

IN THE MATTER of the Gambling Act 2003
AND of an application by **SKYCITY CASINO MANAGEMENT LIMITED**
to revoke condition 8 of its
operator's licence for the Wharf
casino

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
L M Hansen
W N Harvey
S C L Pearson

Date of Application: 19 February 2019

Date of Decision: 16 May 2019

Date of Notification
of Decision: 29 May 2019

**DECISION ON AN APPLICATION BY SKYCITY CASINO MANAGEMENT LIMITED
TO REVOKE CONDITION 8 OF ITS OPERATOR'S LICENCE FOR THE WHARF CASINO**

Application

1. SKYCITY Casino Management Limited ("**SCML**") applied to the Commission, pursuant to section 139 of the Gambling Act 2003 (the "**Act**"), to revoke condition 8 of its operator's licence for the Wharf casino.
2. The Commission is required, under section 140 of the Act, to notify the Secretary for Internal Affairs (the "**Secretary**") and other potentially affected persons of the proposed revocation. The Commission notified the Secretary, Problem Gambling Foundation ("**PGF**"), Salvation Army/Oasis ("**SA**"), the Ministry of Health, Southern DHB ("**DHB**"), the Queenstown Lakes District Council, Queenstown Chamber of Commerce and Destination Queenstown. The Commission received submissions from DHB, PGF, SA and the Secretary. SCML provided submissions in reply.

Licence condition

3. The relevant licence condition is as follows:

SCML operator's licence

8. When the Casino is operating, at least one table game shall be open for play from 5pm except where otherwise approved by the Commission.

Relevant sections of the Act

4. The relevant sections of the Act are as follows:

Gambling Act 2003

3 Purpose

The purpose of this Act is to—

- (a) control the growth of gambling; and
- (b) prevent and minimise **harm from** gambling, including problem gambling; and
- (c) authorise some gambling and prohibit the rest; and
- (d) facilitate responsible gambling; and
- (e) ensure the integrity and fairness of games; and
- (f) limit opportunities for crime or dishonesty associated with gambling and the conduct of gambling; and
- (g) ensure that money from gambling benefits the community; and
- (h) facilitate community involvement in decisions about the provision of gambling.

4 Interpretation

casino venue, in relation to a licensed casino,—

- (a) means the area defined as constituting the casino in the casino venue licence; and
- (b) includes any building or room in which games are conducted and played and in which money counting, surveillance, storage, and other activities related to the conduct and playing of games are carried on

30 Meaning of class 4 gambling

In this Act, class 4 gambling is gambling that satisfies the following criteria:

- (a) the net proceeds from the gambling are applied to, or distributed for, authorised purposes; and
- (b) either—
 - (i) no commission is paid to or received by a person for conducting the gambling; or
 - (i) the only commission that is paid to or received by a person for conducting the gambling is a commission payment to a venue operator that complies with regulations made under section 371(1)(d); and
- (c) there are game rules for the gambling; and

- (d) the gambling, and the conduct of the gambling, satisfies relevant game rules; and
- (e) either—
 - (i) the Secretary has categorised the gambling as class 4 gambling and not as another class of gambling; or
 - (ii) the gambling utilises or involves a gaming machine.

34 Meaning of casino gambling

In this Act, casino gambling—

- (a) means gambling—
 - (i) for which there are game rules; and
 - (ii) that satisfies those game rules; and
 - (iii) which is conducted in accordance with those game rules; and
 - (iv) to which both a casino venue licence and casino operator's licence apply; but
- (b) does not include gambling conducted by the New Zealand Racing Board referred to in section 120.

119 Requirements for casino gambling

A casino may be operated only by a person who holds a casino operator's licence—

- (a) if the casino gambling occurs at a place for which the person also holds a casino venue licence; or
- (b) if the casino operator has an approved casino venue agreement with another person who holds a casino venue licence.

5. The "purpose" equivalent to section 4 of the Act in the predecessor legislation was section 5 of the Casino Control Act 1990 ("**CCA**") which provided:

Casino Control Act

5. Object of the Act – The object of the Act is to establish a system for the licensing, supervision, and control of casinos with the aims of –

- (a) Promoting tourism, employment, and economic development generally; and
- (b) Ensuring that gaming in casinos is conducted honestly; and
- (c) Ensuring that the management and operation of casinos remains free from criminal influence or exploitation.

Submissions by SCML

6. SCML submitted, in summary, as follows:
- (a) In GC08/18 the Commission approved its application to relax the requirement to have at least one table game open for play from 5pm. That approval was granted subject to the following:
 - (i) the approval is for a 12 month period from the date of notification;

- (ii) after 10 months of the approval being implemented, the DIA and SCML are to report to the Commission their observations on the approval.
- (b) Over the 10 month period following the Commission's approval, at least one table game has continued to be available for play during operating hours so there have been no observations to report pursuant to the second condition.
- (c) Over the period 23 April 2018 to 27 January 2019 (reflecting SKYCITY financial months) and broadly aligned to the first nine months of the trial, the EBITDA arising from the operation of table games at Wharf Casino was \$66,814. During this period, expenses outweighed table revenues in four of the nine months. The fact that the tables operated at a loss on 44% of occasions can be attributed in part to the luck of players, but insufficient demand has almost certainly exacerbated the position.
- (d) Nonetheless, it considered that there was enough demand for table play at the Wharf Casino over the nine month period to make it commercially viable to continue to operate one or more table games during operating hours. That indicates that, when it makes commercial sense to operate tables, it will do so. However, if it does not make commercial sense to do so, it wants to have the flexibility to decide not to offer table games. That was the underlying rationale behind seeking the original relaxation. Its position in that respect has not changed, notwithstanding the fact that to date, it has chosen to continue to operate one or more tables games as required by condition 8.
- (e) Licence condition 8 was originally imposed by the Casino Control Authority ("**Authority**") under the CCA, the legislative purpose or object of which included the promotion of tourism, employment and economic development.
- (f) The condition continued in force following the enactment of the Gambling Act and was not varied in the course of a general review of licence conditions in 2008. The rationale for such a condition under the Gambling Act, where the emphasis has moved to controlling the growth of gambling and facilitating responsible gambling, is more difficult to discern.
- (g) There appears to be nothing in the Act to suggest a statutory intent for casinos to operate specific types of games, or to ensure a minimum number of game types are available at particular times.
- (h) Having regard to the meaning of casino gambling and the objects of the Act, the approval sought is entirely consistent with the Act.

- (i) It is unaware of any research to support a position that having more gambling choices available is likely to facilitate responsible gambling, or prevent and minimise harm.
- (j) In decision GC08/18, the Commission agreed to relax the requirement to offer a table game for play for a 12 month period, with the Secretary and SCML to report to the Commission after 10 months on the effect of the temporary relaxation. As it happens, there was sufficient demand over the period in question to make it commercially viable to continue to operate one or more table games as condition 8 would have required. As a consequence, the Commission's decision to relax the condition temporarily had no effect.
- (k) While the operation of table games over the first nine months of the Commission's approval resulted in an overall positive EBITDA, in four of those nine months, table games operated at a loss. That result is in part driven by inconsistent demand for table gaming at the Wharf casino, but SCML has yet to find a way to manage its operation in a manner which limits availability of table games to profitable periods only.
- (l) Its decision to operate table games should be driven by commercial, rather than regulatory, considerations. There may be occasions in future where it does not make commercial sense to open, or keep open, any gaming table during its operating hours and, in the absence of any underlying regulatory rationale requiring it to do so, condition 8 should be revoked.

Submissions by the DHB

7. The DHB submitted, in summary, as follows:

- (a) It reviewed the original application and the submissions made by PGF, SA, MoH, and the Secretary, within an overall analysis provided by the Commission.
- (b) SCML argues that the decision whether and when to operate table games should be driven by commercial rather than regulatory considerations. Whilst commercial considerations are important for running a profitable business, the legislation aims to ensure that the interests of all affected parties are considered in an equitable and transparent manner. Its submissions focus, therefore, on certain purposes of the Act; namely the prevention and minimisation of harm from gambling, including problem gambling; facilitation of responsible gambling; and ensuring that money from gambling benefits the community.

- (c) Although there are no legislative provisions in the Act for table games to be open during the operating hours of a casino, availability of table games is what helps to define the casino experience. Having only EGMs available would be uncharacteristic of a casino setting. If condition 8 were revoked, EGMs would become the main feature of the Wharf casino.
- (d) However, it recognises that the legislative provisions for both casinos and Class 4 venues do not prohibit a casino from operating solely with EGMs.
- (e) Class 4 venue operators are not permitted to have EGMs as their primary activity and venues must be viable without relying on the proceeds from pokie machines. Class 4 operators are required to return 40% of the proceeds back to the community. A casino has no similar obligation and therefore the local community would receive no benefit from the revenue derived from pokie machines at the Wharf casino.
- (f) Class 4 venues are also only allowed to operate a maximum of nine pokie machines, whereas the Wharf casino has a substantially higher number.
- (g) The casino's primary activity is gambling. Although SCML has not requested an increase in the permitted number of EGMs at Wharf casino, it remains concerned that it may become an EGM only venue. It is also concerned that SCML might ask to move the Wharf EGMs to the Queenstown casino in the future. Research shows that EGMs cause the most gambling related harm; 50% of people who seek help with gambling addiction have a preference of using EGMs.
- (h) SCML argues that the inconsistent demand for table gaming at the Wharf casino adversely affects its profitability. It asks why SCML wishes to continue operating at the premises if it is running at a loss when it also operates the Queenstown Casino nearby. The upcoming renewal of the premises lease may be problematic for SCML. There could be a better opportunity for the existing venue location in the attractive tourist destination of Queenstown and the Queenstown Lakes District Council, Queenstown Chamber of Commerce and Destination Queenstown may have views that reflect those of the broader Queenstown community.
- (i) Its role is to advocate for the protection of those who experience gambling related harm from exposure to venues that offer EGMs near where they live, work and play. Therefore it opposes SCML's proposal to revoke condition 8. The condition supports the general expectation that a casino offers table games and ensures that the Wharf Casino cannot operate an EGM only venue.

- (j) If Wharf Casino is operating at a loss, its licence should be revoked in its entirety. If this is not possible, it opposes the revocation of condition 8.

Submissions by PGF

8. PGF submitted, in summary, as follows:

- (a) Its position remains unchanged from its submission on SCML's previous application, which led to decision GC08/18.
- (b) Paragraphs 3 and 4 of SCML's application report that the temporary dispensation was not tested because the tables remained open during the dispensation period. As a result, the dispensation has not been trialled and there is nothing on which to report.
- (c) SCML's loss is a matter of concern for SCML but not for PGF or the Commission. It is strange that a casino that reports positive EBITDA wishes to have flexibility not to offer table games. Table games are an underlying international expectation of a casino, an expectation reinforced by the casino itself whose homepage has a photograph which shows people playing a table game. SCML's flagship (SKYCITY Auckland) website has one pokie machine image out of the seven on the main page for its casino. SCML markets itself as offering casino table games.
- (d) SCML's application contains a number of questionable contentions; paragraph (v) is inconsistent with SCML's own Host Responsibility Programme, which records the importance of "frequency and expenditure data" for the users of EGMs.
- (e) If the casino cannot be run at an EBITDA which satisfies its shareholders, it should be closed and the licence relinquished.

Submissions by SA

9. SA submitted, in summary, as follows:

- (a) It maintains its position on the earlier SCML application to relax the requirement to have at least one table game open for play from 5pm. The revocation of condition 8 would allow SCML to operate an EGM-only casino, something which it does not support. EGMs are the most harmful gambling product available in New Zealand. Table games offer a more social experience, with a much slower rate of play. Failing to offer alternatives to EGMs, particularly within a 'destination gambling' venue (i.e. where the primary activity is gambling), potentially increases the number of people exposed to EGMs and their associated harms.

- (b) SCML argued that there is no research to support the claim that offering a variety of gambling options is less likely to cause harm than offering gaming machines alone. This may be the case but there is also no research to support the opposite claim (that limited options do not increase harm). This is because research on gambling harm is piecemeal at best and, in particular, research on the relative impacts of different casino games and the ratios at which these games are offered is virtually non-existent.
- (c) While SCML could make no observations about the impact of decision GC08/18 (since condition 8 was complied with during the preceding 10 months), the casino is permitted to deploy up to six table games at a time. SCML could have provided observations on the effect of opening different numbers of tables, to show that its application is consistent with the harm minimisation and responsible gambling purposes of the Act.
- (d) While persons who prefer a particular game type generally only engage in that type, regardless of available alternatives, the casino is likely to have visitors who have little, or no, prior gambling experience or preferences. Their choices may be limited to the most harmful product available. A comparable scenario would be a bar offering only spirits and carrying no lower-alcohol alternatives, such as beer or cider. Certainly people who drink only spirits will not be affected but people who would be happy with other options will be limited to the most risky option. Offering only EGMs, the most harmful form of gambling, is inconsistent with the Act's mandate to "facilitate responsible gambling".
- (e) Even if it were legally permissible and commercially sensible for the Wharf casino to operate as an EGM-only site, doing so would affect the integrity of the venue as a provider of 'premium' entertainment. It questions the value of the venue's continued operation to the Queenstown community under such conditions, particularly with another casino only 200 metres away.
- (f) SCML should surrender its licence for Wharf casino, if the sole commercially viable alternative is to turn the venue into another 'pokie den', joining eight Class 4 EGM-only venues in the district.

Submissions by the Secretary

10. The Secretary submitted, in summary, as follows:

- (a) He has no regulatory concerns with the removal of condition 8, provided the gaming tables are manned when there is patron demand. Requiring a gaming table to be staffed when no patron wishes to play serves no useful purpose.
- (b) He is unaware of any difficulties or increase in complaints during the trial period.
- (c) He commends the Commission for engaging with the Queenstown community.

SCML's submissions in response

11. In response, SCML submitted, in summary, as follows:

DHB's submissions

- (a) The DHB expresses concern about the possible request to move the machines from the Wharf casino to the Queenstown casino. There is no such proposal before the Commission.
- (b) Its submissions do not seriously challenge the grounds on which the application has been made, and do not provide a sound basis for declining the application.

PGF's submissions

- (c) PGF does not address or challenge the grounds upon which this application was made. Its position appears to be that having more gambling choices available is likely to facilitate responsible gambling or prevent and minimise harm. However it cites no research to support its position.
- (d) The fact that SCML places importance on the use of frequency and expenditure data in the case of users of EGMs has no relevance to its proposal to revoke the mandatory requirement to open a table game after 5pm. The importance of this data is not diminished by the presence, or absence, of gaming tables.

SA's submissions

- (e) SA asserts that failing to offer alternative gaming products to EGMs has the potential to increase the number of people exposed to gaming machines and their associated harms. However, like PGF, it cites no research to support its position. Indeed, it acknowledges the absence of research in this area, which reduces its assertions to speculation.
- (f) Revoking condition 8 will not automatically turn the venue into a "pokie den", as SA asserts. The fact that SCML never utilised the Commission's original approval to allow it to operate without tables over the 12 month trial period strongly suggests

otherwise. Having regard to the meaning of casino gambling and the objects of the Act, the approval sought is entirely consistent with the Act.

Analysis

12. SCML's current application follows an application made in February 2018, which resulted in decision GC08/18. At that time, SCML applied to the Commission under condition 8 for approval "to relax the requirement to have at least one table open for play from 5pm". At paragraph 14 of that decision, the Commission noted:

... although the application was for an approval under condition 8, its net effect is the equivalent of an application to revoke condition 8 altogether. In that regard, the distinction between amendment of the condition (which included the possibility of relaxation) and the degree of relaxation sought was one of form rather than substance.

13. The Commission declined to grant the application for permanent relaxation, granting a temporary relaxation for a 12 month period only on conditions. Paragraph 33 of decision GC08/18 sets out the approval and the conditions, as follows:

33. The Commission approved, under condition 8 of SCML's operator's licence for the Wharf casino, SCML's application to relax the requirement to have at least one table game open for play from 5pm. The approval is granted subject to the following:

- (a) The approval is for a 12 month period from the date of notification.
- (b) After 10 months of the approval being implemented, the DIA and SCML are to report to the Commission their observations on the approval.
- (c) If SCML wants the relaxation of the entirety of the obligation to continue thereafter, it must make an application to revoke condition 8. Provided that SCML makes such an application before the expiry of the approved 12 month period, the temporary approval will continue in effect automatically until the revocation application is determined (or earlier direction of the Commission).

14. As anticipated by paragraph 33(c) of the Commission's decision, SCML applied to revoke condition 8. Neither SCML nor the DIA had anything to report to the Commission on the effect of the temporary relaxation granted, as required by paragraph 33(b), because SCML continued to make available a table game at all times required by condition 8 for the duration of the temporary approval.
15. A number of the matters raised by the submitters are not material to the application:

- (a) The Act imposes different requirements for casino gambling and Class 4 gambling. Those differences do not support similar treatment of both forms of gambling.
 - (b) There is no application to increase the number of EGMs at Wharf Casino and no application to transfer any EGMs to the Queenstown Casino.
 - (c) There is no application to revoke the casino venue licence for lack of profitability.
 - (d) Several of the foregoing matters are not within the Commission's powers.
 - (e) No submissions were made by the Queenstown Lakes District Council, Queenstown Chamber of Commerce and Destination Queenstown reflecting the views of the broader Queenstown community.
16. Much of the analysis by the Commission in decision GC08/18 remains relevant. In particular, there is nothing in the Act which requires a casino operator to deploy any particular gambling product, including table games. Section 34 defines casino gambling as follows:

34 Meaning of casino gambling

In this Act, casino gambling—

- (a) means gambling—
 - (i) for which there are game rules; and
 - (ii) that satisfies those game rules; and
 - (iii) which is conducted in accordance with those game rules; and
 - (iv) to which both a casino venue licence and casino operator's licence apply; but
- (b) does not include gambling conducted by the New Zealand Racing Board referred to in section 120.

17. Section 119 of the Act sets out the requirements for casino gambling as follows:

119 Requirements for casino gambling

A casino may be operated only by a person who holds a casino operator's licence—

- (a) if the casino gambling occurs at a place for which the person also holds a casino venue licence; or
- (b) if the casino operator has an approved casino venue agreement with another person who holds a casino venue licence.

18. All that is required to meet the Act's requirements for casino gambling is for there to be gambling for which there are game rules, and which satisfies those game rules, and which is conducted in accordance with those rules by a person with the appropriate casino licences.

19. As the governing statute does not require casinos to deploy table games, the current source of regulatory obligation concerning their deployment is the licence conditions imposed by the Commission's predecessor organisation, the Authority.
20. As the Commission noted in GC08/18, in granting the licences for New Zealand's six casinos, the Authority imposed licence conditions requiring table games to be open while the casinos were open. The purpose of the conditions appears to have been to distinguish casinos from class 4 venues, although the Commission has located no recorded rationale for the requirement.
21. The same requirement was not applied universally across all 6 casinos, with the Authority imposing less stringent requirements on the smaller casinos, such as the Wharf casino. Whereas the larger casinos were required to deploy two gaming tables whenever open, Wharf casino was required to offer only a single gaming table, and that only from 5pm. Dunedin casino similarly was required to operate one gaming table only during specified hours.
22. Condition 8 is the result of a policy decision by the Authority, not a legislative requirement. In GC08/18, at paragraphs 23 and 24, the Commission set out policy reasons for and against a licence condition requirement to offer table games. For the most part, they remain applicable on this application.
23. The major reasons in favour of the requirement are conformity to a public expectation about casino operation and a concern that, if table games were not offered, the only form of gambling on offer would be EGMs, the form which is generally acknowledged to be most associated with harm.
24. The reasons against maintaining the requirement are as follows:
 - (a) Removing condition 8 would not result in the removal of the gaming tables, merely the obligation to have one open after 5 pm, irrespective of demand. Even if not in operation, the tables will be visible within the venue, consistent with the appearance of a casino.
 - (b) Although removal of the requirement could result in only EGMs being offered, removal does not increase the number of EGMs which will be available.
 - (c) The Commission has no evidence before it of the likely effect on customer behaviour of one or no table game being open.
 - (d) Removal of the requirement is unlikely, as a matter of practical reality, to result in only EGMs being offered. Although the requirement was suspended for 12

months in decision GC08/18, in fact, Wharf casino kept at least one table game open throughout the whole period.

25. The reduced requirements, compared to the larger casinos, at Wharf and Dunedin casinos recognise the differences in size and demand. There is force in the Secretary's submission: "Requiring a gaming table to be staffed when no patron wishes to play serves no useful purpose."
26. The Commission was satisfied that the revocation of condition 8 was consistent with the purpose of the Act and the section 139(2) criteria, including Schedule 1 to the Act.

Decision

27. The Commission approved SCML's application to revoke condition 8 of its operator's licence for the Wharf casino, pursuant to section 139 of the Act. The licence conditions attached to SCML's operator's licence for the Wharf casino will be renumbered accordingly.

Right of appeal

28. Pursuant to section 235 of the Act, a person affected by this decision may appeal that decision to the High Court. An appeal must be made within 15 working days of the date of notice of the Commission's decision, or any longer period that the High Court may allow.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

29 May 2019