

IN THE MATTER of the Gambling Act 2003
AND on applications by **DUNEDIN CASINOS LIMITED** for approval of construction and design changes, and to amend a licence condition

BEFORE THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
M M Lythe
P J Stanley
G L Reeves
M J Richardson

Date of Applications: 19 November 2008

Date of Decision: 13 February 2009

Date of Notification
of Decision: 20 March 2009

**DECISION ON APPLICATIONS BY DUNEDIN CASINOS LIMITED
FOR APPROVAL OF CONSTRUCTION AND DESIGN CHANGES, AND
TO AMEND A LICENCE CONDITION**

Introduction

1. Dunedin Casinos Limited ("DCL") applied to the Commission:
 - (a) for approval of construction and design changes to level 1 of the casino, under conditions 6 and 7 of DCL's venue licence, to create a new entrance into the Dunedin casino from a proposed new restaurant and bar facility; and
 - (b) to vary condition 8(a) of DCL's venue licence, to allow the Commission to approve gambling activity being visible from the proposed new restaurant and bar.

Licence conditions

2. The relevant licence conditions are as follows:

Venue Licence

- 6 The Licence Holder must obtain the approval of the Commission prior to:
 - (a) construction or design changes to Level 1 of the Casino Venue, including the Gambling Area;

- (b) the construction or relocation outside the Gambling Area and within the Casino Venue of bank facilities available to the public excluding ATMs, EFTPOS and like devices;
- (c) the addition or alteration of signage relating to the casino business on the exterior of the Casino Venue.

The process by which the Licence Holder may obtain approval for construction or design changes to Level 1 of the Casino Venue, (paragraph (a) above) is set out in condition 7. The Commission will determine any application for approval under 6(b) and (c).

7. The Licence Holder must notify the Executive Director of any proposed changes to the construction or design of Level 1 of the Casino Venue. Notification must be accompanied by relevant drawings and an assessment of any impacts the alterations may have on:
 - (a) the integrity and fairness of games;
 - (b) the effectiveness of security and surveillance;
 - (c) harm prevention, harm minimisation and responsible gambling;
 - (d) potential access to the Gambling Area by persons under 20 years of age; and
 - (e) compliance by any person with the Act, including section 11 of the Act

The Executive Director may approve the proposed changes to the construction or design if he or she is satisfied that there are no adverse impacts in relation to the matters specified in (a)-(e) above. If the Executive Director is not satisfied, he or she will refer the proposal to the Commission for determination.

8. The Licence Holder shall ensure that:
 - (a) gambling activity is not visible from the street or other public areas outside the Casino Venue; and

Submissions by DCL

3. DCL stated that:
 - (a) It wants to operate a new bar and restaurant facility, which will be constructed by the Southern Cross Scenic Hotel behind the Dunedin casino.
 - (b) It wants to connect this facility to the casino through a new entrance, which it seeks approval of.
 - (c) It wants to vary condition 8(a) of its venue licence to allow the Commission to approve gambling being visible from the new facility.

4. DCL submitted, in summary, that:

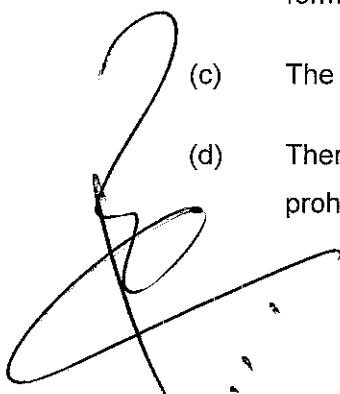
- (a) The proposed facility will be leased from the Southern Cross Scenic Hotel.

- (b) The primary reason for the new facility is that the casino's current restaurant and bar is too small to cater for patron demand.
- (c) The proposed new entranceway would be staffed and under security surveillance, the same as for the current casino entrance.
- (d) The new entrance can be closed off from the casino by glass door if required.
- (e) Patrons in the new facility would be able to see the Gambling Area, so condition 8(a) should be varied to allow this. Such a variation would be consistent with the position at Lasseters Wharf casino and SKYCITY Hamilton casino.
- (f) The proposal is consistent with the Gambling Act 2003 (the "Act").
- (g) The proposal will not have a negative impact on any of the matters set out in condition 7 of its venue licence.
- (h) Having a second, but separate, restaurant and bar facility will be positive as it will provide another breakaway area for casino patrons. This may contribute to a reduction in casino gambling and an increase in responsible gambling.
- (i) The proposal will not increase opportunities for casino gambling and may result in a decrease in opportunities as patrons would be more inclined to take themselves away from the Gambling Area for a break.

Submissions from the Secretary

5. The Secretary submitted, in summary, as follows:

- (a) He does not offer a definitive view on whether DCL would be entitled to use the new facility as part of its casino operation but, based upon the Act's definition of "Casino Venue", it may either constitute an extension of the defined casino premises (which the Commission cannot allow), or it is not part of the defined casino venue (which may be permissible).
- (b) The perception of an average person viewing the new facility would be that it forms part of the casino.
- (c) The Commission cannot amend the licence to expand the casino.
- (d) There is a general presumption in the Act that casinos will not grow as there is a prohibition on increasing opportunities for casino gambling, a prohibition on any



new casinos, and a general purpose statement that the legislation seeks to control the growth of gambling.

- (e) While there are arguments in favour of the new facility (players may take a break from gambling to drink and dine), and against its introduction (more patrons may be attracted to the casino because of the improved environment, and patrons may be encouraged to spend more time in the casino environment), on balance, the proposal would not have a negative impact and the new facility would increase non-gambling entertainment options.
- (f) He had no concerns with the proposed new entrance.
- (g) He had no objection to condition 8(a) being amended to allow gambling being visible from the new facility.

Submissions from MoH

6. MoH submitted, in summary, as follows:

- (a) It offers no comment on whether the Commission has the authority to amend DCL's venue licence.
- (b) Whether DCL should be permitted, as a matter of policy, to extend its premises may depend on the intent of the "control the growth of gambling" purpose of the Act.
- (c) It is sceptical that the proposal will decrease opportunities for casino gambling.

Submissions from PGF

7. PGF opposed the application and submitted as follows:

- (a) DCL cannot, as a matter of law, use the proposed new restaurant and bar as part of the casino operation. Such a proposal represents a substantial change to Dunedin casino's operating licence, and the Gambling Act, with its moratorium on any new or expanded casinos, rules out any effective expansion.
- (b) The Commission does not have the power to amend the physical description of the casino in the venue licence.
- (c) The Commission should not, as a matter of policy, allow DCL to use premises outside its defined boundaries to conduct non-gambling business as part of the casino.

- (d) The Commission should not allow an additional entranceway as to do so would probably result in an increase in opportunities for casino gambling.
- (e) The Commission should not amend licence condition 8(a)

Submissions from GH

8. GH submitted, in summary that:

- (a) The Commission is not able to amend the licence to extend the casino premises.
- (b) The Commission should not, as a matter of policy, allow DCL to use premises outside its defined boundary
- (c) The Commission should not allow an additional entranceway into the casino, or allow gambling to be visible from areas outside the casino venue.

Submissions from SCML

9. SCML submitted, in summary, as follows:

- (a) It does not matter that the venue licence does not include the proposed new facility as there is nothing in the Act, or any other regulatory instrument made under the Act, which would prohibit a casino operator from operating facilities conjunct to the casino venue. There are precedents for such arrangements at the Auckland and Hamilton casinos.
- (b) In the absence of any express power to do so, the Commission cannot vary DCL's venue licence as it constitutes the original grant of rights made by the Casino Control Authority ("CCA").
- (c) There is no downside to increasing the range of non-gambling facilities available to casino patrons.
- (d) There is no reason not to approve a separate entranceway into the casino, provided it is properly monitored.
- (e) It would be unnecessarily harsh to not amend licence condition 8(a) when it applies to a conjunct food and beverage facility that adjoins the casino.

Submissions in reply by DCL

10. In reply, DCL submitted, in summary that:

- (a) It is not seeking to extend the casino's footprint, and accepts, for the purposes of this application that it is not entitled to do this (but reserves the right to argue otherwise before the Courts). Rather it is seeking to operate a restaurant and bar facility in conjunction with, but separately from, the casino.
- (b) There is a clear line of delineation between the proposed new facility and the existing casino, and patrons will be subject to security controls between the casino and the new facility (which is different from the current restaurant and bar within the casino premises, where patrons are free to come and go having already been through security on entering the premises).
- (c) The notion that the new facility effectively extends the casino premises would only have weight if:
 - (i) the only way to enter the new facility was through the casino itself (but this would not be the case as the facility will have a separate external entrance); or
 - (ii) if it were proposed to place security personnel at the external entrance to the new facility, thereby enabling patrons to pass between the casino and the new facility once inside. This will not be the case; and security will be placed between the casino and the new facility.
- (d) The fact that the proposed facility will be staffed by DCL employees does not preclude DCL from operating such a business.

Analysis

- 11 The Scenic Circle Southern Cross Hotel is to undertake a redevelopment of its facilities in Dunedin. As part of this redevelopment, the Hotel proposes to construct new premises, which would be attached to the Hotel and the Dunedin casino. DCL wants to lease this premise from the Hotel to operate a bar and restaurant.
12. DCL applied to the Commission for approval to construct a new entrance into the casino from this new facility, and to amend condition 8(a) of its venue licence, to allow gambling to be visible from the facility.
- 13 While DCL sought approval for these two matters only, its proposal to operate a new restaurant and bar connected to, and directly accessible from the casino, raised a broader issue for the Commission, namely whether the proposed facility amounted to an expansion of the casino operation into an area outside the premises defined in the casino venue licence.

14. The Commission has not been required to consider this issue in previous decisions. DCL's proposal requires the Commission to address this matter, and consider what casino venue licences permit to occur within defined premises and what, expressly or impliedly, cannot be done lawfully outside the defined premises
15. As the Commission's decision on this matter has implications for every casino in the country, the Commission sought submissions on DCL's applications from SKYCITY Casino Management Limited ("SCML"), Christchurch Casinos Limited ("CCL"), Otago Casinos Limited ("OCL"), the Secretary for Internal Affairs (the "Secretary"), the Ministry of Health ("MoH"), Salvation Army ("SA"), Problem Gambling Foundation ("PGF") and Gambling Helpline ("GH"). The Commission also sought submissions from these parties on the following:
- (a) Whether, as a matter of law, DCL would be entitled to use the proposed new restaurant and bar as part of the casino operation, having regard to its licence and the amendments and approvals sought
 - (b) Whether, as a matter of law, the Commission has the power to amend the physical description of the casino contained in the casino venue licence to bring the new restaurant and bar within the defined Casino Venue.
 - (c) Whether the Commission should, as a matter of policy, allow DCL to use premises outside its defined boundaries and conduct non-gambling business there as part of the casino
 - (d) Whether the Commission should approve the proposed construction changes to allow a separate entranceway into the casino from the proposed new restaurant and bar
 - (e) Whether the Commission should allow the application to amend licence condition 8(a) to provide the Commission with the ability to allow gambling activities to be viewed from the new restaurant and bar areas.
16. The Commission first considered whether it has the power to amend a casino venue licence to alter the premises as defined in that licence. DCL's venue licence, as issued by the CCA, identifies the name and address of the licence holder, sets out the term of the licence, identifies the physical premises of the casino and states that the licence is subject to conditions. The physical location of the casino is described in the licence itself (rather than in the conditions) and is identified in plans in the first schedule to the licence.
17. Whether or not a statutory body such as the Commission has the power to amend a licence, the conditions to the licence, or both, depends on the terms of the empowering enactment. In the present case, the Gambling Act 2003 confers on the Commission, at section 139, the power to specify, vary or revoke licence conditions in the casino venue and casino operator's licences. There is no express power in the Act for the Commission to amend the licences themselves. In the absence of an express power to vary licences, no such power can be implied.

18. The Commission may have the ability to amend minor details on the licence, but the physical location of the casino is a fundamental matter going to the grant of the licence, which the Commission has no power to amend.
19. This view is supported by the existence of express powers in the Act to transfer licences by way of mortgage, charge, or other encumbrance, and the express prohibition on otherwise transferring casino licences (see sections 126 and 127 of the Act). The explicit setting out of such powers in the Act suggests that the omission to set out powers to amend casino licences was deliberate.
20. As the casino must be exclusively within the area specified in the casino venue licence, the Commission considers that the casino premises cannot be relocated from, or expanded beyond, the premises defined in the licence. None of the submitters advanced a different view, although DCL reserved its right to do so before the Courts if necessary.
21. In its submissions in reply, DCL submitted that it was not attempting to extend the casino beyond the defined premises, rather it was seeking to operate a restaurant facility in conjunction with, but separately from, the casino. Both DCL and SCML submitted that neither the Act, nor any other regulatory instrument made under the Act, prohibit a casino operator from operating such a conjunct facility.
22. The distinction between facilities being provided within casino premises, and facilities provided outside the casino, but sufficiently proximate to be regarded as being in conjunction with them, was a distinction which was made in the Casino Control Act 1990 (the "CCA Act") in respect of the matters to which the Authority could have regard in granting casino licences. Section 2(1) of the CCA Act defined "Casino Premises" as follows:


Casino premises, in relation to any licensed casino, means the area defined as constituting the casino in the casino premises licence, which shall include any building or room in which games are conducted and played and in which money counting, surveillance, storage, and other activities related to the conduct and playing of games are carried on:

23. Section 29(a) of the CCA Act states as follows:

29. Matters to which Authority shall have regard in considering casino premises licence application -

In considering any application for a casino premises licence, the Authority shall have regard, in addition to the suitability requirements, to the following matters:

- (a) The standard and nature of the proposed casino, and the facilities to be provided in, or in conjunction with, the proposed casino:



24. DCL argues that the new facility should be treated as conjunct, relying on the distinction found in section 29(a) CCA Act
25. Two High Court decisions provide guidance on the application of section 29(a), CCA Act. *Cashel Street Hotel Casino Ltd Ors v Casino Control Authority*, High Court, Auckland, M1658/92, 20 November 2002, Hillyer J, was a special case stated concerning disputed points of law arising in the context of contested casino premises applications. The issues arose from section 29, which required the CCA to have regard to “the standard and nature of the proposed casino and the facilities to be provided in, or in conjunction with, the proposed casino” and the likely impact of the use of the premises as a casino on tourism, employment and economic development. The questions stated were:
- (d) Whether the Authority was required or entitled to have regard to facilities in the nature of restaurants, bars, hotels, convention centres, shops and carparking which do not form part of the proposed casino premises; and
 - (e) Whether the likely impact to be assessed was limited to casino gaming and the use of the proposed casino premises or should extend to the whole proposal of which the casino proper might form only part.
26. The Court observed that “casino” is not defined but “clearly is intended to be a place where gambling is carried on”. After citing the definition of “casino premises”, the Court continued:

That definition is inclusive, so that the casino premises as defined in any given case may include more than just the gaming/surveillance/money counting areas. It must however, still be a casino in the normal sense of the word, as opposed to some wider concept, eg hotel, entertainment or convention centre. A wide interpretation to encompass such facilities would be beyond the normal meaning of the word “casino”, impossible to police and would conflict with other legislation. If for example casino premises could be defined as including a conjunct hotel, or entertainment centre, there would be real problems over the implementation of s67, 68 and 105 of the Act, which refer to the control of people coming into the casino, and admission of minors

Section 29(a), however provides that the Authority shall consider as well as the standard and nature of the proposed casino, and the facilities to be provided in it, facilities which are to be provided in conjunction with the casino. In my view, those words are adequately wide enough to encompass such things as restaurants, bars, hotels, convention centres, shops and car parking buildings which do not form part of the proposed casino premises

27. *Auckland Casino Ltd v Casino Control Authority*, High Court, Auckland, M81/94, 13 July 1994, Robertson J, was an application for judicial review of the CCA’s decision to grant a “casino premises” licence to Sky Tower Casino Ltd. The applicant for review took issue, *inter alia*, with the defined casino premises in the proposed licence because it incorporated carparking, restaurant and hotel facilities with the defined casino premises

which minors could not legally enter. After setting out the definition of "casino premises", the Court continued:

I accept the respondents' submission that the "casino premises" are different to the "gaming area". The latter is defined as:

"the area of the casino designated by the Authority as the area in which gaming is to be conducted"

The "casino premises" will include the "gaming area" but will not be restricted to it

I am satisfied that within the scheme of the Act there will be an area which is greater than the gaming area over which it is appropriate that there will be additional control and in respect of which inspectorate functions can be carried out. However in the circumstances of this grant I am satisfied that they should not extend to the entire building or across the whole city block.

The problem which arises in practical terms in this case is that within the block which is bounded by Hobson, Wellesley West, Federal and Victoria Streets, includes a car park (which is to be available not only for users of the casino but for the public generally) and a public bus station.

There is no justification for the powers which may be exercised under a casino premises licence being available in either of those places. Nor is there any justification for the restrictions which apply in casino premises licence (for example, the exclusion of under-age persons) having application in those areas.

28. The Court accordingly directed the amendment of premises originally defined by the CCA by further excluding from the casino premises the underground car park and bus terminal.
29. The Commission also considered DCL's application to the CCA for a casino premises licence, which stated that the proposed casino was to "include a bar and modest food facilities" in addition to gaming facilities. The CCA's interim decision on that application noted as relevant that restaurants, bars, conference facilities, hotel accommodation and parking were available in the immediate proximity at the Southern Cross Hotel. These facilities appear to have been viewed by the CCA as being in conjunction with the casino premises facilities although not provided or operated by the casino operator and taken into account (as section 29(a) CCA contemplates).
30. The Commission is in no doubt that conjunct facilities outside casino premises can be provided by the casino operator. Historically conjunct facilities operated by casino operators have been beyond or outside what would normally be regarded as a casino operation, such as hotels, and entertainment and convention centres. Other conjunct facilities can supplement what would ordinarily be found in casinos, such as restaurants, and bars (as in the original Dunedin casino licence decision). It is also correct that casino operators are not precluded from operating businesses outside casinos. The key issue in this case is whether, when a casino premises licence has been granted on the basis that the casino premises will include bar and food facilities as well as gaming facilities within the defined casino premises, the operation by the casino operator of additional bar and

food facilities contiguous with the defined premises amounts to an effective extension of the casino operation to premises beyond those approved, or is rather the operation of separate and conjunct premises, and what the essential features of any such distinction might be.

31. Ultimately whether a facility is a separate one in conjunction with the casino, or a de facto extension of it, is a matter of impression by the Commission considering whether the facility should be seen as part of the casino premises, or as something distinct and conjunct.
32. DCL argued that the underlying ownership of the premise (it would be owned by the Southern Cross Hotel with DCL taking a lease and operating it) is highly material, and that security arrangements create a sufficiently clear line of delineation such that members of the public would not be confused about whether they are in the casino or not. DCL suggested that patrons in the facility would not think that it is part of the casino premises because of the security point and because they can access the facility other than from the casino premises.
33. The Commission does not regard the underlying ownership as being material. The construction changes and amendment seem designed to promote a sense of continuity between the existing casino premises and the facility – it will be possible to pass from one premise to the other without leaving and entering through other entrances, and the facility will share staff with the casino. The requested amendment and approval highlight that persons in the new facility will have a clear view of the gaming floor, something usually not the case from outside a casino.
34. DCL provided architectural drawings which showed that the new facility would adjoin the casino's Gainsborough Room. DCL proposed that the new facility and the Gainsborough Room would be separated by three large, open doorways, two of which would simply be "roped off", with access between the casino and the new facility being through the third doorway. Patrons at the new restaurant would have an unencumbered view into the casino, and vice versa.
35. The Commission considered that the average person attending the casino after the proposed changes were effected would be of the view that the new facility was part of the casino. While there would be a security person controlling access to the casino from the new facility, this would, in the circumstances proposed by DCL, be insufficient to overcome the impression that the new facility was anything other than part of the casino.

36. The Commission is asked to approve construction changes to connect the new facility with the casino by way of a new entrance. Condition 7 of DCL's venue licence requires the Commission to consider the impact of the proposal on:

- (a) the integrity and fairness of games;
- (b) the effectiveness of security and surveillance;
- (c) harm prevention, harm minimisation and responsible gambling;
- (d) potential access to the Gambling Area by persons under 20 years of age; and
- (e) compliance by any person with the Act, including section 11 of the Act.

37. The Commission is also required to exercise its powers in furtherance of the intent and purposes of the Act. These include not only the express purposes of section 3, which include "(a) control the growth of gambling", but other indicators in the Act such as the prohibition on granting new casino venue licences (section 10), the prohibition on increasing opportunities for casino gambling (section 11), and the provisions of powers for the Commission to amend licence conditions (section 139) but not licences themselves, including defined premises.

38. The Commission considered that the detail of DCL's proposal failed to create sufficient distinction between the new conjunct premises and the casino. The design (and consequent requirement for exemption from the usual prohibition of external visibility of the gaming area) leave the Commission with the impression that the intent was to reduce any such distinction to a minimum, creating the impression with the public that the casino had indeed been extended. It is not prepared to approve such changes as it would be inconsistent with the absence of power to extend casino premises formally and the underlying policy of containing existing casino operations. The Commission therefore declines DCL's application for approval of construction and design changes.

39. As part of its analysis on this matter and to provide guidance to the applicant and other casino operators for the future, the Commission considered the sort of changes which would need to be made to DCL's proposal to obtain approval by the Commission.

40. A majority of Commissioners were of the view that a design which incorporated access between the new facility and the casino could be approved provided that there were a clearer delineation between the casino and the new facility, and that no gambling were visible from the new facility. The delineation would need to be sufficiently clear that patrons would have the impression that the two premises are distinct and that they were leaving one premises and entering another. For example, the two premises could be separated by a solid, permanent and opaque wall, with the door/entry-point constructed in such a manner as to maintain the impression that the two operations are distinct and to ensure that gambling was not visible from the new facility. Security would need to be

maintained at the proposed new casino entrance, as it is at present for the casino's main entrance

41. A minority of Commissioners were of the view that providing sufficient delineation of the separate premises would preclude direct access from one to the other so that the only access to each was via their main entrances.
42. DCL's second application was to amend condition 8(a) of DCL's venue licence to allow the Commission to approve gambling being visible from the new facility
43. DCL submitted that while gambling would not be visible by any person from any public area outside the "Southern Cross Scenic Circle Hotel Casino", patrons within the proposed facility would "understandably ... be able to see the gaming area ... [meaning that], strictly speaking, licence condition 8(a) ... may be breached". DCL urged the Commission to amend condition 8(a), suggesting that to do so would be consistent with licence conditions for the Wharf and Hamilton casinos. The Secretary raised no objection to the amendment, and SCML concurred.
44. A requirement to ensure that gambling activity is not visible from outside the casino premises has been a standard feature of casino licences. Exceptions have been created and allowed in particular cases where existing building constraints have created a limited potential for visibility (as explained below) but those exceptions do not alter the normal approach.
45. CCA created the exception for the Wharf casino, which is located on level 1 of the Steamer Wharf complex in Queenstown, as passengers on the Earnslaw Steamship may be able to see into the casino as the boat embarks and disembarks from its mooring.
46. Similarly, the exception was created at the Hamilton casino when it was revealed that the design of the building, of which the casino is only a part, meant that it would be very difficult to ensure that persons could not see any of the gaming floor from certain spots near the casino entrance.
47. In this case, the associated construction changes sought by DCL would have the purpose and effect of creating the visibility problem, with DCL seeking relief from the very problem which it set out to create. Granting an approval in such a case would, in reality, be an abandonment of the rule against visibility. The Commission declines to vary condition 8(a) as sought.
48. The Commission was satisfied that the proposed changes would not have had any material effect on opportunities for casino gambling (contrary to the suggestion by DCL

that it might reduce them and the submission of PGF that it would probably increase them).

49. Since the hearing of DCL's applications, and prior to the issue of this written decision, DCL submitted a revised application for approval of construction and design changes, under conditions 6 and 7 of DCL's venue licence, to create a new entrance into the Dunedin casino from the proposed new restaurant and bar facility. This revised application has been granted

Decision of the Commission

- 50 The Commission **resolved** unanimously:

- (a) to decline, under conditions 6 and 7 of DCL's venue licence, DCL's application for approval of construction and design changes to create a new entrance into the casino;
- (b) to decline DCL's application to vary condition 8(a) of the venue licence, to allow the Commission to approve gambling activity to be visible from the proposed new restaurant and bar facility.

- 51 Pursuant to section 235 of the Act, a person affected by the Commission's decision declining to amend condition 8(a) of DCML's operator's licence may appeal to the High Court. An appeal must be made within 15 working days of the date of notice of the Commission's decision, or any longer period that the High Court may allow.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

20 March 2009