SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd* [2018] QCA 202
PARTIES:	**COMMISSIONER FOR LIQUOR AND GAMING** (appellant) **v** **FARQUHAR CORPORATION PTY LTD AS TRUSTEE FOR THE FARQUHAR TRUST (TRADING AS CAXTON HOTEL)** ACN 078 026 418 (respondent)
FILE NO/S:	Appeal No 7880 of 2018 QCATA No 194 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – Unreported, 10 July 2018 (Member King-Scott)
DELIVERED ON:	31 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2018
JUDGES:	Gotterson JA and Boddice and Jackson JJ
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondent's costs of the appeal.**
CATCHWORDS:	GAMING AND LIQUOR – ADMINISTRATION – LIQUOR LICENSING – LICENSING TRIBUNALS GENERALLY – REVIEWS, APPEALS AND CASES STATED – GENERALLY – where appellant refused application under s 111 *Liquor Act* 1992 (Qld) to alter ID scanning commencement time for Caxton Hotel on three dates when events held at nearby Suncorp Stadium – where QCAT set aside appellant's decision and altered ID scanning commencement time – where appellant submits QCAT erred in finding that s 142ZZB conflicts with Part 6AA – whether QCAT did so find – where appellant submits QCAT erred in failing to expressly refer to s 121 which sets out mandatory considerations – whether express reference to s 121 required – where appellant submits QCAT erred in applying "balancing exercise" drawn from applications for exemptions of areas from ID scanning to application for alteration of times for ID scanning – whether such applications are distinct – where appellant submits QCAT erred in failing to give

priority or primacy to s 3(a) among the purposes of the Act – whether QCAT misdirected in law as to the weight to be given to s 3(a) – where appellant submits QCAT erred in failing to expressly consider appellant's statement of reasons – whether required to consider appellant's statement of reasons

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – DISTINCTION BETWEEN QUESTION OF LAW AND QUESTION OF FACT – where appeal from decision of QCAT under s 35(3) *Liquor Act* 1992 (Qld) limited to questions of law – where appellant submits integrity of State-wide ID scanning system undermined by decision to delay commencement of ID scanning on two nights at one licensed premises – where appellant submits QCAT erred in finding that rivalries between State of Origin spectators cause heightened tensions – where appellant submits QCAT erred in finding potential for aggression and violence between queue at Caxton Hotel and spectators streaming up Caxton Street – whether questions of law

Acts Interpretation Act 1954 (Qld), s 27B
Liquor Act 1992 (Qld), s 3, s 3A, s 111, s 142ZZB, s 173EH, s 173NA

Frugtniet v Australian Securities and Investments Commission (2017) 255 FCR 96; [2017] FCAFC 162, considered
Haritos v Federal Commissioner of Taxation (2015) 233 FCR 315; [2015] FCAFC 92, considered

COUNSEL: K M Hillard for the appellant
J M Horton QC, with S Richardson, for the respondent

SOLICITORS: Crown Law for the appellant
No appearance for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Jackson J and with the reasons given by his Honour.

[2] **BODDICE J:** I agree with Jackson J.

[3] **JACKSON J:** This is an appeal from a decision of QCAT dated 10 July 2018, setting aside a decision of the appellant made on 8 June 2018 to adjust the respondent's regulated "ID scanning" times under the *Liquor Act* 1992 (Qld) ("**the Act**").

[4] The appellant's decision of 8 June 2018 refused an application by the respondent to alter the regulated hours that ID scanning must commence at the respondent's (licensed) regulated premises known as the Caxton Hotel on three specific dates when events are being held at the nearby Suncorp Stadium.

[5] QCAT set aside the appellant's decision and altered the ID scanning commencement time for 11 July 2018 and 8 September 2018 to 11.30 pm from 10.00 pm.

[6] The appellant's decision of 8 June 2018 was made under s 111 of the Act under which a licensee may apply to vary a licence by amending or revoking a condition of the licence.

[7] It is not in dispute that in considering an application under s 111, the appellant must have regard to matters specified in s 121 of the Act that provides, relevantly to the circumstances of this case:

> "(1) In deciding whether to grant the application, the commissioner must have regard to—
>
> …
>
> (f) the impact on the amenity of the community concerned; and
>
> …"

[8] The amenity of the community referred to in s 121(1)(f) is defined in s 4 of the Act to mean the atmosphere, ambience, character and pleasantness of the community and the health and safety of persons who live in, work in or visit the community and the comfort or enjoyment they derive from the community.

[9] As well, ss 128A, 128B and 128C set out discretionary matters concerning amenity considerations to which the appellant may have regard in making a decision under s 111.

[10] The scheme for ID scanning is provided for by Part 6AA of the Act. That part sets out obligations, mandatory requirements, regulated hours for scanning and the premises to which the scheme applies. In particular, s 173EH provides, in part:

> "(1) The licensee for regulated premises must ensure that, during the regulated hours for the premises, no person is allowed to enter the premises as a patron unless—
>
> (a) the person produces a photo ID; and
>
> (b) a staff member of the licensed premises scans the photo ID using an approved ID scanner linked to an approved ID scanning system; and
>
> (c) the scan of the photo ID indicates the person is not subject to a banning order for the premises.
>
> Maximum penalty—10 penalty units.
>
> …
>
> (9) In this section—
>
> ***enter*****,** premises, includes re-enter the premises.
>
> …
>
> ***regulated hours***, for regulated premises, means—

(a) if a condition of the licence for the premises states a period that is the premises' regulated hours for this section—that period; or

(b) otherwise—the period during which the licensed premises are open for business between 10p.m. on a day and 5a.m. on the following day (whether under the authority of a licence, extended hours permit or extended trading hours approval)."

[11] Part 6AB provides for safe night precincts in which ID scanning obligations may be applied by the imposition of a condition of the licence for licensed premises that they are "regulated premises", as provided for in Division 2 of Part 6AA. Part 6AB contains an object or purposes section in s 173NA that provides:

"**173NA Purposes of pt 6AB**

(1) The purposes of this part are to, in an area—

(a) minimise harm, and the potential for harm, from the abuse and misuse of alcohol and drugs, and associated violence; and

(b) minimise alcohol and drug-related disturbances, or public disorder.

(2) To achieve its purposes, this part provides for—

(a) areas to be prescribed as safe night precincts; and

(b) local boards and consultative committees to be established for safe night precincts to enable licensees, the State and local governments, the police service and community organisations to collaborate to achieve the purposes."

[12] Further, the main purposes of the Act are set out in s 3 of the Act that provides:

"**3 Main purposes of Act**

The main purposes of this Act are—

(a) to regulate the liquor industry, and areas in the vicinity of licensed premises, in a way compatible with—

(i) minimising harm, and the potential for harm, from alcohol abuse and misuse and associated violence; and

Examples of harm—

- adverse effects on a person's health
- personal injury
- property damage

(ii) minimising adverse effects on the health or safety of members of the public; and

(iii) minimising adverse effects on the amenity of the community; and

(b) to facilitate and regulate the optimum development of the tourist, liquor and hospitality industries of the State having regard to the welfare, needs and interests of the community and the economic implications of change; and

(c) to provide for the jurisdiction of the tribunal to hear and decide reviews of certain decisions under this Act; and

(d) to provide for a flexible, practical system for regulation of the liquor industry of the State with minimal formality, technicality or intervention consistent with the proper and efficient administration of this Act; and

(e) to regulate the sale and supply of liquor in particular areas to minimise harm caused by alcohol abuse and misuse and associated violence; and

(f) to regulate the provision of adult entertainment; and

(g) to provide revenue for the State to enable the attainment of this Act's main purposes and for other purposes of government."

[13] QCAT's power to review a decision of the appellant made under s 111 is conferred by s 21(1)(d) of the Act, by which the tribunal may review a decision of the appellant in relation to the specification of conditions in a licence or permit. By s 21(2), in the exercise of its jurisdiction, QCAT has the powers and discretions of the appellant in respect of the matter under review and the powers otherwise conferred on it by the Act.

[14] It is not in dispute that QCAT's decision dated 10 July 2018 was made in the exercise of a power of review in the nature of a hearing on the basis that QCAT must decide the review by way of a reconsideration of the evidence before the appellant when the decision was made, and in accordance with the same law that applied to the making of the original decision: see s 33 of the Act. It should be noted, however, that QCAT had power to grant either party to the proceeding for review leave to present new evidence if certain conditions were satisfied: see s 34(1).

[15] The appeal to this court is one that a party to the proceeding for the decision of QCAT may bring, "but only if the appeal is on a question of law": see s 35(3) of the Act.

[16] It follows that this appeal can only be maintained by the appellant on a question of law arising out of QCAT's decision dated 10 July 2018.[1]

[17] In the present case, the appellant did not confine itself to grounds that would constitute an appeal on a question of law, as will be discussed. In *Haritos v Commissioner of*

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[1] See *Powell v Queensland University of Technology* [2017] QCA 200, [45]; *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320, 331-332 [18]-[20]; *Waterford v Commonwealth* (1987) 163 CLR 54, 77; *Westport Insurance Corporation v Gordion Runoff Ltd* (2011) 244 CLR 239, 263 [27].

Taxation,[2] in a cognate context, a five member bench of the Full Court of the Federal Court made the following useful observations:

> "(1) The subject matter of the Court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.
>
> (2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.
>
> (3) The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.
>
> (4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.
>
> (5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.
>
> (6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.
>
> (7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.
>
> (8) The expression 'may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal' in s 44 should not be read as if the words 'pure' or 'only' qualified 'question of law'. Not all so-called 'mixed questions of fact and law' stand outside an appeal on a question of law.
>
> …"

[18] Another useful statement appears in *Frugtniet v Australian Securities and Investments Commission*,[3] as follows:

> "In *Repatriation Commission v Hill* … the Full Court comprising Black CJ, Drummond and Ryan JJ said:
>
> > '[A] decision cannot be the subject of an appeal under s 44(1) of the Administrative Appeals Tribunal Act 1975 ("AAT Act"), unless, in making it, the Tribunal has acted otherwise than in accordance with the law. If a tribunal falls into an error of law "which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and

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2 (2015) 233 FCR 315, 341-342 [62].

3 (2017) 255 FCR 96.

> the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers"... An error of law of this kind may support an appeal under s 44 of the AAT Act on a question of law...'
>
> As explained by the Full Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*…, whose comments were subsequently adopted by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*… the Court will not be concerned with looseness in the language of a tribunal nor with unhappy phrasing of a tribunal's thoughts. Further, the Court will not construe the reasons for the decision under review 'minutely and finely with an eye keenly attuned to the perception of error'."[4] (citations omitted)

[19] It should be noted also that QCAT was required to make its decision urgently on 10 July 2018 because the State of Origin match was to be held the next night. The reasons were accordingly given ex tempore. As well, it should be noted that such reasons are not to be assessed by the standards that apply to the reasons of a court,[5] but by those that apply to the tribunal.[6]

[20] Ground 1 of the notice of appeal is that QCAT erred in finding that s 142ZZB of the Act was in conflict with the ID scanning legislative obligations under the Act.

[21] The point relied on stems from a passage in the reasons where the Member said:

> "I also note that under section 142ZZB, the obligation of the licensee to, in its conduct of business on the relevant premises, to (sic) provide and maintain a safe environment in and around the relevant premises does create a conflicting obligation with these other obligations under the ID scanning process."

[22] To understand that passage, it is necessary to understand the essential nature of the problem raised by the respondent as the basis for its application to alter the time that ID scanning must commence on the nominated days. Photographic and other evidence before QCAT showed that on a major event day, such as a State of Origin rugby league match, Caxton Street is closed to vehicle traffic from Petrie Terrace in the direction of the Suncorp Stadium to a point past the Caxton Hotel. After the event, spectators leaving Suncorp Stadium stream up Caxton Street towards Petrie Terrace across both the footpath and the road surface of Caxton Street.

[23] At the same time, patrons seeking to enter the Caxton Hotel line up from the entrance (at which ID scanning would be performed), across the footpath and the road surface. The outcome is a conflict in pedestrian traffic movements between the stationary line of patrons waiting to enter the Caxton Hotel and the spectators leaving Suncorp Stadium and walking up Caxton Street toward Petrie Terrace.

[24] In that context, the Member's reference to the obligations of a licensee to provide and maintain a safe environment in and around the relevant premises may be seen to refer to the environment in which patrons of the Caxton Hotel are lining up to enter.

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4 (2017) 255 FCR 96, 108-109 [47]-[48].

5 For example, *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219, 237-238 [57]-[64].

6 *Acts Interpretation Act* 1954 (Qld), s 27B; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 623-624 [33]-[35]. (Although that reference is to a passage in the dissenting reasons, the dissent was not on this point.)

If those patrons are delayed in entering the Caxton Hotel, by compliance with the licensee's obligations under the ID scanning process, the potential conflict of obligations referred to by QCAT may arise.

[25] The appellant submits that s 142ZZB does not conflict with, but provides an additional protective layer under, the Act. Presumably, the appellant means additional to the "layer" provided by the ID scanning obligations under Part 6AA. The appellant appears to submit that QCAT treated s 142ZZB as prevailing over Part 6AA. I do not read QCAT's reasons as doing that. Rather, in my view, QCAT noted that the ID scanning obligations created under Part 6AA might operate in a way that conflicts with the obligation to provide and maintain a safe environment in and around the premises, under s 142ZZB. In my view, QCAT did not hold that the ID scanning obligations must give way to the obligation to provide and maintain a safe environment under s 142ZZB. It is unnecessary, therefore, to decide whether, properly construed, s 142ZZB would operate in priority to the ID scanning operations in the event of a potential contravention of s 142ZZB.

[26] Accordingly, in my view, ground 1 should be rejected.

[27] Ground 2 of the notice of appeal is that QCAT erred in law in applying a balancing test in failing to take account of the five separate matters specified in paragraphs 2(a) to 2(e) of the ground. In written and oral submissions, the appellant dealt with paragraph 2(a) separately, but otherwise dealt with 2(b) to 2(e) collectively.

[28] The contention in support of paragraph 2(a) is that QCAT failed to take into account the mandatory requirements under s 121(1) of the Act set out above. In its submissions to QCAT, the appellant relied on its statement of reasons and submitted that ss 121, 3(a) and 173NA must be considered. The appellant submits that because QCAT did not expressly refer to s 121 in the reasons, there is an error of law. That is to say the submission is that express reference to s 121 is required as a matter of law.

[29] In my view, this submission must be rejected. First, there is no requirement in law to expressly identify the section number that sets out relevant considerations to which a decision maker must have regard. The true question is whether the decision maker did not have regard to a relevant mandatory consideration. Second, the appellant does not submit that there was any specific relevant consideration under s 121(1) that applied in the present case, other than the impact on the amenity of the community concerned (s 121(1)(f)). That was a matter to which QCAT did refer.

[30] In my view, there is no reason raised by the circumstances of the present case why QCAT was required to refer to the other paragraphs of s 121(1) for the purpose of identifying that those paragraphs did not apply to the questions to be decided in the present case.

[31] The appellant submits further that the failure of QCAT to refer to the other discretionary matters raised in ss 128A, 128B and 128C "compounds the error". But the appellant did not submit to QCAT that the Member was required to consider those matters and does not identify on this appeal that any of those relevant considerations was one that QCAT was bound to but did not consider.

[32] As to paragraphs 2(b) to 2(e) of ground 2, the appellant challenges what is described as a "test" from existing QCAT decisions, namely *Jade Buddha Pty Ltd v Commissioner for Liquor and Gaming Regulation* [2017] QCAT 458 and *The Gresham Bar and*

other licensed premises v Commissioner for Liquor and Gaming Regulation [2017] QCAT 419.

[33] I note that the appellant does not submit that those cases were decided according to a wrong principle. However, the appellant submits that those cases apply only to applications for exemptions for areas from ID scanning, not an alteration of the regulated ID scanning times.

[34] In my view, there is no distinction between the approach to a discretionary decision to be made under s 111 of the Act in relation to the application of conditions for ID scanning as between an application for exemption of an area, on the one hand, and an application to alter the regulated ID scanning times, on the other hand, as a question or matter of law. In my view, no question of law is raised by paragraphs 2(b) to 2(e) of ground 2, based on the distinction between those two kinds of applications.

[35] In oral argument, the appellant pressed a further argument about the proper construction of the relevant provisions, to the effect that QCAT failed to give priority or primacy to s 3(a) among the main purposes of the Act set out in s 3. In support of the submission, the appellant relies in s 3A of the Act, in particular s 3A(4), which provides:

> "(1) The underlying principle of this Act in relation to the sale and supply of liquor is—
>
> (a) a person may obtain a licence to sell or supply liquor as part of conducting a business on premises; and
>
> (b) liquor may only be sold or supplied on the licensed premises as part of the person conducting a business, on the licensed premises, that is the principal activity under the licence.
>
> (2) This Act states the principal activity of a business that may be conducted under each type of licence.
>
> (3) This Act must be administered in accordance with the underlying principle of this Act.
>
> (4) This section applies subject to the main purpose of this Act mentioned in section 3(a)."

[36] In my view, it is unnecessary to explore the appellant's additional argument on this point in detail, for the purposes of deciding the appeal in this case.

[37] In the reasons, QCAT expressly recognised the role of s 3(a) in making the decision, by setting out s 3(a), followed shortly afterwards by s 173NA(1). Second, the Member referred to a passage from the reasons of QCAT in another case, that regard was to be had to the effect of a proposed exemption on the integrity of the ID scanning regime having regard to the purposes of the Act and that of the safe night precincts, concluding that "[t]his is a balance of the competing factors set out in sections 3 and 173NA".

[38] Third, having made findings of fact relevant to the circumstances of this case, the Member said the decision to adjust times requires a balancing exercise between, on the one hand, the cost, inconvenience and potential for violence and anti-social

behaviour and, on the other hand, the effect on the integrity of the ID scanning policy.

[39] In my view, there is nothing in the reasons to support the view that the Member misdirected himself in law as to the weight to be given to s 3(a) as one of the main purposes of the Act and the appellant's submissions on this point must be rejected.

[40] The appellant makes submissions as to the balancing of considerations to be made upon an application to alter the regulated ID scanning times. For example, the appellant submits that the integrity of the ID scanning system is undermined by the decision made in the present case to delay the commencement of regulated ID scanning on the two nights in question.

[41] It is difficult to understand the contention. The appellant submits that the integrity of the system as a State-wide system operating in ten precincts is undermined by the decision in question. But the decision made was only about one particular location outside a single regulated premises in relation to events of the relevant kind at the particular stadium.

[42] The evidence showed that between 1 July 2017 and 31 March 2018, 50,787 persons had ID scanned at the Caxton Hotel, and that of those persons, six have been detected as being subject to a court or police banning notice. The submission that the integrity of the statutory scheme for ID scanning would be undermined by commencing scanning later on the two identified evenings at the one regulated premises is an overreach, in my view.

[43] Further, the appellant submits that the respondent's business is one of many in the vicinity, as though the decision in this case would necessarily affect other relevant regulated premises. But there was no evidence before QCAT to show that other regulated premises produced a queue of patrons seeking to enter, reaching across Caxton Street that the crowd streaming uphill from Suncorp Stadium would encounter, in the same way as the respondent's premises.

[44] In any event, in my view, these questions are not an appeal on a question of law.

[45] Ground 3 of the notice of appeal is that QCAT erred in law in the exercise of discretion in ways identified in paragraphs (a) to (f). Of those paragraphs, only 3(c), 3(d) and 3(e) are pressed by the appellant's written submissions.

[46] In paragraph 3(c), the appellant relies on QCAT's reference in the ex tempore reasons to the rivalries between States that can be quite intense amongst spectators at a State of Origin match as possibly causing heightened tensions. In my view, whether or not there was specific evidence supporting that fact, to make such a finding was not an error of law for the purposes of grounding an appeal on an error of law.

[47] In support of paragraph 3(d), the appellant submits that the finding that there was potential for aggression and violence between people in the queue entering the Caxton Hotel and spectators streaming up Caxton Street was hypothetical. The appellant submits that while s 3(a) of the Act refers to the potential for harm (*vis* "minimising harm, and the potential for harm, from alcohol abuse and misuse and associated violence"), that cannot be merely hypothetical or speculative harm. In my view, the challenge sought to be raised is to QCAT's finding of fact that there

was a potential for aggression and violence and is not a question of law that will ground an appeal on an error of law.

[48] As to paragraph 3(e), the appellant submits that the appellant's statement of reasons was a material document that was not considered on the face of QCAT's reasons. However, it is not contended by the appellant that QCAT misunderstood or made an error of law as to the nature of the review it was required to conduct under s 33 of the Act. There was no requirement in law for QCAT to expressly refer to or consider the reasons of the appellant, as the decision maker whose reasons were being reviewed. In my view, the failure of QCAT to refer to those reasons is not a basis for an appeal on a question of law or an error, per se.

[49] For those reasons, I would dismiss the appeal, and order that the appellant pay the respondent's costs of the appeal.