money which may be won from those Lotto entries is rapidly transferred from Lotto Golden Casket to Mr Kuhne or the Syndicate Club and then to the member in proportion to their membership of a Syndicate (1/25th), with no deduction from those winnings.
- [42] It was thus submitted, the members were in effect advised through the above material that the money physically received by them would be their winnings from Lotto and that that was what occurred in fact.

¹⁹ *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 72 ALJR 841.

²⁰ See Agreed Facts para [45].

[43] The respondent further submitted that, in any event, the applicant created a scheme making the member in the scheme the holder of a beneficial interest in each lottery. It was contended that an analysis of participation in the scheme disclosed the following:

- (a) To participate in the OzPower system a participant does not have to take part in the bonus scheme.
- (b) The participant in OzPower will lose his or her money each week unless by chance the numbers which they have been allocated are the numbers drawn by Lotto. That is their only chance of winning.
- (c) The participants are guaranteed the sixth number as stated in the material provided to participants.²¹
- (d) They are advised that an amount equal to the cost of the lotto tickets will be deducted from their money and used for purchase of Lotto tickets.²²
- (e) The applicant takes no percentage of the winnings and pays the participant after receiving the winnings.
- (f) The amount of money set aside from a participant's weekly contribution is exactly what is required for the cost of the relevant entries in Lotto covering five numbers with the field on Powerball.
- (g) The same range of numbers are chosen to participate in Lotto, as Lotto uses 45.
- (h) The amount to be paid to the winning participants is exactly the same as the win from Lotto and is funded by the Lotto win.

[44] It was argued that a member had a beneficial interest in any lottery tickets purchased by the applicant. It was submitted that the express statement in the membership terms that the parties only stand in the relationship of debtor and creditor could not displace the relationship of trustee and beneficiary which normally follows when one person purchases a lottery ticket for the benefit of another.

[45] In addition, it was submitted that there was no reason why the fiduciary obligation of an agent purchasing a lottery entry should not apply to the Club or Mr Kuhne. It was said that the statement that the entries are purchased in the Club's name merely dealt with the legal title to the entries and not the beneficial title, given that the entries were purchased in Mr Kuhne's name with money originally from members. In this regard reliance was placed on *Van Rassel v Kroon*²³, where Dixon CJ dealt with the situation of a person purchasing a lottery ticket for another.

[46] The respondent relied on the proposition that members paid money to the applicant which they are advised in the Product Book and Bonus Plan Booklet would be used for the purpose of purchasing for them an entry in Lotto and for no other purpose, that that was done through the agency of Mr Kuhne, and that members were advised that winnings coinciding with the entry will be paid to the participant with no proportion deducted. It was submitted that a beneficial interest was created as a simple trust and through that beneficial interest the member did take part in an approved lottery, namely Lotto. The beneficial interest was created by virtue of the

²¹ See Ex F, page 12 of the Agreed Facts.

²² See Agreed Facts paras [46], [50].

²³ (1953) 87 CLR 298 at p 302. See also *Nassar v Barnes & Anor* (1954) 54 SR (NSW) 113 at 118.

participant's involvement from the time of contributions of money to the scheme and the participant by virtue of the agency of the Club and Mr Kuhne has an interest in each lottery entry and takes part in the lottery. The participants' involvement was more than a right to collect winnings and therefore the game playing commenced at or before the contribution to the scheme.

Declaration 1: Did persons who participated in the OzPower System “take part in an approved lottery” within the meaning of s 151(1)(a)(i) of the Act?

[47] As mentioned a breach of s 151 is attended with a penal sanction. The modern approach in construing penal statutes was stated by Gibbs J (as he then was) in *Beckwith v R*²⁴ as follows:

“The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences... The rule is perhaps one of last resort.”

[48] While consideration is to be given to the fact that s 151 is a penal provision, when construing it, it must also be borne in mind that the Act imposes a penalty in order to achieve a beneficial purpose. The stated beneficial purpose is that of ensuring that, on balance, the State and the community as a whole benefit from lotteries, and that that balance is achieved by allowing lotteries, subject to a system of “regulation and control designed to protect players and the community”.²⁵ In construing s 151, consideration must therefore also be given to the beneficial purpose of balance and protection through regulation, which the Act has as its object.

[49] A conflict thus arises between the need to interpret s 151 of the Act liberally so as to achieve its beneficial purpose and the principle of statutory interpretation which operates against extending the operation of a penal provision beyond its strict words.²⁶ In resolving that conflict, the dominant purpose of the Act must be ascertained.²⁷ In the present case, given the stated objectives of the Act, it can be seen that the dominant purpose is a beneficial one and the Act penalises certain conduct in order to promote the achievement of that beneficial purpose. Accordingly, the Act should be interpreted in the sense favourable to achieving the beneficial purpose.²⁸

[50] That beneficial purpose is best promoted by construing s 151 broadly so that a person (other than a licensee or authorized agent) is prohibited from inducing another or offering an opportunity to another to take part in an approved lottery,

²⁴ (1976) 135 CLR 569 at 576.

²⁵ See the objectives of the Act as set out in s 2A of the Act.

²⁶ See *Mathews v Foggitt Jones Ltd* (1925) 37 CLR 455.

²⁷ *Waugh v Kippen* (1986) 64 ALR 195; *Trade Practices Commission v Gillette Company (No2)* (1993) 118 ALR 280 at 289; *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623 at 640; Pearce & Geddes “*Statutory Interpretation*”, 5th ed. para 9.6.

²⁸ See *Glover v MacDougall* [1976] 2 NSWLR 359 at 365; *Trade Practices Commission v Gillette Company (No2)* (1993) 118 ALR 280 at 289; *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623 at 640.

whether directly or indirectly and whether actively or passively. The narrow interpretation urged by the applicant would improperly restrict the beneficial reach of the Act. It would, for example, preclude s 151 from applying to those who grafted schemes onto approved lotteries, in which schemes members of the public were induced to participate, on the basis that those members of the public could only be said to take part in an approved lottery in a passive and indirect sense. It cannot be the intention of the legislature, given the beneficial purpose of the Act, that the Act should be restricted in such a manner.²⁹

- [51] Nor do I accept the applicant's further proposition that the words "take part in" are to be construed by reference to the statutory definition of "participant", so as to require the purchase of a lottery ticket or the acquisition of some other legally enforceable right in the ticket.
- [52] The words "take part in" are commonly of wide import and in particular are wider than the restricted statutory meaning of "participate". Ordinarily the words "take part in" are of wide enough import to encompass a direct and indirect taking part in. While the word "participant" may, as submitted by the applicant, have the meaning of "one who takes part in", the words "take part in" do not ordinarily have the restricted meaning which the word "participate" has by virtue of the statutory definition of "participant". Importantly, while the Act defines "participant" primarily in terms of a person who purchases a ticket,³⁰ which in turn through the statutory definition of "ticket" incorporates the notion of a document evidencing the right of participation,³¹ the word "participate" is not the term used in s 151(1) of the Act. The words used in s 151(1) are "take part in". This is to be contrasted with s 6(4) of the Act, which does use the term "participate" and which prohibits a person from participating in a lottery or a gaming scheme in certain cases.
- [53] It is significant that elsewhere in Division 5 of Part 7 of the Act, the same Division in which s 151(1) appears, the word "participate" rather than the words "take part in" have been selected; see for example, s 144 and s 145, which prohibit participation in lotteries by employees and officials in certain cases. In the same Division there are also references to "participation" and "participant". Thus s 149 prohibits "participation by minors" and contemplates "participation" as "accepting an entry form, or money or other consideration for a lottery ticket, for a lottery" and s 152 prohibits the publication of the identity of a "participant" in a lottery in certain cases. See also s 241 which speaks of a selling fee for processing the entry form of a "participant in a lottery".³²
- [54] The specific use of the terms "participate", "participant" and "participation" in sections such as s 144, s 145, s 149, s 152 and s 241 are thus to be contrasted with the use of the words "take part in", which are only found in s 151 of the Act. The

²⁹ In this regard, decisions such as *Marshall v British Broadcasting Corporation* [1979] 1 WLR 1071; *R v Commons; ex parte Attorney-General* (1987) 1 Qd R 158 and *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 at 831, which were relied upon by the applicant in urging a narrow interpretation are not of assistance. In adopting a narrow interpretation of the relevant words of the legislation, the subject of those cases, the objectives of and the mischief addressed by the quite different legislation there in issue was considered of significance.

³⁰ Lotteries Act, sch 3.

³¹ Lotteries Act, sch 3.

³² Lotteries Act, Sch 3 defines "entry form" as the application form for tickets in a lottery or gaming scheme for use by "prospective participants".

specific use of the words “take part in” in s 151(1), as opposed to the word “participate”, which together with its derivations are used elsewhere in the Act, must in those circumstances be seen as deliberate and as precluding an approach to construction which seeks to restrict the meaning of the words “take part in” by reference to the statutory concept of a “participant” or notions of a right of participation as understood by the statutory term “ticket”. To read down the words “take part in” in the manner proposed by the applicant is inconsistent with the specific use of the distinct terminology in the Act and in Division 5 of Part 7 in particular. Indeed, the fact that the word “participate” is not selected for use in s 151 of the Act points to s 151 being concerned not only with prohibiting a person (other than a lottery licensee or authorized agent) from inducing another or offering an opportunity to another to be a “participant” in a lottery, by for example purchasing a ticket, but also with prohibiting a person from inducing or offering an opportunity to another to take part in a more indirect or passive manner.

- [55] Therefore, there is nothing in the scheme of the Act to suggest that a person may only “take part in” an approved lottery for the purposes of s 151 of the Act, where the person has the legal rights of a “participant” as that term is statutorily understood; that is, a person who purchases a ticket or otherwise has an interest in the ticket. Nor is there anything in the scheme of the Act which suggests that the words “take part in” should not be given a broad interpretation which encompasses an indirect or passive taking part in.
- [56] For the purpose of s 151(1), it is therefore sufficient that the applicant induces another or offers another an opportunity to “take part in” an approved lottery as a matter of fact, albeit in an indirect or passive way. It matters not that the inducement or offer is not also to “participate”, that is to purchase a ticket in a lottery and thereby obtain a legal entitlement to the ticket or winnings.
- [57] Such a construction of s 151 of the Act, to encompass an inducement or offer to take part in an approved lottery as a matter of fact, irrespective of a legal entitlement to a lottery ticket, does not lead to the consequences contended for by the applicant. For example, such an interpretation would not expose employees of a lottery to prosecution under s 144 simply by virtue of their carrying out their duties, because what that section prohibits is not a taking part in, but a “participation” in the lottery in its restricted statutory sense. Nor does a broad interpretation of s 151 have the consequence, as argued by the applicant, that every OzPower member would, by virtue of “taking part in” an approved lottery, be regarded as a “participant” in such a lottery and thus as having rights of “participants” under the Act, since the scheme of the Act is specifically to segregate the concepts of “taking part in” and of “participating in”.
- [58] The question then remains – does an OzPower member take part in an approved lottery as a matter of fact? In the present case, the numbers drawn in an approved lottery act as the trigger that may give rise to a contractual entitlement to payment, with the amount of the lottery win defining the quantum of the contractual payment by the applicant. Were there no other nexus, it may well be correct to say that there was no act of “taking part in” an approved lottery by a member. However, the Agreed Facts and the two documents referred to therein, namely the Product Book and the Bonus Booklet, indicate a greater nexus.

[59] While the membership terms and conditions are silent as to how the members' weekly payments are used and as to the source of the payments made to members upon a match with a Lotto draw, the Agreed Facts and the two documents referred to therein provide the detail. They reveal the following significant matters:

- (a) Members are informed that the weekly payments they make are used to purchase tickets in approved lotteries. Indeed the documents mentioned make many comments to the effect that the OzPower System "plays" Lotto. In the Agreed Facts the applicant acknowledges that the members' payments are in fact used to purchase tickets, through Mr Kuhne, in approved lotteries.
- (b) Winnings made from tickets purchased through Mr Kuhne are passed on to the members. Moreover, the applicant undertakes to credit members with that part of the winnings that represents the amount the member would have made if the member had played the lottery, without any deduction for commissions.³³ Indeed, the Bonus Plan Booklet contains a specimen statement which illustrates how the statement records that the applicant's winnings are so passed on to members. The specimen statement thus contains an entry which states "syndicate win Oz Lotto draw 327 matched 4 and 1".
- (c) A member's contractual right to payment is in fact funded through the purchase of tickets through Mr Kuhne. Members are made aware of this mechanism, since they are given to understand that part of their weekly payments go to purchase Lotto tickets and they are advised in the Booklets that the winnings from Lotto will be passed on to them. Even if it is the case that the payments made to members are not "their" winnings from Lotto, they are directly paid "the" winnings from Lotto. Indeed, the applicant seeks to ensure that there is a transparent relationship between the winnings received by it from the tickets it purchases and the payments credited to the member's account in the statements it issues. It undertakes that the members' portion of the winnings are separately accounted for in the member's account.

[60] The above circumstances demonstrate that a member of the applicant by taking part in the OzPower System can be said as a matter of fact to "take part in" an approved lottery in the ordinary meaning of those words. That is sufficient for the meaning of those words in s 151(1) of the Act. It is irrelevant that the member is unable to assert any legal entitlement in respect of a lottery ticket purchased through Mr Kuhne or the winnings from such ticket. It follows that it is not necessary to consider the further issue as to what legal or equitable entitlements, if any, arise in favour of a member as a result of a member taking part in the OzPower System.

[61] In the circumstances, the applicant is not entitled to the declaration it seeks in paragraph 1 of the originating application.

Declaration 2 & 3: Did the applicant for gain or reward induce another or offer to another an opportunity to take part in an approved lottery contrary to s 151(1)(a)(ii) of the Act?

³³ See the Product Book, exhibit "G" p 5, which states: "We do not take any percentage of our lottery wins".

- [62] The applicant's documentation and activities can properly be characterised, given the findings in respect of declaration 1, as amounting to an inducement to others and as offering to others an opportunity, to take part in an approved lottery.
- [63] Furthermore, that inducement or offer of an opportunity can be said to be for the applicant's "gain or reward". The concept of "gain" includes an "increase in resources or business advantage resulting from business transactions or dealings".³⁴ The concept of "gain" is not restricted to pecuniary or commercial profits; it includes other considerations of value obtained.³⁵ In the present case the applicant makes a profit from the Bonus Plan, which is funded through the payments made by members using the applicant's OzPower System.
- [64] In the circumstances it is not appropriate to make the declarations sought by the applicant that it did not for gain or reward induce another or offer to another an opportunity to take part in an approved lottery contrary to s 151(1)(a)(ii) of the Act.

DECLARATIONS SOUGHT IN PARAGRAPHS 4 – 6 OF THE ORIGINATING APPLICATION:

- [65] The applicant seeks the following declarations concerning s 6(2) of the Act:
- Declaration 4: that the OzPower System is not a "gaming scheme" within the proper meaning of s 6(2) of the Act;
- Declaration 5: that the OzPower System would not be "reasonably confused with a lottery" within the proper meaning of s 6(2)(a) of the Act;
- Declaration 6: that the applicant did not, by use of the OzPower System, conduct a gaming scheme, that is not a lottery, when the gaming scheme may reasonably be confused with a lottery, contrary to s 6(2)(a) of the Act.

Applicant's Submissions as to Declaration 4

- [66] As previously mentioned, the Act relevantly defines "gaming scheme" as "a game, scheme or arrangement in which the winners of prizes are decided . . . wholly or partly by chance". The applicant's submission that it did not conduct a "gaming scheme" was based on a number of contentions. Firstly, it was said that members did not receive a prize. Rather, they were contractually entitled to receive a sum of money equivalent to 1/25th of the payment made to persons who held prize winning tickets in an approved lottery. Secondly, it was said that the applicant did not itself draw any winning numbers or conduct a draw. Thirdly, it was said that the member's entitlement to receive a payment did not arise by virtue of any activity in which they participated in which there was an element of fate or guessing. Rather, the activity in which they were involved was pre-determined through the contractual arrangements between the member and the applicant. The member's entitlement arose by contract and not by chance; that is, as a result of the contractual obligation on the applicant when the member became entitled to payment because there was a match between the numbers on the member's card and the numbers drawn in a lottery.

³⁴ *Re Riverton Sheep Dip* (1943) SASR 344.

³⁵ *Re Commonwealth Homes & Investment Co Ltd* [1943] SASR 211.

[67] In making the latter submission, the applicant relied on the decisions such as *United States Postal Service v Amada*,³⁶ in which it was said that the common law definition of lottery required proof of a distribution of prizes, by chance, for consideration. That case concerned a company which ran a lottery ticket pooling service inviting the public to become members in syndicates of 25 or 50 players, for whom the company in turn purchased tickets in State lotteries. In the event that one of the tickets purchased was a winning ticket, the prize money was divided among the syndicate. It was held that, in distributing the prize money to the syndicate members, the company could not be said to “distribute a prize by chance”, because the distribution by the company did not occur by chance. Once the lottery in which the ticket was drawn won, which was an event which occurred by chance, the company was obliged to distribute the lottery money according to a pre-determined formula in which each member received either a twenty-fifth or a fiftieth share of the proceeds.

Respondent’s Submissions as to Declaration 4

[68] It was contended by the respondent that the applicant and its members participate in a scheme in which the winners of prizes are decided wholly by chance; that is, by adopting the (random) system which Lotto chooses to select winners. In submitting that the applicant does conduct a “gaming scheme”, the respondent highlighted the following features of the applicant’s scheme:

- (a) Any participant taking part in the OzPower System will lose their money unless five of their numbers match those drawn in Lotto. The last number required is stated to be guaranteed in documents published by the applicant.
- (b) The scheme uses the Lotto system of determining the numbers.
- (c) The OzPower scheme contributes an amount of money which is equal to that determined by Lotto for entries.
- (d) The range of numbers available within which the five numbers may be selected is exactly the same as Lotto and the ‘win’ if any, is drawn by chance insofar as it adopts the numbers drawn by chance for Lotto.
- (e) Any money which is distributed as a prize is not paid to all entrants or on all occasions, but only if and when the winning numbers drawn by Lotto are the same as numbers held by the participant.

[69] The respondent argued that if the applicant’s attempt to sever the nexus between Lotto and the winnings by means of the contract was successful, then on the applicant’s case, the OzPower System was not simply a distribution of the Lotto money and the American authorities referred to by the applicant had no application since they were concerned with a distribution of money after it was won by entering a State lottery. Alternatively, it was said that, although the OzPower member’s entitlement may be contractual, there was still the utilisation of the chance component of the Lotto draw, such that the scheme mirrored Lotto. Thus, it was submitted that the OzPower System is a scheme in which the winners of prizes are decided by chance, in the same way as Lotto was, as the system adopted the mechanism of chance used by Lotto to determine who received the prize or benefit.

³⁶ US Ninth Circuit Court of Appeals No 9815589.

Declaration 4: Is the OzPower System a “gaming scheme” within the proper meaning of s 6(2) of the Act?

- [70] The American authorities referred to by the applicant are not of assistance in determining whether the definition of “gaming scheme” in s 4 of the Act has been met. The scheme under consideration in this case differs from that in those cases. Nor are the legislative provisions in issue the same.
- [71] I do not accept the proposition that what the OzPower member receives cannot be said to be a prize, simply because there is a contractual agreement to pay the amount in certain eventualities. The fact that the basis of the entitlement is agreed to in advance by contract does not detract from the element of chance involved in whether the contractual criteria for payment are satisfied.
- [72] Thus, while it can be said that once the contractual criteria for payment are satisfied, there is no element of chance as to whether a member is entitled to payment, the fact remains that the contractual criteria for payment concern the occurrence of an unpredictable event. That is, the contractual event triggering the entitlement to payment is a chance event. That event, in the case of Gold Lotto and Oz Lotto is whether “any combination of numbers printed on the Card issued to [the member], plus any other number, result in a match” with the numbers drawn in Gold Lotto and Oz Lotto. Although the applicant has no choice, if that event occurs, as to whether it will make a payment, the member’s entitlement to payment is nevertheless triggered by a chance event and as such the entitlement to payment can be said to arise at the least “partly by chance”. That is sufficient for the purposes of determining whether the OzPower System is a “gaming scheme” as defined by s 4 of the Act.
- [73] The OzPower System, being a scheme in which the winners of prizes are decided partly by chance, is a “gaming scheme” within s 4 of the Act. That conclusion is underscored by the many references to games of chance by reference to “odds getting better”, increased chances of winning, playing, the number of Lotto wins and other such statements in the applicant’s documentation referred to in the Agreed Facts. Nor does the fact that the draw is not made by the applicant, but by another, make the OzPower System any less a scheme in which the winners of prizes are decided by chance.
- [74] It follows that the applicant is not entitled to the declaration it seeks in paragraph 4 of the originating application.

Applicant’s Submissions as to Declaration 5

- [75] The applicant contended that the differences between the OzPower System and the three approved lotteries in question are such that the applicant’s scheme could not reasonably be confused with a lottery. It was said that a member received documentation which allowed no room for confusion and that there was no evidence of any prior complaint of confusion on the part of anyone.
- [76] In its submissions the applicant pointed to a number of differences between the OzPower System and the lotteries in question, such that there could not reasonably be any confusion between them. These included the following:

- (a) Members are not sold and do not acquire tickets in a lottery as part of the arrangement.
- (b) Members are approached separately to become members for a 12 month period and members must commit to a minimum period of a month.
- (c) Membership is not acquired through a lottery casket agency or any other vendor involved in the business of selling lottery tickets but through a contract with the applicant.
- (d) The member has no choice as to the numbers allocated and those numbers remain with the member during the member's membership.
- (e) Payment in the OzPower System is by credit card, direct debit or telegraphic transfer, cash payment and personal cheques being unacceptable.
- (f) The applicant guarantees the sixth number in a draw.
- (g) Payment to the member is not immediate but is made when the member's account is credited every 4 weeks.
- (h) Payments to a member do not depend on the number of other members who have participated in the OzPower System or the amount of money committed by them, whereas with an approved lottery the winnings depend on the amount of money wagered by persons in the lottery that week.
- (i) A member obtains the benefit of a Bonus Plan.

Respondent's Submissions as to Declaration 5

[77] Relying on the meaning assigned to "confused" by the Oxford English Dictionary, namely "made indistinct, mixed up in the mind", the respondent submitted that the OzPower System may be reasonably confused with an approved lottery. It was said that the OzPower System offends against s 6(2), due to the confusion arising because the applicant, through its actions, has adopted the Lotto scheme and overlaid it with their own scheme, and has used the same numbers drawn on the same occasion and the same prize amount.

[78] Therefore it is said that it may be reasonably confused with Lotto because it is an identical method of deciding the prize conducted at the same time as Lotto. The respondent refers to the description of the activity in the documents issued by the applicant,³⁷ which refers to winning Lotto, and other references to gaming such as "odds getting better" which clearly compare it to Lotto.

Declaration 5: Would the OzPower System be reasonably confused with a lottery within the meaning of s 6(2)(a) of the Act?

[79] It is clear from the matters highlighted by the applicant that there are some critical differences between the OzPower System and Oz Lotto, Gold Lotto and Powerball. The differences are of such a nature that it cannot be said that the OzPower System could reasonably be confused with those lotteries. Furthermore, the OzPower System is portrayed as one which itself plays in the lotteries and is therefore presented as being distinct from those lotteries.

³⁷ See ex F of the Agreed Facts.

- [80] Accordingly, it is appropriate to make a declaration the OzPower System would not be reasonably confused with a lottery within the meaning of s 6(2)(a) of the Act.

Declaration 6: Did the applicant, by use of the OzPower System, conduct a gaming scheme that is not a lottery when the gaming scheme may reasonably be confused with a lottery, contrary to s 6(2)(a) of the Act?

- [81] Given the determination in respect of declarations 4 and 5, it follows that the applicant is entitled to a declaration that it did not, by use of the OzPower System, conduct a gaming scheme, that is not a lottery, when the gaming scheme may reasonably be confused with a lottery, contrary to s 6(2)(a) of the Act.

DECLARATIONS SOUGHT IN PARAGRAPHS 7 TO 9 OF THE ORIGINATING APPLICATION:

- [82] The applicant seeks the following declarations concerning s 6(2)(b) of the Act:

Declaration 7: that the OzPower System was not similar to a lottery within the proper meaning of s 6(2)(b) of the Act;

Declaration 8: that the OzPower System could not reasonably be taken to be “in direct competition with a lottery” within the proper meaning of s 6(2)(b) of the Act;

Declaration 9: that the applicant did not, by use of the OzPower System, the subject of this application, conduct a gaming scheme similar to a lottery and that may reasonably be taken to be in direct competition with a lottery contrary to s 6(2)(b) of the Act.

The Issue of Similarity

- [83] The fact that there are differences between the OzPower System and the lotteries in question such that the OzPower System could not be reasonably confused with those lotteries does not necessarily result in the conclusion that the OzPower System is not similar to the lotteries. “Similar” includes as a meaning “having material resemblance” or “resemblance to or shaped alike”.³⁸ The applicant points to the differences referred to above in contending that the OzPower System cannot be said to be “similar to a lottery”. The respondent, however, submitted that there was a clear similarity between the scheme and Lotto, in that in important aspects of the gaming scheme (as opposed to the business arrangements of the Syndicate Club) there was an identical step taken by the applicant to the usual way of entering Lotto; for example, in relation to the amount of money for purchasing entries, the range of numbers within which numbers are selected, the amount of the prize, the timing of the draw, and the payment of the prize after receipt from Lotto.

- [84] The applicant also argued that, on the basis of the Agreed Facts, there was insufficient evidence to determine whether the applicant’s scheme was in direct competition with a lottery for the purposes of declaration 8. Nevertheless, it was submitted that declarations 7 and 9 could be determined in its favour, because the issue of whether there was a “similarity” between the scheme and a lottery, should be determined in its favour. I do not, however, consider that the issues can be determined in so segregated a manner.

³⁸ See Oxford English Dictionary.

- [85] While there are some similarities between the OzPower System and the lotteries in question, that issue cannot, for the purposes of s 6(2)(a) of the Act, be looked at in the isolated manner proposed by the applicant. The question for the purposes of s 6(2)(a) of the Act is whether “because of the scheme’s similarity to a lottery, it may reasonably be taken to be in direct competition with a lottery.” The critical issue therefore is not simply whether there is a similarity between the scheme and a lottery, nor simply whether the scheme is in direct competition with a lottery, but rather whether “because” of the similarity, the scheme is in direct competition. The question of competition is to be determined in the light of the similarities of the scheme to the lotteries in question.

The Issue of Direct Competition

- [86] The applicant submitted that in order to determine whether the applicant’s scheme is in direct competition with a lottery, it is necessary to define the relevant market so as to ascertain the extent of competition in the market and to look at the conduct of the Syndicate Club.³⁹ The applicant pointed to the lack of evidence as to the relevant market or the extent of competition in the market. Further, it was said by the applicant that the words “in direct competition with a lottery” suggest that the market in which competition is proscribed is limited to approved lotteries, which in this case are Oz Lotto, Gold Lotto and Powerball. Moreover, since the applicant’s activities are tied up with a bonus scheme of multi-level marketing, it was submitted that the Syndicate Club business was an entirely different business in an entirely different market to that conducted by an approved lottery.
- [87] In any event, it was argued that there was no evidence of competition between the activities of the applicant and an approved lottery, in that the applicant buys tickets from a lottery agent, the only entity authorised to sell them. The applicant does not on-sell tickets in the lottery. The applicant argued that, given that it uses the tickets as a form of insurance or hedge to protect itself against a payout under the contract with its members, the more members who join in the OzPower system the more tickets the applicant must buy in order to insure against a payout. This has the effect, according to the applicant, of increasing the applicant’s participation in an approved lottery. Accordingly, it is said that the Agreed Facts do not, in any event, support the conclusion that the applicant is in direct competition with a lottery.
- [88] The respondent, on the other hand, submitted that statements of the applicant, such as the statement that the “odds just got better” and references to “winning Lotto”,⁴⁰ show that the applicant is attempting to attract those persons interested in lotteries such as Lotto and attempting to entice them to spend money on the OzPower System, rather than in an approved lottery. It was argued that the fact that Mr Kuhne might take some of the money placed in the Syndicate Club and “insure” himself by covering those same numbers with Lotto is irrelevant to the question of whether the scheme carried out by the applicant is in direct competition with Lotto. It was contended that the OzPower System offered to the public promised better odds to win the same amount at the same time and in the same locality as Lotto and that those people who played with the applicant were diverted to the OzPower

³⁹ See *News Ltd v Australian Rugby Football League Ltd & Ors* (1996) 58 FCR 447; *Qld Wire Industries Pty Ltd v Broken Hill Pty Co Ltd & Anor* (1989) 167 CLR 177, and *Re Qld Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at 188.

⁴⁰ See for example, ex F of the Agreed Facts.

System by the existence of promises such as “the odds just got better”. (I note that there is no evidence as to whether those who participate in the OzPower System do so because of the claims that their chances of winning are enhanced or because they are attracted by the Bonus Plan.)

- [89] It was also submitted that, while the applicant has sought to characterise the arrangement by terms more suitable to notions of commercial competition, the legislation was directed to protection of the public and regulation of the industry. Thus, it was said that the characterisation of the concepts “gaming scheme” and “lottery” contemplated by the legislation required a broad and realistic view of the scheme, not merely a narrow view of the legal relationship amongst the parties.
- [90] Given that the question arising under s 6(2)(a) of the Act cannot meaningfully be resolved by a consideration of the question of similarity in isolation of the issue of direct competition and the differences between the parties as to the appropriateness of the evidence concerning the issue of competition, it is not appropriate to make a finding in respect of the declarations sought in paragraphs 7 to 9. .

Orders

- [91] In the circumstances it is only appropriate to make two of the declarations sought by the applicant, that is:
1. that the OzPower System would not be reasonably confused with a lottery within the meaning of s 6(2)(a) of the Act.
 2. that the applicant did not, by use of the OzPower System, conduct a gaming scheme, that is not a lottery, when the gaming scheme may reasonably be confused with a lottery, contrary to s 6(2)(a) of the Act.
- [92] I shall hear submissions as to costs.