

IN THE MATTER of the Gambling Act 2003

AND of an appeal by **BLUE WATERS
COMMUNITY TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
A K Foote

Date of Decision: 9 December 2011

Date of Notification
of Decision: 1st February 2012

**DECISION
ON AN APPEAL BY BLUE WATERS COMMUNITY TRUST**

Background

1. Blue Waters Community Trust (the “**Appellant**” or “**Blue Waters**”) appealed against a decision by the Secretary for Internal Affairs (the “**Secretary**”) to suspend its Class 4 operator’s licence. The Secretary suspended Blue Waters’ licence for three days under sections 58(1)(b) and 59 of the Gambling Act 2003 (the “**Act**”) on the ground that it exceeded Limit D of the Limits and Exclusions on Class 4 Venue Costs Notice dated 17 July 2008 (the “**Gazette Notice**”) for the year ending 31 July 2009.
2. The parties filed their substantive submissions, with the Appellant also filing submissions in reply. In its reply submissions, Blue Waters questioned the validity of the Gazette Notice because it was issued by a person within the Department who, in Blue Waters’ submission, may not have had authority to do so. The Commission therefore requested the Secretary to file additional submissions addressing this issue.
3. On Monday 14 November 2011, the High Court released its decision in *The Trillian Trust v The Secretary for Internal Affairs* HC Wellington CIV 2010-485-2411, 14 November 2011. On Friday 18 November 2011, counsel for Blue Waters sought leave to file additional submissions addressing the *Trillian* decision. The Chief Gambling Commissioner granted leave and directed Blue Waters and the Secretary to file additional submissions limited to addressing the *Trillian* decision. Both parties did so.



Relevant law

4. The relevant law is as follows:

Gambling Act 2003

4. Interpretation

- ...
 (3) References to this Act include regulations made or continued under this Act.

52. Grounds for granting class 4 operator's licence

- (1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that,—
- (a) the gambling to which the application relates is class 4 gambling; and
 - (b) the applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes; and
 - (c) the applicant's proposed gambling operation is financially viable; and
 - (d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and
 - (e) the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes; and
 - (f) the applicant is able to comply with applicable regulatory requirements; and
 - (g) the applicant will minimise the risks of problem gambling; and
 - (h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); and
 - (i) there are no factors that are likely to detract from achieving the purpose of this Act; and
 - (j) a key person is not a key person in relation to a class 4 venue licence held, or applied for, by the applicant (except in the case of a club that intends to operate gambling equipment on its own non-commercial premises, the New Zealand Racing Board, or a racing club).
- (2) In assessing financial viability under subsection (1)(c), the Secretary must consider, among other things, the ability of the applicant to reward winners and pay levies, taxes, and other costs, as well as apply or distribute the net proceeds from the class 4 gambling to or for authorised purposes.
- (3) The Secretary may refuse to grant a class 4 operator's licence if an applicant fails to provide the information requested by the Secretary in accordance with section 51.
- (4) In determining whether an applicant is suitable for a class 4 operator's licence, the Secretary may investigate and take into account the following things:
- (a) whether the applicant or a key person has, within the last 10 years,—
 - (i) been convicted of a relevant offence:
 - (ii) held, or been a key person in relation to a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused:
 - (iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt; and
 - (b) the financial position of the applicant and the credit history of the applicant and each key person; and
 - (c) the profile of past compliance by the applicant and each key person with—
 - (i) this Act, minimum standards, game rules, Gazette notices, and licence conditions; and
 - (ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and

- (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act.
- (5) The Secretary may take into account matters of a similar nature to those listed in subsection (4) that occurred outside New Zealand.
- (6) If the Secretary decides to refuse to grant a class 4 operator's licence, the Secretary must notify the applicant of—
- (a) the reason for the decision; and
 - (b) the right to appeal the decision; and
 - (c) the process to be followed for an appeal under section 61.

58. Suspension or cancellation of class 4 operator's licence

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 operator's licence if the Secretary is satisfied that—
- (a) any of the grounds in section 52 are no longer met; or
 - (b) the corporate society is failing, or has failed, to comply with any relevant requirement of this Act, licence conditions, game rules, and minimum standards; 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 operator's licence; or
 - (ii) a renewal or an amendment of a class 4 operator's licence; or
 - (iii) a class 4 venue licence; or
 - (iv) a renewal or an amendment of a class 4 venue licence.
- (2) In deciding whether to suspend or cancel a class 4 operator's licence, the Secretary must take into account the matters in section 52.

116. Secretary may limit or exclude costs of corporate society

- (1) The Secretary may, by notice in the Gazette, set limits on, or exclude, the costs that may be incurred by a corporate society that conducts class 4 gambling.
- ...
- (5) A contract or other arrangement or obligation entered into by a corporate society, whether before or after the passage of this Act, that does not comply with limits set under subsection (1) is an illegal contract for the purposes of the Illegal Contracts Act 1970.
- (6) A notice by the Secretary under subsection (1)—
- (a) is a regulation for the purposes of the Regulations (Disallowance) Act 1989; but
 - (b) is not a regulation for the purposes of the Acts and Regulations Publication Act 1989.

Interpretation Act 1999

29. Definitions

Act means an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand

Regulations means—

- (a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown;
- (b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment;
- (c) an Order in Council that brings into force, repeals, or suspends an enactment;
- (d) regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand;
- (e) an instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or the Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989:

- (f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e)

State Sector Act 1988

41. Delegation of functions or powers

- (1) The chief executive of a department may from time to time, either generally or particularly, delegate to any other person (being a chief executive or an employee) any of the functions or powers of the chief executive under this Act or any other Act, including functions or powers delegated to the chief executive under this Act or any other Act:
provided that the chief executive shall not delegate any functions or powers delegated to the chief executive by a Minister without the written consent of that Minister, or any functions or powers delegated to the chief executive by the Commissioner without the written consent of the Commissioner.
- (2) In any case where the chief executive has, pursuant to subsection (1), delegated any functions or powers to any person, that person may, with the prior approval in writing of the chief executive, delegate such of those functions or powers as the chief executive approves to any other person (being an employee) or to the holder for the time being of any specified office in that department.
- (3) Subject to any general or special directions given or conditions imposed by the chief executive, the person to whom any functions or powers are delegated under this section may exercise those functions or powers in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by delegation.
- (4) The power of the chief executive to delegate under this section—
- (a) is subject to any prohibitions, restrictions, or conditions contained in any other Act in relation to the delegation of the chief executive's functions or powers; but
 - (b) shall not limit any power of delegation conferred on the chief executive by any other Act.
- (5) Every person purporting to act pursuant to any delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.
- (6) Any delegation under this section may be made to a specified person or to persons of a specified class, or to the holder or holders for the time being of a specified office or specified class of offices.
- (7) No such delegation shall affect or prevent the exercise of any function or power by the chief executive, nor shall any such delegation affect the responsibility of the chief executive for the actions of any person acting under the delegation.

Agreed Statement of Facts

5. The parties agreed on the following background facts:
- (a) On 13 August 2009 the Department of Internal Affairs (the "**Department**") wrote to Blue Waters seeking information on compliance with Limit D of the Limits in the Gazette Notice.
 - (b) Blue Waters provided information to the Department. That information confirmed that \$297,847.00 was spent on total venue costs and total gaming machine profits amounted to \$1,690,603.00. Accordingly, 17.62% of gaming machine profits was spent on total venue costs for the 12 months before 31 July 2009.

- (c) There was a total expenditure of \$27,351.00 in excess of the permitted percentage of gaming machine profits limit.
- (d) On 20 April 2011, the Department wrote to Blue Waters. That letter proposed a suspension of seven days.
- (e) On 26 May 2011, Blue Waters made submissions in reply.
- (f) On 30 June 2011, the Department made a decision to suspend Blue Waters for three days.
- (g) On 25 July 2011, Blue Waters appealed the Department's decision.
- (h) Blue Waters has not served a sanction before.

Submissions by the Appellant

- 6. The Appellant accepted that it exceeded limit D in the 12 month period to 31 July 2009 because it spent 17.62% of gaming machine profits in this period, and therefore exceeded the 16% maximum cap required by Limit D. The over-spend totalled \$27,351.
- 7. However, the Appellant submitted that there was no jurisdiction to impose a suspension for an historic breach of the Gazette Notice. In the alternative, it argued that, if there were jurisdiction to suspend for such a breach, the period of suspension imposed was too long.

Jurisdiction to suspend

- 8. The Appellant submitted that there was no jurisdiction to suspend its licence for non-compliance with the Gazette Notice for the following reasons:
 - (a) None of the grounds to suspend in section 58 apply to this case.
 - (b) Section 58(1)(a) does not apply because under section 58(1)(a) the Secretary must be satisfied that "any of the grounds in section 52 are no longer met." This involves a consideration of an existing and future state of affairs. It does not otherwise involve an inquiry into historic non-compliance. Blue Waters was not, at the time of the Secretary's decision to suspend, in breach of any of the matters set out in section 52(1), so it was complying with the applicable regulatory requirements.
 - (c) Sections 58(1)(c) and (d) did not apply.
 - (d) Therefore the only potential ground for suspension under s 58(1) is section 58(1)(b), under which the Secretary may suspend if "the corporate society is

failing, or has failed, to comply with any relevant requirement of this Act, licence conditions, game rules and minimum standards."

- (e) There was no breach of a licence condition, game rule or minimum standard, so the only question is whether a past breach of limit D is a breach of the Act.
- (f) A past breach of a Gazette Notice does not amount to a failure to comply with a relevant requirement of the Act.
- (g) The Gazette Notice is a deemed regulation pursuant to section 116(6). Section 116 does not state that a failure to comply with any deemed regulations promulgated under it amounts to a breach of the Act – it is simply an empowering provision which enables the Secretary to set limits by Gazette Notice. For the purposes of section 58(1)(b), it is not, therefore, the Act that sets out any relevant requirements for cost limits – it is the Gazette Notice.
- (h) Section 58(1) does not refer to any non-compliance with a breach of the Gazette Notice or a regulation. Elsewhere in the Act, where Parliament has intended to refer to the Gazette Notice or a regulation, this has been expressly set out.
- (i) The specific references to the Gazette Notice and/or regulations in other parts of the Act highlight their absence from section 58(1)(b). It must, therefore, have been Parliament's intention that past non-compliance with a Gazette Notice or a regulation, of itself, would not be grounds for suspension. There must also be a corresponding breach of the Act.
- (j) The definition of "Act" in the Interpretation Act 1999 does not include Gazette Notices or regulations made under the Act. Regulations are separately defined at section 29.
- (k) Section 116 does not create an implication that any non-compliance with the limits set by section 116(1) would amount to a breach of the Act. The Act is detailed as to the consequences of breach of certain sections. For example, section 106(2) expressly provides that a breach of section 106(1) is an offence. By contrast section 116 is silent as to the consequences for non-compliance with the Gazette Notice, except for an express reference in section 116(5) providing that any contract which exceeds the limits is deemed to be an illegal contract for the purpose of the Illegal Contracts Act 1970.

- (l) The only sanction that the Act contemplates for exceeding Limit D of the Gazette Notice is the possibility that past non-compliance will be taken into account on a licence renewal decision.

Suspension Factors

- 9. In the alternative, the Appellant submitted that, if the Commission found that there were jurisdiction to impose a suspension for a breach of limit D, a three day suspension was too long because:
 - (a) the circumstances of the breach did not justify a three day suspension;
 - (b) a three day suspension was disproportionate when compared with penalties imposed on other class 4 operators for more serious breaches; and
 - (c) the Secretary's methodology of calculating the three day suspension was flawed.

Circumstances of the Breach

- 10. The Appellant submitted that the circumstances of the non-compliance with the Gazette Notice limit did not justify a three day suspension for the following reasons:
 - (a) Blue Waters exceeded the 16% cap by \$27,351. No venue received any payment in excess of its actual, reasonable and necessary costs. The breach was caused by a failure to reduce immediately the amount of venue payments proportionately with a reduction in overall society revenue.
 - (b) There was no inappropriate personal gain, conflict of interest or any entertainment or hospitality type expenditure.
 - (c) The 16% cap is difficult for small societies with two or three venues to monitor as it is calculated on a rolling 12 month basis, rather than each financial year, without putting all venues on a 16% commission (which is prohibited under the Act).
 - (d) Blue Waters took reasonable steps to address the issue, by releasing a low performing venue in June 2009, and making significant reductions to the venue payments for the remaining venues.
 - (e) The Gazette Notice breach in question related to a period in 2008 and 2009. In setting the three day suspension the Secretary alleged historical breaches, stating that Blue Waters exceeded limit D in the period 1 May 2007 to 30 April 2008 (17%) and 1 May 2008 to 30 April 2009 (16.8%). However, until 17 July 2008 the

limit was effectively 18% (16% plus GST). In The Southern Trust's Final Audit Report dated December 2008, the Secretary acknowledged this as follows:

The Gazette Notice limits venue costs to 16% of the turnover from class 4 gambling less the prizes paid. Because of a misinterpretation of whether this figure is GST inclusive or exclusive, **the Department allowed, during the period this audit covered, for societies to incur venue costs in a 12 month period to a maximum of 18% GST exclusive.** An amendment to the Gazette Notice has clarified that the maximum percentage is 16% GST exclusive. [Emphasis added]

- (f) It was inconsistent and unfair to penalise Blue Waters for costs of between 16% and 18% prior to 17 July 2008 when the Secretary allowed other societies to have costs of up to 18% in this period.
- (g) Although there is a need for general deterrence in the area of entertainment expenditure and conflicts of interest, there is no need for any new precedent to be set in relation to a modest breach solely of limit D, as the Appellant has been deterred and is now compliant with Limit D.
- (h) The only parties which will be penalised by a lengthy suspension are the community and the venue operators. Further, only one of the current three operators was with Blue Waters during the period in question. It is unfair that the new operators be penalised for past breaches with which they had no involvement.

Comparison with other suspensions

11. Blue Waters also submitted that a three day suspension was high having regard to the penalties imposed upon other societies (either by the Secretary, the Commission, or as a matter of agreement between the Secretary and the society in question) for far more serious breaches. The Appellant referred to a number of other societies, which had overspent in breach of various provisions, by greater dollar amounts than had the Appellant. The Appellant submitted that those societies had received periods of suspension which, although longer than the period of suspension imposed on the Appellant were disproportionately short when the other societies' total overspend was compared to that of the Appellant. The Appellant also referred to several societies that had received suspensions of three days or less, which had made inappropriate payments of a greater total amount than had the Appellant. The Appellant submitted that a suspension of less than two days would be consistent with the cases to which it had referred.

The Department's Gaming Machine Profit ("GMP") calculation method

12. Finally, the Appellant submitted that the model that the Department had used to arrive at the suspension period was inherently problematic. The Department took the Appellant's average daily GMP (at the time of the proposal and decision), calculated the number of days it would take for the GMP to equal the amount misspent and imposed that number of days as the period of suspension. As the breach was in 2008/2009, the Appellant questioned whether, if in the meantime its average GMP had increased, the period of suspension would have decreased, or vice versa.
13. Further, the Appellant submitted that, if the GMP-based suspension model were endorsed, large societies could misspend gaming proceeds by around \$250,000 before qualifying for a one day suspension. Such a model meant that sanctions were not based on the seriousness of the breach in comparison to sanctions imposed in similar cases.
14. The Appellant also submitted that the Department's rationale – that the amount that was overspent needs to be recovered – was flawed. A three day suspension would result in a further loss of \$27,351. Further, the Department's approach to "recovery" in this way was inconsistent because, in its decision letter, the Department stated that the money would not be retained by the community but spent at rival venues.

Submissions by the Secretary

15. The Secretary submitted, in summary, that the Commission should confirm his decision to suspend Blue Waters' operator's licence for three days for the following reasons:
 - (a) there was jurisdiction to impose a suspension;
 - (b) a three day suspension was an appropriate and reasonable sanction for the breach.

Jurisdiction to impose suspension

16. In relation to jurisdiction, the Secretary submitted:
 - (a) Blue Waters' failure to comply with Limit D of the Gazette Notice was a failure to comply with "any relevant requirement of this Act in terms of s 58(1)(b).
 - (b) An express reference to the Gazette Notice in s 58(1)(b) is not necessary as section 4(3) of the Gambling Act provides that "references to this Act include regulations made or continued under this Act" and the Gazette Notice is a deemed regulation under section 116(6).



- (c) Blue Waters refers to the definition of “Act” in the Interpretation Act, and notes that it does not refer to Gazette Notices or regulations. However, section 4 of the Interpretation Act provides that the Interpretation Act applies to any enactment that is part of the law of New Zealand unless the enactment provides otherwise, or the context of the enactment requires a different interpretation. Section 4(3) of the Gambling Act provides that references to the Gambling Act include “regulations made or continued under this Act”. This overrides the definition of “Act” in the Interpretation Act because the Gambling Act requires a different interpretation.
- (d) Section 29 of the Interpretation Act provides that “regulations” includes an instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations (Disallowance) Act 1989. This definition is consistent with section 116(6) of the Act.

Suspension factors

- 17. The Secretary submitted that a three day suspension was an appropriate and reasonable penalty. The Secretary submitted, in summary:
 - (a) He considered two overarching factors when determining a regulatory penalty – deterrence and the appropriateness of the penalty.
 - (b) With these factors in mind, his Department followed an approach, according to which “the length of suspensions should, in the first instance, be proposed on a notional ‘recovery’ basis based on a society’s daily averaged GMP.” The approach was set out in detail in the affidavit of Mr Abbott, Regional Manager, Gambling Compliance Unit Northern Region, who was responsible for the audit of, and investigation into the Appellant’s compliance with Limit D.
 - (c) Following this approach, the Department calculated the length of the suspension as follows:
 - (i) Blue Waters had overspent \$27,351 of GMP;
 - (ii) Blue Waters had an average daily GMP of \$10,697; and
 - (iii) therefore a three day suspension would be sufficient to “recover” the amount overspent by Blue Waters.
 - (d) As the final determination of any sanction must also be appropriate and proportionate for the particular offender and the regulatory issue, he also considered relevant aggravating and mitigating factors in deciding to impose a three day suspension, including the following:

- (i) Although Blue Waters claimed it had subsequently recovered the over-expenditure, he did not consider it to be a true recovery and the likely reason that there appeared to be a recovery was because the actual, necessary and reasonable venue costs incurred amounted to less than 16% of GMP anyway as a result of the increase in GMP that occurred.
 - (ii) From May 2009 to January 2010, venue costs in excess of Limit D continued. This demonstrated that the non-compliance with Limit D was not a one-off event.
- (e) He did not accept the Appellant's argument that the model disadvantaged small societies. His model meant that the length of the suspension was proportionate to both the percentage of the GMP overspent on total venue costs, and the actual figure of overspend. Since both are taken into account a smaller society will not be disadvantaged.
- (f) His calculation of the three day suspension was also determined in consideration of relevant aggravating and mitigating factors. This meant that the sanction was not solely determined by the amount and percentage of the breach, but took into account the wider circumstances of the non-compliance.
- (g) The length of the Appellant's suspension did not take into account any Limit D figures prior to 1 August 2008. The three day suspension was not, therefore, based on a breach of the Gazette Notice over multiple years.

Previous society suspensions

18. In relation to suspensions imposed upon other societies, the Secretary submitted that most of the cases that Blue Waters referred to either did not relate to breaches of Limit D, or related to breaches of Limit D committed in conjunction with other breaches. Therefore, it was difficult to use the suspensions imposed in those cases to determine the appropriate sanction for Blue Waters' breach.
19. The Secretary also submitted that Blue Waters mainly considered the amount overspent by the societies and compared that to the amount it had overspent. However, the amount overspent by a society is not the sole factor in determining an appropriate penalty – the Secretary looks at the amount of overspend, the percentage overspent and the overall circumstances of the case. For this reason, Blue Waters could not simply view the amount overspent by another society and the applicable penalty in that case and compare it to Blue Waters' overspend and corresponding three day suspension.

20. The secretary submitted that a more relevant comparison of cases, showing the suspension of societies which had breached Limit D and the majority of which had been arrived at using the GMP “recovery model”, was provided by the evidence filed in support of the Secretary’s submissions. Looking at these cases, the three day suspension imposed on Blue Waters was proportionate and consistent with other cases.

The Appellant’s submissions in reply

21. In reply, the Appellant submitted, in summary, that:
- (a) The Secretary’s argument that the reference to “this Act” incorporated a reference to the Gazette Notice only raised further anomalies:
 - (i) If reference to “this Act” included the Gazette Notice, why would Parliament include express reference to the Gazette Notice in other sections of the Act which also refer to “this Act”? The Secretary’s position would render the wording in the other sections superfluous.
 - (ii) If deemed regulations were automatically within the meaning of “this Act”, why would Parliament specifically list game rules and minimum standards in section 58(1)(b)? They too are deemed to be regulations (game rules pursuant to section 367 and minimum standards pursuant to section 327).
 - (b) The listing of certain deemed regulations within sections 58(1)(b), 52(4)(c), 68(1)(c) and 201(2) was deliberate. The omission of Gazette Notice from s 58(1)(b) must also have been deliberate.
 - (c) The reference to regulations “made or continued under this Act” in section 4(3) must, therefore, only refer to traditional regulations; that is instruments that are described as regulations and are made under the authority of an Act by the Governor-General by Order in Council. There are numerous provisions for traditional regulations made under the Act (for example sections 17, 114, 172, 219, 313 and 314).
 - (d) Traditional regulations are clearly “made under” the Act. By contrast, each of the sections of the Act which provide for deemed regulations contains an express provision qualifying that they are only regulations for the purposes of the Regulations (Disallowance) Act 1989.
 - (e) Instruments under these sections, including the Gazette Notice under section 116, are “regulations” under the Interpretation Act 1999 and Regulations (Disallowance) Act 1989, but remain distinguishable from traditional regulations.



Validity of the Gazette Notice – delegated authority issue

22. The Appellant also submitted that there was an arguable issue about the validity of the Gazette Notice for the following reasons:

- (a) Section 116(1) of the Act provides that the Secretary may, by notice in the Gazette, set certain limits on, or exclude, the costs that may be incurred by a corporate society that conducts class 4 gambling.
- (b) The notice is a form of delegated legislation.
- (c) The power to make delegated legislation must be exercised by the person or body on whom it is conferred and, in the absence of express legislative provision, a power to make regulations cannot be sub-delegated. This is the maxim, *delegatus non potest delegare* (a delegate cannot delegate).

(d) The Gazette Notice appears to have been made under a sub-delegation:

... I, Michael Francis Hill, Director, Gambling Compliance Group,
Department of Internal Affairs, acting under the authority delegated to me,
give notice that ...

- (e) There is no express right of sub-delegation in section 116. Accordingly, the Secretary needs to clarify the basis of the authority referred to in the Gazette Notice.
- (f) If he is unable to point to a clear statutory right to sub-delegate, then there is a significant issue. The Trust cannot be suspended under the Act for non-compliance with a notice that is invalid.

Suspension model

23. Finally, in relation to the Department's suspension model, the Appellant submitted, in summary:

- (a) Mr Abbott appeared to concede that the suspension length was set purely by the use of his mathematical model.
- (b) As detailed in Mr Abbott's affidavit, the model initially indicated that a seven day suspension was warranted, but he accepted that seven days would be excessive. Mr Abbott also acknowledged that, following his mathematical model, he would have imposed a suspension of 13 or 14 days for the identical breach, if the Trust's GMP had reduced. The fact that vastly different penalties can be imposed for an identical breach, illustrates the fundamental flaws in the mathematical model.

- (c) Using a mathematical formula does not keep the penalty in proportion to the breach. It is very easy for a large society to monitor and manage the 16% limit. This is because, if a large society unexpectedly loses three very high performing venues, the effect may only be a 0.001% change in their venue payment ratio. However, if a small society does not lose any venues at all, but has a period where an unexpected drop in GMP is experienced at one of its venues, this can rapidly have a dramatic effect on the total amount paid in venue payment as a percentage of the Trust's total GMP. A breach by a large society is therefore more likely to be a deliberate or reckless act, whereas a breach by a small society can easily occur quickly, despite prudent management.

Secretary's submissions on delegated authority

24. In response to a request by the Commission to clarify the authority of the Secretary to delegate the setting of the Gazette Notice, the Secretary submitted as follows.
- (a) Section 41 of the State Sector Act 1988 (the "**SSA**") overrides the maxim *delegatus non potest delegare* as it provides that a chief executive of a department may, from time to time, delegate to any other person any of the functions or powers of the chief executive under the SSA or any other Act, including functions or powers delegated to the chief executive under this Act or any other Act.
- (b) There is no need for there to be an express statutory delegation in the Gambling Act because section 41 of the SSA is a general delegation power applicable to delegations made by the Secretary pursuant to any statute, including the Gambling Act.
- (c) On 13 June 2008, Brendan Boyle, then the Secretary for Internal Affairs, made a written delegation of the power conferred on him by section 116 of the Gambling Act. In the Delegation, he delegated the power to the Deputy Secretary Regulation and Compliance and the Director of the Gambling Compliance Group. The Delegation dated 13 June 2008 was in force on 17 July 2008. Michael Francis Hill held the role of the Director of the Gambling Compliance Group on 17 July 2008. Accordingly, the power under section 116 was validly delegated to Michael Francis Hill.
25. The Commission agrees and therefore does not consider the issue of validity further in this decision.

Appellant's additional submissions on *Trillian*

26. In relation to the *Trillian* decision, the Appellant submitted:

- (a) The *Trillian* decision focused on items of expenditure that the Secretary considered were unreasonable and/or unnecessary. Paragraph 4 of the judgment records that, following an audit, the Secretary determined that the Trillian Trust had committed five breaches of the Act in relation to expenses and that one breach related to the Limit D rule. The judgment records that Trillian accepted this. However it is clear that the High Court was not asked to consider whether a breach of the Gazette Notice is included in section 58(1)(b) of the Gambling Act. The decision therefore cannot be considered as an authority for the position that jurisdiction exists to suspend for Limit D breaches.
- (b) The High Court did not consider whether there is power to suspend an operator for past breaches of a Gazette Notice.
- (c) In *Trillian*, the High Court focused on the actual words of section 58. The actual words of section 58(1)(b) do not support a power to suspend in the circumstances of this case.
- (d) *Trillian* is also useful in confirming the proper approach to the assessment of penalty. If the Commission determines that it has jurisdiction to suspend the Appellant's operator's licence, then *Trillian* supports Blue Waters' alternative submission that it is not appropriate for the Department to rely on a mathematical model for calculating the length of suspension. The proper approach is to look at penalties imposed in comparable cases.

Secretary's additional submissions on *Trillian*

27. The Secretary submitted, in relation to *Trillian*, that:

- (a) *Trillian* was of no relevance to the current appeal because the main issues in the decision were not at issue here.
- (b) Blue Waters submitted that *Trillian* was useful as the High Court focused on the actual words of section 58 of the Act. The actual words of the Act support a power for the Secretary to suspend due to non-compliance with the Gazette Notice.
- (c) Blue Waters submitted that *Trillian* also supported the submission that it was not appropriate for the Department to rely on a mathematical model for calculating the length of suspension, and that the proper approach was to look at penalties

imposed in comparable cases. The Secretary agreed that *Trillian* is relevant, but argued that the following extract (at [54]) was more representative of the Judge's view:

It is important not to place too great an onus on the Department. It is not a Court and cannot be expected to provide a detailed breakdown. However, it cannot pluck a figure from nowhere, so there must be reasoning behind the figure ... One would imagine the reasoning will draw significantly on penalties imposed or approved by the Commission in other cases. Once these are identified, an operator can then point to similarities or differences with penalties in comparable cases.

28. Having considered the additional submissions regarding *Trillian*, the Commission was of the view that it was not materially assisted by them and they added nothing material to the earlier submissions received.

Analysis

29. This appeal raised two issues for consideration by the Commission, as follows:
- (a) Can the Secretary (or the Commission on appeal) suspend a Class 4 operator's licence for a past breach of the Gazette Notice?
 - (b) If so, what is an appropriate period of suspension?

Is there jurisdiction to suspend for a breach of the Gazette Notice?

30. Under section 58(1)(b) of the Act, the Secretary has jurisdiction to suspend a class 4 operator's licence if the society has failed to comply with any relevant requirement of the Act, licence conditions, game rules and minimum standards. It is common ground that compliance with the Gazette Notice is not a requirement of a licence condition, game rule or minimum standard, so in order for there to be jurisdiction to suspend on the ground that Blue Waters failed to comply with the Gazette Notice, compliance with the Gazette Notice must be a requirement of the Act.
31. The Secretary submitted that non-compliance with the Gazette Notice is non-compliance with a requirement of the Act because the reference in section 58(1)(b) to "this Act" includes, by virtue of section 4(3), all regulations made under the Act, which in turn includes the Gazette Notice.
32. To the contrary, Blue Waters argued that, because deemed regulations such as game rules, minimum standards and Gazette notices are frequently referred to in addition to references to "this Act", "this Act" must be taken to include only traditional regulations that are promulgated under the Act, and not deemed regulations such as the Gazette Notice issued pursuant to section 116.

33. Faced with competing constructions, both of which appeared to be technically arguable on the wording of the Act, the Commission preferred to adopt the construction of section 58 which best gave effect to what it took to be the underlying Parliamentary intention.
34. In enacting section 116, Parliament indicated an intention that the limits and exclusions set out in the resulting Gazette Notice would be complied with, be enforceable and have consequences for breach. In the Commission's view, compliance with the Gazette Notice is accordingly a requirement of the Act in terms of section 58(1)(b). Approached on that basis (construing the phrase as a whole rather than by reference to a single word), it was not necessary to decide whether the Gazette Notice itself fell within the definition of "Act".
35. The Gazette Notice is directed at preserving community funds by controlling costs, when community benefit is a critical feature of class 4 gambling in New Zealand. If the Gazette Notice lacked consequences for breach, community interests would be less protected.
36. The Appellant suggested that breach of the Gazette Notice had potential consequences but they were limited to licence renewal, because section 52(4) provides that past non-compliance with Gazette notices is a factor in assessing the suitability of applicants and key persons. The submission involves treating non-compliance with the Gazette Notice not as non-compliance with a requirement of the Act but as a basis for a finding of unsuitability under the Act. That strikes the Commission as an odd distinction to draw. Apart from that, the Commission did not consider that Parliament intended the Gazette Notice to have such limited consequential importance, particularly as the limit is directed at the critical issue of enhancing community benefit and controlling costs.
37. Accordingly, the Commission was of the view that jurisdiction exists for the Secretary (and the Commission on appeal) to suspend a class 4 operator's licence for past non-compliance with the Gazette Notice.

The Secretary's approach to suspension for breach of the Gazette Notice

38. Before addressing what, if any, suspension is appropriate in this case, the Commission makes some observations about the Secretary's approach to calculating an appropriate period of suspension.
39. The Commission is of the view that the Secretary's standard approach to fixing suspension periods (as explained in Mr Abbott's evidence) has a number of serious conceptual deficiencies. First, the Secretary calculates the period of suspension according to the number of days that it would take for GMP to equal the amount that was spent in breach of Limit D. The primary rationale behind his approach is the "recovery" of expenditure. However the suspension of an operator's licence, which requires that the

operator's venues to be closed for each day of the period of suspension, does not recover expenditure (but rather the reverse) as the society does not generate any GMP for those days. No additional net proceeds are generated by the suspension to apply or distribute to the community. This is not to say that the amount of the reduction in net proceeds which would have been available to the community is not relevant to suspension, but the fact that a suspension interrupts the generation of GMP and net proceeds precludes the adoption of a rationale of "recovery".

40. Secondly, the Secretary argued that:

- (a) in addition to recovery, the model meant that the length of the suspension was proportionate to both the percentage of the GMP overspent on total venue costs, and the actual figure of the overspend; and
- (b) the model did not unfairly punish smaller societies as a smaller society would only receive a longer suspension for a lesser breach in dollar terms if the amount by which the society had breached Limit D was a greater proportion of the smaller society's GMP. Such a result was justified by the fact that the smaller society had put at risk a greater proportion of its GMP than had the bigger society.

41. However, the emphasis on percentage of overspend assumes that societies are entitled to spend up to the Limit, rather than treating the Limit as a further restriction on incurring costs. That is, the Secretary's reasoning assumes that 16% is the baseline indicator. However, if, for example, a larger society's actual, reasonable and necessary costs are something less than 16% of GMP, the percentage of overspend above 16% is not a true indication of that society's excessive spending; nor is it necessarily an appropriate basis of comparison with overspend by other societies. Therefore, a larger society that overspends by a greater dollar amount but a smaller proportion of its GMP does not necessarily justify a shorter suspension period. Although section 116 provides for the expression of limits as percentages, the percentage expressed should not be the sole focus of the inquiry, beyond the underlying requirement, to which section 116 limits are additional, of the minimisation of costs.

42. Thirdly, the Secretary's approach also assumes that the percentage of overspend is determinative of the seriousness of the breach. However, this fails to recognise the importance of the amount of loss to the community. Class 4 gambling is predicated on the fact that funds will be raised for and distributed to the community. That loss to the community is appropriately measured in dollar terms, not as a percentage of a particular society's GMP. That is, an overspend of \$100,000 that makes up only 0.1% of a large



society's GMP is a greater loss to the community than an overspend by \$50,000 that makes up 1% of a smaller society's GMP.

43. Finally, the Secretary's model results in the period of suspension either increasing or decreasing between the non-compliance upon which it is based and its imposition, depending on whether the society's profits increase or decrease. In the present case, the Secretary originally calculated that a period of seven days would be necessary for the Appellant to "recover" the amount overspent. As the Appellant's GMP increased, however, the period of suspension was reduced to reflect that it would take fewer days for of suspension for the average daily GMP to amount to the figure overspent. The possibility of shorter suspensions for societies that improve GMP between non-compliance and suspension, however, would potentially be counterproductive, incentivising societies to spend money excessively on retaining or attracting high performing venues, as success in doing so will lead to a shorter suspension. There is a risk that some societies might consider such non-compliance to be economically efficient. In this respect, the Commission's remarks at paragraph 99 of The Trusts Charitable Foundation decision (GC11/10) are apposite:

- (d) In a competitive environment, enforcement of obligations which conflict with competitive urges is critical if compliance is to be expected. The results of the historical non-punitive approach are sadly obvious. If one expects societies to resist competitive pressure to engage in questionable expenditure or other conduct, the consequences must be plain and reliably imposed.
- (e) There is a question of fairness overall, to those societies who have been compliant, or at least less aggressively non-compliant, and to those whose non-compliances are or have been subject to investigation and punitive consequences.

44. The Secretary's approach to suspension, resting as it does on later GMP performance, aggravates elements of concern to the Commission regarding Limit D itself, an operational requirement already assessed after the event based on subsequent GMP performance. It produces results that lack proportionality and proper focus on culpability and deterrence of deliberate misconduct.

45. The Commission notes that, in creating his "recovery" model, the Secretary was motivated by a desire to achieve consistency across consequences for breaches of the Act. The motivation is understandable, and consistency is desirable. However, the myriad of differences between the circumstances of each society means that consistency, proportionality and fairness are not achieved by such a simple mathematical model. The Secretary (and the Commission on appeal) has discretion and must also, in each case, consider the particular circumstances of the individual and the offending (or in the case of corporate societies, the non-compliance), while also trying to maintain consistency.

Period of suspension

46. The Commission has previously dealt comprehensively with the issue of over-spending by corporate societies in *The Trusts Charitable Foundation* (GC11/10) and *The Southern Trust* (GC11/10) decisions. In those decisions, the Commission recorded a number of observations in relation to class 4 gambling in New Zealand, which are relevant here:
- Class 4 gambling is defined by section 30 of the Act as gambling, the net proceeds of which “are applied to or distributed for authorised purposes.” “Net proceeds” are defined by section 4 as the gross turnover of gambling less the “actual, reasonable and necessary costs” in conducting the gambling and complying with the Act. The effect of section 106 is that all net proceeds must be distributed for authorised purposes.
 - The importance of the distribution of net proceeds is further catered for by the requirement that class 4 societies minimise their operating costs and maximise their net proceeds. The Secretary must refuse to grant a licence (section 52) or must refuse to renew a licence (section 56) if he is not satisfied, amongst other things, that the society’s purpose in conducting the class 4 gambling is to raise money for authorised purposes; that the society will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and that the net proceeds from the class 4 gambling will be applied or distributed for authorised purposes.
 - Class 4 societies, and, to a degree, the Secretary, had appeared to view the limits on spending on venues set out in the Gazette notice as caps up to which class 4 societies were free to spend. In the Commission’s view, the starting point was the requirement to minimise costs and maximise and distribute net proceeds. Section 116 allows the Secretary to set specific and absolute limits on venue expenses in addition to the more generally expressed obligation (in section 52(1)(d)) to maximise net proceeds and minimise costs. The Act does not confer on the Secretary the power to set limits that would have the effect of contravening other obligations under the Act; therefore any limits set by the Secretary can only either confine or further limit costs that a class 4 society would otherwise incur under the Act. The limits set out in the Gazette Notice are not, therefore, synonymous with the other obligations under the Act, rather, they overlay them – it is possible that a society may spend within a limit, but still not be minimising its costs.
47. However, this case is quite different from *The Southern Trust* and *The Trusts Charitable Foundation* decisions. The *Southern Trust* decision involved spending on individual

venues that was in excess both of what was reasonable and necessary and of Limit C of the Gazette Notice, and The Trusts Charitable Foundation decision involved overspending that was driven by competitive pressures in relation to obtaining and retaining venues. This case does not appear to have involved unreasonable or unnecessary spending of that kind.

48. The Secretary appears to have accepted that the Appellant's expenditure was limited to what was reasonable and necessary, and so did not involve any unlawful distribution of net proceeds. It also appears, from financial records provided by the Appellant to the Secretary, that the specific items of expenditure were controlled by Limits A and B only, neither of which was breached. In addition, the costs were presumably provided for in venue agreements which the Secretary had approved under section 69(1).
49. As a result, Blue Waters has found itself in a position in which it complied with all other obligations which were assessable in advance but later found itself in breach of an overall limit which can only be assessed in hindsight by reference to ongoing GMP performance.
50. The Commission, therefore, gave some consideration to imposing no period of suspension for this breach, but ultimately formed the view that a short suspension should be imposed for non-compliance with the Gazette Notice.
51. In reaching this decision, the Commission noted that this was not a case where competitive pressures drove Blue Waters to spend excessively in breach of the reasonable and necessary requirement, the venue agreement provisions and the Gazette Notice limits, nor was it a case that involved inappropriate gain. The overpayment arose because the GMP fell and Blue Waters failed either to lower its payments in a timely manner or to increase its GMP.
52. In the Commission's view, such a breach should be preventable as operators should be looking forward, forecasting possible trends and adjusting costs accordingly. While forecasting may be difficult, it is undertaken in most forms of business, and should be undertaken by class 4 operators as well. Simply because a society is small, as it is in this case, does not excuse it from attempting to address the vagaries of business life as a large society would be expected to do.
53. Taking all of this into account, the Commission suspends Blue Waters' operator's licence for one day. The Commission considers such a period to be fair noting the particular facts of this case, including the abovementioned complexities, and compared to other cases involving suspension.

Decision of the Commission

54. For the reasons already provided, the division allows the appeal and suspends Blue Waters' operator's licence for one day. The suspension must be taken within one month of the date of the decision.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

1st February 2012

