

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **PUB CHARITY
 INC**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
 P J Stanley
 R D Bell

Date of Decision: 17 February 2012

Date of Notification of Decision: 16th March 2012

**DECISION
 ON AN APPEAL BY PUB CHARITY INC**

Background

1. Pub Charity Inc (the “**Appellant**” or “**Pub Charity**”) appealed against a decision by the Secretary for Internal Affairs (the “**Secretary**”) to suspend its class 4 operator’s licence. The Secretary suspended the licence for 1 day on the ground that it exceeded Limit D of the Limits and Exclusions on Class 4 Venue Costs dated 17 July 2008 (the “**Gazette Notice**”) for the year ending 31 July 2009. In breaching Limit D, the Secretary considered that the Appellant was in breach of sections 52(1)(d) and 106 of the Gambling Act 2003 (the “**Act**”).
2. The parties filed substantive submissions, with the Appellant also filing submissions in reply. On Monday 14 November 2011, the High Court released its decision in *The Trillian Trust v The Secretary for Internal Affairs* HC Wellington CIV 2010-485-2411. On Wednesday 16 November 2011, the Appellant wrote to the Commission seeking guidance on the implications for its appeal following release of the *Trillian* decision. On Monday 21 November 2011, the Chief Gambling Commissioner directed both the Appellant and the Secretary to file additional submissions limited to addressing the *Trillian* decision. Both parties did so.

Relevant law

3. The relevant law is as follows:

Gambling Act 2003

52. Grounds for granting class 4 operator’s licence

- (1) The Secretary must refuse to grant a class 4 operator’s licence unless the Secretary is satisfied that,—

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

- (b) the right to appeal the decision; and
- (c) the process to be followed for an appeal under section 61.

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

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

59. Procedure for suspending, cancelling, or refusing to amend or renew class 4 operator's licence

- (1) If the Secretary proposes to suspend, cancel, or refuse to amend or renew a class 4 operator's licence, the Secretary must notify the corporate society of—
 - (a) the proposal to suspend, cancel, or refuse to amend or renew the licence; and
 - (b) the reason for the proposed suspension, cancellation, or refusal; and
 - (c) the corporate society's rights, and the procedure to be followed—
 - (i) before the suspension or cancellation takes effect; or
 - (ii) as a result of the refusal to amend or renew the licence.
- (2) The corporate society may make written submissions to the Secretary concerning the proposed suspension, cancellation, or refusal to amend or renew within—
 - (a) 20 working days after the date of the notice under subsection (1); or
 - (b) any longer period that the Secretary allows if an application for an extension is made within the time period specified in paragraph (a).
- (3) The Secretary must consider any submissions made by the corporate society.
- (4) If the Secretary decides to suspend a licence, the Secretary must notify the corporate society of—
 - (a) the date that the suspension takes effect; and
 - (b) the suspension period (up to 6 months); and
 - (c) the reason for the suspension; and
 - (d) the matters to be dealt with in order for the Secretary to consider withdrawing the suspension before the end of the suspension period; and
 - (e) the consequences of not dealing with the matters identified.
- (5) If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the corporate society of,—
 - (a) for a cancellation, the date on which the cancellation takes effect and the reason for the cancellation; or
 - (b) for a refusal to amend or renew, the reason for the refusal.

- (6) If subsection (4) or subsection (5) applies, the Secretary must also notify the corporate society of—
- (a) the right to appeal the decision; and
 - (b) the process to be followed for an appeal under section 61.

106 Corporate society must apply or distribute net proceeds from class 4 gambling to or for authorised purpose

- (1) A corporate society must apply or distribute the net proceeds from class 4 gambling only to or for an authorised purpose specified in the corporate society's licence.
- (2) A corporate society that fails to comply with subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.
- (3) A court that convicts a corporate society of an offence under this section may—
- (a) make whatever orders are necessary to recover an amount of proceeds wrongly applied or distributed or to safeguard an amount not applied or distributed; and
 - (b) order the application or distribution of an amount of proceeds not yet distributed.
- (4) The effect of a conviction under this section is that—
- (a) the class 4 operator's licence and all class 4 venue licences held by the corporate society are cancelled; and
 - (b) the corporate society does not have a right to appeal the cancellation.

115 Payment of commission prohibited

- (1) The payment of, or receipt of, commission by any person for conducting class 4 gambling is prohibited.
- (2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

116. Secretary may limit or exclude costs of corporate society

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

2004 Gazette Notice

...

2. A corporate society, when incurring costs associated with class 4 venues, must not incur costs of: ...
 - (d) more than 16% of the turnover from all class 4 gambling conducted by that corporate society in any 12-month period, less prizes paid in that period (Limit D).

2008 Gazette Notice

...

2. A corporate society, when incurring costs (excluding GST) associated with class 4 venues, must not incur costs (excluding GST) of: ...
 - (d) more than 16% of the gaming machine profits (as defined in section 104 of the Gambling Act 2003, but excluding GST), in any 12 month period (Limit D).

Submissions by the Appellant

4. Pub Charity accepted that it exceeded Limit D by 0.46% in the period 1 August 2008 to 31 July 2009, but submitted that a suspension was not justified for several reasons.
5. First, that it was given insufficient notice of the 2008 Gazette Notice, which specified that Limit D was to be calculated as 16% of GMP excluding GST. The Appellant submitted that the Gazette Notice was gazetted after a very short notice period, which provided no indication of a commencement date and that when it was gazetted, there was no implementation period, despite the fact the change amounted to an effective 11% reduction in aggregate payments from that permitted under the 2004 Gazette Notice. This contrasted with the 15 month implementation period allowed in 2004. Further, although its approved venue agreements allowed for the review and variation of venue payments, this required notification to and, in most cases, renegotiation with, the venues.
6. Secondly, the Appellant submitted that, despite the lack of adequate notice, the concerted efforts it made to reduce venue payments in the relevant period would have allowed it to meet the new Limit D if it had not been for unprecedented economic conditions, resulting in poor performance by its top 25 venues. Those economic conditions made it difficult to accurately forecast revenue. If its forecasts had been correct, the average reduction of \$17,909 per week in venue payments would have been sufficient to meet the new Limit D.
7. The Appellant also submitted that it was particularly affected by the global financial crisis because of its large number of rural and provincial venues, which were even more volatile than urban venues.
8. Despite even more conservative forecasting and further reviews and renegotiations, the decline in revenue continued to outpace the Appellant's ability to adjust payment levels.

After the second quarterly payment, reviews and negotiations, leading to adjustments were being made monthly.

9. The Appellant submitted that over the 2008/2009 compliance period only 28 of 178 venues received 100% of their approved venue payments, while 103 venues received less than 50% of their entitlement. By the end of the 2008/2009 year 30 venues were receiving no payment at all. By mid-2008, it was "exiting" venues that had become non viable but a dramatic collapse in the final quarter of the compliance period saw it end that 12 month period with venue payment costs at 16.46% of net revenue. By the end of 2009, revenue began to stabilise and new business boosted total revenue and improved margins.
10. The Appellant submitted that it wrote to the Secretary in March 2011 and offered to resolve the matter by withholding an amount of venue payments equivalent to the amount of funds that it overspent in 2008/2009. It submitted that the Secretary rejected the proposal without further investigation, but that it nevertheless chose to withhold from total venue payments the amount of \$297,402. The Appellant submitted that this amount would otherwise have been paid as venue costs under Limit D, but has instead been distributed to the community as net proceeds. This was done to demonstrate that any deficit to the community from the 2008 overspend has now been restored.
11. The Appellant disputed the Secretary's position that a suspension would result in a recovery of funds, and that gamblers who would have gambled at Pub Charity venues during a suspension would necessarily go to other venues. The Appellant submitted that a suspension would, therefore, result in a loss to the community, and that, if the Secretary were serious about recovering funds, he would have accepted Pub Charity's offer to recover the amount of the overpayment from the 2009/2010 and 2010/2011 financial years.
12. Finally, the Appellant submitted that a deterrent is not required as it takes its compliance responsibilities very seriously. It submitted that it complied with Limit D in 2005/2006, 2006/2007, 2009/2010 and 2010/2011.

Submissions by the Secretary

13. The Secretary submitted that the Commission should confirm his decision to suspend the Appellant's class 4 operator's licence because:
 - (a) Pub Charity received ample warning of the change to Limit D, so it was appropriate to require immediate compliance with the Gazette Notice; and



- (b) a one day suspension is an appropriate and reasonable penalty for non-compliance with Limit D.
14. The Secretary stated that on 18 April 2008 his Department wrote to all class 4 societies, including the Appellant, advising that it was going to change the treatment of GST in relation to Limit D and that this afforded the Appellant three months notice. The Secretary acknowledged that this letter did not state when the Gazette Notice would come into force, but submitted that it expressly stated that the Department expected immediate compliance and advised class 4 licence holders to begin considering any necessary operating adjustments immediately.
15. The Secretary further submitted that his Gambling Compliance Unit did not apply the amended Limit D retrospectively, so the Appellant effectively had a 12 month period before any compliance action would be taken.
16. In response to the Appellant's submission on the 15 month implementation period for the 2004 Gazette notice, the Secretary submitted that, prior to the 2004 notice, there were no limits or exclusions on class 4 venue costs so that it was reasonable to have an implementation period. Further, the 2004 notice introduced four new limits on venue costs whereas the 2008 Gazette Notice simply clarified an aspect of one of the four existing limits. Therefore, the implementation periods appropriate for the 2004 and 2008 Gazette notices were not comparable.
17. In relation to the period of suspension, the Secretary submitted that:
- (a) The decision to suspend was based upon the two overarching factors of deterrence and the appropriateness of the penalty. The starting point for a period of suspension was calculated according to the "notional recovery model". Based on Pub Charity's average daily GMP, the start point was between one and two days to "recover" the amount overspent. The Secretary submitted that the suspension imposed took into account the effort the Appellant made of recovery by lowering its venue costs significantly.
- (b) Although it appeared that his decision to suspend took into account the Appellant's Limit D expenditure under the 2004 Gazette Notice, it did not. If it had been taken into account, it would have led to an increase in the suspension period.
- (c) The one day suspension was consistent with suspensions imposed in similar cases.



18. Finally, the Secretary submitted that the impact of the global financial crisis was not a mitigating factor, because it affected all class 4 societies. If it were accepted as a mitigating factor, it would mean that societies that had complied with Limit D for the year to 31 July 2009 were disadvantaged.

Appellant's submissions in reply

19. In reply, Pub Charity submitted that:

- (a) The Secretary implicitly acknowledged that some amount of notice was necessary for the changes to the application of Limit D.
- (b) The 18 April 2008 letter was not effective notification of the change; it simply advised that a decision had been made to "progress an amendment". Further, the letter went on to say that "if gazetted the Department will expect immediate compliance". Warning of potential change is not notification of change. Proper notice would require both a date of implementation and confirmed detail of the change.
- (c) As the working party responsible for the 18 April 2008 letter had been discussing the issue since 2005, there was no reason to consider that a change was imminent.
- (d) The Secretary's argument that Pub Charity should have followed the suggestion in the 18 April 2008 letter to begin "operating adjustments" immediately ignored the fact that, until it was amended, the 2004 Gazette Notice provided for Pub Charity to lawfully pay up to 16% of GMP including GST in venue costs.
- (e) In decision GC22/10, the Commission set out guidance in relation to the authority to suspend under section 74(1) for failure to meet section 67. The Commission recorded that the requirements set out in section 67 were systemic ones, which needed to be satisfied on an ongoing and forward-looking basis. The Secretary had not offered any evidence that Pub Charity had failed, or was failing, on a systemic or ongoing basis, to meet its obligations under section 52(1)(d). Indeed, a department audit for the period 1 October 2009 to 30 September 2010, noted that Pub Charity had performed well in minimising costs and in complying with Limit D.
- (f) Mr Abbott, acting on behalf of the Secretary, took a single-minded, pre-determined and punitive approach in the investigation and subsequent application of section 58 in this case. There is no evidence that he considered remedial action as an alternative to punitive action. Instead he ignored precedents and



guidance in Gambling Commission decisions, preferring his own interpretation of statutory requirements and procedure, ultimately writing and applying his own policy paper.

- (g) In his affidavit Mr Abbott stated that the Act does not provide any guidance as to the length of the suspension and that, while Gambling Commission cases provided some guidance, “none dealt with a breach of such a specific statutory requirement.” In doing so, Mr Abbott elevated non-compliance with the Gazette Notice to a “statutory breach” and assumed that a punishment by way of suspension was a mandatory response, stating in his affidavit:

There are two statutory benchmarks with which class 4 societies must comply. One of them is Limit D; the other is the minimum distribution of net proceeds per year of 37.12%. For a breach of such a statutory figure as Limit D that has been in force for many years the minimum appropriate punishment is suspension.

- (h) The objectives on which Mr Abbott based his policy approach reflect influences of criminal justice and commercial litigation which are not applicable for the Gambling Act.
- (i) It is irrelevant that the majority of class 4 societies met Limit D in the same period. The fact that they did so was largely a reflection of the fact that most societies had been convinced by the Department to calculate Limit D under the 2004 Notice as 16% of GMP less GST and were therefore already meeting the 2008 Limit D. The Secretary was influenced by his longstanding frustration with societies like Pub Charity that insisted upon the correct interpretation of the 2004 Notice.
20. The Appellant concluded by submitting that it recognised that its fundamental obligation was to raise funds for the community, and to minimise costs in doing so. It submitted that the matter under appeal was not evidence of a systemic failure or culture of excess. The Appellant acknowledged the Secretary’s authority under section 58(1)(b) to impose a suspension for a past failure to comply, but questioned the appropriateness of such a sanction after two years of compliance have passed and when any outstanding sums have been restored.

Additional submissions on *Trillian* decision

21. The Secretary submitted that the *Trillian* decision was not relevant to this appeal. In *Trillian*, the Secretary suspended the Trillian Trust’s class 4 operator’s licence under section 58(1)(b) for five days for four alleged “breaches” of section 52(1)(d). In the present case, he suspended Pub Charity’s operator’s licence under section 58(1)(b) for one day for a breach of Limit D. The Secretary submitted, therefore, that whether section

52(1)(d) created a statutory requirement capable of breach was not at issue at all on this appeal.

22. The Appellant submitted that, in light of the *Trillian* decision, the Secretary's application of the sections of the Act relied upon was incorrect. The Appellant submitted:

(a) In *Trillian*, Justice Simon France held that section 52 does not impose compliance obligations on an operator who holds a licence and therefore section 52 does not provide a basis on which to find non-compliance for the purpose of the suspension power in section 58(1)(b).

(b) In *Trillian*, Justice Simon France held that past breaches could be a basis for suspension, but also qualified this view with the statement that a suspension for a past breach must be considered in very clear context and, further, that a suspension, once proposed, can be withdrawn under sections 59(4)(d) and 60(2) if the reasons for the suspension have been resolved to the satisfaction of the Secretary. The Appellant submitted that the Secretary failed in his duty to provide it with the criteria and the opportunity for matters to be resolved and ignored the opportunity provided by Pub Charity to resolve the issue by restoring the funds to the community.

23. The Secretary responded that the cases were not on all fours. Whereas this appeal related to his decision to suspend Pub Charity's licence under section 58(1)(b) for non-compliance with Limit D, *Trillian* related to his decision to suspend Trillian's licence under section 58(1)(b) for four alleged non-compliance with section 52(1)(d). The Secretary also stated that *Trillian* made it clear that there was jurisdiction for him, and the Commission on appeal, to suspend for breach of Limit D under section 58(1)(b) and that the Judge was careful to point out that his comments on reconsideration of a penalty were case-specific.

Analysis

24. The Commission recently considered an appeal by Blue Waters Community Trust (see decision GC01/12) which also involved an appeal against a suspension for non-compliance with Limit D. As with the Blue Waters appeal, this appeal raised two issues for consideration, as follows:

(a) whether the Commission has jurisdiction to suspend for a breach of Limit D of the Gazette Notice; and

(b) if so, what is an appropriate period of suspension?

Jurisdiction to suspend

25. In its substantive submissions, the Appellant accepted that it breached Limit D of the Gazette Notice (by 0.46%), with the remainder of those submissions directed towards reducing or eliminating any period of suspension. In its subsequent submissions, the Appellant shifted its focus from mitigation to questioning whether non-compliance with Limit D provided a ground for suspension.
26. At paragraph 5 of his letter, the Secretary stated that he decided to suspend Pub Charity's class 4 operator's licence "in accordance with section 58(1)(b) and 59 of the Act", and slightly further on at paragraph 6, he stated that the reason for suspension was for "exceeding Limit D ... for the 12 month period ending 31 July 2009, which is a breach of sections 52(1)(d) and 106 of the Act."
27. The Secretary has therefore equated non-compliance with Limit D with a "breach" of sections 52(1)(d) and 106. This is problematic for three reasons:
- (a) Section 52(1)(d) imposes a forward-looking assessment obligation on the Secretary but does not impose a compliance obligation on the operator (as the High Court found in *Trillian*). Section 52 can provide a basis for a suspension under section 58(1)(a) but not under section 58(1)(b). The Secretary did not make an assessment under section 58(1)(a).
 - (b) Section 52(1)(d) relates to maximising net proceeds and minimising operating costs in the future. Limit D is not necessarily connected with this as Limit D is simply a standardised percentage of revenue, without reference to minimisation or what is reasonable or necessary. It would be possible for Limit D to be observed without expenses being minimised, or for Limit D to be exceeded despite expenses being minimised.
 - (c) Unlike section 52(1)(d), section 106 imposes a statutory obligation on an operator (to distribute net proceeds). However a breach of Limit D does not establish a breach of section 106. The analysis required to find a breach of section 106 is that adopted by the Commission in *The Southern Trust* and *The Trust Charitable Foundation* decisions (decisions GC10/10 and GC11/10) – that payments have been made in excess of actual, reasonable and necessary operating costs – but such an analysis forms no part of the Secretary's case in this appeal.
28. The Commission therefore agrees with Pub Charity that the Secretary's jurisdictional analysis was flawed. However this conclusion does not ultimately determine the appeal. The Commission considers an appeal on a *de novo* basis, meaning that the Commission



considers the matter afresh and unencumbered by the Secretary's approach or legal analysis. It is open to the Commission to impose a suspension on Pub Charity for any ground or grounds which may be available.

29. The Appellant's submissions were filed before the Commission released its *Blue Waters* decision, meaning that it did not have the benefit of the Commission's comments in that decision. In *Blue Waters*, the Commission held that compliance with Limit D of the Gazette Notice is "a requirement of the Act" pursuant to section 58(1)(b), with the result that a breach of Limit D is a ground for suspension under section 58(1)(b). The Commission is accordingly satisfied that grounds for suspension exist, but on that basis only.

Suspension

30. The Commission next considered what, if any, period of suspension should be imposed on Pub Charity. Pub Charity submitted that no suspension should be imposed for a number of reasons, as follows:
- (a) the Secretary provided inadequate notice of the change in calculating Limit D;
 - (b) it made extensive efforts to comply but non-compliance became virtually inevitable, despite its best endeavours;
 - (c) it took steps to rectify the impact of the breach after the event by reducing payments further in the following years;
 - (d) its efforts to avoid breach, and its subsequent remedial steps mean that deterrence was not required; and
 - (e) the Secretary failed to accept the rectifying steps as a reason to decline to impose a penalty, and compounded that by confused thinking that suspension would restore funds to the community.
31. For two reasons the Commission was not persuaded by Pub Charity's submission regarding a lack of adequate notice of the change to Limit D. First, although the Secretary informed operators that he expected immediate compliance with Limit D, he did not apply the new Gazette Notice retrospectively, meaning that Pub Charity had 12 months to achieve that compliance.
32. Secondly, Pub Charity filed detailed evidence of the changes that it made over the course of the year in question in its endeavour to meet Limit D, submitting that it would have met the Limit had it not been for unprecedented economic conditions.



33. These reasons demonstrate that Pub Charity's breach was not the result of a lack of notice, but rather of Pub Charity's inability to achieve compliance with the amended Limit. Pub Charity was aware of the Limit D requirement and took steps to meet it, but was unsuccessful in doing so.
34. The Commission considered Pub Charity's other submissions to have more force. The Commission has previously commented critically on the Secretary's "recovery" method of calculating suspension periods (see decision GC01/12). The Commission declines to adopt that method of assessing an appropriate suspension period for the purposes of considering the issues in this appeal.
35. The Commission has also previously indicated (decision GC10/10) that efforts by operators to recover excessive expenditure should reduce consequences, especially if those efforts are successful.
36. The Commission considered that this case was comparable to the recent Blue Waters decision. Both cases involved spending in excess of limit D, but not spending that was excessively in breach of the requirement to incur only reasonable and necessary expenses, or that involved inappropriate gain. Rather, in each case, the overspending occurred because of the society's inability to forecast GMP accurately or to alter spending in order to meet changes in GMP. As the Commission set out in decision GC01/12, such breaches should be preventable because operators should be looking forward, forecasting possible trends and adjusting costs accordingly. While forecasting may be difficult, it is undertaken in most forms of business and should be undertaken by class 4 operators as well. The Gazette Notice limits are not mere targets and non-compliance with the limits should generally have consequences.
37. However the Commission considered that Pub Charity's overall culpability was low. The steps that Pub Charity took following the breach, particularly its unilateral recovery of funds in circumstances where the Secretary did not provide any encouragement to do so, were positive and meant that only a minimal suspension was appropriate. Ultimately the Commission concluded that a one day suspension was appropriate for Pub Charity.

Maximising net proceeds and minimising costs – some comments

38. In previous decisions, the Commission has set out detailed analyses in relation to the purpose of class 4 gambling and the reasons for its existence in New Zealand (see decisions GC19/09, GC10/10 and GC11/10 in particular). Class 4 gambling is conducted by not for profit societies for the purpose of raising money for charitable or community purposes. In conducting this gambling, it is incumbent upon societies to maximise their net proceeds and minimise their costs.



39. The Commission has also commented on Regulation 10 of the Gambling (Class 4 Net Proceeds) Regulations 2004 (which provides the minimum amount of net proceeds that must be distributed – 37.12% of GST exclusive gross proceeds) and Limit D of the Gazette Notice (which provides that societies must not incur costs of more than 16% of GMP when incurring costs associated with its class 4 venues).
40. It appears to the Commission that current industry practice does not have a real focus on the maximisation of returns and the minimisation of costs, but instead treats Regulation 10 and Limit D as standardised limits with effective compliance being achieved if societies return at least 37.12% and do not incur costs of more than 16%.
41. The Commission alluded to this concern at paragraph 41 of the Blue Waters decision where it stated:

However, the emphasis on percentage of overspend assumes that societies are entitled to spend up to the Limit, rather than treating the Limit as a further restriction on incurring costs. That is, the Secretary's reasoning assumes that 16% is the baseline indicator. ...

42. The Commission's concern appears to be validated by some of the material which the Commission has seen in the course of this appeal. For example, the Secretary relied upon Mr Abbott's affidavit in which he deposed:

There are two statutory benchmarks with which class 4 societies must comply. One of them is Limit D; the other is the minimum distribution of net proceeds per year of 37.12%.

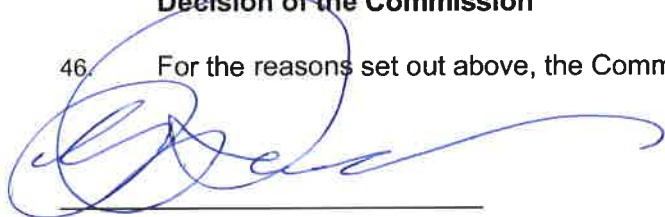
The Secretary's submissions on the impact of the global financial crisis (see paragraph 18 above) also indicated a view that material compliance was limited to remaining under Limit D, treating all societies who met Limit D as compliant and therefore disadvantaged by the appellant's breach if unpunished.

43. Similarly, in its substantive submissions, Pub Charity outlined its offer to the Secretary to withhold an amount of venue payments equivalent to the amount of funds that it spent in excess of Limit D in 2008/2009 year. Pub Charity stated that the Secretary rejected this proposal but that it (Pub Charity) nevertheless chose to withhold almost \$300,000 from venue payments in the following year – a sum would otherwise have been paid out under Limit D. Pub Charity also commented that the apparent compliance by other societies had been achieved by pegging venue payments to revenue, a practice which has a similar economic result as the prohibited practice of paying venues on a commission basis (see section 115). A focus on enforcement of Limit D only will tend to produce a similar result.

44. The fact that Pub Charity was able to “recover” \$300,000 in the following year suggests that Pub Charity was previously not truly minimising its costs, and instead has been spending up to the full 16%. If Pub Charity had truly been minimising its costs, recovery in the following year would have been practically impossible. Limit D is thus being treated as a compliance target rather than as merely an additional limit on costs, and so has, it seems, Regulation 10 and the 37.12% return. The Commission does not make this point to be critical of Pub Charity in particular. In circumstances where the Secretary’s enforcement practices require societies to be focused on the “statutory benchmarks”, a society which is prepared to make a “recovery” by not spending up to its “entitlement” deserves credit for its choice.
45. Rather the Commission observes that the apparent enforcement focus on the “statutory benchmarks”, which are the product of regulation under s section 116, appears to have produced a situation in which the Secretary and societies alike treat the regulatory venue costs limits as a compliance target, with the result that expenditure below that target is treated as an effective entitlement. That is not consistent with the primary focus of the language of the Act itself, including the requirements for a licence (section 52(1)(d)), the obligation to distribute net proceeds (section 106), the definition of the latter, and the prohibition of fixing venue payments as a commission (section 115). In decisions G10/10 and GC11/10, the Commission made the point that its punitive decisions assumed that the Secretary would scrutinise other societies against the same standard of actual, reasonable and necessary expenditure and treat them similarly. It would encourage the Secretary to do so. The Gazette Notice limits may not be sufficiently attuned to circumstances to represent a fair focus of enforcement alone.

Decision of the Commission

46. For the reasons set out above, the Commission dismisses the appeal.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

16 March 2012

