

**IN THE MATTER** of the Gambling Act 2003  
**AND** of an appeal by **THE LION FOUNDATION**

**BEFORE A DIVISION OF THE GAMBLING COMMISSION**

Members: P Chin (Chief Gambling Commissioner)  
K M Ford  
G L Reeves

Date of Appeal: 18 October 2006

Date of Decision: 16 March 2007

Date of Notification of Decision: ~~30~~<sup>m</sup> March 2007

**DECISION**  
**ON AN APPEAL BY THE LION FOUNDATION**

**Appeal**

1. The Lion Foundation (the "**Appellant**") appealed under section 77 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs to impose a condition on the class 4 venue licence for the Kilbirnie Tavern, located at 22 Rongotai Road, Kilbirnie, Wellington (the "**Venue**")
2. The condition (the "**condition**") states that:

Class 4 gambling must not be conducted in areas where smoking is permitted
3. The effect of the condition would be to require the Venue operator to reposition five gaming machines at the Venue so that these can no longer be played from the courtyard of the Venue, where smoking is permitted.
4. The Appellant requested that the Commission reverse the Secretary's decision to impose the condition, the Secretary asking the Commission to confirm his decision.

**Relevant provisions of the Gambling Act 2003**

5. The relevant provisions of the Act are as follows:



**Section 3 Purpose**

The purpose of this Act is to –

- (a) control the growth of gambling; and
- (b) prevent and minimise the harm caused by gambling including problem gambling; and
- ...
- (d) facilitate responsible gambling;

**Problem gambler** means a person whose gambling causes harm or may cause harm

**Harm –**

- (a) means harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and
- (b) includes personal, social, or economic harm suffered –
  - (i) by the person; or
  - (ii) the person's spouse, civil union partner, de facto partner, family, whanau, or wider community; or
  - (iii) in the workplace; or
  - (iv) by society at large

**Section 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 -
  - ...
  - (p) the risk of problem gambling at the class 4 venue is minimised; and
  - ...
  - (r) there are no other factors that are likely to detract from achieving the purpose of this Act; ...

**Section 70 Content and conditions of class 4 venue licence**

- (1) ...
- (2) The conditions the Secretary may add to a class 4 venue licence include –
  - ...
  - (g) procedures to encourage responsible gambling at the venue;
  - (h) conditions specifying areas within a class 4 venue as the only areas permitted for conducting class 4 gambling;
  - (i) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act

**Facts**

6. The imposition of the condition arises, ultimately, out of the Smoke-free Environments Amendment Act 2003 ("**Amendment Act**"), which came into force on 10 December 2004. The Amendment Act prohibited smoking in casinos and class 4 venues, but excluded from both of these prohibitions smoking in an "open area", a term newly defined in the Smoke-free Environments Act 1990 ("**Smoke-free Act**") as meaning "a part of the premises that is not an internal area". An internal area is, in turn, defined as meaning:

... an area within or on the premises or vehicle that, when all its doors, windows, and other closeable openings are closed, is completely or substantially enclosed by –

- (a) a ceiling, roof, or similar overhead surface; and
- (b) walls, sides, screens, or other similar surfaces; and
- (c) those openings

7. The Kilbirnie Tavern is licensed for 18 gaming machines. As a consequence of the Amendment Act, smoking was banned from internal areas at the Kilbirnie Tavern, where



the machines were located, with smoking restricted to open areas, including an exterior courtyard at the Venue.

8. Inspectors from the Department of Internal Affairs (the “Department”) visited the Venue on 11 May 2006, having been notified by a member of the public that five gaming machines had been relocated to the open smoking area of the Venue. Inspectors found that the five machines in question had been turned around to face outwards into the courtyard, and were partially enclosed within a plywood structure located in the courtyard. Patrons sit in the courtyard, but inside the plywood structure, and are able to use the five machines while smoking.
9. This external gaming area is accessed via the gaming room, which is in turn accessed via the Venue’s main bar area. Further modifications to the Venue included the installation of a LCD monitor, located in the working area of the bar, displaying a fixed security camera image of the external gaming area.
10. The Secretary raised with the Appellant a number of concerns about the arrangement, relating primarily to the harmful effect of the positioning of the machines so as to enable patrons to smoke and gamble. The Appellant was asked on 19 May 2006 to restore the gaming machine area to its previous state, with the Appellant formally declining the Secretary’s request by letter of 21 August 2006. The Secretary added the condition by way of letter dated 28 September 2006, the imposition of the condition then being appealed to the Commission.

#### **Submissions on behalf of the Appellant**

11. The Appellant submitted, in summary, that:
  - (a) it is not established that harm is minimised by preventing people from smoking while playing gaming machines. This proposition relies on two assumptions that are unsubstantiated by evidence, namely, that breaks in play minimise harm, and that the decline in help seeking since 2004 is attributable to the Amendment Act. Further research is needed to establish these causal links;
  - (b) the Secretary has failed to consider other significant factors, such as race and alcohol consumption, relevant to the incidence of problem gambling;
  - (c) any potential for harm minimisation is limited to smokers;
  - (d) the licence condition is designed to reduce gambling and ban smoking while gambling, neither of which are consistent with the purpose of the Act or what

Parliament intended. There is therefore no justification under the Act for the imposition of the condition;

- (e) the placement of gaming machines in smoking areas does not seek to grow the rate of gambling, but is instead intended to maintain gambling at the Venue at the same level as it was prior to the introduction of the smoking ban.

### **Submissions by the Secretary**

12. The Secretary submitted that:

- (a) locating gaming machines in the smoking area is inconsistent with the Secretary's statutory duty to be satisfied that the risk (ie possibility) of problem gambling at the Venue is minimised;
- (b) locating gaming machines in the smoking area is inconsistent with the prevention and minimisation of harm caused by gambling, including problem gambling;
- (c) locating gaming machines in the smoking area is inconsistent with facilitating responsible gambling, as maintenance of a scenario in which people make conscious decisions about their gambling is conducive to an environment that facilitates this;
- (d) there are no other relevant objectives of the Act that would mitigate the above three submissions;
- (e) the condition will promote and ensure compliance with the Act by negating the ability of class 4 gamblers to smoke while they play;
- (f) the condition is reasonable as there is a demonstrable benefit from its imposition and little or no prejudice or hardship.

13. The Secretary lodged evidence from experts Professor Max Abbott, Dr Barry Borman and Professor Janice McMillen; John Markland and Stephen Balmer from the Department; and treatment providers Dr Philip Townshend, Clinical Director for the Problem Gambling Foundation, and Krista Ferguson, CEO of the Gambling Helpline. In summary, this evidence traverses the following matters:

- (a) The correlation between gaming machine play and problem gambling, with a majority of people presenting for treatment identifying gaming machines in pubs and clubs as the primary reason for help seeking;

- (b) The correlation between regularity of gaming machine play and problem gambling, with problem gamblers playing more frequently than non-problem gamblers, and for longer periods. Reference was made in evidence to the 1999 New Zealand National Prevalence Survey which found that the average gambling session length for problem gamblers (all types of gambling activity – class 4, casinos, racing etc) was over two hours, over double the average non-casino gaming machine session;
- (c) The correlation between smoking and problem gambling, with problem gamblers having greater propensity to smoke and smoke heavily, particularly when gambling. The 2002/2003 Ministry of Health Survey (attached to the Agreed Statement of Facts submitted by the parties and discussed in Dr Borman's affidavit) showed that 58.3% of problem gamblers were daily smokers compared with 22.5% of non-problem gamblers, and that 61.2% of problem gamblers increase the amount they smoke when they gamble, compared to 32.4% of non-problem gamblers;
- (d) The correlation between problem gambling and gambling expenditure, with problem gamblers spending more money on gaming machines than non-problem gamblers. Reference was made in evidence to the 1999 New Zealand National Prevalence Survey, which reported that although problem gamblers make up about 1.3% of the New Zealand population, they are estimated to be responsible for 19% of overall reported monthly gambling expenditure;
- (e) The effect of breaks in play. While some noted the lack of direct evidence, experts supported the view that interruptions may assist players to maintain or re-establish control over their gambling behaviour, so reducing gambling harm. Reference was made in Professor Abbott's evidence to a review, undertaken by the Auckland University Centre for Gambling Studies, of research into proposed gaming machine changes in New South Wales, that review concluding that the modification of note acceptors together with the removal of ATMs would be an effective harm minimisation measure. This, Professor Abbott stated, was supportive of the view that breaks in play can assist players in re-establishing control over their gambling. Dr Townshend cited a Market Research Briefing Report prepared in October 2002 for Tattersalls, assessing the impact on revenue and customer satisfaction of a law banning smoking in Victorian gaming venues from 1 September 2002. Dr Townshend stated that the Report supported his own clinical experience and the proposition that smoking bans assist problem gamblers who are smokers;

- (f) The correlation between the introduction of the Amendment Act and the reduction in New Zealand of expenditure on gaming machines. Mr Markland's evidence was that expenditure on gaming machines has declined from approximately \$1 035 billion for the calendar year 2004, to \$900 million for 2005 and 2006. A decline in expenditure was also reported to have occurred in Australian jurisdictions when similar smoke-free legislation was introduced;
- (g) The correlation between the introduction of the Amendment Act and the decline in help seeking for problem gambling, particularly for gaming machine play. Evidence was presented that there was a 33% decline in new client presentations to the Gambling Helpline between calendar year 2004 and 2005, with a decline also in new clients accessing face-to-face treatment services. The number of new gambler clients citing non-casino gaming machines as their primary mode of gambling fell from 83.2% in 2004 to 78.6% in 2005.

#### **Appellant's submissions in reply**

- 14. In reply, the Appellant submitted that the Secretary's evidence was flawed because it relied on causative links between smoking and problem gambling, between gaming machine expenditure and problem gambling prevalence, and between presentations and prevalence, which were not borne out in the evidence.
- 15. In support, the Appellant filed two affidavits from Martin Cheer, the Appellant's Compliance Manager and Clive Books, the Venue operator. Mr Cheer's evidence refers to a limited observational study done by the Appellant at the Venue, suggesting that non-smokers and smokers played for the same length of time. Reference was also made to views expressed by the Woodlands Trust (a treatment provider) to the effect that environmental factors, for example number of machines, are of limited importance, as they do not address the loss of control which individuals experience, which is the key problem gambling risk.
- 16. In his evidence, Mr Brooks described the changes made at the Venue to accommodate the machines, and the positive reaction of patrons to those changes. Mr Brooks' affidavit also attached a letter from Hon Annette King to the Minister of Internal Affairs, suggesting that the configuration at the Venue does not contravene the Smoke-free Act, and pointing out that that legislation was not intended to address those who gamble and smoke. This part of Mr Brooks' evidence is not relevant to the appeal for reasons which are explained below, nor is it properly within the scope of evidence in reply.

## Analysis

17. The two principal issues to which the appeal gives rise are the Secretary's jurisdiction to impose the condition and the reasonableness of it.
18. The Secretary imposed the condition pursuant to section 70(2)(i) of the Act in order to "promote or ensure compliance with the Act". He submitted that the condition can also be justified under sections 67(1)(p), (r), 70(2)(g), (h) or (i).
19. Sections 67(1)(p) and (r) require the Secretary to be satisfied, before granting a licence, that "the risk of problem gambling at the class 4 venue is minimised" and that "there are no other factors that are likely to detract from achieving the purposes of this Act".
20. While the imposition of conditions may satisfy the Secretary that he may grant a licence under section 67, the Secretary was not, in this instance, considering a new or renewal application for a class 4 licence. This being the case, the Commission considered it to be unnecessarily confusing to rely on section 67 in order to establish jurisdiction to impose the condition. The power to impose conditions under section 70 depends on the construction and application of that section, and it is to that section the Commission has had recourse.
21. The Secretary imposed the condition pursuant to section 70(2)(i), but submitted that it could also properly be imposed under sections 70(2)(g) and (h). Section 70(2)(h) contemplates that the Secretary (and the Commission on appeal) may impose conditions specifying areas within a class 4 venue for gambling, with section 70(2)(i) providing for the imposition of "any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with the Act".
22. The Commission observes that section 70(2)(i) appears to be intended to capture any other matters which are not already caught by other more specific parts of section 70(2). Where a condition falls within one of the specific parts of section 70(2), it is unnecessary, in the Commission's view, to have recourse to the more general provision in section 70(2)(i).
23. A condition of the nature contemplated would sit less comfortably under section 70(2)(g), which provides that the Secretary may add conditions including "procedures to encourage responsible gambling at the Venue". "Procedures" are understood by the Commission to be established ways of doing something, or a series of actions done in a certain way. The condition imposed by the Secretary prevents gambling from being conducted in a specified area. It does not constitute a "procedure" as such.

24. In this instance, the Commission determined that the Secretary (and the Commission on appeal) has jurisdiction to impose conditions under section 70(2)(h) for harm minimisation purposes. This follows from the purpose of the Act, which is, inter alia, to “prevent and minimise the harm caused by gambling, including problem gambling” (section 3(b)). The requirement to prevent and minimise harm is an ongoing one. The issue is not whether the Appellant is increasing harm (compared to a 2003 benchmark), but whether the condition is properly imposed for harm minimisation purposes.
25. The Commission next considered whether the condition was fair and reasonable in the circumstances. This requirement follows from the presumption that Parliament intends condition-making powers to be exercised reasonably and for proper purposes.
26. In decision GC16/06, and following the approach in *Newbury District Council v Secretary for State for the Environment* [1980] 1 All ER 731, the Commission took into account the following factors in assessing whether a condition was fair and reasonable:
- (a) whether the condition is the result of a process of reason rather than a whim or arbitrariness;
  - (b) whether the condition is proportionate. This involves weighing the benefits gained from imposing the condition, compared to the costs and the detrimental effects incurred; and
  - (c) whether the condition is fair to both the individual faced with the condition and the community.
27. In this case, there was no question that the Secretary imposed the condition as a result of a process of reason, and for a proper purpose under the Act, namely harm minimisation and not, as argued by the Appellant, to reduce gambling or smoking. The key issue in this case was whether the condition was proportionate and fair. In making this assessment, the Commission balanced the likely benefits and detriments and considered whether, overall and in the round, the condition was fair and reasonable.
28. As a preliminary point, the Commission considered the purposes of the Smoke-free Act which, according to its long title, was passed to “reduce the exposure of people who do not themselves smoke to any detrimental effect on their health caused by smoking by others”; regulate the marketing and sponsorship of tobacco products; monitor and regulate the presence of harmful constituents in tobacco products and smoke; and establish a Health Sponsorship Council. The Commission observed that the Act focused on regulation of smoking for health purposes, and that it does not indicate an intention to have any effect on gambling.

29. The Amendment Act significantly amended the Smoke-free Act, and was quite specific about the effect which it was to have on gambling, by prohibiting smoking in casinos (by means of a new section 13A) and class 4 venues (new section 13B). Excluded from both of those prohibitions, was smoking in an "open area", the definition of which is discussed above. Section 13B of the amended Smoke-free Act provides as follows:

**13B Smoking in certain gaming machine venues**

(1) The holder of a class 4 gambling venue licence in respect of a place must take all reasonably practicable steps to ensure that no person smokes at any time in any part of the place that is not an open area.

(2) Subsection (1) does not prevent the holder of a class 4 gambling venue licence in respect of a place from prohibiting smoking in a part of the place that is an open area.

(3) No person may smoke at any time in any part of a place in respect of which a class 4 gambling venue licence is held that is not an open area.

30. The Commission considered it important that the Amendment Act provides for the possibility of open areas in class 4 gambling premises and that the prohibition on smoking does not extend to such areas. The Amendment Act did not completely prohibit smoking in class 4 venues, as Parliament could have done if that were its intention, but rather provided for the circumstances in which smoking could take place.
31. The Appellant correctly submitted that, if the condition was imposed for the purpose of banning smoking or reducing gambling, then it could not properly be imposed for the purpose of promoting or ensuring compliance with the Act. The Act permits gambling and accordingly it is not permissible simply to reduce the permitted activity (gambling) in order to reduce problem gambling. Similarly, the Act is not concerned with smoking at all and so conditions imposed with the intention of reducing smoking while gambling, or even achieving the purposes of the Smoke-free Act, would be improperly imposed. The Commission did not, however, consider that the condition had been imposed for either of these purposes.
32. The reasoning behind the imposition of the condition is a combination of two theories: first, that, since 58% of problem gamblers are smokers, preventing smoking while gambling would have the effect of encouraging 58% of problem gamblers to take regular breaks from gambling activity; and secondly, that, if problem gamblers took breaks from gambling to smoke, they would reflect on their gambling and would be more likely to exercise control over their behaviour.
33. The expert witnesses for the Secretary were generally supportive of the latter theory, that breaks in play may help to reduce problem gambling by enabling problem gamblers to regain control over their behaviour. The Commission noted, however, that the comments

in the affidavits of Professor Abbott, Dr Townshend, and Mr Markland were qualified, with Professor Abbott stating that he would like to see more research into the relationship between breaks in play and harm reduction. No evidence was presented of how, or to what extent, breaks in play have been shown to modify gambling behaviour generally or, if they did, whether they have a similar effect on problem gamblers (who suffer from diminished ability to control their behaviour) compared to the far greater number of non-problem gamblers.

34. The Secretary pointed to evidence that the introduction of the Amendment Act here and similar legislation overseas has been followed by a reduction in both problem gambling presentations and gambling expenditure on gaming machines, indicating that an unintended consequence of the smoke-free legislation has been a desirable reduction in gambling harm. The Commission was not prepared to draw such a conclusion merely from that correlation: it is equally possible that the introduction of the Amendment Act and other regulatory changes has simply been to reduce gambling activity, with the reduction in presentations being an incidental consequence of reduced activity and expenditure overall. While the Commission noted evidence that problem gamblers spent more than non-problem gamblers, the Commission did not consider this fact to be a proper basis for concluding that measures which simply reduced gambling expenditure generally could be lawfully imposed for harm minimisation purposes, for reasons outlined in paragraph 31 above.
35. In other words, measures can only be imposed which reduce the harm caused by problem gambling as distinct from simply reducing gambling activity, which is a lawful and permitted activity under the Act. The Secretary must be able to demonstrate that the measure is likely to have the former effect, not just the second effect with proportional consequent effects on the former. He cannot seek to make gambling less attractive generally in order that it appeal less to problem gamblers.
36. In considering the proportionality of the condition, the Commission observed that only 1.3% of New Zealand's population are problem gamblers according to the 1999 New Zealand National Prevalence Study. While the condition may affect beneficially 58% of those problem gamblers who are smokers (assuming the condition is effective in minimising harm), it will also adversely affect what is likely to be a substantially larger number of non-problem gamblers who smoke.
37. In this regard, the Commission noted that the evidence did not compare the proportion of class 4 gamblers who are daily smokers with the proportion of class 4 problem gamblers who are daily smokers. The evidence that has been used to make the comparison is from the 2002/2003 New Zealand Health Survey which indicates that approximately



22.5% of non-problem gamblers (all classes, including Lotto, Racing etc) are daily smokers, compared to 58.3% of problem gamblers. It is possible that more than 22.5% of class 4 gamblers are daily smokers and so the correlation between smoking and problem gambling in respect of class 4 gambling may not be as pronounced as it might appear and the number of affected non-problem class 4 gamblers may be higher than assumed.

38. On the assumption that breaks in play minimise harm, the contended justification for a condition prohibiting smoking where gambling can take place is the higher incidence of smoking among problem gamblers than in the general gambling population. The Commission is dubious about directing restrictions to correlated activities (smoking) rather than to the activity intended to be affected (gambling). It is clear that there are many co-relationships with problem gambling. The 2002/2003 New Zealand Health Survey found an even more pronounced correlation between problem gambling and hazardous drinking patterns. The study found that problem gamblers were four times more likely to have potentially hazardous drinking patterns than non-problem gamblers, while only being three times more likely to be daily smokers than non-problem gamblers. On the Secretary's approach, logically, there is an even stronger case to ban the consumption of alcohol while class 4 gambling so as to procure drinking gamblers to take breaks. Alternatively, if the underlying rationale for the condition is sound, namely that breaks in play are helpful in reducing problem gambling, the result could be expected to be a condition or legislative requirement for breaks in play. Regulation 8 of the Gambling (Harm Prevention and Minimisation) Regulations 2004, requiring gaming machines to include features that interrupt play at irregular intervals not exceeding 30 minutes of continuous play, already achieves this objective in part (the measure is also intended to provide players with information)
39. In essence, the aim of the condition is to retain a perceived benefit arising as an unintended consequence of the Amendment Act. Its effect is, however, to ban gambling where smoking is permitted, something which the Smoke-free Act did not endeavour to do, and to prevent class 4 operators from making effective use of the statutory "open spaces" exception to the smoke-free prohibition.
40. The justification for the condition relies on two cumulative assumptions, the first about the effect of breaks in play – that interruptions work to minimise harm for problem gamblers – the second about the effects on problem gamblers of restricting smoking – that the restriction will compel problem gamblers to break their play. To establish a benefit in terms of harm minimisation from the proposed prohibition the Commission needed to be satisfied first, that breaks in play positively affect the conduct of problem gamblers and secondly, that further restricting smoking results in problem gamblers taking breaks (leading to reconsideration and behaviour modification)

- 41 Overall, the Commission did not consider the potential harm minimisation benefits, which would always be limited to smoking problem gamblers, to be sufficiently established to justify the restrictions proposed. Assessing the reasonableness of the condition, the Commission decided, accordingly, to allow the appeal and reverse the Secretary's decision.
42. Allowing the appeal is not expected by the Commission to produce a proliferation of gaming machines in open areas. The requirement for smoking to be conducted in an open area means that machines cannot be enclosed in a way that is inconsistent with the requirements of the Smoke-free Act 1990. If, when all windows, doors and other closeable openings are closed, the machine enclosure is completely or substantially enclosed by ceiling, roof, wall, sides and closeable openings, it will constitute an internal area where smoking is banned. The Commission does not know whether the existing structures at the Venue comply with the smoke-free legislation (and it is not a matter within its jurisdiction or responsibility). It has assumed that either they do or that some other means of utilising the open space exception can be found (as otherwise the condition would have no effect, ie smoking would not be permitted under the Smoke-free Act in the area in question).
43. The Commission anticipates that any placement of gaming machines in open areas will also be limited by the need for the Department to ensure adequate regulatory control of machines, including the need to be satisfied of safety and security arrangements, and that any risk of access by minors is minimised. Additional constraints may include compliance with existing licence conditions, limitations arising from existing building structures and New Zealand climatic conditions.

#### Decision

44. The Commission decided to allow the appeal and reverses the Secretary's decision to impose the condition.

  
  
 Mark Ford  
 Gambling Commissioner

for and on behalf of the  
 Gambling Commission

30<sup>th</sup> March 2007