

23 June 2004

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Dear Heather

PROBLEM GAMBLING LEVY

1. Further to recent discussions and correspondence relating to the proper construction of certain sections concerning the problem gambling levy consultation process, we set out below our views on the issues identified.

Background

2. We have been told that the Ministry of Health will assume funding responsibility for the treatment of problem gambling from 1 July 2004 and that it has received an appropriation from that date accordingly. Section 317 (1) allows the Government to allocate responsibility for an integrated problem gambling strategy to a department other than the Department of Internal Affairs. The power to do so came into effect when the Act received assent on 18 September 2003. We are advised that the Ministry was allocated such responsibility as a matter of law on or shortly after that date. However, we are also told that the Ministry received appropriations and incurred expenditure in its 2001, 2002 and 2003 financial years to formulate strategy in advance of the passage of the Act and legal allocation of responsibility.
3. The problem gambling levy will not commence until regulations are promulgated after receipt and consideration of the Commission's forthcoming report (s 319 (1)). As a matter of practical and operational reality, that will not be earlier than the last quarter of 2004 and possibly not until the first quarter of 2005. The appropriation will be received and expenditure incurred prior to the commencement and collection of the problem gambling levy. The purpose of the levy is to recover the cost of the integrated gambling strategy (s 319 (2)).
4. The prior expenditure, the delay in commencement of the levy and the consequent effect on the proposed strategy prepared by the Ministry have given rise to several issues of statutory interpretation concerning:
 - the period of the initial levy; and
 - the period of relevant expenditure to be recovered by the levy.

The levy period

5. The Ministry's proposed strategy recommends setting a shorter period for the initial levy period than 3 years. The underlying rationale is the assumption that the period of expenditure should match exactly the levy period so that, if the levy period commences later than the related expenditure period, the levy period should be shortened and the cost recovered over the reduced period. The strategy proposes an initial levy period of 33 months (assuming a 1 October 2004 levy commencement), or even shorter period if commencement is further delayed, to recover costs from 1 July 2004.
6. Our view is that the Act is somewhat equivocal about the possible length of the initial levy period (or at least the period of collection), but quite unequivocal about the period which must form the basis for the Commission's recommendations.
7. No section expressly specifies the length of the levy period. Section 317 (3) (d) permits regulations which prescribe the period for which the levy is payable or may be collected, impliedly indicating that the period is open to be set by regulation. On the other hand, there are several indications that a period of three years (and no shorter or longer period) is contemplated by the Act. References include s 318 (1) (f) and (5); s 320 (3) (c) (i); s 321 (2) (b) (ii) and s 322.
8. The Commission is not directly concerned with the issue of whether the power to make regulations in s 319 (3) (d) is circumscribed by the provisions referred to above either as to the period for which the levy is set or for the period over which it is collected. It does not appear that the timing of the collection of the levy will have a direct impact on the receipt of appropriations or expenditure by the Ministry and it is also possible that the regulations, even if setting the levy for a three year period, will require it to be collected over a shorter period (as s 319 (3) (d) distinguishes between periods payable and collection and there is a degree of flexibility about periods of levy calculation and collection: s 320 (5)).
9. What is clear, in our view, is that the Commission must make "recommendations on the **total annual amount** of the problem gambling levy for [a] ... **3-year period**" (s 318 (5)) and accordingly may not recommend a total annual amount on the basis that it will be imposed for, and collected over, a shorter period. The Commission's recommendation must assume a three year levy period starting whenever the necessary regulations come into force and all calculations and estimates used for estimating the total annual amount and the associated levy rate attaching to each of the gambling industry sectors should be on that basis. However it will only be making a recommendation of the total annual amount to be collected over the period of three years, not the actual levy structure or collection timeframe; those are matters for regulation.
10. The Department and the Ministry have suggested that s 321 (2) (discussed below) means that, even if the Commission must make a recommendation of the total annual amount over a three year period, it can recommend a levy rate which assumes a shorter period of collection. With respect, we do not agree. Section 321 (2) enables the effective backdating of the period for which recovery is sought (as we indicate below and as the Ministry has done in its proposed strategy), not the contraction of the levy period itself (or, as also suggested, when utilised, the recovery of costs "over all three years of the levy period" as opposed to a period of three financial years). In addition, calculation of the levy rate is expressly prescribed by s 320 (2). We see no proper basis to adjust the specified statutory values to take account of or assume a shorter collection period; on the contrary, the relevant value, C, is the funding required "for the period for which the levy is payable".

The expenditure or cost recovery period

11. The result is that, if the levy is to recover the cost of the strategy, steps may be taken so that it relates to a period which does not track exactly with the levy period. Although the primary rule is that the period of expenditure should match the levy period ("C is the funding requirement for the period for which the levy is payable": s 320 (2)), there are other provisions which allow the cost recovery period to be shifted in relation to the levy period, namely s 321 (2) and s 320 (3) (c) (ii). Although there are construction difficulties with each of them (as set out below), we are in no

doubt that the latter provision at least means that the total amount of the levy to be collected need not be reduced simply because of a late start and there is accordingly no need to reduce the period of the levy in order to recover the cost of the strategy.

12. Section 321 (2) expressly authorises the levy to commence part-way through a financial year and, in that event, to be set at a rate to recover the full cost of the strategy for that financial year and the next two (presumably financial) years in the relevant 3-year period. This provision accordingly permits the three year cost recovery period to run behind the three year levy period on a permanent basis; if the levy commences on 1 October 2004 and the initial period ends on 30 September 2007, the cost recovery period may be a three year period starting from the beginning of the relevant financial year in which 1 October 2004 fell and ending 3 years later.
13. "Financial year" is not defined either generally in the Act or specifically in, or for the purposes of, s 321. This is in contrast to other provisions of the Act such as section 270 (3) (which defines "financial year" for the purposes of that section only as commencing on 1 July in each year), section 265 (which specifies the financial year of the Lotteries Commission) or provisions such as section 325 which at least indicate the entity to which the term relates ("its last financial year") so that it can be ascertained as a matter of fact. The fact that other provisions specify the particular period supports the view that "a financial year" has no generic meaning; this is further supported by the use of the indefinite rather than definite article ("a financial year"). Although it is not entirely free from doubt for those reasons, adopting a purposive construction, we consider that s 321 (2) refers to the financial year of the entity incurring the costs of the integrated problem gambling strategy, namely the Ministry of Health. The Ministry and the Department concur with this view. In that case, the relevant financial year may commence on 1 July and, if the levy commences before 30 June 2005, it may recover the cost of the strategy from 1 July 2004 for three years. That is the course taken by the Ministry in its proposal. It is obviously sensible and convenient to relate cost recovery to a financial year.
14. In addition to the "financial year" provision, there are two related provisions, in respect of the initial levy only, which permit the recovery of transition costs "in the period before the introduction of the initial levy". Those provisions are express about when the transition period ends (namely, with the introduction of the initial levy) but not when it starts.
15. Section 320 (3) (c) (ii) provides that the proposed amount C for the levy calculation must **take into account** "the estimated costs of the department that has responsibility for the integrated problem gambling strategy in the period before the introduction of the levy". It is no doubt for this reason that the Ministry was required to estimate its costs over this period in the course of developing the strategy (s. 318 (1) (d)). Section 321 (2) (b) (ii) is to similar effect to s 320 (3) (c) but without reference to the department responsible.
16. The Ministry of Health proposes to recover costs incurred over a three period prior to its current financial year, on the basis that it has incurred costs in relation to the strategy over that period.
17. We see some potential difficulties with a construction which would enable this course:
 - (a) The Ministry could not have been "the department that has responsibility for the... strategy" prior to 18 September 2003 because the statutory provision which enabled that responsibility to be allocated for the purposes of the Act did not become law until that date.
 - (b) The fact that the provision refers to "estimated costs" (rather than actual costs) is consistent with a relatively short period between the commencement of the Act and the introduction of the levy (the machinery for which was created by the Act).
 - (c) Construing the provision to enable recovery of costs incurred prior to the commencement of the Act would be inconsistent with the principle that enactments do not have retrospective effect (s 7, Interpretation Act 1999).

18. Our doubts relate only to the period before the commencement of the Act. It is clear that the provisions permit the recovery of costs incurred between the commencement of the Act and the commencement of the levy, no matter how delayed the latter is and irrespective of whether the financial year provision is utilised. As a result, the Ministry's costs in this period should be incorporated in the levy calculation in any event; this should remove the need to shorten the levy period in order to obtain full cost recovery.
19. We have considered the contrary arguments put forward by the Ministry and the Department. In part, they depend on establishing that the omission of the reference to the department responsible in s 321 (2) (b) was deliberate so that it has a different meaning to the other sections referred to in paragraph 15 above. We doubt that a court would so construe the Act – it would involve construing the power inconsistently with the prior process and information gathered. In the final analysis, the position is fairly arguable either way and therefore no certain conclusion is presently possible. On balance, we prefer the view that the Act should be construed so as to limit its retrospective effect in the face of ambiguity on the issue.
20. We suggest that the Commission consider the matter from a pure policy point of view in the first instance, assuming that the power to recover is unconstrained by time. If the Commission supports recovery over three prior years as a matter of policy it can so recommend but, if it wishes, add a rider regarding its doubts about the extent of the power to do so. If the Commission does not support recovery as a matter of policy, the doubts about the legality of doing so can be added to the policy reasons for its recommendation.

Conclusion

21. In summary, we consider that:
- (a) the initial levy can cover costs of the strategy for the three year period of the levy **plus** the costs incurred between the commencement of the Act and the commencement of the levy;
 - (b) alternatively, the initial levy can cover the costs for the three financial years of the Ministry starting with the year in which the levy commenced **plus** the costs incurred between the commencement of the Act and the commencement of the first financial year (ie a shorter transitional period);
 - (c) it is doubtful that the levy can be set for a period of other than 3 years and, in any event, the Commission's recommendation of a total annual amount and related levy rate must assume a three year levy period; and
 - (d) it is doubtful that costs incurred prior to the commencement of the Act can be recovered under the levy.

Yours sincerely



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