

IN THE MATTER of the Gambling Act 2003

AND of an appeal by **NEW ZEALAND
COMMUNITY TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Division: P Chin (Chief Gambling Commissioner)
M Ford
M Lythe

Date of Appeal: 23 December 2004

Date of Decision: 26 April 2005

DECISION

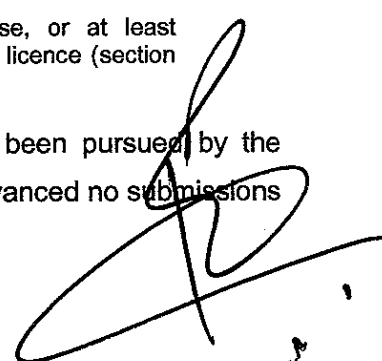
ON AN APPEAL BY NEW ZEALAND COMMUNITY TRUST

1. APPEAL

1.1 This appeal was brought by New Zealand Community Trust ("**NZCT**" or the "**Appellant**") under section 77 of the Gambling Act 2003 (the "**Act**") against the decision of the Secretary of Internal Affairs ("**Secretary**" or the "**Respondent**") to cancel NZCT's class 4 venue licence for a venue known as Isobar located at Chalmers Street, Hornby, Christchurch. NZCT was notified of the decision by letter dated 8 December 2004. The reasons for the cancellation were expressed to be those contained in the proposal to cancel the licence (by way of a letter dated 8 October 2004), namely:

- (a) The grounds for granting a class 4 venue licence are no longer met as the Trust has not supplied the required territorial authority consent (sections 74(1)(a) and 67(1)(f) of the Act).
- (b) The Trust has failed to comply with relevant requirements of the Act in that it did not supply the correct description of the venue (sections 74(1)(b) and 65(2)(a) of the Act).
- (c) The class 4 venue agreement between the Trust and Isobar is no longer and in fact never was, consistent with ensuring compliance with the Act (section 74(1)(c) of the Act).
- (d) The Trust supplied information that was materially false, or at least misleading, in its application to amend the Tuskers venue licence (section 74(1)(d)(i) of the Act).

1.2 In its evidence the Appellant deposed that reason (c) has not been pursued by the Secretary. That was not directly challenged, and the Secretary advanced no submissions



or information from which it was possible for the Commission to uphold the decision based on that ground. The Commission has accordingly considered the appeal by focusing on the other three grounds.

- 1.3 This appeal arises in the context of a relocation of a bar where class 4 gambling took place, to a new location approximately 75 metres away. In their written submissions, the parties focused on whether the consent of the territorial authority was required. That issue is said to turn on whether Isobar is located at the same "place" as Tuskers Hornby Mall, the location for which a venue licence was issued to NZCT on 13 November 2000. If Isobar were not in the same venue or place, NZCT would need to obtain territorial authority consent for the new venue. It is common ground between the parties that no such consent would be given. The Secretary must refuse to grant a licence in the absence of the consent of the relevant territorial authority, and the relevant authority, Christchurch City Council, has imposed a moratorium on approvals for all new gambling sites.
- 1.4 The NZCT requests that the Commission reverse the decision of the Secretary to cancel the class 4 venue licence issued to Isobar on 19 August 2004.

2. GAMBLING ACT 2003 AND LICENCE CONDITIONS

- 2.1 The appeal raises issues relating to the interpretation of various sections of the Act and conditions 14 and 15 of NZCT's operator's licence.
- 2.2 Section 4 of the Act provides in part:

In this Act, unless the context otherwise requires,-

class 4 venue means a place used to conduct class 4 gambling

class 4 venue licence means-

- (a) a licence granted under section 67; or
- (b) a site approval

site approval means that part of an existing gaming machine licence that approves a place for gambling with gaming machines

- 2.3 The word "place" is used both in the definition of "site approval" and "class 4 venue" and is defined in section 4 as follows:

place includes-

- (a) a building, structure, or tent, whether fully or partly constructed; and
- (b) a room in a building or structure; and
- (c) a court or a mall; and
- (d) land; and
- (e) a vehicle, vessel, or aircraft; and
- (f) a caravan or a trailer or other conveyance

- 2.4 The circumstances in which the Secretary may cancel a class 4 venue licence are set out in section 74(1) which reads:

The Secretary may ... cancel a class 4 venue licence if the Secretary is satisfied that-

- (a) any of the grounds in section 67 are no longer met; or
- (b) the corporate society ... has failed to comply with any relevant requirement of this Act, licence conditions ...; or
- (c) the class 4 venue agreement is no longer consistent with ensuring compliance with this Act or the licence; or
- (d) the corporate society supplied information that is materially false or misleading in its application for-
 - (i) a class 4 venue licence;
 - (ii) a renewal or an amendment of a class 4 venue licence;

- 2.5 Section 67(1)(f) provides that the Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that the territorial authority has provided a consent (if required under section 98).

- 2.6 Section 98 of the Act reads in part:

A territorial authority consent is required in the following circumstances:

...

- (b) unless paragraph (c) or paragraph (d) applies, the first time there is an application for a class 4 venue licence for a venue for which a class 4 venue licence was not held on 17 October 2001;
- (c) if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last 6 months;

...

- 2.7 NZCT's operator's licence was subject to standard licence conditions which included:

Condition 14 Site approvals

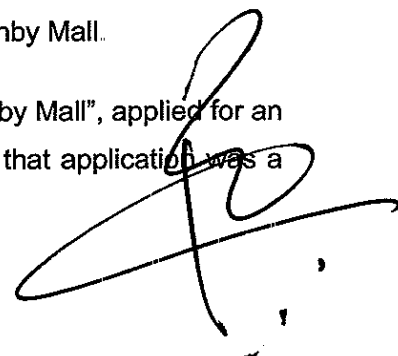
- (1) The Society shall operate gaming machine equipment on approved sites only. An approved site is one that is listed on the current schedule attached to the Society's licence and for which there is a current site approval issued by the Department.

Condition 15 Liquor Licence requirements

- (1) The Society shall furnish evidence for each and every site that there is the capability of enforcing a restriction on unsupervised persons under the age of 18 years.
- (2) Except in cases where it is proved to the Department's satisfaction that other statutory based means of enforcing this restriction can be effectively implemented, an "on" or a "club" liquor licence or a permanent charter under the Sale of Liquor Act 1989 must be held by the site operator. Any 'on' liquor licence must be in the name of the site operator and must show a designated area (supervised or restricted).

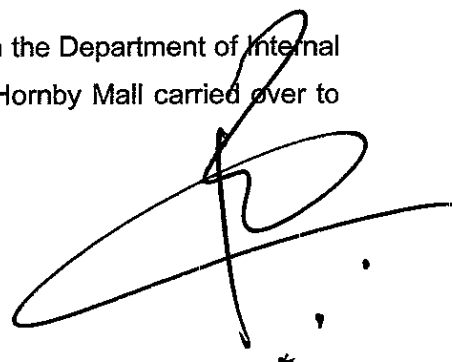
3. FACTS

- 3.1 NZCT entered into a site agreement with Tuskers Franchising Limited ("TFL") in August 2000 for the operation of NZCT's gaming machines at Tuskers Hornby Mall.
- 3.2 On 22 August 2000, TFL, trading under the name of "Tuskers Hornby Mall", applied for an "on licence" for 416 Main South Road, Hornby Mall. Attached to that application was a



site plan showing the location of Tuskers within the Hornby Mall complex. The actual location of Tuskers Hornby Mall corresponded to a street address of 33 Chalmers Street, while the address of the Hornby Mall was 416 Main South Road.

- 3.3 On 10 November 2000, the Christchurch District Licensing Authority issued the on-licence sought. The premises were described as being situated at 416 Main South Road, Christchurch and known as "Tuskers Hornby Mall", and were more precisely identified in the licence "as outlined in a plan date stamped as received by the District Licensing Agency on 22 August 2000". This plan corresponded with the actual location of Tuskers within the Hornby Mall.
- 3.4 On 13 October 2000, NZCT applied to the Secretary for a site approval to operate gaming machines at "Tuskers Hornby Mall, 416 Main South Road, Hornby, Christchurch". The Secretary granted a site approval for this site on 13 November 2000. On 17 October 2001, NZCT was operating 18 machines at the Tuskers Hornby Mall premises and held a site approval for the premises under the Gaming & Lotteries Act 1977.
- 3.5 In 2001, The Midas Group Limited ("**Midas**") acquired the primary business from TFL and began trading from the premises as "Tuskers Hornby Mall" under a franchise agreement.
- 3.6 In 2002 the ownership of the Hornby Mall changed several times. The new owners, via a subsidiary, acquired a site across the road from the mall which was at that time being used as a Blockbusters Video store. This was to be redeveloped as part of a major expansion of the Hornby Mall.
- 3.7 The new owners informed Midas that, because of the redevelopment of the mall, they would have to move. A dispute arose between TFL as franchisor and Midas as franchisee that led to Midas terminating the franchise agreement on 31 March 2004, and TFL evicting Midas on 1 April 2004.
- 3.8 One of the shareholders of Midas, Stephen Roper (who held his shares through SGR Holdings Limited) bought out the majority shareholders and incorporated a new company, the Iso Group Limited ("**Iso**"), to carry on the business. Iso then obtained a lease for the Blockbusters Video site. NZCT entered into a new site agreement with Iso on 26 March 2004. The new site of the bar has a street address of 7-11 Chalmers Street and is approximately 75m from the original location of the Tuskers bar.
- 3.9 In a letter dated 10 May 2004, NZCT sought confirmation from the Department of Internal Affairs (the "**Department**") that its site approval for Tuskers Hornby Mall carried over to the Blockbuster site operated by Iso, on the basis that:

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- The address does not change.
- The new business 'replaces' the old business. There is no increase to either the number of machines or the number of venues in the area.
- The same liquor license will apply (but will be in the new business name).
- The same operator will operate the machines (but under a new business name and site agreement).
- The move of premises was forced on the operator by the Mall owners who fully support the reestablishment of the business in the new building (approximately 75 metres from the old location, still within the mall complex).
- The Christchurch City Council does not view the new business as a 'new gaming venue'. They accept that the venue is simply the relocation of the current venue within the same geographical location. They do not require that the new business obtain a new liquor license or other consent. Under the Christchurch City Council Gambling Venue policy, no 'new' venues are permitted in the Christchurch City area. Therefore this venue is either able to operate under the current site license or it will not be able to operate at all.

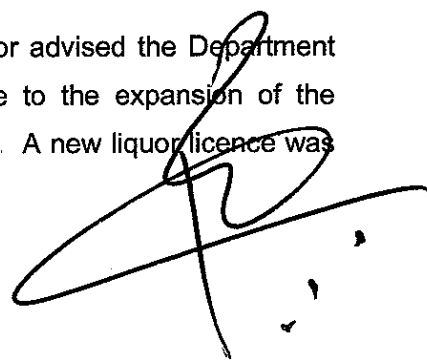
3.10 On 28 June 2004, the Department issued a venue licence to operate gaming machines at "Tuskers Hornby Mall, 416 Main South Road, Christchurch". On or about 13 July 2004, NZCT submitted an application to amend its venue licence stating that Tuskers Hornby Mall was to be known as Isobar. The application also asked for the Department's consent that the venue could remain inactive until 1 September 2004.

3.11 On 19 August 2004, the Department issued a new class 4 venue licence in respect of Isobar which was located at "416 Main South Road, Christchurch". Isobar opened for business at the beginning of September 2004.

3.12 Subsequently, the Department received correspondence from Mr Smith of TFL challenging the issue of the new venue licence. Following a review of the situation, the Secretary in a letter dated 8 October 2004, notified NZCT of the proposed cancellation of the venue licence (see paragraph 1.1 above).

3.13 The letter advised NZCT that the Secretary did not accept that the venue remained the same for the following reasons:

- (a) The Isobar venue is physically situated at the Blockbuster Video site which has a different street address, is located outside the generally accepted boundaries of the Hornby Mall, owned by a different party, on a separate legal title, and is not subject to the Property Council Shopping Centre lease.
- (b) The Christchurch City Council Sale of Liquor Inspector advised the Department that in his view Isobar had effectively relocated due to the expansion of the Hornby Mall and the demolition of the original building. A new liquor licence was required for the new site.

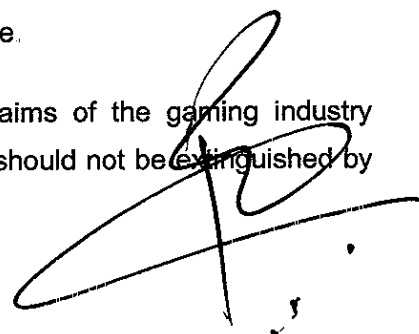
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- (c) If the correct address of Isobar had been provided at the time of application, the Secretary would not have approved the venue licence for Isobar.
- (d) The information provided by NZCT which led to the issue of the venue licence on 22 August 2004 was materially false and misleading. All information supplied by NZCT indicated that the applicant remained within Hornby Mall, 416 Main South Road, and that the time extension sought was only required as Tuskers Hornby Mall was undergoing renovations. The proper application would have required a territorial authority consent, which was not obtained, or even applied for.

3.14 NZCT replied to this letter contesting the proposed grounds for cancellation. However, in a response dated 8 December 2004 to NZCT's reply, the Secretary confirmed the proposed decision essentially because Isobar is a completely different venue from that occupied by Tuskers Hornby Mall.

4. SUBMISSIONS ON BEHALF OF APPELLANT

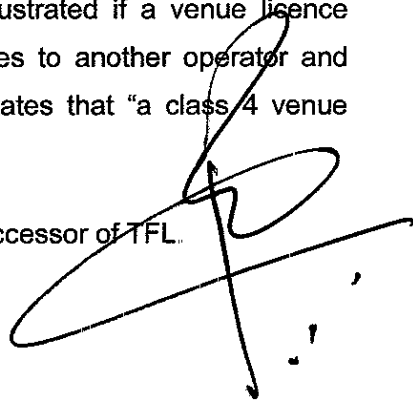
- 4.1 In NZCT's view, the essential ground relied on by the Secretary in cancelling the licence "is that NZCT has not supplied territorial authority consent for the venue as required by section 67(1) of the Act". NZCT submitted that the Secretary was wrong to cancel on this ground because, on 17 October 2001, NZCT held a "class 4 venue licence" for the Isobar "venue" within the meaning of the Act, and accordingly section 98 of the Act did not require territorial authority consent.
- 4.2 NZCT argued that while the Isobar site was not originally within the confines of the Hornby Mall, the redevelopment of the mall meant the site had been incorporated into the overall commercial enterprise which co-ordinates the management of the various retail establishments. It was noted that the prospectus issued by the mall treats Isobar as a tenant retailer. It was further noted that Isobar submits turnover details (although rental is not related to turnover), receives the same communication from the mall property managers as other tenants, and that its rubbish is collected by the mall owner. In addition, the mall property managers provided storage while the new premises were being constructed.
- 4.3 Section 98 refers to a "class 4 venue", a phrase defined in terms of "place" which is in turn defined to include "a court or a mall". Hence NZCT submitted the old and new locations of the bar are, for the purposes of section 98, the same place.
- 4.4 In making that submission, NZCT emphasised the key aims of the gaming industry reforms and the constitutional principle that existing rights should not be extinguished by



statutory reform. It argued that not requiring a territorial consent would not "offend" the Council's policy, as there is no increase in the permitted number of machines which may operate in the mall or Christchurch city. It was argued that if the venue licence was cancelled, NZCT would lose the right that it had prior to statutory reform through no action or omission of its own or the venue operator, but through the happenstance of the redevelopment of the mall.

5. SUBMISSIONS ON BEHALF OF RESPONDENT

- 5.1 The Secretary disputed NZCT's assertion that the licence was cancelled for lack of territorial consent. Instead, the four reasons in the 8 October 2004 letter were relied upon. However, the Secretary's submissions only addressed the territorial authority consent ground.
- 5.2 Essentially, the Secretary's submission was that site approval was given in respect of the original location of the bar. As this location is different to that of Isobar, the licence was rightly cancelled as the consent of the territorial authority was not obtained for the new location.
- 5.3 The Secretary noted that the definition of "place" in the Act was expressed to be "unless the context otherwise requires". It was argued that the context did require a narrow reading of "place" since licence condition 14 only allowed gaming to take place at "approved sites only" and the guidelines to the conditions state that the conditions defined site as "the area of the premises covered by an 'on' or 'club' liquor licence or permanent charter at the time the site approval is granted".
- 5.4 It was submitted that the site approval issued by the Department therefore applied only to that part of the Hornby Mall which was covered by the on-licence in force when the site approval was granted – a site that corresponded to the original location of the bar.
- 5.5 The Secretary also advanced the following arguments:
 - (a) The loss of NZCT's right to conduct class 4 gambling was a result of the surrender of the lease rather than statutory reform.
 - (b) Christchurch City Council's moratorium would be frustrated if a venue licence could be transferred from one operator and premises to another operator and another premises. In fact, section 80 of the Act states that "a class 4 venue licence is not transferable".
 - (c) Isobar is a completely new business and is not the successor of TFL.

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5.6 In summarising, it was stated that "It matters not whether the new premises of Isobar is regarded as part of the expanded Hornby Mall or not. The fact of the matter is that Isobar is a new venue. As such, a class 4 venue licence held on 17 October 2001 does not apply in respect to the Isobar premises".

6. SUBMISSIONS IN REPLY

6.1 In reply, NZCT submitted that the Department's letter of 8 December 2004 only dealt with the territorial authority point. The submissions briefly disputed the allegation that NZCT had been misleading, mainly on the basis that NZCT made considerable efforts to engage the Department in the process and that an expectation had been communicated to the Department that a gambling inspector would come to visit the new premises once the application was made.

6.2 In relation to point (c) of the Department's letter quoted at paragraph 1.1 above, Mr Coffey (the Operations and Compliance Manager of NZCT) swore a second affidavit attaching the Department's approval of NZCT's standard site agreement.

7. KEY ISSUES

7.1 The Commission considers that the key issues for determination are:

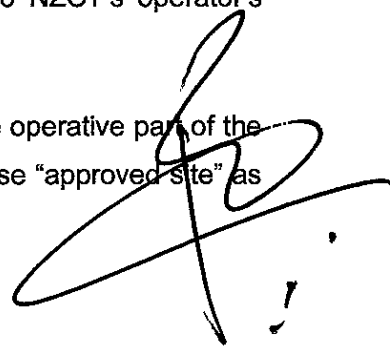
- Where did the class 4 venue licences granted to NZCT permit gaming to take place?
- Did territorial consent need to be obtained for the relocation?
- Was the venue correctly described in the application?
- Was NZCT's application to amend its licence misleading or materially false?

7.2 These issues are examined in turn.

Where did the licences permit gaming to take place?

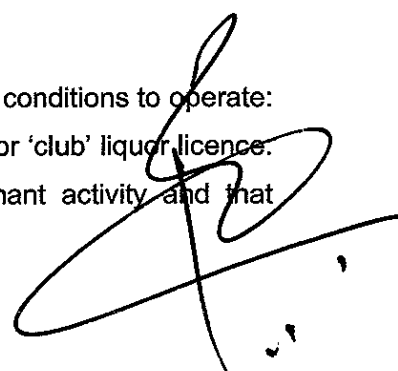
7.3 The Appellant contended that the relevant place is the Hornby Mall whereas the Secretary argued that the place is the specific premises which were the subject of the on-licence. The starting point is the licence conditions that applied to NZCT's operator's licence. Condition 14(1) is set out in paragraph 2.7 above.

7.4 In the Commission's view, the first sentence of condition 14(1) is the operative part of the condition. The second sentence of condition 14(1) defines the phrase "approved site" as



“one that is listed on the current schedule attached to the Society’s licence and for which there is a current site approval issued by the Department”.

- 7.5 Section 4 of the Act defines site approval as “that part of an existing gaming machine licence that approves a place for gambling with gaming machines” and a class 4 venue licence is defined to be a site approval or a licence granted under section 67.
- 7.6 The submissions for the Secretary focused on the guidelines to condition 14 which state “the licence conditions define a site as the area of the premises covered by an “on” or “club” liquor licence or permanent charter *at the time the site approval is granted*” (emphasis in original). On the face of the October 2001 set of conditions, this guideline did not appear to be correct, there being no such definition in the conditions. The position was corrected the following year. The October 2002 set of conditions contain a definition of “site” in identical terms to the guideline quoted immediately above, a definition expressed to be “unless the context otherwise requires”.
- 7.7 To the extent that the Secretary’s argument rests on the guidelines rather than the licence and its conditions, there would be difficulties in the event of conflict between the licence conditions and the guidelines. In *Pub Charity v Attorney-General* [2003] NZAR 512 the High Court held that guidelines have no separate regulatory status themselves. The Court went on to note however that guidelines may be used in interpreting the conditions.
- 7.8 It is unnecessary to consider this question further however, because the Commission considers that this key issue turns on the meaning of “approved site”, a term defined in condition 14(1), rather than on the meaning of the term “site”. Identifying the relevant place requires identification of the “approved site”, a defined term. The meaning of “approved site” is set out in condition 14(1) and is not affected by guideline comments about, or even the presence elsewhere in the conditions of, a definition for “site”. In the context, the “approved site” is the site listed on the schedule (or site approval) attached to NZCT’s licence.
- 7.9 Most of the site approvals/venue licences were issued in respect of “Tuskers Hornby Mall, 416 Main South Road, Christchurch”. The venue licence that was cancelled was issued for “Isobar, 416 Main South Road, Christchurch”. The address in the licences never corresponded to the actual street address of the original bar (33 Chalmers Street) or the address of the new bar (7-11 Chalmers Street). Rather the address in the licence always corresponded to the general address of the Hornby Mall.
- 7.10 In this case the guidelines indicate how the Department wanted the conditions to operate: the site approval should correspond to the area covered by an ‘on’ or ‘club’ liquor licence. This would help to ensure that gambling was not the predominant activity and that



persons under the age of 18 were not present on the premises. However, the guidelines alone cannot create a linkage between liquor licence and site approval if the licence does not do so. In this case, to achieve the intended effect, the Department needed to insert the full premises description from the on licence into the class 4 licence schedule either directly by adopting the same words and/or attaching the same plan or indirectly by referring to such premises description as the on licence contained. It chose instead to describe the place more generally, with a consequent effect on the ambit of the approved site.

- 7.11 In the Commission's view, the licences have always permitted class 4 gambling to take place at any place known as "Tuskers Hornby Mall" or "Isobar" (depending on the licence) within the confines of the Hornby Mall.

Did territorial consent need to be obtained for the relocation?

- 7.12 Section 98 is set out in paragraph 2.6 above. While the term "venue" that appears in section 98 is not defined in the Act, "class 4 venue" is defined in terms of "place" which is, in turn, expansively defined to include "mall" among other things. The Commission is of the view that in section 98, "venue" bears an expansive meaning similar to "place".
- 7.13 The Commission takes the view that in the present case, the venue for which there is a licence is 416 Main South Road, Christchurch – ie the Hornby Mall. Whether the old and new locations of the bar are part of the Hornby Mall is a factual question, "mall" not being a term which is defined in the Act.
- 7.14 Malls may be redeveloped and expanded. Their boundaries may change. The Commission inclines towards the view expressed in NZCT's submissions that the geographical limits of a mall are essentially defined by the area occupied by the overall commercial enterprise incorporating the retail establishments which are managed on a co-ordinated basis there. Although 7-11 Chalmers Street was not originally part of the Hornby Mall, it became part of the Hornby Mall when the mall operator acquired it and incorporated it into the mall operation. Isobar appears to have been run as part of the Hornby Mall. As the District Licensing Inspector's report stated, the new location "falls under the umbrella and control of the Hornby Mall" (exhibit Q to the Hunter affidavit at page 2).
- 7.15 The Commission did not place much weight on the fact that the new location of the bar is situated on another certificate of title, or that the land is owned by a wholly owned subsidiary of the entity which owns the original mall complex. While the Commission took such facts into account, ultimately the question of whether the original and new locations

of the bar are part of the mall is a question of fact. After weighing all the evidence, the Commission is of the opinion that the new location of the bar is part of the mall.

- 7.16 Therefore, since the old and new locations of the bar are the same "venue" for the purposes of section 98, territorial consent was not required.

Was the venue correctly described in the application?

- 7.17 Each time that NZCT submitted applications for class 4 venue licences, it included a copy of the current liquor licence for the site. Each time a licence was issued, the only description of the venue was the general address of the Hornby Mall. Although the Department could have more precisely and restrictively defined the venue as the actual physical location within the mall, it did not do so.

- 7.18 Since the Department, in the licences which it issued, only referred to the general address of the Hornby Mall, in the Commission's view NZCT described the venue correctly in the application to amend the class 4 venue licence. Its description matched the degree of description which the Department's licences had adopted.

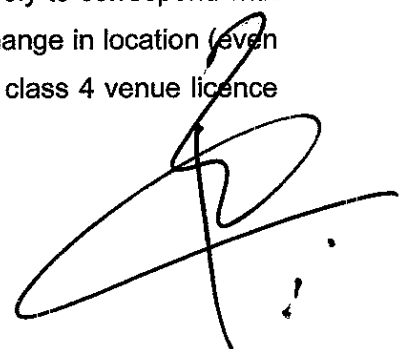
Was NZCT's application to amend its licence misleading or materially false?

- 7.19 By issuing licences which did not precisely define the venue, the Department chose not to treat the precise location as material when issuing the class 4 venue licences. Since the Department treated the general address of the Hornby Mall as an adequate description for the licence, the Commission considers that the application to amend the licence did not contain information that was misleading or materially false - the omission of the precise location within the mall was not a material omission.

8. DECISION ON APPEAL

- 8.1 The Commission is of the view that the appeal should be allowed as no territorial consent was needed and by describing the venue in the same way as the Department did, NZCT did not misdescribe the venue. In that respect the application was not misleading or materially false. This result follows from the way in which the Department described the venue in the class 4 venue licence schedule. The position would be otherwise if a more precise description had been used.

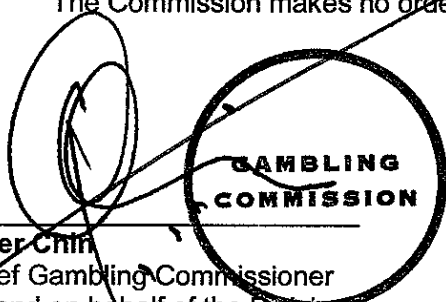
- 8.2 It was open to the Department to define the approved site restrictively to correspond with the actual physical location of the bar. Had it done so, then *any* change in location (even moving next door) would have necessitated an amendment to the class 4 venue licence as to place and the consent of the territorial authority.



8.3 It was also open however to the Department to define the approved site as being a business located in the mall. This would mean that class 4 gambling could take place anywhere known as "Tuskers Hornby Mall" (or Isobar depending on the licence) within the mall. Of course the venue would need to comply with the Act and the other licence conditions – for instance there would have to be an "on" liquor licence (or other alternative contemplated by condition 15); restrictions on access to persons under the age of 18 (condition 16); a maximum of 18 machines at the venue; and gambling not to be the primary activity on the site. In this case, that is what the Commission considers the Department did when issuing the class 4 venue licences.

8.4 The Commission has reached its decision principally by construing the form of Class 4 venue licence and site approvals actually issued. The decision is not influenced by considerations relating to the extinguishing of rights by statutory reform and it agrees with the Department's submissions that, in this case, if the venue had not been the same, the loss of the licence would have been the result of the termination of the lease rather than a statutory change.

8.5 The Commission makes no order as to costs.



**GAMBLING
COMMISSION**

Peter Chin
Chief Gambling Commissioner
for and on behalf of the Division

26 April 2005