GC05/17

IN THE MATTER	of the Gambling Act 2003
AND	on an appeal by **NEW ZEALAND RACING BOARD – TAB MANGERE BRIDGE**

BEFORE THE GAMBLING COMMISSION

Members:	G L Reeves (Chief Gambling Commissioner) L M Hansen D C Matahaere-Atariki W N Harvey
Date of Appeal:	14 October 2016
Date of Decision:	17 March 2017
Date of Notification of Decision:	10th April 2017

DECISION ON AN APPEAL BY NEW ZEALAND RACING BOARD – TAB MANGERE BRIDGE

Introduction

1. The New Zealand Racing Board ("**NZRB**") has appealed against a refusal to grant an application for a venue licence for TAB Mangere Bridge. The Secretary for Internal Affairs refused to grant venue licences for TAB Mangere Bridge and TAB Kapiti Lights because the applications did not satisfy the Secretary in respect of the requirements of section 67(1)(c), 67(1)(n) and 67(1)(q) of the Gambling Act 2003.

2. The Secretary's decision follows the result of a successful earlier appeal by NZRB. The earlier appeal, GC09/16, considered the Secretary's refusal to grant an application for the same class 4 venue licences by reason of a new section 33(3) of the Gambling Act coming into effect. The Commission declined to confirm the decision and referred the matter back to the Secretary with a direction that he reconsider the applications and determine them on the material before him immediately prior to 21 October 2015 (the commencement date of section 33(3)) and in accordance with the statutory criteria that were applicable at that date.

3. The present appeal is against one of the reconsideration decisions in which the Secretary again refused the applications but on different grounds. An appeal has also been filed

against the decision to refuse the TAB Kapiti Lights application but, at the request of the appellant, the hearing was deferred pending the Commission's decision on this appeal.

Factual background

4. As was the case with the previous appeal (GC09/16), the legislative addition of section 33(3) to the Gambling Act, which came into effect on 21 October 2015, is central to this appeal. It is discussed in more detail later in this decision. For reasons set out below, NZRB found itself with a time-limited opportunity to make applications for venue licences which, until the decision in *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, had been thought to be prohibited. The *Whitehouse Tavern* appeal decision was given on 28 August 2015 and created an opportunity which was closed by section 33(3) taking effect on 21 October 2015.

5. On 25 September 2015, NZRB filed applications with the Department of Internal Affairs (the "**Department**") for venue licences for TAB Kapiti Lights and TAB Mangere Bridge. The Department began reviewing the applications on 28 September 2015 (the next business day). Both venues were licenced to other class 4 operators at the time that the applications were made. Neither application included a surrender notice from the society holding the existing licence, which was required by section 65(2)(g) of the Act. The applications were also not accompanied by finalised lease documents but did include draft lease agreements for the sites. On 6 October 2015, the Department wrote to NZRB, advising that, if surrender notices were not submitted by close of business on 16 October 2015, the applications would be returned to NZRB as incomplete.

6. NZRB provided a surrender notice for the Kapiti Lights venue by email on 16 October 2015. From its receipt, the Secretary treated the application in respect of TAB Kapiti Lights as complete for the purposes of section 65 of the Act. On 19 October 2015, the Department returned the application in respect of the Mangere Bridge venue as incomplete. On the same day, NZRB re-submitted the application, enclosing a surrender notice for the Mangere Bridge venue. From the re-submission of the application, the Secretary treated the application for TAB Mangere Bridge as complete for the purposes of section 65.

7. On 21 October 2015, the Gambling Amendment 2015 (No 2) came into force. The Amendment Act inserted a new subsection 3 into section 33 of the Gambling Act which provided that a class 4 venue licence may not be issued to NZRB if a corporate society other than NZRB held a class 4 venue licence for the venue within the previous five years. From 21 October 2015, the Secretary ceased consideration of the applications, because he considered that he was then prohibited from issuing either licence.

8. On 3 February 2016, in accordance with a prior arrangement between the counsel and the Department to delay its issue, the Secretary issued a decision formally declining to grant the venue licences on the grounds that he did not have the ability to issue a class 4 venue licence to the NZRB because of section 33(3).

9. On 8 July 2016, on appeal by NZRB, the Commission issued decision GC09/16, holding that NZRB was entitled to have the merits of its applications determined under the law prevailing at the time that it lodged completed applications. The Commission exercised its power to refer the matter back to the Secretary to reconsider the applications and to determine them on the material before him on 20 October 2015 and in accordance with the statutory criteria then applying.

10. On 30 September 2016, after reconsidering the applications and the evidence available at 20 October 2015, the Secretary notified NZRB of his decision to refuse to grant the applications for both venues. NZRB appealed the decisions of the Secretary declining its applications.

Decision under appeal

11. The Secretary refused the venue licence because he was not satisfied that the application met three of the statutory criteria set out in section 67:

    (a) *Suitability of the venue manager* (sections 67(1)(c) and 68(1)(d)): The Secretary was not satisfied of the proposed venue manager's suitability because Mr Wemyss appeared to be a "placeholder" venue manager until a permanent venue manager could be found and the Secretary doubted that Mr Wemyss could fulfil the role because he already held other roles for NZRB.

    (b) *The lease* (s 67(1)(n)): The Secretary was not satisfied that NZRB owned or leased the venue. NZRB enclosed with its application a draft unsigned lease agreement that was subject to the term and annual rate being confirmed. No evidence of a lease agreement had been received by the Secretary as at 20 October 2015.

    (c) *Venue suitability* (s 67(1)(q)): The Secretary had been informed by NZRB on 6 May 2015 that there was a major re-development planned for the venue. Although NZRB submitted a floor plan with its application, no site visit had taken place which left the Secretary unsatisfied about the venue both as to its present suitability and with regard to the impact of the intended re-development.

Relevant law

12. Section 33 now provides:

> **33 Status of New Zealand Racing Board and racing clubs**
>
> (1) The New Zealand Racing Board and societies that are racing clubs under the Racing Act 2003 must be treated as corporate societies—
> (a) for the purposes of—
> (i) a class 4 opèrator's licence or class 4 venue licence; or
> (ii) an application for, or the renewal or amendment of, either licence; and
> (b) that, for the purposes of a class 4 operator's licence or a class 4 venue licence, apply net proceeds from class 4 gambling to an authorised purpose.
>
> (1A) Despite subsection (1)(b) and to avoid doubt, section 52A does not apply to the New Zealand Racing Board or a racing club.
>
> (2) A class 4 venue licence may be issued to the New Zealand Racing Board or a racing club to conduct class 4 gambling only at—
> (a) a venue owned or leased by the New Zealand Racing Board and used mainly for racing betting or sports betting; or
> (b) a racecourse.
>
> (3) However, a class 4 venue licence may not be issued to the New Zealand Racing Board or a racing club if another corporate society (other than the New Zealand Racing Board or that racing club)—
> (a) holds a class 4 venue licence for the venue; or
> (b) held a class 4 venue licence for the venue at any time during the 5-year period immediately before the date on which the application for the licence is made.

13. Immediately prior to the 21 October 2015 amendment, section 33 was limited to subsections (1), (1A) and (2), in their current form. Subsection (3) was added by the 21 October 2015 amendment.

14. Section 33(2) provides that the NZRB may not be issued with a class 4 venue licence unless the venue is owned or leased by the NZRB and used mainly for racing betting or sports betting, or unless the venue is a race course. The prohibition on issuing licences matches a requirement of section 67(n), which prohibits the grant of a venue licence to NZRB, unless the Secretary is satisfied that the class 4 venue is either owned or leased by NZRB and used mainly for racing betting or sports betting, or is a race course.

15. Section 33(3) provides that NZRB may not be issued with a class 4 venue licence if another corporate society had held a venue licence for the premises during the preceding 5 years. Unlike section 33(2), the prohibition was not matched by an equivalent requirement in section 67(1) controlling the grant of venue licences.

16. The following sections of the Gambling Act 2003 are also relevant to the appeal:

> **65 Application for class 4 venue licence**
>
> (1) A corporate society may apply to the Secretary for a class 4 venue licence.

(2) An application must be on the relevant standard form and be accompanied by—

...

(e) a profile of the venue manager and the venue operator, including details of their experience in [conducting class 4 gambling,] character, and qualifications; and....

66 Secretary must investigate applicant for class 4 venue licence

(1) The Secretary must undertake any investigations the Secretary considers necessary to determine—

...

(b) whether the venue manager and venue operator are suitable persons in terms of section 68....

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:

...

(c) the venue manager is an individual and any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about his or her suitability, in terms of section 68, to supervise—
(i) the conduct of class 4 gambling at the venue; and
(ii) venue personnel; and....

...

(n) if the New Zealand Racing Board is the applicant, the class 4 venue is either—
(i) owned or leased by the New Zealand Racing Board and used mainly for racing betting or sports betting; or
(ii) a racecourse; and

...

(q) the proposed venue is suitable in all other respects to be a class 4 venue; and

70 Content and conditions of class 4 venue licence

(1) A class 4 venue licence must include the following information and conditions:

...

(e) the name of the venue manager; and

...

(2) The conditions that the Secretary may add to a class 4 venue licence include—

(a) conditions to ensure that both the venue operator and the venue manager can supervise effectively—
(i) the class 4 gambling at the venue; and
(ii) the venue personnel:

71 Significant changes in relation to class 4 venue licence must be notified

(1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur:

...

(da) the venue manager changes:

...

(2) Notification must be made before, or as soon as practicable after, an event listed in subsection (1) occurs.

(3) The powers and obligations in section 66 apply to a notification as if the notification were an application for a class 4 venue licence.

(4) The Secretary may require the corporate society to apply for an amendment under section 73, or may invoke the suspension or cancellation provisions under sections 74 and 75, as a result of the notification.

74 Suspension or cancellation of class 4 venue licence

(1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that—

(a) any of the grounds in section 67 are no longer met; or

...

(d) the corporate society supplied information that is materially false or misleading in its application for—
(i) a class 4 venue licence; or

...

77 Appeal to Gambling Commission regarding class 4 venue licence

(1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—

(a) refuse to grant a class 4 venue licence to the corporate society; or ...

(3) The Gambling Commission—

(a) may request any information from the corporate society or the parties to the agreement or the venue manager or the Secretary; and
(b) is not bound to follow any formal procedure; and
(c) does not need to hold a hearing; and
(d) must consider any information provided by the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary...

78 Consequences of appeal regarding class 4 venue licence

...

(2) A class 4 venue licence remains in force until—

(a) the expiry of the period for an appeal under section 77(2); or
(b) the date that the Gambling Commission specifies under section 77(5), if the appellant—
(i) appeals a refusal to renew or amend the licence under section 77(1)(c) or (d); or
(ii) appeals a decision to suspend or cancel the licence under section 77(1)(e).

The issues

17. Although the submissions from the parties did not present arguments in the order analysed below, the parties each ultimately addressed a series of identifiable inter-connected issues. Rather than summarise the evidence and submissions in the order presented, the issues are identified in this section and parties' submissions on each issue is summarised in the following section.

First issue: Should NZRB have been granted a licence based on the application submitted by 20 October 2015?

18. The first issue is whether the Commission is satisfied that NZRB's application submitted by 20 October 2015 met the section 67 criteria. NZRB argued that the Secretary should have been satisfied of the three grounds for rejecting the application set out in paragraph 11 above. For his part, the Secretary set out the reasons for his lack of satisfaction and maintained that they justified his view.

Second issue: How should the Commission treat information that became available after the application was filed?

19. The Commission's appeal powers include the possibility of receipt of information that was not available at the time of the Secretary's decision under appeal. NZRB submitted that the Commission should give full weight to additional information that became available after 20 October 2015, such as the identity and qualifications of a newly proposed venue manager and later developments regarding the lease.

20. The Secretary submitted that the Commission should only take into account material that was provided by 20 October 2015. He pointed out that the Commission's earlier appeal decision directed that only information as at that date should be considered and argued that section 33(3) limits NZRB's ability to rely on any additional information not available by that date.

Third issue: If the Commission can consider additional material, is the Commission now satisfied that the application meets the statutory criteria under section 67?

21. Depending on the Commission's decision on the second issue, it may reconsider NZRB's application based on all the additional information that NZRB has subsequently provided. The Secretary accepts that, if that were the case, the Commission could be satisfied that the application meets the statutory criteria but that, in the particular circumstances, further inquiries should be made before a licence is granted.

First issue: Did NZRB's application submitted by 20 October 2015 meet the statutory criteria?

22. Each of the three grounds for rejecting the application as at 20 October 2015 is dealt with separately.

Venue manager

23. NZRB submitted that the Secretary's lack of satisfaction regarding Mr Wemyss's suitability as venue manager was unjustified. It relied on his CV and listed several attributes, including his prior vetting and approval by the Secretary as a key person, his extensive management experience, including in the areas of risk and compliance, his

background in operational management, planning, policy development, administration and human resources, and his establishment of training systems and procedures at TAB venues.

24. NZRB submitted that the Secretary was wrong to consider Mr Wemyss could not perform the dual roles of Head of Retail and venue manager at two venues in different cities. Based on Mr Miller's evidence, it submitted the roles were complimentary because the Head of Retail role is sufficiently flexible and it is common for a person to be a venue manager in multiple venues in different locations. On the latter point, NZRB relied on the examples of Tony Crosbie, who is venue manager for eight different venues in the South Island and Mr Cunneen, who manages three different venues. NZRB submitted a venue manager's tasks do not require him to be on site at all times; it is sufficient to have suitable systems and staff training in place and to be on call.

25. NZRB also submitted that, as acting Head of Retail, responsible for the running of the TAB Board Venue network, Mr Wemyss had a role similar to that of a venue manager who ran several venues, but that Mr Wemyss would have the advantage of all of NZRB's staff and resources at his disposal and could delegate tasks.

26. The Secretary expressed concern that, if Mr Wemyss became the venue manager of the two venues for which he was listed, it would be in addition to his full-time role as Acting Manager of Retail for NZRB. The Secretary doubted that Mr Wemyss would adequately perform as venue manager at two venues, in Auckland and Kapiti, whilst also performing his fulltime role as Acting Head of Retail for NZRB in Wellington. The Department's evidence was that it had never approved a venue manager that also held Mr Wemyss's positions and NZRB had not provided enough information about how Mr Wemyss would manage all of the roles.

27. The Secretary also considered that, in truth, Mr Wemyss was not the intended venue manager: he was merely a placeholder until NZRB could find an appropriate manager. The Secretary's suspicion at the time was based on previous experience of NZRB using placeholder venue managers in applications and NZRB's letter of 25 September 2016, which stated that Mr Wemyss was the "venue manager (as Acting Head of Retail until such a time as staff for the venue are formalised)". No subsequent confirmation that Mr Wemyss would be the venue manager was submitted to the Secretary.

28. In reply NZRB accepted that it intended to replace Mr Wemyss once a local manager was found, but submitted that it was not inappropriate to lodge an application naming Mr Wemyss and to amend the application (or licence) when the local manager was appointed. NZRB submitted that the Secretary did not deal with the original licence

application on the basis of the information then in front of it, but rather what might occur at a future time.

Analysis

29. The suitability assessment that the Secretary is required to undertake pursuant to section 66 is more than a background check in isolation. The investigation requires the Secretary to consider whether the proposed venue manager is suitable to perform the role having regard to the demands of the particular venue in question. It is therefore important for the Secretary to know the identity of the actually intended venue manager and the venue. The use of a placeholder does not enable the Secretary to make a proper assessment.

30. The submission that use of a placeholder in an application could be cured by amendment of the application or licence failed to have proper regard to the statutory scheme. Only limited provision is made for amendment of a venue licence after it is issued by reason of a change of venue manager. Critically, once issued, venue licences are not invalidated by a subsequent change in the venue manager.

31. Rather, section 72 creates an obligation to notify the Secretary of a change in venue manager. The notification may be before or, as soon as practicable, after the event. Notification requires the Secretary to investigate the new manager. The investigation can give rise to either amendment of the licence if the Secretary is satisfied or, if not, a notified process to cancel or suspend the venue licence. If the process results in cancellation or suspension (pending appointment of a satisfactory manager), the decision would come with a right of appeal, accompanied by the benefit of a statutory stay protecting the licence in the interim.

32. There is a significant difference between being satisfied about the suitability of the venue manager before issuing a licence and dealing with dissatisfaction about a later change in management during the term of the issued licence. In addition, as section 66 requires the Secretary to investigate the suitability of the proposed manager, permitting the nomination of a placeholder who is not actually intended to discharge the duties of venue manager would both undermine the intended effect of sections 65, 66, 67 and 68 (which is to ensure satisfaction in advance of the licence) and result in a waste of Departmental resources in undertaking a pointless investigation. The Commission also notes that providing false or misleading information in an application is one of the statutory grounds for cancellation or suspension of a licence (section 74(1)(d)(i)).

33. Satisfaction of the suitability of a venue manager or other person may, in cases of possible doubt, include satisfaction that the individual is correctly nominated. The

principle is illustrated in an appeal by Bluegrass Holdings (GC10/14 at [32]), in which the issue of suitability of key persons turned ultimately on the disputed identity of the key persons.[1]

34. In the present case, the Secretary doubted that Mr Wemyss was the actually intended manager such that a licensing decision should not be made until the applicant had decided who the actual venue manager would be. NZRB intimated that Mr Wemyss was not a permanent venue manager (and so did not mislead the Secretary) in a letter to the Secretary, stating that he was named in the application pending NZRB confirming its staffing. The Secretary's doubts were also supported by its concern that Mr Wemyss would not have the capacity to perform the role, given his other commitments. His doubt has tended to be confirmed by the subsequent change of proposed manager.

35. A venue manager's capacity to perform the venue manager role is a separate consideration for the Secretary's assessment of suitability. The matters relevant to the suitability of a venue manager, set out in section 68, include any matter which the Secretary considers relevant (in addition to certain listed matters). It appears to be common ground that the capacity of the nominated person to supervise the venue adequately is a relevant consideration. That is consistent with section 71, which provides that a corporate society must notify the Secretary if a venue manager "is incapable of performing his or her duties". NZRB's case was primarily based on Mr Wemyss's ability to perform the role through adequate systems, staff training and on-call availability.

36. On the information contained in the application lodged by 21 October 2015, the Commission was not satisfied that Mr Wemyss was the actually intended venue manager or that he had capacity to perform that role along with his other roles.

Lease

37. NZRB accepted that, when it filed its application, it included only an unsigned draft lease document. It submitted that the draft lease clearly set out the parties to the lease and confirmed that the premises would be leased to NZRB upon a class 4 venue licence being issued.

38. NZRB relied on evidence from Mr Miller that the Secretary has been satisfied on previous occasions without the need for NZRB to have taken possession of the premises or to have an unconditional agreement to lease. Mr Miller identified four different venues in respect of which the Secretary had previously been satisfied with an agreement to lease and an unsigned deed of lease, namely: TAB Papamoa, Bethlehem, Rotorua and Napier.

[1] The issue was also referred to in GC09/16 at [8.17](e)

Mr Walsh, the landlord and new proposed venue manager, confirmed that, by 20 October 2015, he was able and willing to lease the venue to NZRB.

39. NZRB also submitted that the approach to the statutory requirement should have regard to the practical implications and consequences for applicants. By analogy, NZRB pointed to section 67(1)(g) which imposes a requirement that venue owners own the gambling equipment that they propose to operate, and submitted it was not common practice to do so.

40. The Secretary did not submit that there was a requirement to provide a signed lease in every case. What is required is evidence that satisfies the Secretary that the venue was in fact leased to NZRB. In the circumstances, the Secretary considered it appropriate to require a signed copy of the lease, even if it were conditional on NZRB obtaining a venue licence, because the Secretary had previously experienced difficulties with NZRB providing finalised lease documents and a signed agreement would provide the best evidence about what had been leased.

41. In circumstances where he understood that the site was undergoing major redevelopment and there had been no site visit, the Secretary also considered a signed lease was necessary to satisfy him of the requirement. A signed copy of the lease had not been provided to the Secretary by 20 October 2015.

Analysis

42. Section 67(1)(n) requires the Secretary to be satisfied that the class 4 venue is either "owned or leased" by NZRB and "used mainly for racing betting or sports betting". The section uses the past tense, which means that the Secretary must be satisfied that, at the time of deciding the application, NZRB has secured the right to occupy the premises by lease (even if it is not actually occupying it at the time). A signed deed of lease that is conditional only on the venue operator obtaining a class 4 licence would be sufficient evidence to support an application because the venue operator would have the required interest in the premises, once the application was approved.

43. An unsigned deed of lease is not evidence of a concluded agreement to lease (giving the applicant the necessary interest) in the absence of extrinsic evidence that the lessor and lessee have agreed to essential terms. The unsigned lease that NZRB submitted did not even have a concluded term or rate (although it did include a mechanism for determining the rate, if the parties failed to agree by the commencement date). In the Commission's view, without extrinsic evidence that the parties had entered into a binding agreement to lease (perhaps by an exchange of correspondence or a separate conditional agreement to lease), NZRB did not provide a basis for satisfaction that it had leased the venue. Mr

Walsh's confirmation that he was willing to lease the venue is not enough to do so. It only indicates that one party was prepared to enter into agreement, not that an agreement had in fact been concluded between both parties.

Venue Layout

44. NZRB submitted that the layout of the venue was clear and had been included in the licence application and that the potential for future redevelopment did not prevent the venue being licenced in its current form. It submitted that, if and when a future redevelopment occurred, NZRB would be required to submit an updated floor plan and to have it duly approved. The fact that a future redevelopment was contemplated was not a reason to refuse to grant the licence. NZRB also submitted that the Department had completed a site visit.

45. The Secretary expressed concern that it was not clear from the floor plan what the impact of the indicated redevelopment would be on the venue and that no site visit had been possible prior to 20 October 2015. The information that was available to the Secretary was that "the site is the subject of a major redevelopment. The existing tavern will be demolished and a range of new units will be built on the land". Employees of the Department had met with NZRB representatives and the Secretary understood that the development was still at a "high level". On 10 September 2015, NZRB wrote to the Department enclosing information about the current bar layout and TAB premises, an aerial photo of the proposed site and a floor plan of the TAB leased area. The letter noted that the floor plan was not in its final form but any changes were "expected to be minor". The application dated 19 October 2015 enclosed the same floor plan.

46. The Secretary was aware of other instances in which NZRB had changed the floor plan while applications were being processed. This, combined with the proposed major redevelopment, meant the Secretary was not satisfied that the venue layout would be suitable.

47. The Secretary did not accept that a site visit had occurred. As the visit in question occurred well before the application was received and was unconnected with the application, it was not sufficient to satisfy the Secretary.

Analysis

48. As with the issue of a placeholder venue manager, in the Commission's view, the Secretary would have grounds not to be satisfied that a venue layout is suitable if he considers that the suggested or inspected layout will only be temporary. However, in contrast to the identity of the actually intended manager, the evidence to support such a view is not strong. While NZRB had intimated that the proposed venue manager was not

the intended venue manager, the redevelopment to the venue appeared to be prospective and removed in time. The Commission did not regard the prospect of redevelopment in this case as leaving it unsatisfied about the venue's suitability.

49. However, for the reasons set out above, the application as at 20 October 2015 did not result in the Commission being satisfied about the matters in section 67, specifically the suitability of the venue manger and that NZRB had leased the venue,

Second issue: How should the Commission treat information that became available after the application was filed?

50. NZRB submitted that decision GC09/16 had decided that it was entitled to have the merits of its application determined under the law prevailing at the time that it lodged a completed application and that the Commission's earlier decision had thereby confirmed its right to appeal any decision to the Commission and to have the Commission determine its application under the law prevailing at the time of the application, which included a right to provide new information in the course of the appeal.

51. NZRB submitted that it is well established that the Commission hears matters *de novo*, meaning that the Commission considers matters afresh and must have regard to all information before it, irrespective of whether the Secretary had that information when he made his decision, and whether the original information justified the Secretary's decision. It submitted that the Commission's practice note and previous decisions also establish that the Commission can seek additional information from the applicant and the Secretary and must consider any received in reaching a decision.

52. The Secretary submitted that the Commission's direction in GC09/16 required him to consider the application "on the basis of the material before him on that date, in accordance with the criteria set out in section 67 and without regard to statutory provisions that were not then in operation". He submitted that the effect of that direction was that the Commission had determined in its prior decision that only information received by that date could be used to make a licensing decision. The Commission did not direct the Secretary to take into account any later acquired information, notwithstanding that the Secretary had raised such concerns in that appeal. He argued that decision GC09/16 had already decided what was relevant on this appeal and that the issue was accordingly *res judicata*.

53. The Secretary argued that the amendment to section 33 clearly signalled Parliament's intention that, from 21 October 2015, NZRB was not to be issued a class 4 venue licence if another corporate society held a venue licence for the same venue in the preceding five years. NZRB had an opportunity to submit a complete and satisfactory licence application before that date. But the application was not satisfactory and the law had

since changed. It would be contrary to Parliament's intent for NZRB to be able to supplement its application on appeal after the law had changed, particularly as the law was amended to preserve what was thought to be the legal status quo at the time.

54. The Secretary submitted that the practice note and cases relied on by NZRB are not applicable because, unlike this case, they did not contemplate an intervening law change. Additionally, in *The Southern Trust Incorporated* and *Te Wheke Holdings Ltd* appeal, the Commission had directed the Secretary to consider the original application and any later information. The decision not to give a similar direction in GC09/16 appeared to have been deliberate.

55. The Secretary submitted that, if the Commission considered new material, it would be deciding an entirely different question to what the Secretary was directed to consider in the first instance. The Secretary submitted that the obligation of the Commission to "consider" any further information does not contain a requirement about the weight to be given to it. The Commission will have considered any further information if it considers it but decides ultimately that it should not affect the result of the appeal.

56. In reply, NZRB argued that, even if the Commission determines that the Secretary's decision was correct according to its direction, it can still make a different decision without needing to find that the Secretary was wrong. The Commission's direction in GC09/16 was to the Secretary; it did not fetter its own future decisions. NZRB submitted that the effect of section 77(3)(d), which states that the Commission must consider any information, is that the Commission cannot limit the information that it considers. It argued that the Commission's previous decisions and practice note to that effect gave it a legitimate expectation that the Commission would follow the same practice in this appeal. Additionally, the issue is not *res judicata* because the parties did not make any submissions in the first appeal about what evidence should be considered on a later appeal.

57. NZRB also submitted that decision GC09/16 endorsed the approach that, where an existing right includes an appeal right, both the original application and the appeal should be determined in accordance with the law that applied that that time. NZRB also submitted that strictly limiting the scope of the evidence was impractical: if the venue manager were declared bankrupt before the appeal but after the original licence application were filed, the Commission would want to consider that information.

58. NZRB submitted that Parliament could not have intended to reduce its normal appeal rights. The amendment to section 33 does not suggest that it should be applied retrospectively and NZRB did not know that it could have applied for a licence sooner because it was incorrectly advised of the effect of section 118. NZRB also argued that

restricting the material on appeal would be a breach of natural justice (section 27(1), New Zealand Bill of Rights Act 1990) because its right to be heard includes the right to put new information before the Commission.

59. If a temporal limit did exist on the information that can be relied on, NZRB submitted that the Commission would still have the power to hear further evidence that was capable of being submitted by 20 October 2015.

Scope of Commission's earlier decision

60. In decision GC09/16, the Commission considered whether the commencement of section 33(3) justified the Secretary ceasing to consider two applications that NZRB had filed before section 33(3) came into effect. The Commission held that the commencement of section 33(3) did not have that effect: if NZRB had filed a complete application before 21 October 2015, it was entitled to have that application considered and determined on its merits. The Commission's direction to the Secretary to consider the application as at that date was intended to correct the failure to consider the application properly at that time.

61. In doing so, the Commission did not address the extent of any appeal rights which would arise if NZRB appealed the Secretary's re-considered decision on its application. As a result, in decision 09/16, the Commission determined neither:

    (a) that it would only consider information that was submitted by 20 October 2015 on this appeal; nor

    (b) that NZRB was entitled, if it exercised its appeal rights following a negative reconsideration, to supplement and amend its application with material which was not available by the time that section 33(3) came into effect.

Those issues fall for determination on this appeal and are not *res judicata*.

Analysis

62. The additional information that NZRB relies on in this appeal substantively amends the original application which was made before the statutory change came into effect but which the Commission has now confirmed was inadequate. On the other hand, section 77(3)(d) requires the Commission to consider any information put before it by the appellant in an appeal against a refusal by the Secretary to grant a licence.

63. When section 77 was enacted, Parliament would not have contemplated the application of section 77(3)(d) in the particular circumstances of this case where an applicant seeks to rely on new information that became available after its opportunity to apply for a licence had ended. It is clear that Parliament did not even anticipate the present circumstances

when it passed the amendment to section 33 because it believed that it was preserving the status quo.

64. On the other hand, the language of section 77(3) is clear and contains no qualification or exception: the Commission is obliged to consider all new material submitted to it on appeal.

65. The decision in GC09/16 held that section 33(3) operated as a partial repeal of section 33(1).[2] Section 33(1) provides that for the purposes of class 4 venue or operators licences, NZRB was to be treated as a corporate society. While other provisions required differential treatment and therefore limited the application of section 33(1) (such as sections 33(1A), 22(2) and 67(4)), the new section 33(3) further limits the operation of section 33(1) because it provides that, unlike corporate societies, NZRB is unable to apply for a class 4 licence for a venue that has previously hosted class 4 gambling in the previous five years.

66. Sections 17 and 18 of the Interpretation Act 1999 set out principles in relation to the interpretation of the effect of repeal provisions on existing rights. In appeal decision GC09/16, the Commission held that, having submitted a completed application to the Secretary prior to section 33(3) coming in to force, NZRB had a right to have its application considered by the Secretary in accordance with the law at the time that it was lodged.[3] It determined that, by refusing the application on the basis of section 33(3), the Secretary had effectively applied section 33(3) retrospectively by extending its effect to an application filed before it took effect.

67. Section 18 provides that the repeal of a provision does not affect "the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right". In the Commission's view, NZRB's appeal to the Commission under s 77 against the refusal decision of the Secretary constitutes a part of proceedings that relate to its right to have its application considered. Treating section 33(3) as limiting rights under section 77(3)(d), narrowing the matters that the Commission must consider on appeal, would adversely impact on the prosecution of NZRB's appeal.

68. Parliament may enact legislation that departs from the provisions of the Interpretation Act 1999, but its intent to do so must be sufficiently clear to displace the presumption that it intends to do so. As section 18 would ordinarily preserve NZRB's right to an appeal under section 77 without qualification, a clear expression that section 33(3) was intended

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[2] At paragraph 8.11

[3] At paragraph 8.24

to limit the Commission's obligation to consider new material on an appeal on an application now prohibited by section 33(3) would be needed.

69. The Commission can see nothing in the statutory language to support, with sufficient clarity, an express or implied intention to limit the material which the Commission must consider on appeal.

70. For the reasons set out below, it appears that Parliament did not contemplate that NZRB would even be able to lodge an application of the kind that is the subject of this appeal, far less bring an appeal against its refusal:

(a) The apparent purpose of the addition of section 33(3) was to preserve what was previously, but ultimately erroneously, believed to be the legal status quo in respect of the NZRB's ability to acquire venues with existing class 4 venue licences. Until the Court of Appeal's decision in August 2015 in the *Whitehouse Tavern* judgment,[4] the Secretary had considered that section 118 prohibited any commercial transactions between the NZRB (as a corporate society) and venue operators, so that NZRB could not enter into a transaction to buy or lease hospitality venues with existing licences.

(b) Section 118 concerns exchanges of benefits with conditions attached between class 4 operators and class 4 venues. It was also amended, with effect from 21 October 2015, by the passage of Gambling Amendment Bill (No 3). Prior to that amendment, section 118(2) prevented venue operators from seeking or receiving any money or benefit with a condition attached from class 4 operators. Section 118(3) prohibited a class 4 operator from offering any money or benefit with a condition attached to a key person in relation to a venue operator.[5] The Department had interpreted "condition" as including any kind of contractual term or condition.[6]

(c) The Department recommended to the Government Administration Committee that section 118 of the Act be amended by adding the word "improper", so that the section would only prohibit benefits flowing between class 4 societies and venue operators if "improper conditions" were attached to those benefits. In making that recommendation, the Department informed the Committee that doing so would remove what it viewed as the then current constraint in section 118 on

[4] *The Department of Internal Affairs v The Whitehouse Tavern Trust Board* [2015] NZCA 398.

[5] The Department apparently took the view that commercial contracts (which the Department considered fell under conditions attached to benefits or money) with venue operators were necessarily contracts with key persons in relation to venue operators for the purpose of section 118(3). See for example *Whitehouse Tavern*, above n 2, at [71].

[6] *Whitehouse Tavern*, above n 2, at [72].

commercial transactions between NZRB and class 4 venues (other than those operated by NZRB) and, following consultation with NZRB, the Department recommended that the Act be amended expressly to prohibit NZRB from acquiring licensed class 4 venues. The Department recorded, in its recommendation, that this would confirm what it considered to be the status quo, as well as the underlying policy, and would provide certainty.[7]

(d) The result was section 33(3), enacted with effect from 21 October 2015. However, in August 2015, after enactment of the amendment but before it came into effect, the Court of Appeal construed section 118 to have the same effect (of prohibiting improper conditions) as a matter of purpose and context and without the necessity of the amendment that would come into effect about two months later. NZRB's right to file its application therefore arose only as a result of the two month window that was opened by the Court of Appeal's decision.

71. As Parliament did not turn its mind to the possibility of an application being made or an appeal against the Secretary's refusal to grant it, it is unsurprising that section 33(3) made no provision for transitional arrangements, including any limiting effect on the provisions of section 77. The Commission can infer no intent to limit the operation of section 77(3)(d) from the legislative history of the amendment nor from the absence of a transitional provision. Accordingly, it has concluded that it ought to apply section 77(3)(d) without special qualification or limitation.

Issue three: Should the licence be granted based on the additional information provided?

72. NZRB submitted that the three grounds raised for refusing to grant the venue licence would all be satisfied by new information provided on the appeal. That conclusion was largely conceded by the Secretary, subject to the need to carry out checks which had not been undertaken because of the position which the Secretary had taken on Issue 2.

Venue Manager

73. NZRB informed the Commission that it proposed a new venue manager, Mark Walsh, who also submitted an affidavit in support.

74. The Secretary accepted that, subject to satisfactory checks being completed in respect of Mr Walsh (which had not taken place because of the Secretary's position on issue 2), if the Commission were to take into account all information before it, including information that became available after 20 October 2015, it would be satisfied of the grounds in section 67(1)(c) and 68(1)(d). For that reason, if the decision were not confirmed, the

[7] Letter from Department of Internal Affairs to Government Administration Committee.

Secretary suggested that that, rather than reverse the decision and issue a licence immediately, the Commission should consider referring the application back to the Secretary on terms which would allow those checks to be made.

Lease

75. NZRB submitted that the Commission should now be satisfied that NZRB had leased the premises subject to the class 4 venue licence being granted. NZRB provided, in the course of the appeal, a signed agreement to lease which is conditional solely upon the Secretary confirming that a venue licence class 4 will be issued.

76. The Secretary indicated that, subject to receipt of a letter confirming that the only outstanding condition is the Department's approval of the licence application, the Secretary would be satisfied of the issues regarding the lease of the premise (section 67(1)(n)).

Venue Layout

77. NZRB invited the Commission acting in its *de novo* capacity to visit the venue and confirm for itself that the venue is suitable to conduct class 4 gambling. Mr Miller deposed that the work that will be undertaken by NZRB is purely cosmetic, namely painting, carpeting and exterior signage, that the venue is a model venue and that it has been previously licenced without concern.

78. The Secretary accepted that, subject to a satisfactory site visit following the renovations, the Secretary would be satisfied in relation to the venue layout and section 67(1)(q).

Decision

79. The Commission refers the application for a class 4 venue licence back to the Secretary with a direction that he undertake the limited inquiries referred to in paragraphs 74, 76 and 78 above and, subject to those inquiries being satisfactory, that he issue a venue licence to NZRB for TAB Mangere Bridge.

Graeme Reeves
Chief Gambling Commissioner
for and on behalf of the Gambling Commission

5th April 2017