


IN THE MATTER of the Gambling Act 2003

AND of an appeal by **HELLS ANGELS
NOMADS MOTORCYCLE CLUB
INCORPORATED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Decision: 17 February 2012

Date of Notification
of Decision:  March 2012

**DECISION
ON AN APPEAL BY HELL'S ANGELS NOMADS MOTORCYCLE CLUB INCORPORATED**

Background

1. Hells Angels Nomads Motorcycle Club Incorporated (the "**Appellant**" or "**HANMC**") appealed against a decision by the Secretary for Internal Affairs (the "**Secretary**") to refuse to grant it a class 3 operator's licence. The Secretary refused the application under section 37(1)(g) of the Gambling Act 2003 ("**Act**") because investigations that he had carried out caused him not to be satisfied about the suitability of the applicant, its officers and the organiser of the gambling.

Relevant law

2. The relevant law is as follows:

27 Meaning of class 3 gambling

In this Act, class 3 gambling is gambling that satisfies the following criteria:

- (a) the net proceeds from the gambling are applied or distributed to authorised purposes; and
- (b) the total value of the prizes offered or awarded to the winners of the gambling activity, or to the winners of 1 session (if the gambling is conducted in sessions of more than 1 game), exceeds \$5,000; and
- (c) the gambling satisfies relevant game rules; and
- (d) the gambling does not utilise or involve a gaming machine, directly or indirectly; and
- (e) no commission is offered or paid to, or received by, a person for conducting the gambling, except a licensed promoter; and
- (f) the Secretary has not categorised the gambling as another class of gambling.

37 Grounds for granting class 3 operator's licence

- (1) The Secretary must refuse to grant a class 3 operator's licence unless the Secretary is satisfied that—
 - (a) the gambling to which the application relates is class 3 gambling; and
 - (b) the applicant's purpose in conducting class 3 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 3 gambling and minimise the operating costs of that gambling; and
 - (e) the net proceeds from the class 3 gambling will be applied to or distributed for authorised purposes; and
 - (f) the applicant is able to comply with applicable regulatory requirements; and
 - (g) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant, any officers of the applicant, or the organiser of the gambling.
- (2) In assessing financial viability under subsection (1)(c), the Secretary must consider, among other things, the ability of the applicant to both reward winners and apply or distribute the net proceeds from the class 3 gambling to or for authorised purposes.
- (3) The Secretary may refuse to grant a class 3 operator's licence if an applicant fails to provide the information requested by the Secretary in accordance with section 36.
- (4) If the Secretary decides to refuse to grant a class 3 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 46.

Submissions by the Appellant

3. The Appellant submitted, first, that the had Secretary erred by taking into account irrelevant considerations, in particular by taking into account convictions against members of the Appellant that, in the Appellant's submission, were irrelevant to its suitability to conduct a class 3 gambling operation. The Appellant submitted:
 - (a) Prior to its application, the Secretary had focused on finance or fraud-related offences as relevant offences, but now the Secretary had introduced new criteria aimed at the "moral fibre" of the Appellant and its members.
 - (b) The new criteria were inappropriate. The only offences that should properly be taken into account are offences relating to fraud, dishonesty or financial crime. This is supported by the fact that a "relevant offence" in the context of class 4 licensing is defined as meaning, among other things, "a crime involving dishonesty". Further, the purposes of the Act include ensuring the integrity and fairness of games and limiting opportunities for crime and dishonesty associated with gambling.



- (c) Convictions for violence, drug-dealing and manslaughter do not reflect on a person's ability to conduct fair and honest gambling as part of a wider group.
 - (d) The Secretary failed to take into account that officers of the Appellant had all been involved in a class 3 gambling activity conducted by Hells Angels Auckland (a separate legal entity to the Appellant). That case involved an almost identical raffle to the one which the Appellant proposed to conduct, and there was no suggestion of any impropriety in relation to it.
 - (e) The Secretary failed to consider whether any conditions could be imposed in order to address his concerns.
 - (f) The Secretary had improperly adopted a policy of rigid refusal in relation to the Appellant. This amounted to a breach of natural justice for pre-determination.
 - (g) The Secretary had also breached natural justice by focusing on gathering evidence that would justify a refusal to grant the licence and by failing to give the Appellant the opportunity to respond to his concerns (which arose from the OFCANZ report referred to below).
4. The Appellant also submitted that a licence should be granted to it for the following reasons:
- (a) It is only by considering matters not strictly relevant that the Appellant could be considered unsuitable for a licence.
 - (b) The evidence establishes that the Appellant can be trusted to run a fair and honest gambling activity.
 - (c) Dr Gilbert, a gang and motorcycle club researcher, who swore an affidavit relied upon by the Appellant in support of its appeal, deposed that groups such as the Appellant "play a clean game" and that this is because they need to maintain their support base. Dr Gilbert stated in his affidavit that "if the group intends to run a legal activity, the members would be fully committed to that decision" and that a group such as the Appellant would be unlikely to act illegally to establish an asset (in this case a club-house) given that the Criminal Proceeds (Recovery) Act 2009 allowed for the confiscation of illegally obtained assets.
 - (d) It would be illogical for the Appellant to apply for a class 3 gambling licence and subject itself to the associated scrutiny if it had improper motives. This is



especially so given that it can conduct class 2 gambling raising up to \$25,000 each week without a licence.

- (e) Even if the Commission had concerns, these would be best addressed by granting a class 3 licence with conditions and the oversight that this entails, given that the Appellant has, in any case, the ability to run a class 2 gambling activity on a regular basis.

Submissions by the Secretary

- 5. The Secretary submitted that the Commission should uphold his decision. He submitted that, in accordance with section 36(1), which requires the Secretary to carry out investigations into applicants for class 3 operator's licences, and section 36(2), which permits the Secretary to require the Police or a government agency to provide information about or comment on an application, he had sought information from the Organised & Financial Crime Agency New Zealand ("**OFCANZ**"). He submitted that the information he received regarding the convictions of members of the Appellant for violence and dishonesty offences, together with the fact that the Appellant is part of the Hells Angels Motorcycle Club, which in turn is recognised by law enforcement agencies internationally to be involved in criminal activity, caused him not to be satisfied of the suitability of the Appellant, its officers and the organiser of the gambling. The Secretary submitted that the following information regarding the criminal activities of members of the Appellant was relevant:

- (a) The Appellant's vice president, treasurer and contact person was facing charges for possession, supply and conspiracy to deal class A drugs (methamphetamine) and had convictions relating to the cultivation of cannabis, assault and wilful damage. Since the Secretary's decision, he had become aware that this person was facing further criminal charges for aggravated robbery, burglary and participating in an organised criminal group.
- (b) The person named in the application as the organiser of the gambling, secretary and chairman of the Appellant had a conviction for manslaughter. However, OFCANZ doubted that this person was the Appellant's secretary as it was contrary to its own intelligence and because he was not so named in the Appellant's constitution.
- (c) The member whom OFCANZ in fact believed to be the secretary of the Appellant had convictions for serious drug offences, money laundering, theft and receiving. He was also bankrupt. Since making his decision, the



Secretary had also become aware that this person faced further criminal charges, including for use of a document for pecuniary advantage.

- (d) The Appellant's president had convictions for, among other things, wounding with intent to cause grievous bodily harm, and receiving stolen property.
 - (e) Another member of the Appellant had criminal convictions for disorderly behaviour and wilful damage.
6. The Secretary submitted that, because the people who would conduct the gambling had serious criminal violence and dishonesty convictions, he was not satisfied that the Appellant, its officers and the organiser of the gambling were suitable. In particular he was not satisfied that the statutory purposes of ensuring the integrity and fairness of the games (section 3(e)) and limiting opportunities for crime and dishonesty associated with gambling (section 3(g)) would be met.
7. The Secretary acknowledged that he had previously considered only fraud or finance-related offences as being relevant in the class 3 context. He submitted that, in May 2011, he had carried out a review of the matters to be taken into account in relation to applications for class 3 licences. He did so because he had become aware, through his role as supervisor of certain matters under the Money Laundering and Countering Financing of Terrorism Act 2009, that it was possible that organised criminal groups could try to use class 3 operator licences as a way of legitimising the holding of large amounts of cash. Following the review, the Secretary considered that he should take into account other offences, not just fraud or financial offending, when considering applications for class 3 operator licences.
8. The Secretary submitted that he was entitled to take into account the factors set out at paragraph 6 above under section 37(1)(g), as that section was broadly expressed and provided for the Secretary to take into account any matters that he considered relevant. He was not restricted by the previous criteria he had used, nor by the statutory framework for considering class 4 gambling. He further submitted that the Act clearly contemplated that, when making his decision, he may take into account the fact that the Appellant was recognised by law enforcement agencies internationally as being part of an organisation involved in criminal activity, and the serious nature of the Appellant's officers' violence and dishonesty convictions.
9. In response to other aspects of the Appellant's submissions, the Secretary submitted that the previous raffle was irrelevant, as it was conducted by a different legal entity; he did not have a policy of refusing any application by the Appellant; he considered whether conditions could be imposed, but did not consider that his concerns regarding suitability



could be addressed by conditions; and it was illogical for the Appellant to argue that, if anything, the Secretary's concerns supported granting a licence (in order to subject the Appellant to oversight and control). Finally, the Secretary submitted that Dr Gilbert's opinion was based on speculation, whereas the Secretary had relied on factual information and a proper interpretation of the Act.

The Appellant's submissions in reply

10. In reply, the Appellant submitted:

- (a) The Secretary's position was based solely on the fact that some members of the Appellant society had convictions involving violence, drugs and dishonesty, however unsuitability could not be presumed from those convictions alone.
- (b) The Secretary had not provided any evidence to rebut that of Dr Gilbert.
- (c) It was not a proper inference to say that a person with a conviction for violent offending was more likely than another randomly selected person to cause harm through gambling activities, conduct gambling irresponsibly or act dishonestly in relation to gambling.
- (d) The Secretary submitted that, because some of those involved in the society had criminal convictions for relatively unsophisticated criminal offending as individuals (albeit serious offending in some cases), there was a risk that they would come together and collectively act in a dishonest manner as regards the conduct of a licensed raffle under the "full glare" of the Police and the Department. Such a submission defied common sense and arose from prejudice and improper inference.
- (e) The Secretary was wrong to submit that the conduct of class 3 gambling activity by Hells Angels Auckland was irrelevant. It was not the Appellant's past conduct that was the focus of the inquiry, but rather the Appellant's suitability as derived from the character and conduct of the Appellant's members. The Secretary must take account of the good as well as the bad.
- (f) Sections 3, 37 and 38 must be read in a cohesive manner. When this is done it is apparent that Parliament recognised that concerns might exist regarding the suitability of an applicant, and that those concerns should not rule the applicant out of contention for a licence but, rather, should be managed through the imposition of special conditions. This is supported by section 38(2)(g) which allows the Secretary to impose "any other conditions consistent



with this Act that the Secretary considers will promote or ensure compliance with this Act” (emphasis in Appellant’s submissions).

- (g) There was no real evidence to suggest that the Appellant would not comply with the Act.
- (h) There was a “consumer protection” element to the purposes of the Act which, if there were concerns about the suitability of an applicant, could only be addressed through regulation of any gambling activity that is conducted.
- (i) The Secretary failed to comply with natural justice because he collected and considered adverse information without giving the Appellant an opportunity to respond.
- (j) The Appellant had nothing to hide and was prepared to proceed upon the basis of an “open book”.

Analysis

11. As this was the first class 3 appeal that it has considered, the Commission began by considering the class 3 licensing scheme.
12. Class 3 gambling is defined in section 27 as gambling that satisfies a number of criteria, including that the net proceeds from the gambling are applied or distributed to authorised purposes and the gambling does not utilise or involve gaming machines directly or indirectly. Class 3 gambling may be conducted only by a society that holds a class 3 operator’s licence for the gambling.
13. Under section 36(1), the Secretary must undertake any investigations the Secretary considers necessary to determine whether the applicant for a class 3 operator’s licence is eligible and suitable. Specific provision is made for receiving a Police report as part of his investigation (section 36(2)(b)).
14. Under section 37(1)(g), the Secretary must refuse to grant a class 3 operator’s licence unless the Secretary is satisfied that any investigations carried out by him do not cause him not to be satisfied about the suitability of the applicant, any officers of the applicant, or the organiser of the gambling.
15. The default position is that a licence will not be granted. The Secretary must be positively satisfied of all the matters in section 37(1)(a)-(g) before granting a licence. However, the double negative in section 37(1)(g) (“any investigations carried out by the Secretary do not cause the Secretary not to be satisfied...”) means that the Secretary



does not have to be positively satisfied of the applicant's suitability; but rather he must be satisfied that there is nothing to cause him not to be satisfied.

16. The Act does not specify the types of things that may be considered in the assessment of suitability. This is in contrast to the provisions regarding class 4 licensing, section 52(4) of which provides:

52 Grounds for granting class 4 operator's licence

...

- (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.

There is no equivalent provision for class 3 licence applications.

17. An examination of the different provisions indicates that there are several parallels between the licensing of class 3 and 4 gambling. Both are underpinned by the aim of creating net proceeds for distribution to authorised purposes. Both require the criteria for a licence to be met, including the suitability of the key persons. The authorised purposes are the same as for class 4 (except that class 4 proceeds may not be distributed for an electioneering purpose) and that includes "a non-commercial purpose that is beneficial to the whole or a section of the community". This is the purpose that



entitles clubs of all kinds to raise money by class 4 gambling to provide funds to the club to acquire assets or meet expenses.

18. The points of difference mainly relate to the issue of suitability. Class 4 gambling involves the operation of electronic gaming machines (“**EGM**”) in commercial or club premises as a secondary activity. Class 3 does not involve an installed EGM base and involves a primary gambling activity (in the case of the application, a raffle). Logically the suitability requirements for each class of licence should be dictated by the operating requirements of the different licensed gambling operations. In addition, the Act’s provisions for investigation and the matters to be taken into account in assessing suitability for class 4 licences (see sections 50,51, 52, 65, 66,67, 68), differ in material respects from the equivalent provisions for class 3:
- (a) A class 3 application requires only the contact details of the society, officers and organiser of the class 3 gambling and not a profile of each key person including details of relevant class gambling experience, history in gambling, **character** and qualifications (as class 4 requires).
 - (b) However, the Secretary’s investigation powers and obligation are identically worded and include consideration of financial position and credit history and the obtaining of police reports.
 - (c) There is the same requirement not to be dissatisfied about the suitability of, in the case of class 3, the Applicant, any officers of the Applicant and the organiser of the gambling.
 - (d) Class 4 gambling provisions specify what must be considered in respect of financial viability and the suitability of the applicant and key persons. Similar provisions appear in class 3 only for financial viability, not suitability.
19. In contrast to class 4 gambling, therefore, class 3 licensing applications require:
- (a) no evidence of gambling experience and history, qualifications and good character; and
 - (b) no specific matters to be taken into account in assessing suitability.
20. In the absence of specific direction on what is relevant to suitability, the Commission considered that the relevant matters arise from a pragmatic assessment of the practical requirements of acceptable class 3 gambling activity, having regard to the purposes of the Act.



21. The appeal grounds challenge numerous aspects of the decision making process adopted by the Secretary, many of which are not particularly material to the Commission's *de novo* consideration of the merits on appeal. Because of that approach, the Commission is concerned with what it considers the correct outcome to be on the material before it; not whether the Secretary adopted a rigid policy, whether he wrongly omitted to give the Appellant an opportunity to comment on or rebut adverse information or whether he was wrong to stop investigating at the point when he considered the application must fail. The *de novo* appeal approach means that these issues lack ongoing materiality.
22. The parties' submissions adopted two very different perspectives on the issue of suitability:
- (a) The Appellant adopted a narrow approach, focusing on the limited scope of a raffle operation. The Appellant argued that general good character is not a requirement and the focus on suitability should be on the likelihood of the Appellant running an honest and well-organised raffle. Indeed this seems to have been the Secretary's prior approach. It was suggested that the controversial reputation of the Appellant logically would incline it to scrupulous good conduct of the licensed activity, being aware of the likely levels of scrutiny. The Appellant also pointed to the fact there had been no issue with a previous class 3 licence, and to the public benefits of scrutiny and supervision of licensed class 3 gambling in circumstances where the Appellant can conduct smaller raffles (class 2) without a licence.
 - (b) The Secretary adopted a broader approach to assessment of suitability. The substance of his submissions indicated an implicit view that there is a general good character requirement for class 3 licences that was not met because various club officers and members have criminal convictions. The Secretary explained his change of approach to the relevance of convictions by reference to his new responsibilities in respect of money laundering. He also regarded the experience of an earlier class 3 licence as irrelevant because the licence was issued to a different Hells Angels entity.
23. The Secretary did not identify and outline the suitability requirements for a class 3 licence by reference to class 3 gambling activity and did not make any explicit logical connection between criminal convictions and suitability. The analysis had regard to neither the statutory differences summarised in paragraph 16 above (other than the fact that express suitability factors were set out in relation to class 4 gambling but not class 3 gambling) nor the different operational requirements of class 3 and class 4 gambling.



24. The Commission disagreed with the Secretary's submission that the experience of the prior class 3 licence granted to Hell's Angels Auckland was irrelevant on the basis that the Appellant was a different entity to the previous class 3 licence holder. Both entities are part of the same organisation and a number of members of the Appellant had been members of the previous licence holder and had been involved in the operation of the earlier raffle. The suitability assessment covers the applicant organisation, its officers and the organiser. The prior experience and gambling history (good or bad) of the officers and organiser are material to the assessment of suitability, even if they were gained in a different organisation.
25. The Commission took the view that the question of suitability for the purposes of s 37(1)(g) could not simply be answered by the presence or absence of criminal convictions on the part of a society's officers or members. Section 36(2)(b) provides that the Secretary may require the police to "provide information about, or comment on" the applicant or its members. The Secretary is, therefore, able to seek broader information regarding criminal activities than simply a history of convictions. The Secretary (or the Commission on appeal) is then required to exercise judgment in satisfying himself (or itself) that the information received from investigations such as those through the police do not cause him not to be satisfied of the applicant's suitability. The existence of convictions will not automatically render a society unsuitable; equally, an absence of convictions amongst a society's members will not necessarily mean that a society is suitable to conduct class 3 gambling. Unlike the position with class 4 applications, there is no express requirement to consider convictions. However convictions should always be a potential concern because they are evidence of past failures to act in accordance with the law, while certain convictions are likely to give rise to more concern than others.
26. On the other hand, the Commission considered that the Appellant's suggested approach was too narrowly focused on a single consideration, namely the likelihood that the Appellant would run a fair and honest raffle. Such a narrow perspective addressed only one of the purposes of the Act, namely the integrity of games.
27. The Commission considered that the information obtained by the Secretary under section 36 potentially touched on more than that single purpose of the Act, ensuring the integrity and fairness of games (section 3(e)). The information also brought into focus the purpose of limiting opportunities for crime and dishonesty associated with gambling (section 3(f)). The Commission considered that this latter purpose suggested a broader concern than simply the likelihood that the raffle itself would be run honestly and fairly. The statutory provision for the Secretary to obtain information from the Police was

consistent with a broader approach to assessing suitability than one solely focused on the ability to run a fair lottery.

28. If the application is considered from the perspective of limiting opportunities for crime and dishonesty associated with gambling, a lot of the information obtained by the Secretary is of concern. The matter of most concern to the Commission is one mentioned by the Secretary, in explaining his change of approach, namely the potential for licensed gambling to be used for money-laundering purposes, to hide, and legitimise dealing with, the proceeds of criminal activities such as theft and drug dealing. The information gathered by the Secretary indicates that this is a serious concern:

- (a) The Appellant is part of an organisation which is internationally regarded by law enforcement agencies as a criminal organisation.
- (b) The past convictions and pending charges for present officers and members include dishonesty offences, such as theft, burglary, receiving stolen property and documentary fraud.
- (c) Present officers and members also have past convictions and pending charges for class A drug dealing and cultivation of cannabis.
- (d) One member, who on the information obtained by the Secretary is an officer of the Appellant, has a conviction for money laundering.

In the Commission's view, this information provides a basis for concluding that there would be a real risk that a reputedly criminal organisation with connection through its membership to offending involving class A drug dealing, theft, burglary, receiving, fraud and money laundering would use the opportunity offered by licensed gambling to facilitate money laundering. Accordingly, the information obtained by the Secretary in his investigation of the Appellant causes it not to be satisfied about the suitability of the Appellant and its officers, including the organiser.

29. In addition, the information about convictions and the criminal reputation of the organisation, combines with the money laundering risk to provide a basis for a lack of satisfaction about the true purpose of the gambling (section 37(1)(b)) and the likely application or distribution of the net proceeds (section 37(1)(e)), namely that the true purpose of the class 3 gambling would be money laundering.

30. The Commission gave consideration to the Appellant's argument that there was evidence to suggest it could be trusted to run a fair raffle, including its members' involvement in the licensed class 3 raffle run by the Hells Angels Auckland Chapter and

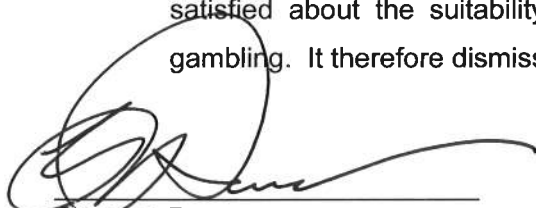


the evidence from Dr Gilbert that if the group decided to run a clean game, then its members would abide by this.

31. Ultimately, however, the evidence put forward by the Appellant to suggest that it would run a "clean game" did not change the Commission's view regarding its lack of satisfaction regarding the suitability of the Appellant and its officers and other concerns arising from the potential for money laundering. The likelihood that the Appellant would comply with the formal requirements of its licence and run an honest raffle is only one of the factors to take into account regarding suitability. Indeed, a society would be careful to do so if it were using class 3 gambling as a means of legitimising the holding of cash, in order not to attract additional official attention.
32. Consideration was also given to the submission by the Appellant that any matters of dissatisfaction could be addressed by the imposition of conditions. The nature of the concerns means that conditions would be inadequate to deal with them. The concern would be that licensed gambling might provide covert opportunities for criminal and dishonest conduct. Dealing with those concerns through the imposition of conditions requires expectations about compliance and honesty additional to those raised by class 3 gambling itself and, in that regard, character and reputation assume an importance which they might not otherwise have had. If the doubt about suitability were fear of the covert use by a criminal organisation of opportunities to use licensed gambling for criminal purposes, the imposition of conditions would not offer a safe solution. The Commission agrees with the Secretary that the nature of the concerns mean that conditions provide no practical solution in circumstances.

Decision of the Commission

33. For the reasons set about above, the Commission considered that the information obtained by the Secretary in his investigation of the Appellant causes it not to be satisfied about the suitability of the Appellant, its officers and the organiser of the gambling. It therefore dismisses the appeal.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

16th March 2012

