GC09/16

IN THE MATTER of the Gambling Act 2003

AND appeals by **NEW ZEALAND RACING BOARD** re venue licence applications for TAB Kapiti Lights and TAB Mangere Bridge

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
L M Hansen
R D Bell
D C Matahaere-Atariki
W N Harvey

Date of Decision: 8 July 2016

Date of Notification of Decision: 27th July 2016

DECISION ON APPEALS BY NEW ZEALAND RACING BOARD RE APPLICATIONS FOR VENUE LICENCES AT TAB KAPITI LIGHTS AND TAB MANGERE BRIDGE

1. INTRODUCTION

1.1 The New Zealand Racing Board ("**NZRB**") has appealed against a refusal to grant applications that it made for venue licences for TAB Kapiti Lights and TAB Mangere Bridge. The Secretary for Internal Affairs ("**Secretary**") refused to grant the licences because he considered that, in each case, he was prohibited from issuing a class 4 licence to NZRB for either venue by section 33(3)(a) of the Gambling Act ("**Act**").

1.2 Section 33(3) is a recent amendment to the Act, which came into effect on 21 October 2015, after the NZRB had applied for the licences, but before the Secretary had issued a decision on the applications. It provides that a class 4 venue licence may not be issued to NZRB if another corporate society holds a class 4 venue licence for the venue, or has held a class 4 venue licence for the venue at any time in the five year period immediately before the date on which the application for the licence is made. Other corporate societies held venue licences in respect of each venue at the time that the Secretary made his decision.

1.3 The NZRB appealed the Secretary's decision on the grounds that section 33(3)(a) does not apply to its applications for the venues in question and, alternatively that the Commission should grant licences, backdated to a date prior to 21 October 2015, in order to circumvent the application of section 33(3).

1.4 Following receipt of the parties' submissions, the Commission sought further submissions on two issues; namely, whether the amendment to section 33 had involved a repeal, for the purpose of the Interpretation Act 1999 (because NZRB's submissions relied heavily on sections 17 and 18 of that Act, which apply only to repeals) and what the purpose of section 33(3) is. Both parties made further submissions on those matters.

2. FACTUAL BACKGROUND

2.1 On 25 September 2015, NZRB filed applications with the Department of Internal Affairs ("**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).

2.2 Both venues were licensed 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, a document required by section 65(2)(g) of the Act to accompany a licence application. The applications were also not accompanied by finalised lease documents but did include draft lease agreements for the sites.

2.3 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. In an earlier email dated 4 October 2015, the Department also advised NZRB that, if the surrender notices and finalised lease documents were provided in respect of the Kapiti Lights venue, it was unlikely that the application for that venue would be refused.

2.4 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 Kapiti Lights as complete for the purposes of section 65 of the Act.

2.5 On 19 October 2015, the Department returned the application in respect of Mangere Bridge as incomplete. On the same day, NZRB re-submitted the application, this time enclosing a surrender notice for the Mangere Bridge venue. From the re-submission of the application, the Secretary treated the application for Mangere Bridge as complete for the purposes of section 65.

2.6 On 21 October 2015, the Gambling Amendment Act 2015 (No 2) came into force. The Amendment Act inserted a new subsection 3, into section 33 Gambling Act (as set out below).

2.7 From 21 October 2015, the Secretary ceased consideration of the applications, because he considered that he was prohibited from issuing either licence.

2.8 On 3 February 2016, in accordance with a prior arrangement between counsel and the Department to delay its issue, the Secretary issued a decision formally declining to grant the venue licences on the ground that he did not have the ability to issue a class 4 venue licence to the NZRB as a result of the new subsection 3 of section 33.

2.9 NZRB appealed the Secretary's decision declining its applications.

3. RELEVANT SECTION OF THE ACT

3.1 Section 33 now provides:

> **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 operator'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.

3.2 Immediately prior to the 21 October 2015 amendment, section 33 was limited to subsections (1), (1A) and (2), in their current form (referred to in this decision as "**pre-**

amendment section 33"). Subsection (3) was added by the 21 October 2015 amendment (and the section with that addition is referred to in this decision as "**current section 33**").

4. SUBMISSIONS

NZRB initial submissions

4.1 NZRB appealed on two grounds:

(a) The Commission, acting *de novo*, should grant the venue licence applications on the basis that they should be determined under pre-amendment section 33.

(b) In the alternative, the Commission should grant the venue licences, avoiding the application of current section 33, by using its power to backdate the resulting licence commencement dates to the date of application.

4.2 On the primary ground of appeal, NZRB argued that the applications should be determined according to the wording of section 33 at the time NZRB made the applications (pre-amendment section 33), rather than according to current section 33 for the following reasons:

(a) The amendment of section 33 involved the repeal and amendment of section 33.

(b) The Interpretation Act 1999 provides that repeal does not affect existing rights (section 17(1)(b)), and allows for the enforcement of existing rights, despite their repeal (section 18).

(c) The insertion of subsection (3) "removed entirely what was a pre-existing right for the NZRB to be treated exactly the same as any other corporate society" in respect of an application for a class 4 venue licence.

(d) In addition, section 7 (Interpretation Act) provides that enactments do not have retrospective effect. NZRB argued that deciding the applications according to the current section 33 would give it retrospective effect.

(e) If subsection (3) were applied according to the date of decision, rather than the date of application, applications made at the same time would have different outcomes depending on the Department's resources, and the priority accorded to different applications. The result would be "disorderly, illogical and unfair", and would epitomise the type of arbitrariness and unfairness that section 18

Interpretation Act, and other non-retrospectivity principles in the Interpretation Act and common law, are designed to prevent.

4.3 On the alternative ground, NZRB argued that, as the Commission has the power to grant backdated venue licences, doing so in this case would allow it to grant the licences without breaching section 33(3). NZRB's argument relied on an earlier Commission decision that provided for the possibility of the grant of a backdated licence where there had been delay or inaction by the Secretary.

Secretary's submissions

4.4 The Secretary's response conceded that any existing right to a class 4 venue licence would be protected by section 17 Interpretation Act despite section 33(3) but that such a right would only arise once the applicant for a licence had provided sufficient evidence to the Secretary. The proposed test for sufficiency giving rise to a right was not consistently expressed and included, at different points of the submissions for the Secretary;

(a) that the information was capable of satisfying the Secretary and, when he later considered it, the information did in fact satisfy him; and

(b) that the information was such that the Secretary's satisfaction was required (i.e. there was no rationally available basis for holding a contrary view).

4.5 The Secretary's submitted that no right had accrued in this case. Citing several cases discussing the nature of an "accrued" or "acquired" right, for the purposes of sections 17 and 18 (and similar sections in other jurisdictions), the Secretary argued that a person asserting a right for the purposes of sections 17 and 18 must have done something, beyond "mere procedural" steps, towards the acquisition of the right and simply making an application was not enough.

4.6 Addressing the possible points at which a right to a licence might accrue for the purposes of sections 17 and 18, he submitted that the test for an accrued right would not be satisfied on the facts in either case.

4.7 The first possibility is that the right to a licence accrues only when the Secretary has in fact assessed the application and is satisfied that it meets the relevant requirements. On this test, the right had not accrued before the amendment came into effect because no assessment had been made. However, the Secretary doubted this formulation of the test, as it is based on the Privy Council decision in *Director of Public Works v Ho Po*

Sang,[1] in which the alleged right was a "discretionary" benefit. The Secretary conceded that rights in relation to applications for venue licences under the Act are not merely discretionary. Although the Secretary is required to refuse to grant the licence if all statutory criteria under section 67 are not met to his satisfaction, he accepted that, if he is satisfied of all criteria, there is no residual discretion and the licence must be granted.

4.8 The second possibility is that the right to a licence accrued if, prior to the amendment, the applicant had lodged an application that in fact met the statutory criteria, even if, at that stage, it had not yet been considered by the Secretary. The Secretary submits that, even if this were the test, it would not have been satisfied in the circumstances. The Secretary set out a number of areas of possible dissatisfaction with the statutory criteria, including as to the finality of the proffered lease, the identity and suitability of a key person (the venue manager), the lack of information about proposed changes to the venue layout and their impact on prevention of problem gambling and access by minors.

4.9 As to the alternative ground, the Secretary submitted that there is no power to backdate the licences applied for in this case in the light of the prohibition on issue and that the Secretary did not act with undue delay or error (which would justify backdating if it were possible).

4.10 The Secretary also raised a potential issue about the Commission's jurisdiction to consider the appeal.

NZRB's submissions in reply

4.11 In its reply submissions (filed before either party filed the further submissions on repeal and the purpose of section 33(3)), the NZRB submitted as follows:

(a) It agrees with the Secretary that the grant of a venue licence is not a purely discretionary benefit.

(b) The cases relied upon by the Secretary are distinguishable.

(c) The relevant right or interest was the NZRB's existing right or interest under section 33 to be treated as a corporate society for the purpose of the two venue licence applications. However, if the Secretary were correct that the relevant right accrued when sufficient information had been provided to the Secretary, the right had accrued on this basis as well because NZRB had provided the Secretary with sufficient evidence to satisfy him that the statutory criteria were met.

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[1] *Director of Public Works v Ho Po Sang* [1961] AC 901 (PC).

(d) The Secretary's alleged doubt whether the NZRB would lease the premises had not been a real concern at the time, but rather had been elevated to a concern as part of the appeal argument.

(e) The draft lease agreements provided to the Secretary with the initial applications were sufficient to satisfy him that the NZRB would lease the premises. Further, the territorial authority consents provided to the Secretary (prior to 21 October 2015) demonstrated the seriousness of the NZRB's intention – it would not have gone to the trouble of obtaining the consents if it were not going to lease the premises. Moreover, on several earlier occasions (as set out in a second affidavit of Mr Miller, accompanying the submissions in reply), the Secretary had been satisfied that NZRB would lease premises without requiring a signed deed of lease.

(f) It would be unworkable if NZRB had to commit to a lease and take possession of new venues before submitting a venue licence application.

(g) The more plausible conclusion is that the licences could in fact have been issued before 21 October 2015, but senior officials elected not to advance the applications because of the pending amendment (and possibly personal views regarding the merits of racing as an authorised purpose). NZRB based this submission on an internal Department email, in which a Manager, Licensing Compliance, stated that the only way the applications would be processed "in time for" (presumably meaning "before") the Royal Assent was if they were given priority, but that the instructions were not to do so "given the nature of the pending amendment" and that the Department would "treat this application as we would for any other compliant operator".

(h) The Secretary's stated concerns regarding the venue manager, and the prevention of problem gambling and gambling by minors, are unfounded. Adequate information was available to satisfy the Secretary on these matters (and, in this regard, NZRB provided further information on the proposed venue manager, annexed to Mr Miller's second affidavit).

5. ISSUES

5.1 The Commission has identified the following issues as arising on the appeal:

(a) Does the Commission have jurisdiction to consider the appeal?

(b) What is the effect of the 21 October 2015 amendment? In particular, had NZRB acquired a right by 21 October 2015 that should be preserved under sections

17 and 18 of the Interpretation Act or otherwise under general principles of statutory interpretation?

(c) If the applications should be decided under current section 33, would backdating the commencement date of the licences enable them to be issued and, if so, would that be appropriate?

6. JURISDICTION TO HEAR THE APPEAL

6.1 The Secretary raised a potential jurisdictional issue in relation to the Commission's ability to hear the appeal, without ultimately challenging the Commission's jurisdiction. The Secretary noted that section 33(3) prevents the issue of a venue licence, whereas section 67 concerns the grant of a venue licence. In his view, the issue of a licence is a final procedural step, which necessarily follows a prior decision to grant a licence. According to the Secretary, the words "must not issue" impose a procedural bar, rather than affecting the assessment of the substantive merits of the application, which must be determined under section 67. The potential jurisdictional issue, in the Secretary's view, arises from the fact that the Commission has jurisdiction to consider appeals against "refusals to grant" class 4 licences,[2] but not to hear appeals against decisions not to issue licences.

6.2 The distinction raised by the Secretary is an important one that the Commission addresses below but it does not, in the Commission's view, give raise to a jurisdictional issue in this case. The decisions of the Secretary under appeal, as set out in the decision letters dated 3 February 2016, are expressed as decisions refusing to grant a venue licence in respect of each venue. The decision letters also advised NZRB of its right to appeal the decisions under section 77. Although the reason given for refusing to grant the licences was the new prohibition on issuing licences under section 33(3), the decisions themselves did not make the distinction between grant and issue in the way suggested in the Secretary's submissions. In particular, the Secretary did not make a decision to grant but not to issue the licences. As the Secretary described his decisions as refusals to grant the licences, they should be treated as decisions to refuse to grant under section 67. There is no need to consider whether the Commission's jurisdiction under section 77 extends to appeals against refusals to issue licences because the decisions under appeal are refusals to grant licences, appeals against which are expressly provided for in section 77.

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[2] section 77(1)(a)

7. SECTION 33

Overview of section 33 and its effect

7.1 Section 33 concerns the status of NZRB (and racing clubs) in relation to class 4 gambling. It is located in Part 2, Subpart 2 of the Act ("Classes of Gambling") under the heading "Class 4 gambling". Other sections under the same heading provide for, and define, the different classes of gambling. Section 33 follows the definition of class 4 gambling (section 30), general class 4 requirements for both an operator's licence and a venue licence (section 31) and provisions for existing gaming machine licences and site approvals. The specific requirements for the operator's licences and venue licences referred to in section 31 are set out in Part 2, Subpart 4, "Licensing of Class 4 gambling". The provisions covering applications for class 4 venue licences, their investigation, decisions to grant them, the form, content and approval of class 4 venue agreements, and the content and conditions of class 4 venue licences are set out in section 65 to section 70.

7.2 Section 33(1) provides that, for the purposes of class 4 operator's licences, class 4 venue licences, applications for them and for renewals or amendments of either type of licence, NZRB and racing clubs must be treated as corporate societies that apply net proceeds from class 4 gambling to an authorised purpose. Section 33 must be read in the light of the section 4 definitions of "corporate society" and "authorised purpose". Section 4 defines corporate society as follows:

> **corporate society** means 1 society that is –
>
> (a) incorporated under the Incorporated Societies Act 1908; or
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> (b) incorporated as a board under the Charitable Tursts Act 1957; or
>
> (c) a company incorporated under the Companies Act 1993 that –
>
> (i) does not have the capacity or power to make a profit; and
>
> (ii) is incorporated and conducted solely for authorised purposes;
>
> (d) a working men's club registered under the Friendly Societies and Credit Unions Act 1982

7.3 Section 4 defines authorised purpose, in relation to class 4 gambling, as:

(a) a charitable purpose;

(b) a non-commercial purpose that is beneficial to the whole or a section of the community;

(c) promoting, controlling, and conducting race meetings under the Racing Act 2003, including the payment of stakes.

7.4 Under section 33(1), sections 65 to 70 (which govern applications for class 4 venue licences) apply to NZRB. References to corporate societies in those sections therefore include NZRB. Under section 33(1)(b), NZRB must be treated as a corporate society that applies (rather than distributes) net proceeds to authorised purposes. In other words, NZRB is like a club that directly applies net proceeds to its own authorised purposes, rather than a society that distributes net proceeds to authorised purposes within the community. Thus, whenever provisions (of which there are few) relating to class 4 venue or operators' licences differentiate between societies which distribute net proceeds, and societies which apply net proceeds, NZRB must be treated as one of the latter category.

7.5 Section 33(1A) was inserted with effect from 3 March 2015. It provides that, despite section 33(1)(b), section 52A, which concerns the circumstances in which a corporate society may apply net proceeds to (its own) authorised purposes (and which was also inserted with effect from 3 March 2015), does not apply to NZRB. That amendment was accordingly to exempt NZRB from a new requirement which otherwise applied to applying societies.

7.6 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.

7.7 Section 33(3) is the most recent change, inserted with effect from 21 October 2015. It prohibits the issue of a class 4 venue licence to NZRB or a racing club if another corporate society holds a class 4 venue licence for the venue, or has 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. Unlike section 33(2), however, the new prohibition in section 33(3) is not accompanied, in the 21 October 2015 amendment, by a matching change to section 67 to prohibit the grant of a licence unless the Secretary were satisfied that the issue of a licence was not prohibited by section 33(3). The distinction is important for reasons addressed below.

The purpose of section 33(3)

7.8 The original wording of section 33, which contained subsections (1) and (2) in their current form, was the subject of comment by the Government Administration Committee, in its report on the Responsible Gambling Bill (which later became the Gambling Act). The Committee's report indicates that the purposes of the section were to clarify that the

TAB (which subsequently became NZRB) could obtain class 4 venue licences for stand-alone TAB venues, but also to control the growth of potential NZRB class 4 gambling venues. The Committee saw the control on growth arising from the fact that, if the NZRB wished to operate gaming machines itself, it could only do so in stand-alone TAB venues and on racecourses, and from the requirement for the NZRB to apply for a venue licence (and therefore a territorial authority), which meant that it would be subject to the same licensing and monitoring regime as other gaming machine venues.

7.9 The purpose of section 33(3) appears to have been 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. Broadly, it appears that, until the Court of Appeal's decision in August 2015 in the *Whitehouse Tavern* judgment,[3] the Department considered that section 118 prohibited commercial transactions between the NZRB (as a corporate society) and venue operators, which meant (in the Department's view) a prohibition on buying or leasing hospitality venues with existing licences.

7.10 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 a 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.[4] The Department had interpreted "condition" as including any kind of contractual term or condition.[5]

7.11 On 30 March 2015, following the closure of public submissions on the Gambling Amendment Bill (No 3), 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. As matters transpired, the Court of Appeal subsequently construed section 118 to have that effect as a matter of purpose and context and without the necessity of the amendment that would come into effect about 2 months later. When recommending the amendment to section 118, the Department informed the Committee that doing so would

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

[4] 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].

[5] *Whitehouse Tavern*, above n 2, at [72]; Secretary's further submissions at [29].

remove the current constraint in section 118 (which had not then been ruled on by the Court of Appeal) on commercial transactions between NZRB and class 4 venues (other than those operated by NZRB). The Department obtained the Committee's approval to consult with NZRB and to discuss options.

7.12 On 24 April 2015, following consultation with NZRB, the Department recommended that the Act be amended specifically 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.[6] The Committee accepted the recommendation, recommending to the House the insertion of a new clause 6A in the Bill to amend section 33, preventing the NZRB from acquiring a class 4 venue if another society held, or had held, a licence at the venue in question.[7] Ultimately, the current wording of section 33(3) was introduced by a Supplementary Order Paper, which replaced clause 6A of the Bill with the final wording of subsection (3) as enacted with effect from 21 October 2015. The prohibition goes well beyond the presumed earlier effect of section 118 by prohibiting the issue of licences to the NZRB for venues licensed in the past five years (not just currently licensed venues).

7.13 In light of the legislative history, the Secretary submitted that the objective purpose of section 33(3) is to restrict NZRB from expanding its gambling operation through the acquisition of existing and former class 4 venues in order to preserve what was thought to be the *status quo* (prior to the *Whitehouse Tavern* decision). The Secretary suggested some underlying policy justifications for the intention but conceded that they were not apparent on the face of the materials and were open to rebuttal in some respects.

7.14 NZRB agreed that the primary purpose appears to have been to maintain what the Department incorrectly considered to be the *status quo*; namely to preserve what the Department perceived to be a prohibition on NZRB purchasing existing class 4 venues, but that it is now "undisputed" that the Department's view on this point was incorrect. Accordingly, NZRB submitted that, as the amendment to section 33 was made on the basis of incorrect advice from the Department, it should be read down, and in any case not applied "retrospectively".

7.15 NZRB made submissions regarding the purposes of the Racing Act and Gambling Act in relation to NZRB, in apparent response to the Secretary's policy suggestions, submitting

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[6] Letter from Department of Internal Affairs to Government Administration Committee.
[7] Gambling Amendment Bill No 3, 216-2 (as reported by the Government Administration Committee), 11 May 2015; Secretary's further submissions at [43].

that the acquisition by NZRB of existing class 4 venues does not conflict with these purposes. However, these arguments did not directly address whether the new subsection (3) should apply to the applications subject to the appeal in particular. Rather, the arguments would apply equally to any application by NZRB for an application for a class 4 venue licence, including those made after 21 October 2015.

7.16 In the Commission's view, both the statutory language and the recent legislative history indicate that section 33(3) was intended to restrict the ability of NZRB to expand its class 4 gambling operations, specifically by ensuring that it would not be licensed to operate in venues previously licensed to other corporate societies. Such a purpose is consistent with a purpose of the original section 33, namely to control the growth of NZRB class 4 gambling venues. The Commission considers it to be material that section 33(3) was introduced to preserve what was thought to be the legal *status quo* at the time that the amendment was introduced; namely a prohibition on the transfer of existing class 4 venues to the NZRB. The fact that the view of *status quo* was later held to have been based on an incorrect interpretation of section 118 does not detract from what appears to have been a clear legislative intention to prohibit such transfers in the future.

7.17 Statutory interpretation is concerned with the objective ascertainment of legislative intent from the statutory language. It is not concerned with critical evaluation of the underlying policy rationale. To do so would be to usurp Parliamentary sovereignty. The Commission does not consider that it would be entitled to override clear statutory language on the grounds of perceived shortcomings in the underlying policy rationale, as NZRB impliedly suggests.

Does section 33 confer the right claimed by NZRB?

7.18 NZRB submits that it had a right, which pre-existed the 21 October 2015 amendment, to be "treated exactly the same as any other corporate society". NZRB characterises the right more narrowly elsewhere in its submissions, by reference to section 33(1) and the use of the word "must", as an existing right at the date of the applications to be treated as a corporate society for the purposes of an application for a class 4 venue licence in relation to the TAB Kapiti and TAB Mangere Bridge venues.

7.19 Subsection 33(1) is similar to a deeming provision in form but, on close examination, its function is more to confirm, rather than to change, NZRB's status in relation to class 4 gambling. Section 33(1) concerns the treatment of NZRB in relation to class 4 operator and venue licences by providing that, in certain circumstances, it is to be considered as a corporate society that applies net proceeds to authorised purpose (as distinct from one which distributes net proceeds to authorised purposes in the community).

7.20 One difficulty with the attempt to frame section 33 as giving rise to a right to identical treatment on venue licence applications is that there are relatively few provisions in relation to class 4 gambling that relate specifically to corporate societies that apply net proceeds to authorised purposes, and none of them apply specifically to class 4 venue applications. In fact, the only provision that provides specifically for corporate societies that apply net proceeds is section 52A, which relates to class 4 operator (rather than venue) licences and from which NZRB is expressly exempted by section 33(1A). NZRB is also expressly exempted[8] from the requirement[9] to provide a class 4 venue agreement with certain venue licence applications but its status under section 33 does not amount to deemed compliance with any requirement in sections 65 to 70.

7.21 The Commission does not consider that section 33 conferred on NZRB a right to be treated identically to other corporate societies. Such a claim is inconsistent with section 33(1A) and (2) and section 67(4), which were in place at the time that the NZRB made the applications and which expressly provide for differential treatment of NZRB, despite subsection (1):

(a) Subsection (1A) exempts NZRB from section 52A, which otherwise applies to corporate societies that apply net proceeds to authorised purposes and which provides for the circumstances in which a corporate society may apply net proceeds to (its own) authorised purposes, and what the Secretary may take into account.

(b) Section 33(2) subjects the NZRB to an additional restriction (in the form of a special prohibition on the issue of a venue licence to it) to which no other corporate societies are subject.

(c) Section 67(4) exempts NZRB from a requirement that applies to other applying societies, thus requiring it to be treated differently from other such societies.

8. DID NZRB NEVERTHELESS HAVE PROTECTED RIGHTS PRIOR TO 21 OCTOBER 2015?

Repeal and section 33

8.1 NZRB's submissions for the protection of an existing right are based primarily on the application of sections 17 and 18 Interpretation Act. Section 17 Interpretation Act provides that the repeal of an enactment does not affect existing rights (section 17(1)(b)) or an existing status (section 17(1)(c)). Section 18 provides, broadly speaking, that the

[8] section 67(4)
[9] section 67(3)

repeal of an enactment does not affect the enforcement of existing rights. Both sections only apply where a statute, or part of a statute, has been repealed.

8.2 The sections provide expressly as follows:

> **17 Effect of repeal generally**
>
> (1) The repeal of an enactment does not affect—
>
> (a) the validity, invalidity, effect, or consequences of anything done or suffered:
>
> (b) an existing right, interest, title, immunity, or duty:
>
> (c) an existing status or capacity:
>
> (d) an amendment made by the enactment to another enactment:
>
> (e) the previous operation of the enactment or anything done or suffered under it.
>
> (2) The repeal of an enactment does not revive—
>
> (a) an enactment that has been repealed or a rule of law that has been abolished:
>
> (b) any other thing that is not in force or existing at the time the repeal takes effect.
>
> **18 Effect of repeal on enforcement of existing rights**
>
> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

8.3 NZRB argues, on the basis of section 29 Interpretation Act and certain cited cases, that section 33 was **repealed** and replaced in the course of the 21 October 2015 amendment. Section 29 Interpretation Act provides, in relevant part:

> **enactment** means the whole or a portion of an Act or regulations
>
> **repeal**, in relation to an enactment, includes expiry, revocation, and replacement

8.4 While NZRB accepts that section 33(3) is a new subsection that does not replace a prior provision, it argues that the new subsection (3) permanently reduces the ambit of section 33 as a whole and so amounts to a repeal. NZRB says that its right to be treated as a corporate society and to apply for and obtain class 4 venue licences for any TAB venue that was used mainly for race and sports betting has been reduced to apply only to locations which have not previously hosted class 4 gambling.

8.5 NZRB relied on the High Court of Australia decision in *Mathieson v Burton*[10] to support its argument that section 33(3) amounted to a repeal. In that case, Windeyer J held that an amendment that permanently reduces the ambit of any provision of an Act, involves a repeal of that Act in part.[11] NZRB also relied on the Court of Appeal decision in *Police v Hicks*[12] in which O'Regan J held that, where a later Act was so inconsistent with an earlier Act so that the two could not stand together, the later Act amounted to an implied repeal of the former Act.

8.6 For his part, the Secretary considered that a repeal had occurred but not of any part of section 33 nor of anything that affected any existing right, interest, title or immunity of NZRB. In light of Windeyer J's comments in *Mathieson v Burton*, the Secretary accepted that section 33(3) might be regarded as a repeal but only by way of reduction in his power to issue class 4 licences (not of any right of NZRB). The Secretary did not identify the provisions affected by such a repeal, submitting simply that:[13]

> ... there is now an exception to the Secretary's ability to issue class 4 venue licences that did not previously exist, despite the fact that no text has been removed from the enactment – effectively a repeal in part of the Secretary's previous legislative power to issue licences.

8.7 The Secretary argued that repeal was of a provision other than section 33 but did not identify the provision. In fact, there is no provision conferring a power to issue licences. At best, in the Commission's view, a power to grant and issue venue licences may be implied in all circumstances outside the express prohibitions on granting (s 67) and issuing licences (sections 33(2) and (3)) in the Act.

8.8 The Secretary also noted that judicial views in *Mathieson v Burton* were not unanimous. He cited the following passage by Gibbs J:[14]

> In my opinion, where a later statute provides for the addition of particular words to an earlier section, which otherwise remains unaffected, the earlier section is thereby amended, but cannot be said to have been repealed within [the Australian equivalent of section 17].

The same Judge was also "unable to agree that a section to which words are added and which remains in force in its amended form can rightly be said to be repealed".

8.9 However, the Secretary also referred to the following statement in *Burrows and Carter Statute Law in New Zealand*:

> While an amendment by the insertion of additional words is not normally a repeal, it is possible to imagine cases where it might be so regarded – for

[10] *Mathieson v Burton* (1971) 124 CLR 1 (HCA).
[11] At [3] of Windeyer J's judgment.
[12] *Police v Hicks* [1974] 1 NZLR 763 (SC).
[13] At [16] of the Secretary's further submissions.
[14] At [9] of Gibbs J's judgment.

> example, if the additional words qualified the original provision by exempting from it something that was previously within it.

He considered that the insertion of section 33(3) qualified provisions in the Act relating to the grant and issue of class 4 venue licences and exempted, from the scope of that general power, the ability to issue a licence for a class 4 venue in certain circumstances.

8.10 What makes a statutory amendment a repeal does not appear to have been considered definitively in any New Zealand decision on the point. Although both parties made submissions on the basis that there had been a repeal, they differed fundamentally on what had been repealed and whether that affected any prior right of NZRB.

8.11 The Commission considers that section 33(3) does further limit the effect of section 33(1). While section 33(1) never had the unqualified effect asserted by NZRB, because it had always been qualified in the respects identified in paragraph 7.21 above, section 33(3) added a further exception or qualification and thus can be seen, in that sense, as a partial repeal of section 33(1). The Commission considers that this is a preferable view of what has been repealed than that advanced by the Secretary. The latter identified no statutory provision that had been restricted (so as to constitute its partial repeal). The failure to do so is explicable by the fact that there is no provision expressly authorising the issue of class 4 venue licences. The difficulty with treating any new prohibition as a repeal of a power or right which is implied simply by the prior absence of that prohibition is that, on that reasoning, most amendments would be "repeals". The advantage of NZRB's submission is that it identifies a provision (section 33(1)) the scope of which has now been reduced by excluding from its ambit applications which fall within section 33(3). For that reason, the Commission proceeded to consider whether NZRB had acquired a relevant right prior to 21 October 2015 which section 33(3) may have affected but for section 17 Interpretation Act.

Did the Secretary act contrary to an existing or accrued right of NZRB?

8.12 An "existing right" under section 17 appears to be the same as an "accrued right" under the predecessor to the Interpretation Act (the Acts Interpretation Act 1924).[15] In the Commission's view, and contrary to NZRB's submission, case law regarding what amounts to an "accrued right" is therefore relevant. An accrued, or existing right, is a right that in "one way or another has been acquired by an individual, and which some persons have got and others have not got".[16] In *Dental Council of New Zealand v Bell*[17] Tipping J described the requirements of an accrued right as follows:

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[15] *Jackson Mews Management Ltd v Menere* [2010] 2 NZLR 347 (CA) at [16], per Chambers J.
[16] *Starey v Graham* [1899] 1 QB 406 at 411, per Channell J; *Burrows and Carter Statute Law in New Zealand*, above n 14, at 652.
[17] *Dental Council of New Zealand v Bell* [1992] 1 NZLR 438 (HC) at 443.

> The essence of an accrued right in this context is that something must have happened to give the person claiming the right the ability to prosecute the same to judgment. Although the right need not have matured into formal legal relief the facts entitling the person concerned to relief must have happened before the repeal in such a form that the right, although not having matured into judgment or relief, can nevertheless be described as inchoate or contingent.

8.13 The *Dental Council* case involved a disciplinary complaint against a dentist. The complaint was made after new legislation had been passed, but in respect of conduct that had occurred while the repealed legislation was in force. The new legislation set out new, and considerably different, disciplinary procedures, including more onerous penalties. The Court held that the defendant did not have an accrued right to have the complaint against him determined under the old Act's procedures.

8.14 According to the judgment in *Dental Council*, an existing right must be "something more than a hope or expectation".[18] It must also be something more than the possibility of the exercise of a discretion.[19] The mere right, existing at the date of a repealing statute, to take advantage of an enactment, without the individual having done anything to secure that right, is not a "right accrued".[20]

8.15 NZRB submits that, in contrast to *Dental Council*, it had a right that could be prosecuted to judgment, because it had submitted a complete application, which could not be arbitrarily refused and, if refused, it had a statutory right to appeal to the matter to the Commission and to seek a decision in its favour. The Commission agrees.

8.16 The Commission considers that the real issue on the appeals is whether the Secretary's decision to refuse the applications breached any right held by NZRB prior to 21 October 2015. That is a different question to whether it had a right to be treated identically to other societies (as NZRB argued) or whether it had acquired a right to receive a licence by that date (as the Secretary framed the issue).

8.17 The Act sets out a process for determining venue licence applications:

(a) Section 65 provides for applications, requires them to be on the relevant standard form and for them to be accompanied by specified information. Relevantly that includes a description of the venue, proposals for minimising the risk of problem gambling and access by minors, a profile of the venue manager and venue operator (including experience, character and qualifications), notice of surrender of any current venue licence and evidence

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[18] *Dental Council v Bell*, above n 18, at 443.
[19] *Official Assignee v NZI Life Superannuantion Nominees Ltd* [1995] 1 NZLR 684 (HC), Blanchard J.
[20] *Abbot v Minister for Lands* [1895] AC 425 (PC) at 431; *Jackson Mews Management Ltd v Menere* [2010] 2 NZLR 347 (CA) at [17], per Chambers J.

that the venue is suitable in all respects. NZRB is expressly relieved from the requirement for a class 4 venue agreement to accompany its applications.

(b) Any incomplete application may be returned to the applicant[21] and the Secretary may request any further information that he regards as necessary for proper consideration of the application.[22]

(c) Under section 66, the Secretary is obliged to undertake any investigation that he considers necessary to determine whether the applicant is eligible and suitable for the grant of a licence, and whether the venue manager, the venue operator and any other key person are suitable in terms of section 68.

(d) Under section 67, the Secretary must refuse to grant a venue licence application unless he is satisfied of a number of listed criteria. Those criteria relevantly include:

(i) the possibility of access by minors is minimised;

(ii) the venue manager is an individual and the Secretary's investigations "do not cause the Secretary not to be satisfied about his or her suitability" to supervise the conduct of the gambling and the venue staff;

(iii) the surrender of any current venue licence;

(iv) the class 4 venue is owned or leased by NZRB and used mainly for racing, betting or sports betting or a racecourse;

(v) the risk of problem gambling is minimised; and

(vi) the proposed venue is suitable in all other respects to be a class 4 venue.

(e) The Commission has previously confirmed, in the context of a class 4 operator's licence[23] that satisfaction of applicant or key person suitability necessarily encompasses satisfaction about the identity and status of the relevant persons. The same principle applies to the slightly different suitability criteria, in the case of venue licences, regarding the venue manager and other key persons.

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[21] section 65(5)
[22] section 65(6)
[23] Appeal by Bluegrass Holdings, GC10/14, at [32].

(f) If an application is refused, the Secretary must notify the applicant of the reason for the decision, the right to appeal and the process to be followed (section 67(2)).

8.18 The factual background set out above establishes that, prior to 21 October 2015, the applications were lodged, issues regarding their completeness were raised but satisfactorily addressed and the Secretary had not sought any further information from the NZRB to enable him to consider the application properly. In the Commission's view, NZRB was entitled at that point to have its applications considered under the applicable law on the material then before the Secretary. That is not a right to the grant of a licence because section 67(1) makes the Secretary's satisfaction of all criteria a prerequisite to such a grant and it is common ground that that had not occurred.

8.19 However, rather than determining NZRB's application on its merits and in accordance with the requirements of section 67, the Secretary refused the applications by reason of a prohibition which had not come into effect by the time that the Secretary had complete applications to consider. In that limited respect, the Secretary gave section 33(3) a form of retrospective effect (by applying it prospectively to the applications).

8.20 In addition to sections 17 and 18 (which expressly apply to the principle of non-retrospectivity in the context of repeal), NZRB relies on section 7, Interpretation Act, which provides that statutes do not have retrospective effect.

8.21 A statute will have retrospective effect if it changes rights and obligations at a past date.[24] It will not have retrospective effect if it changes the position for the future, even where that future change may mean that prior public expectations are unfulfilled.[25] In fact, statutes almost always change existing rights, and people who have ordered their lives on the basis of the previous law may be disadvantaged (or advantaged).[26] So long as the statute changes an existing right in the future, rather than the legal effect of a past event, it will not be retrospective.[27]

8.22 By failing to consider the applications on their merits in accordance with the current law, the Secretary acted in breach of NZRB's right to have its completed applications considered. He did so in anticipation of a future prohibition coming into effect. That future prohibition was not one of the criteria of which the Secretary was required to be satisfied in deciding whether to grant the applications.

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[24] *Art Deco Society (Auckland) Incorporated v Auckland City Council* HC Auckland, CIV 2005-404-1729, 15 December 2005, Asher J at [53].
[25] *Art Deco Society v Auckland City Council*, above n 35, at [57].
[26] *Art Deco Society v Auckland City Council*, above n 35, at [53].
[27] *Art Deco Society v Auckland City Council,* above n 35, at [53].

8.23 In the course of his submissions, the Secretary suggested a number of potential concerns about the applications in order to indicate that he may not have been satisfied of one or more of the statutory criteria. However, those suggestions are all beside the point when the notified reason for his decision did not involve consideration and determination of those matters but rather turned entirely on the forthcoming prohibition in section 33(3).

8.24 In the Commission's view, NZRB was entitled to have the merits of its application determined under the law prevailing at the time that it lodged a completed application. It is common ground that the determination was not discretionary but depended on assessment according to express and fixed criteria. The Secretary failed to render a decision that recognised that right and thereby deprived NZRB of the opportunity of a favourable determination of its application. A favourable determination would have entitled it to the issue of a licence despite the prohibition in section 33. It was common ground that section 33 would not apply retrospectively to prevent the issue of a licence that the Secretary had decided to grant.

8.25 Such an approach meets the concerns raised by NZRB summarised in paragraph 4.2(a) above, relying on observations in *Foodstuffs (Auckland) Ltd v Commerce Commission.*[28]

8.26 The Commission has considered whether to exercise any of the powers given to it to determine appeals under section 77(4) and has concluded that it should exercise its power to refer the matter back to the Secretary with directions to reconsider his decisions to refuse to grant the applications. The Secretary is directed to reconsider the applications as at 20 October 2015, 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. If he is satisfied of the applicable criteria, he should grant a venue licence. If he is not, he should give notice of each refusal with reasons and other matters, as required by section 67(2).

9. BACKDATING

9.1 Under the alternative ground of appeal, NZRB submitted that, if the Commission does not determine the applications in accordance with pre-amendment section 33, the Commission should direct the issue of licences backdated to a date prior to 21 October 2015. NZRB submits that, if the licences were backdated to a date before subsection (3) took effect, the issue of the licences would not be in breach of subsection (3). NZRB relies on the Commission's decision in GC 26/10 *Air Rescue Services Limited* ("***Air Rescue* GC26/10**"), in which the Commission held that, in some circumstances, licence

[28] [2004], NZLR 145 (PC)

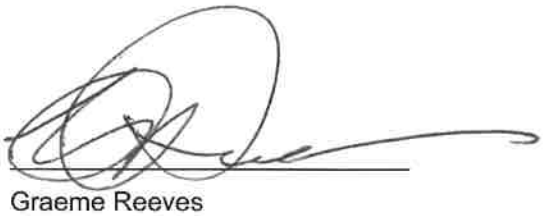
commencement dates could be backdated in order to preserve rights that might otherwise be lost. The NZRB submits that this is such a case, because otherwise rights could be lost through circumstances that are not the fault of the appellant, but the result of inaction or delay by the Secretary.

9.2 The Secretary challenged the NZRB analysis in its submissions, arguing that backdating the commencement date of a licence does not address the prohibition on its issue and otherwise arguing that no right had arisen to require preservation and that there were no failures in its processing of the applications.

9.3 The Commission's decision on the first ground means that there is no need to consider the alternative ground. The decision on the first ground includes the identification of a limited right and the failure by the Secretary to deal with the applications in accordance with that right. The Commission notes that there are material differences between the circumstances in this appeal and in *Air Rescue* GC26/10 but considers that it is unnecessary to consider the effect of those differences in this decision.

10. DECISION

10.1 The Commission refers the applications for class 4 venue licences 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 and in accordance with the statutory criteria then applicable.



Graeme Reeves
Chief Gambling Commissioner
for and on behalf of the Gambling Commission
27th July 2016