

IN THE MATTER of the Gambling Act 2003
AND on an appeal by Perry Foundation Limited

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
P J Stanley
M J Richardson

Date of Appeal: 8 July 2008

Date of Decision: 17 October 2008

Date of Notification
of Decision: 31 October 2008

**DECISION
ON APPEAL BY PERRY FOUNDATION LIMITED**

Appeal

1. Perry Foundation Limited ("**Perry**") appealed under section 77 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to impose a condition on the class 4 venue licence for the Mount Mellick restaurant and bar, at Mt Maunganui (the "**venue**"). Perry requested that the Commission reverse the Secretary's decision to impose the condition. The Secretary asked the Commission to confirm his decision.

The Gambling Act 2003

2. The key sections of the Act for this appeal are sections 67 and 70. These sections (in part) are as follows:

67. Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that –
 - (b) The possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimal;

70. Content and conditions of class 4 venue licence

- (2) The conditions that the Secretary may add to a class 4 venue licence include:
 - (b) conditions to minimise the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue;
 - (g) procedures to encourage responsible gambling at the venue;
 - (i) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act

Background

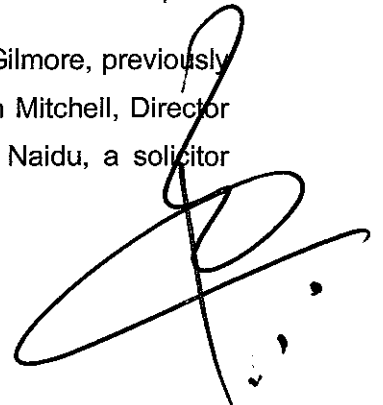
3. This appeal has arisen because the gaming room at the venue is accessible by two internal entrances. One of these internal entrances is adjacent to one of the venue's three external entrances (which the parties, in their submissions, referred to as "entrance B"). The Secretary is concerned that persons under the age of 18 could use entrance B to gain access to the gaming machines. The Secretary also filed evidence suggesting that entrance B may encourage problem gamblers to use that venue's class 4 gambling facilities.
4. The Secretary proposed adding a licence condition which would require entrance B and the rear entrance to the venue, entrance C, be closed, but in his decision letter dated 20 June 2008, the Secretary stated that he was adding a licence condition to close only entrance B. The condition added is:

Special Condition – Access

The external entrance situated on the eastern frontage of the building leading via steps into the gaming machine area must remain closed and locked at all times that the gaming machines are in operation, and may only be used to meet fire, health and safety regulations specific to the venue.

Submissions on behalf of Perry

5. Perry submitted (in summary) that:
 - (a) The possibility of access to the machines by minors is already minimal due to the measures in place. These measures include infrared sensors, pagers, CCTV cameras, a swipe-card system in the gaming room, and a clear line of sight from the bar to entrance B.
 - (b) It has an older clientele and there is no history of underage gambling at the venue.
 - (c) Closure of the external entrance would have no effect on the risk of minors accessing the gaming room.
 - (d) The condition is not reasonable having regard to the benefits gained compared to the costs and detriment suffered.
6. Perry supported its submissions with affidavit evidence from Stephen Gilmore, previously the venue's General Manager; Grant Paterson, CEO of Perry; Clayton Mitchell, Director of Prestige Cabarets Limited which owns the venue; and Rajenthra Naidu, a solicitor employed by Harkness Henry & Co, Perry's solicitors.



Submissions by the Secretary

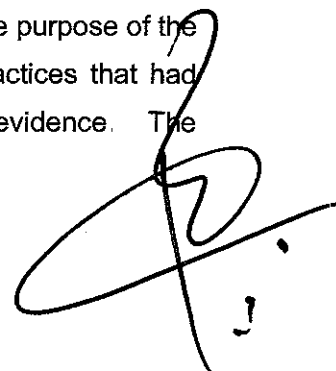
7. The Secretary submitted (in summary) that:
- (a) The possibility of minors gaining access to class 4 gambling is not minimal.
 - (b) The measures in place are not an adequate substitute to closing entrance B.
 - (c) Closing entrance B would require minors who wanted to access the gaming machines to enter the main part of the venue before entering the gaming room. This would minimise the risk of access by minors.
 - (d) The condition is reasonable, is a result of a process of reason, is proportionate, has no detrimental effects, and is fair to the venue, Perry and the community.
 - (e) The condition can appropriately be imposed for reasons other than risk of access, namely on harm minimisation and prevention grounds.
8. The Secretary supported his submissions with evidence from Steven Jewkes, a senior investigator with the Department of Internal Affairs (“DIA”); Neove Christoforou, the Compliance and Community Outcomes Manager in the DIA’s Gambling Compliance Unit; Geoffrey Lawry, a Compliance and Investigations Manager in the DIA’s Gambling Compliance Unit; Gregory Carsons, a Senior Gambling Inspector with the DIA; John Stansfield, the former CEO of the Problem Gambling Foundation; and Dr Philip Townshend, a Clinical Psychologist and Director of Research for the Problem Gambling Foundation.

Submissions in Reply

9. In reply, Perry submitted (in summary) that:
- (a) The closure of entrance B would not reduce the risk of minors entering the gaming room.
 - (b) The evidence of Dr Townshend and Mr Stansfield does not apply to the venue as their findings relate to gaming rooms that have direct access from the street – entrance B does not provide this.

Visits to the venue

10. A Commissioner visited the venue on two occasions in October 2008. The purpose of the visit was to gain an impression of the venue’s layout and operating practices that had been represented to the Commission in plans, photographs and in evidence. The

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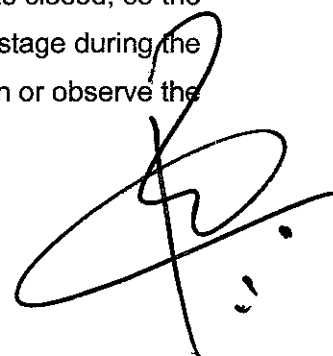
Commissioner visited the venue as a member of the public, unaccompanied by representatives of either party.

Legal test

11. The Commission has, in two previous decisions, GC16/06 and GC37/06, considered the closure of secondary entrances into class 4 gaming areas. In decision GC16/06, the Commission set out a framework for considering the validity of proposed licence conditions. That framework, which the Commission also adopted in decision GC37/06, is applicable to the present appeal.
12. It is not necessary to repeat that framework verbatim, but the Commission considered the following:
 - (a) In the absence of the condition, are the measures in place sufficient to satisfy the Commission that the possibility of minors gaining access to class 4 gambling at the venue is minimal?
 - (b) Will the imposition of the condition minimise the risk of access?
 - (c) Is the condition reasonable in all of the circumstances of the venue?
 - (d) Is the condition appropriately imposed for reasons other than risk of access by minors, such as problem gambling and harm minimisation?

In the absence of the condition, is the possibility of minors gaining access to class 4 gambling minimal?

13. The Commission considered whether, in the absence of the condition, the possibility of minors gaining access to class 4 gambling at the venue is minimal, and determined that, as a result of the number of external entrances and the distance of the gaming room entrances from the bar, it is not.
14. The Commission noted that, in addition to standard venue measures such as CCTV, the venue has infrared sensors (which set off a sensor behind the bar and a pager worn by the duty manager when a person enters entrance B), and a magnetic swipe-card system located in the gaming room (which staff swipe when they check the gaming room), the latter simply being a means of recording visits to the gaming room by staff.
15. On both occasions that a Commissioner visited the venue, entrance B was closed, so the operation of the infrared system and pager could not be observed. At no stage during the two visits did a staff member enter the gaming room to physically check on or observe the patrons. Staff did not appear to actively monitor the CCTV screen either.



16. The Commission assessed the view from the bar to the entrance B to determine whether staff would have a clear line of sight to identify people using that entrance. The Commission considered the view to be extremely limited. As the Secretary identified, staff would need to be positioned at a specific part of the bar to obtain any view of entrance B, which view is then obscured by patrons, bar stools, bar leaners and stair rails. Whilst carrying out bar duties, it would be near impossible for bar staff to obtain a sufficiently clear view of a person who entered entrance B and proceeded directly into the gaming room.

17. The Commission concluded that the risk of access to class 4 gambling was not minimal and that the imposition of the additional condition was appropriate.

Will the imposition of the condition at the venue minimise risk of access?

18. The Commission next considered whether the condition imposed by the Secretary was potentially effective in minimising the possibility of underage access, and concluded that it was. Closing entrance B would require minors who wanted to access the gaming machines to enter through one of the venue's other entrances before entering the gaming room.

Is the condition reasonable in all of the circumstances of the venue?

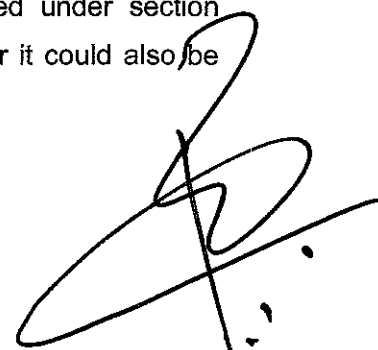
19. The Commission considered that the condition was reasonable, given all of the circumstances of the venue, as it would potentially reduce the possibility of access by minors to class 4 gambling. The Commission considered that very little, if any, detriment would be suffered as a result of closing entrance B, and that detriment would not be disproportionate to the benefit gained.

20. The Commission noted that the main entrance into this venue is located very near to entrance B, and that on both occasions that the Commission visited the venue, entrance B was closed, without apparent inconvenience.

Imposition of the condition on harm minimisation grounds?

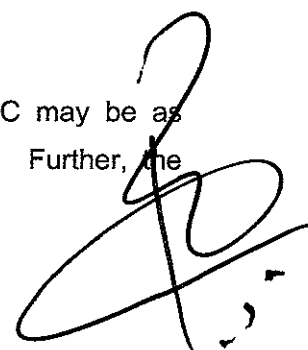
21. Under sections 70(2)(g) and 70(2)(i), the Secretary may add conditions relating to procedures to encourage responsible gambling at the venue which the Secretary considers will promote and ensure compliance with the Act.

22. Having determined that the condition could be appropriately imposed under section 70(2)(b), it was unnecessary for the Commission to determine whether it could also be imposed pursuant to section 70(2)(g) and 70(2)(i).

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General observations

23. As the Commission has previously noted in appeals of this nature, it has concerns about the adequacy of technological measures as a means of ensuring that the possibility of access to class 4 gambling by minors is minimal. In decision GC16/06, the Commission stated as follows:
32. At least in part as a result of the observation of Commissioners, the Commission has concerns about the adequacy of alarms and CCTV monitors as a means of ensuring that the possibility of access to class 4 gambling by minors is minimal. The concern is not with the adequacy of the technology so much as the extent to which their effectiveness relies upon attentiveness by bar staff. Commissioners' own observation of staff behaviour at the 11 venues supported the doubts raised by the Secretary that busy bar staff were unlikely to pay sufficient attention to alarms and CCTV monitors. Commissioners noted in a number of instances that monitors were switched off and that alarms were inaudible (despite close proximity of observers to the bar area). Commissioners did not observe any checks by staff of the gaming rooms at any of the venues during their visits.
24. The Commission's concerns as to the effectiveness of reliance on technology to ensure that the possibility of access by minors is minimal remains following its visits to the Mount Mellick venue. As noted above, at no stage during either of the two visits did any member of staff enter the gaming room, nor did they appear to pay attention to the CCTV monitor located at the bar. Irrespective of whether technological assistance is used, all measures to prevent under age gambling or minimisation of harm from gambling rely in practice on the diligence of the venue's staff in making and following up on observations of activity.
25. In addition to the apparent lack of diligent observation, the Commission had concerns about the quality of the CCTV. The images shown on the CCTV monitor were of poor quality and would be unlikely to enable bar staff to identify the age of any occupants of the gaming room. The images were dark and scrolled from one screen to the next at short intervals, meaning that it would be difficult for staff to focus and analyse the image shown before it scrolls over. The Commission doubted that the CCTV system added significantly to the detection of under age gambling.
26. The Commission also has serious concerns about the position of the gaming room at this venue and the lack of ready opportunity for staff to observe activity in the room. The Commission gave serious consideration to referring the matter back to the Secretary, under section 77(4)(b) of the Act, with directions for him to reconsider whether the venue should be licensed to conduct class 4 gambling at all or without significant changes to the layout and operation, such as enhanced monitoring requirements and/or closing both entrance B and the rear entrance into the venue, entrance C.
27. The Commission's concerns arise from its observations that entrance C may be as problematic as entrance B for minors accessing the gaming machines. Further, the



Commission notes that the venue has a restricted liquor licence, meaning that minors can legitimately be at the venue, provided they are accompanied by an appropriate guardian. As such, minors could walk around the venue, whether to use the bathrooms or access the garden bar outside entrance C, and enter the gaming room without suspicion or observation by venue staff.

28. Ultimately the Commission decided that, as it lacked sufficient material before it to consider such other options, its orders on appeal should be limited to the subject condition (the closure of entrance B). Nevertheless it considers that it should record its broader concerns, leaving it for the Secretary to consider the concerns which it raises in consultation with the operator.

Decision of the Commission

29. For the reasons already provided, the Division unanimously dismisses the appeal.


Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

31 October 2008