

IN THE MATTER of the Gambling Act 2023

AND an application by the
**SECRETARY FOR INTERNAL
AFFAIRS** to suspend a casino
licence

BEFORE THE CHIEF GAMBLING COMMISSIONER

Date of Application: 31 August 2023
Date of Hearing: 14 November 2023
Date of Notification: 16 November 2023

**DIRECTIONS FROM PRE-HEARING CONFERENCE RE
AN APPLICATION BY THE SECRETARY FOR INTERNAL AFFAIRS
TO SUSPEND A CASINO LICENCE**

Background

1. On 31 August 2023, the Secretary for Internal Affairs ("**Secretary**") applied to the Gambling Commission ("**Commission**") under section 144 of the Gambling Act 2003 ("**Act**", all references to this Act unless otherwise stated) to suspend the casino operator's licence held by SkyCity Casino Management Limited ("**SCML**"). The application seeks suspension of the licence on the ground that SCML breached condition 23 of its casino operator's licence for the Auckland casino relating to compliance with clause 3.1.6 of its Responsible Gambling Programme, which imposes obligations on the operator relating to continuous play by gamblers at the casino.
2. On 5 September 2023, pursuant to section 145(2), the Commission notified SCML and the other parties to casino venue agreements with SCML, namely SkyCity Auckland Limited, SkyCity Management Limited, SkyCity Hamilton Limited, Queenstown Casino Limited, and Otago Casinos Limited, (collectively "**the casino venue agreement parties**") of the application and the rights of those parties to file written submissions on the application and to request an oral hearing.
3. In accordance with section 145(3), SCML and the casino venue agreement parties were invited to file written submissions within 20 working days after the Commission's notice, or within such longer period as the Commission allowed following an application for extension of time, and were also advised of their right to request an oral hearing.
4. By letter dated 6 September 2023, the solicitors for SCML sought an extension of a further 10 working days within which to make written submissions. By letter of 11 September 2023, counsel for the Secretary raised no objection.

5. On 12 September 2023, on behalf of the Commission, the Chief Gambling Commissioner granted the requested extension (and later a further minor extension), and the parties were notified accordingly.
6. On 19 October 2023, by letter from its solicitors, SCML notified the Commission and the Secretary of its request for an oral hearing of the application. It sought a pre-hearing teleconference for the purposes of procedural directions including evidence, confidentiality and fixing a hearing date. The letter also enclosed the initial written submissions for SCML and a bundle of authorities.
7. On 2 November 2023, the Commission gave notice of a pre-hearing conference to be conducted by the Chief Gambling Commissioner by videoconference at midday on 14 November 2023. To assist with conduct of the conference, counsel for the Secretary and SCML were asked to confer and to file memoranda 48 hours prior to the video conference addressing the following matters:
 - (a) Mode of giving evidence.
 - (b) Number of witnesses (including whether any would need to give evidence remotely and whether there would be any expert evidence).
 - (c) Estimated hearing length.
 - (d) Availability constraints affecting counsel or witnesses.
 - (e) Physical requirements for the hearing.
 - (f) Proposed timetable directions.
 - (g) Confidentiality.
8. On 10 November 2023, counsel for the Secretary and SCML each filed memoranda addressing those matters. In most respects, counsel for the parties were in agreement. The principal exception was in respect of a direction sought by the Secretary for a preliminary hearing to determine an argument raised by SCML in its initial submissions. As the proposed preliminary determination direction had not been addressed in the memorandum of counsel for SCML, the Commission invited SCML to file a further memorandum regarding the proposal. The further memorandum was received on 13 November 2023.
9. Counsel for the parties appeared by videoconference before the Chief Gambling Commissioner on 14 December 2023. The Executive Director of the Commission and counsel assisting were also in attendance.

Preliminary determination

10. As the proposal for the preliminary determination of an issue is the most controversial matter and also potentially affects the timetabling to hearing, it is addressed first.
11. The Secretary seeks suspension of the licence on the grounds of non-compliance with condition 23 of SCML's casino operator's licence which requires it to operate the Auckland casino in compliance with the Responsible Gambling Programme originally approved by the Casino Control Authority on 1 December 2023 as amended from time to time. Over time, what were referred to by the Authority as Responsible Gambling Programmes have come to be referred to as Host Responsibility Programmes ("**HRP**"). The current practice is that HRPs incorporate the Problem Gambling Identification Policy ("**PGIP**") required by section 308. All casino operators' licences contain a condition providing for periodic review by the Commission of the content of their HRPs.
12. The current HRP for the Auckland casino was the result of the Commission's review decision GC19/19 which approved a revised HRP (attached to the decision), with effect from 12 August 2019, replacing the earlier revised HRP approved by the Commission in review decision GC11/17.
13. The initial submissions for SCML included an argument that condition 23 did not apply to the 2019 HRP (and accordingly did not apply to 20 of the 23 instances of continuous play referred to in the application, all of which were said to have occurred after 12 August 2019). The Secretary sought a preliminary hearing, to determine the correctness of SCML's submission regarding the application of the 2019 HRP to condition 23 ("**the preliminary issue**"), in advance of the principal hearing.
14. Following review of the written submissions filed before the conference, the Chief Gambling Commissioner heard oral argument from counsel for the parties.
15. For the Secretary, it was submitted as follows:
 - (a) Prior determination of the preliminary issue would affect the scope of the evidence, the hearing time required, the scope of submissions to be made by the parties and SCML's culpability and thus affect timetabling of the hearing of the application.
 - (b) The preliminary determination hearing should be preceded by an exchange of written submissions by SCML and the Secretary.
 - (c) The power of the Commission to determine its procedure was unconstrained and not subject to section 145. The Commission had considered and determined preliminary issues in decision GC07/08 (which related to a suspension application in respect of Dunedin casino after an oral hearing had been requested) and has done so in the course of determining a number of class 4 appeals.

- (d) No provision of the Gambling Act constrains whether a preliminary determination may be made by the Commission. There is no presumption against preliminary determinations to be displaced and the identity of the party proposing a preliminary determination is not relevant.
- (e) The real question is one of efficiency – whether a preliminary determination will assist in fair and efficient decision making. In that regard, the proposed preliminary issue avoids any difficult demarcation areas, as it is capable of being framed as a single legal issue.
- (f) Preliminary determination of the preliminary issue was likely to reduce the length of the principal hearing substantially.

16. Counsel for SCML opposed a preliminary determination on the following basis:

- (a) A preliminary hearing of a legal issue would contradict the provisions of section 145, which provide for the right to request an oral hearing, for the fixing of the earliest practicable date of the hearing and the right “to produce evidence, to appear and be heard at the hearing and to call, examine and cross-examine witnesses”.
- (b) Clause 2 (1) of Schedule 3 which provides that “(t)he Commission may regulate its procedure as it thinks fit” is subject to section 145, as the Commission held previously in decision GC07/06 at [64]. Although the Commission held a preliminary hearing in GC07/06, the hearing was requested by the respondents in advance of the principal hearing, in contrast to the present case.
- (c) Class 4 appeals are not affected by any provision similar to section 145 and the prior Class 4 appeal preliminary hearings are of a different character.
- (d) In any event, the Commission has previously held that preliminary determinations are likely to be uncommon as they require issues suitable for separate determination and likely to lead to a just, speedy and inexpensive outcome.¹ There have been many judicial warnings about preliminary determination “shortcuts” leading to overall delay and increased cost.
- (e) A preliminary determination is likely to lead to delay and significant added cost, when compared to a single hearing addressing all issues. A preliminary hearing will necessarily extend the timetable to final hearing and result in the filing of additional written submissions by both parties.
- (f) No possible determination of the preliminary issue would dispose of the application. Nor would any determination affect the scope of the evidence materially because all instances raised, whether 3 or 23, arose from the same causes, and will result in essentially the same evidence being given.

¹ GC38/12, at [14] – [18].

- (g) The length of the principal hearing will largely be determined by the evidence and extent of cross-examination, not legal submissions on the relationship between the 2019 HRP and condition 23.
- (h) If there is no preliminary hearing, the principal hearing will be sooner and the timetabling for the anticipated principal hearing is already tight.
- (i) The potential for delay arising from an appeal or judicial review of the preliminary determination is a further concern.
- (j) The proposed preliminary issue is merely one of a number of substantive submissions advanced by SCML. It is not necessarily preliminary as it does not go to the Commission's jurisdiction.
- (k) Delay in determination of the application is harmful to SCML's business, especially if it brings with it further damaging media coverage.

17. In reply, counsel for the Secretary submitted:

- (a) There is no reason in principle or practice why a preliminary determination should result in additional media coverage.
- (b) A preliminary hearing would be expedient as SCML has already filed detailed submissions on the issue and the burden of submissions would fall mainly on the Secretary to respond.
- (c) Concerns about the possibility of appeal or judicial review were not a sound reason to decline.
- (d) Section 145 did not preclude a preliminary determination, as demonstrated by decision GC07/06.
- (e) The real question was the effect of preliminary determination on the likely length of the hearing.

18. Having heard the parties, the Chief Gambling Commissioner does not favour a preliminary hearing as proposed by the Secretary, principally because a preliminary determination will delay disposal of the application, while offering no real efficiency benefits. It is common ground that no outcome of the preliminary issue determination would eliminate the need for the principal hearing. The Chief Gambling Commissioner concluded that a preliminary determination would not likely materially reduce the length of the principal hearing but rather would certainly delay it.

19. While accepting that the general power to determine the Commission's procedures as it thinks fit is subject to specific provisions of the Act affecting procedure, including section 145, the exercise of rights given by section 145 does not preclude a preliminary hearing (as decision

GC07/06 demonstrates), nor require only a single uninterrupted hearing nor establish a general “respondent preference” rule.

20. The proposed direction for a preliminary hearing is declined because the proposed preliminary issue is best determined at the principal hearing, where it can be considered in full context. There is no disadvantage in doing so and, in the particular circumstances, declining to direct a preliminary determination hearing in favour of a single hearing is the most likely course to enable the Commission to fix the earliest practical date for the hearing, as required by section 145(4)(a).

Hearing directions

21. All parties were agreed that evidence at the hearing should be given by affidavit, filed and served in advance of the hearing, with cross-examination of deponents as required by written notice to be given by other counsel.
22. All parties similarly agree that the hearing should take place at a suitable location in Auckland, with facilities for the parties to confer in private. As at least one witness is expected to give evidence remotely, the necessary facilities will be required for that purpose. The facilities should be able to accommodate 2 to 3 counsel for each party and a further 5 or 6 attendees, in addition to witnesses.
23. Counsel were also agreed that 5 days should be allowed for the hearing.

Confidentiality

24. While section 145 provides a right to request an oral hearing and provides rights to appear and to call, examine and cross-examine witnesses, it does not require the hearing to be in public and the Commission’s general power to determine whether its proceedings are in private or in public, as provided in Schedule 3, clause 2(3), is unaffected. SCML proposed that the hearing be in private (as is the usual practice of the Commission), a course not opposed by the Secretary.
25. SCML also sought interim non-publication and confidentiality orders over the hearing documents (including the application, the submissions, the evidence, interlocutory rulings and communications between the parties and the Commission), pursuant to sections 4 and 4C of the Commissions of Inquiry Act 1908, which applies to the Commission pursuant to section 225(2).
26. In decision GC02/12, the Commission summarised the effect of those provisions as follows:

18. The Commission considered that (assuming the material was relevant) it had jurisdiction to require the provision to it of the material in question, by virtue of the COI Act and the Gambling Act for the following reasons:

- (a) Under section 225 of the Act, the Commission is a commission of inquiry under the COI Act, and has the powers of a commission of inquiry under that Act.

- (b) Under section 4C COI Act, the Commission may require any person to produce for examination “any papers, documents, records, or thing, in that person’s possession or under that persons control” and to allow copies to made (section 4C(1)(b)).
- (c) The Commission may also require any person to furnish “any information that may be required by it” (section 4C(1)(c)).
- (d) Further, under section 4C(3), the Commission may, of its own motion or on an application, order that any information or document furnished, produced to it be supplied to any person appearing before the Commission and it may impose such conditions as it thinks fit on the supply or use of the information. The latter is in contrast to the OIA where information is provided without restriction on its future use or disclosure.

19. In the Commission’s view, the Act and COI Act expressly and adequately provided for the provision to the Commission of the information sought by [party] as well as for the protection of sensitive information in the event of its provision to the Appellant....

- 27. SCML emphasised that it was not seeking permanent non-publication and confidentiality orders. The orders sought would remain subject to further orders of the Commission and its expectation was that the Commission would publicly release a detailed and reasoned written decision on the application. It expected that, in doing so, the Commission would balance matters of confidentiality, commercial sensitivity and personal privacy with the public interest.
- 28. The orders were sought, in part, because SCML is owned by an entity listed on the stock exchanges in New Zealand and Australia and subject to continuous disclosure obligations to ensure that all market participants had access to material information. Without orders regulating the flow of information outside the parties to the hearing, those obligations would be unmanageable. There was also a reasonable probability that information received by the Commission would include commercially sensitive information, such as details of its detection methods and the financial consequences of suspension, and personal information relating to customers.
- 29. In addition, SCML’s parent had already suffered adverse consequences from media coverage and there was a risk of sensationalised and selective media reporting of disclosed information. The orders sought were consistent with the Commission’s past practice.
- 30. The orders sought were not opposed by the Secretary.
- 31. The Chief Gambling Commissioner considers that the orders sought are appropriate for the reasons advanced by counsel for SCML.

Timetable

- 32. The memoranda of counsel each proposed timetable orders, culminating in a hearing on a date to be fixed after 1 March 2024. The sole timetable difference was the date by which the affidavit evidence for SCML would be filed and served; SCML proposed 18 December 2023 and the Secretary proposed 8 December 2023, the earlier date being proposed to increase the time allowed for its evidence in response.

33. The Chief Gambling Commissioner advised that the hearing date which the Commission proposed was the week of 15 April 2024 and inquired of counsel whether the Secretary would oppose the date proposed by SCML for its evidence if the subsequent dates proposed were extended to allow more time for the later steps. Counsel agreed that such a timetable would meet the requirements for each party. As a result, the following timetable directions adopt the date initially proposed by SCML for its evidence, with all subsequent dates proposed extended by agreement.

Directions

34. The Chief Gambling Commissioner gives the following directions for the hearing of the application:
- (a) The application is to be heard in the week commencing **15 April 2024**. The Commission has allowed 5 days for the hearing and expects that the hearing time allocated will be sufficient for opening and closing submissions (of which it expects to receive at least a written outline in advance) as well as all oral evidence to be given.
 - (b) The hearing will be in Auckland at a venue to be advised by the Commission.
 - (c) Evidence-in-chief will primarily be given by affidavit, to be filed and served in advance of the hearing and taken as read.
 - (d) All deponents who are the subject of notice from other counsel that they are required for oral examination will be required to attend for that purpose.
 - (e) The hearing will be in private.
 - (f) Non-publication and confidentiality orders are made prohibiting disclosure or publication, until further order of the Commission, of the whole or any part of the following documents:
 - (i) the application;
 - (ii) all written submissions of the parties;
 - (iii) all affidavit evidence;
 - (iv) any interlocutory applications and memoranda;
 - (v) any interlocutory rulings of the Commission;
 - (vi) the transcript of the hearing;
 - (vii) communications between the parties and the Commission.

- (g) The following timetable directions are given:
- (i) SCML is to file and serve its affidavit evidence by **18 December 2023**.
 - (ii) The Secretary is to file any affidavit evidence in reply by **19 February 2024**.
 - (iii) The parties must file and serve lists of witnesses required for oral examination by **27 February 2024**.
 - (iv) An outline of the opening submissions for the Secretary is to be filed and served 2 weeks in advance of the hearing.
 - (v) An outline of the opening submissions for SCML is to be filed and served 1 week in advance of the hearing.
 - (vi) Counsel will be expected to provide a written outline of closing submission in advance, with the exact timing to be the subject of later directions from the Commission during the hearing.

35. One consequence of the orders in paragraph 34(f) is that these directions will not be published immediately on the Commission's website in accordance with its usual practice. Publication is expected to occur at a later date, following a future order permitting publication.



Susan Hughes KC
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

16 November 2023

